

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 TRAVIS JAY,

Claimant,

vs.

 ARCHER SKID LOADER SERVICE,
 LLC,

Employer,

and

 GRINNELL MUTUAL REINSURANCE
 COMPANY,

 Insurance Carrier,
 Defendants.

File No. 19003586.01

ARBITRATION DECISION

Head Note: 1803

STATEMENT OF THE CASE

Claimant Travis Jay seeks workers' compensation benefits from the defendants, employer Archer Skid Loader Service, LLC (Archer) and insurance carrier Grinnell Mutual Reinsurance Company (Grinnell) for a work injury he sustained on September 19, 2019. This decision will refer to Archer and Grinnell collectively as the defendants and individually as appropriate.

The undersigned presided over an arbitration hearing on July 15, 2021, held via internet-based video under order of the agency. Jay participated personally and through attorney Brian F. Keit. The defendants participated by and through attorney Aaron T. Oliver.

ISSUES

Under rule 876 IAC 4.19(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) What is the extent of permanent disability caused by the stipulated work injury?

- 2) Is Jay entitled to taxation of costs against the defendants?

STIPULATIONS

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

- 1) An employer-employee relationship existed between Jay and Archer at the time of the stipulated injury.
- 2) Jay sustained an injury on September 19, 2019, which arose out of and in the course of his employment with Archer.
- 3) The alleged injury is a cause of temporary disability during a period of recovery, but Jay's entitlement to temporary disability or healing period benefits is no longer in dispute.
- 4) The alleged injury is a cause of permanent disability.
- 5) The commencement date for permanent partial disability (PPD) benefits, if any are awarded, is June 8, 2020.
- 6) At the time of the stipulated injury:
 - a) Jay's gross earnings were one thousand five hundred eight and 75/100 dollars (\$1,508.75) per week.
 - b) Jay was married.
 - c) Jay was entitled to two exemptions.
- 7) Prior to hearing, the defendants paid to Jay twelve (12) weeks of compensation at the rate of nine hundred fifty and 24/100 dollars (\$950.24) per week.

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

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 5;
- Claimant's Exhibits (Cl. Ex.) 1 through 2;
- Defendants' Exhibits (Def. Ex.) A through F; and

- Hearing testimony by Jay.

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

Archer specializes in construction, dirt work, underground boring, and septic systems. (Hrg. Tr. p. 9) In 2014, Archer hired Jay. (Hrg. Tr. p. 9) He worked full time there as a laborer and machine operator. (Hrg. Tr. p. 10)

Jay experienced shoulder pain on and off for a period of time before May 2019. (Hrg. Tr. p. 25) On May 16, 2019, he sought care at Ottumwa Regional Health Center where Jasmine Benson, A.R.N.P., provided care. (Jt. Ex. 4, pp 28–31) Benson noted Jay went to a walk-in clinic a couple of weeks prior for right hand swelling and pain. (Jt. Ex. 4, p. 30) He complained of joint stiffness and pain in his hands, shoulders, and knees. (Jt. Ex. 4, p. 31) At hearing, Jay confirmed that his primary complaint was swelling in his right hand. (Hrg. Tr. p. 25) Benson prescribed prednisone and ordered testing. (Jt. Ex. 4, p. 31)

Jay saw Benson for a follow-up exam on July 30, 2019, complaining of no improvement in his right hand, increased pain and swelling with use, and the belief his "other joints are beginning to be affected." (Jt. Ex. 4, pp. 32–34) Benson's notes indicate Jay's primary complaints were in his knees and hands, the x-rays of which showed osteoarthritis. (Jt. Ex. 4, p. 33–34) Benson increased Jay's prescription for meloxicam to address the symptoms caused by osteoarthritis in his hands and requested Jay bring to his next appointment the report from the magnetic resonance imaging (MRI) he had on his right knee for review. (Jt. Ex. 4, p. 34)

During a follow-up exam on August 27, 2019, Jay reported his hand and knee symptoms had improved after the increase in his meloxicam dosage. (Jt. Ex. 4, p. 35–36) Benson made no note of any shoulder complaints. (Jt. Ex. 4, pp. 35–37) She directed Jay to continue taking meloxicam as prescribed and to ice and heat as needed. (Jt. Ex. 4, p. 37) The date of this appointment was the last time Jay refilled a meloxicam prescription before the date of the stipulated work injury. (Jt. Ex. 1, p. 1)

On September 19, 2019, Jay was working for Archer on a project at the Ottumwa Wastewater Treatment Plant. (Hrg. Tr. p. 10) A malfunction required him to climb onto a truck to perform repairs. (Hrg. Tr. pp. 10–11) While Jay was trying to climb down from atop the truck, his foot caught a power washer hydraulic line causing him to fall off the side of the truck. (Hrg. Tr. p. 11) Jay fell about four feet and landed on concrete. (Hrg. Tr. p. 11) He had his left arm out, trying to catch himself, which caused an injury to his left shoulder. (Hrg. Tr. 11)

Jay screamed in pain after he hit the concrete. (Hrg. Tr. p. 12) Jay's boss came around the truck and helped him. (Hrg. Tr. 12) His boss then took him to get medical care at Ottumwa Occupational Health. (Hrg. Tr. p. 12; Jt. Ex. 1, p. 1)

Jay saw David Burrows, A.R.N.P., at Ottumwa Occupational Health. (Jt. Ex. 1, p. 1) Burrows did not review Jay's medications with him but noted that his medications included atorvastatin and meloxicam as of August 27, 2019. (Jt. Ex. 1, p. 1) Jay reported his left shoulder got "real tight, real fast" and he could not move his left arm at the shoulder. (Jt. Ex. 1, p. 2) Burrows directed Jay to ice his shoulder, ordered an MRI, and prescribed physical therapy. (Jt. Ex. 1, pp. 1–2) The MRI showed a large full-thickness tear of the rotator cuff involving supraspinatus and infraspinatus. (Jt. Ex. 2, pp. 6–7)

On September 27, 2019, Jay saw Dr. Christopher Vincent at Iowa Ortho. (Jt. Ex. 3, pp. 8–10) Dr. Vincent verified Jay was taking meloxicam and atorvastatin as directed. (Jt. Ex. 3, p. 8) Dr. Vincent reviewed the imaging of Jay's shoulder and discussed the treatment options with him. (Jt. Ex. 3, p. 10) Jay denied "any previous shoulder issues or injuries" despite his previous complaints of pain and stiffness in his shoulders. (Jt. Ex. 3, p. 8) Dr. Vincent and Jay chose to proceed with surgery on his shoulder. (Jt. Ex. 3, p. 10) On December 11, 2019, Dr. Vincent performed left shoulder arthroscopic:

- 1) Reconstruction of massive supraspinatus and infraspinatus rotator cuff tear;
- 2) Subacromial decompression, acromioplasty, and ligament release;
- 3) Distal clavicle excision. (Jt. Ex. 3, p. 11)

At hearing, Jay denied seeking care for his joints and taking meloxicam for arthritis. (Hrg. Tr. pp. 23–24) According to Jay, the increased dosage of meloxicam upset his stomach, so he stopped taking the drug and never received a refill of his prescription. (Hrg. Tr. pp. 24–25) Jay's testimony is in line with Dr. Vincent note on October 8, 2019, "He describes inability to really tolerate meloxicam." (Jt. Ex. 4, p. 50) The weight of the evidence shows Jay sought care for symptoms relating primarily to arthritis in his hands, received a prescription for meloxicam to treat the condition, took meloxicam as directed until at least September 27, 2019, and then stopped taking meloxicam sometime thereafter because it upset his stomach.

After the surgery, Jay followed up with Dr. Vincent. (Jt. Ex. 3, pp. 14–19) He showed improvement over time. (Jt. Ex. 3, pp. 14–19) Because of Jay's recovery, Dr. Vincent began "a gradual, more aggressive work restriction schedule" on February 28, 2020. (Jt. Ex. 3, p. 19) Jay returned to light-duty work at Archer on March 9, 2020. (Hrg. Tr. p. 28)

On April 6, 2020, Jay reported no pain in his surgically repaired shoulder. (Jt. Ex. 3, p. 20) Dr. Vincent noted Jay was experiencing some popping and that "with no pain there is nothing we would do with this." (Jt. Ex. 3, p. 21) Dr. Vincent also noted Jay had "good range of motion and good strength." (Jt. Ex. 3, p. 21) He encouraged Jay to continue with physical therapy and released him to return to work without restrictions. (Jt. Ex. 3, p. 21) Jay returned to full-duty work at Archer that day. (Hrg. Tr. p. 28)

Jay attended his final physical therapy appointment on April 7, 2020. (Jt. Ex. 5, p. 52) Jay had met or exceeded his physical therapy goals. (Jt. Ex. 5, p. 52) He was discharged from physical therapy. (Jt. Ex. 5, p. 52)

Jay returned for a follow-up exam with Dr. Vincent on June 8, 2020. (Jt. Ex. 3, p. 22) He reported pain at a level of two out of ten. (Jt. Ex. 3, p. 22) Jay also complained of occasional numbness. (Jt. Ex. 3, p. 22) Dr. Vincent found Jay had reached maximum medical improvement (MMI) from his surgery. (Jt. Ex. 3, p. 23) He released Jay from care. (Jt. Ex. 3, p. 23)

Dr. Vincent sent Grinnell Mutual a letter regarding Jay's status dated June 25, 2020, in which he stated on June 8, 2020, he performed a comprehensive evaluation of Jay's left shoulder and one of his right shoulder for comparison purposes. (Ex. D, p. 7) Based on these evaluations, Jay "was found to have normal strength of both right and left shoulders in all planes." (Ex. D, p. 7) Range of motion measurements were as detailed in the following table:

Range of Motion	Left	Right
Flexion	160	180
Abduction	160	180
Extension	45	45
External Rotation	90	90
Internal Rotation	70	90

Dr. Vincent found Jay to have reached MMI on June 8, 2020. (Ex. D, p. 7) He opined Jay needed no future care and no permanent work restrictions were needed. (Ex. D, p. 7) Dr. Vincent used the Fifth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides) to reach the following assessment of Jay's permanent impairment from the stipulated work injury:

Figure(s) 16-40, 16-43, and 16-46 were utilized to award 1% impairment rating for loss of flexion, 1% for loss of abduction and 1% for loss of internal rotation. These range of motion measurements are summarized to a 3% impairment rating of the upper extremity. Remaining physical exam findings demonstrated normal stability, neurologic and vascular exams with good strength in all planes of motion.

(Ex. D, p. 7)

In or around July 2020, Jay sustained another left shoulder injury. (Hrg. Tr. pp. 27-28) He was holding onto the tongue of a trailer when the gate fell, which jerked the trailer out of his hand. (Hrg. Tr. p. 28) Jay's shoulder swelled some after the incident.

(Hrg. Tr. p. 28) Jay did not go to the doctor because of the incident and described the injury as “nothing major” during his deposition testimony. (Ex. F, p. 24, Depo. p. 34) The weight of the evidence shows this was a temporary injury from which Jay recovered.

Jay’s attorney arranged for an IME with Dr. Mark Taylor on August 26, 2020. (Cl. Ex. 2, p. 4) Dr. Taylor performed a records review and examination. (Cl. Ex. 2, pp. 4–8) Dr. Taylor’s range of motion measurements were as shown in the following table:

Range of Motion	Left	Right
Flexion	150	165
Abduction	130	170
Extension	40	60
External Rotation	65	85
Internal Rotation	45	65

Dr. Taylor found Jay to have reached MMI on June 8, 2020. (Cl. Ex. 2, p. 9) He assigned Jay permanent work restrictions of occasional overhead lifting on the left side and changing work tasks when symptoms worsen—specifically, when driving a skid loader at Archer aggravates his pain. (Cl. Ex. 2, p. 9) On the question of permanent impairment, Dr. Taylor used the Guides to opine:

Turning to Figures 16-40, 16-43, and 16-46, on pages 476–479, and compared to his unaffected right side, I recommend 5% left upper extremity impairment related to decrements in range of motion. The range of motion values were checked and rechecked with the use of a goniometer, and the values were shown to the staff member that was recording the values as they were being measured. Additionally, Mr. Jay underwent a distal clavicle resection. As per Table 16-27, on page 506, this is assigned an additional 10%. When 10% is combined with 5%, as per the Combined Values Chart on page 604, the result is 15% left upper extremity impairment. As per Table 16-3, on page 439, this converts to 9% whole person impairment.

I am aware that this rating is significantly higher than the rating assigned by Dr. Vincent. The range of motion values were actually fairly close to each other and only resulted in a minimal difference as far as the rating. The bulk of the difference is related to the distal clavicle excision that was documented as part of the surgery.

(Cl. Ex. 2, pp. 9–10)

Defense counsel shared Dr. Taylor's IME report with Dr. Vincent and asked for a response. (Ex. D, p. 9) In a letter dated June 7, 2021, Dr. Vincent stated in pertinent part:

I disagree with an impairment of 10% for the upper extremity impairment due to the distal clavicle excision and will outline my rationale and opinion below.

I would consider myself a specialist in shoulders. I am fellowship-trained in sports medicine specializing in shoulder and knee pathology. I do not award impairment rating for distal clavicle excisions alone, based on [T]able 16-27 on page 506. I am well aware of this table in the [Guides]. Many of my colleagues, who are similarly trained, agree with this opinion. Table 16-27 is a table that awards impairment for "arthroplasty" procedures". The term "resection arthroplasty" is an old term to describe the distal clavicle excision procedure, or previously known as "Mumford procedure". Resection arthroplasty is really an inaccurate term as this is not a true arthroplasty. This procedure should not be listed in this table. This table is meant for joint replacement surgeries. This includes things like total shoulder arthroplasty, total elbow arthroplasty, radial head replacement, and these procedures do warrant impairment and I agree with the other arthroplasties in this table. However, the distal clavicle excision is not a joint replacement. It is a resection of a small amount of defective bone, much like cheilectomy or acromioplasty. This is also reflected in the current CPT coding guidelines, which does not refer to the distal clavicle excision as an arthroplasty/joint replacement. Current coding descriptions from CPT coding states "29824 – arthroscopy, shoulder, surgical; distal claviclectomy including distal articular surface (Mumford procedure)." This is further evidenced that the terminology of arthroplasty is inaccurate for this procedure. This procedure should not be compared with joint replacement surgeries of the upper extremity, which involves implantation of permanent implants.

In training and during my continuing medical education, I have performed extensive literature review for many procedures and conditions that I treat and particularly have reviewed long-term functional outcome studies after distal clavicle excision. There is good orthopedic literature that supports good long-term function and successful improvements in function after distal clavicle excision. This is based on an extensive body of orthopedic literature demonstrating excellent outcomes and improved function after distal clavicle excision. The table referenced above does award a 10% impairment for acromioclavicular arthroplasty in Table 16-27. Based on articles written in the AMA Guides Newsletter as well as my own training, I do not include this base impairment for distal clavicle excision. I have included the article "*Acromioclavicular Joint Arthritis*" by Charles Brooks, September 2005, to support my opinion. The [Guides] provides no

impairment rating for cheilectomy around the acromioclavicular joint or other joints such as subacromial decompression. During a distal clavicle excision, one is removing a portion of diseased or pathologic bone. Consider the procedure, subacromial decompression, which results in loss of a small portion of the body. The bone that is excised, however, is an abnormality. Similarly, the patient undergoing an appendectomy for a diseased infected tissue does not get a base impairment for removal of the appendix. This is because removal of this defective diseased tissue results in improved function, not diminished function. Excision of an inferiorly projecting spur from the distal clavicle should improve function. Because removal of this liability is beneficial, it should result in no and even perhaps negative impairment. This reasoning is consistent with prior article in the AMA Guides Newsletter, *Acromioplasty: Is it an impairment?* by Charles Brooks. This article states that uncomplicated acromioplasty results in no impairment. Distal clavicle excision does remove 1 to 1.5 cm of bone from the lateral end of the clavicle; however, this does not result in impairment. I would argue that despite the loss of a small portion of abnormal bone, if done for appropriate indications, the upper extremity function should be improved postoperatively, and like cheilectomy or decompression results in an even negative impairment. There are other examples in the Guides, which demonstrates loss of a body part or a portion thereof does not result in impairment. There is, for instance, no impairment due to splenectomy. Even though this is an organ that serves a real physiologic function in the body. This article that I have included has been written after the publication of the Guides, (i.e. is more up to date) and I believe it further supports my opinion that no impairment should be awarded based solely on the distal clavicle excision procedures being performed.

(Ex. D, pp. 9–10)

Jay's attorney shared Dr. Vincent's letter with Dr. Taylor, who wrote a response dated June 16, 2021. (Cl. Ex. 2, pp. 15–16) Dr. Taylor opined that "it could reasonably be argued that most orthopedic procedures serve, in large part, to improve function." (Cl. Ex. 2, p. 15) He also stated that while Dr. Vincent's knowledge is undisputed, the authors and reviewers of the Guides were similarly familiar with the procedure when they developed and included the table in the publication. (Cl. Ex. 2, p. 15)

Apparently, they decided that, although the procedure may not be a typical arthroplasty-type procedure, such as a shoulder replacement, it was still worth including, and that this Table was a reasonable location in which to place it, a placeholder, if you will. There may also be other procedures in the Table that are not necessarily a true arthroplasty, but were still included. The Table has a column for both implant and resection arthroplasties, and a DCR, as the name implies, is a "resection"-type procedure.

(Cl. Ex. 2, p. 15) Further, Dr. Taylor noted the Sixth Edition of the Guides, which was published in 2007, includes an impairment range of between eight and twelve percent for a distal clavicle resection. (Cl. Ex. 2, p. 16)

CONCLUSIONS OF LAW

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

1. Permanent Disability.

"In this state, the right to workers' compensation is purely statutory." Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992) (citing Caylor v. Employers Mut. Casualty Co., 337 N.W.2d 890, 893 (Iowa App. 1983)). The "broad purpose of workers' compensation" is "to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010) (citing 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.02, at 80–2 (2009)). With the 2017 amendments, the legislature altered how this is done under the Iowa Workers' Compensation Act. Some of these legislative changes apply in the current case.

The Iowa Workers' Compensation Act contains a schedule of body parts. See Iowa Code §§ 85.34(2). Compensation for work injuries to body parts listed in the schedule are limited to functional disability over a number of weeks set by the statute. See Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994); see also Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993). Injuries to body parts not included in the statutory list are considered unscheduled. See Id.; see also Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 157 (Iowa 1996). Disability caused by such injuries is deemed to the whole body and compensation is based on industrial disability, the impact on the injured worker's earning capacity. Id.

Consequently, the maximum amount of compensation to which an injured worker is entitled under the statute can "differ radically" depending on whether the worker's injury is to a scheduled member or the body as a whole. Mortimer, 502 N.W.2d at 15. "The very purpose of the schedule is to make certain the amount of compensation in the case of specific injuries and to avoid controversies" Gilleland, 524 N.W.2d at 407 (Iowa 1994) (quoting Dailey, 10 N.W.2d 569, 571 (Iowa 1943)). "The schedule brings a windfall to the worker in some cases and gross hardship to the worker in others." Id. at 409 (Lavarto, J., concurring specially) (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 119–20 (Iowa 1983) (McCormick, J., concurring specially)). Thus, the legislative purpose of the statutorily prescribed schedule is not so much beneficence to the worker, though that sometimes is the result, as cost certainty and limiting controversies resolved by litigation. McSpadden v. Big Ben Coal Co., 288

N.W.2d 181, 188 (Iowa 1980) (citing Cedar Rapids Cmty. Sch. Dist. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979); Wetzel v. Wilson, 276 N.W.2d 410, 411-12 (Iowa 1979); and Hoening v. Mason & Hanger, Inc., 162 N.W.2d 188, 190 (Iowa 1968)) (“The primary purpose of the workers’ compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit.”).

Before 2017, the shoulder was not included in the statutory list of scheduled members. See Second Injury Fund v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995) (citing Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 837–39 (Iowa 1986) and Alm v. Morris Barick Cattle Co., 38 N.W.2d 161, 163 (Iowa 1949)). Instead, shoulder injuries such as the one at issue in this case were considered unscheduled injuries under Iowa law. Alm, 38 N.W.2d at 163; Westling v. Hormel Foods Corp., 810 N.W.2d at 252 (Iowa 2012). Permanent partial disability caused by shoulder injuries that occurred before July 1, 2017, was considered industrial. Id.; Westling, 810 N.W.2d at 252. Compensation was therefore based on the loss of earning capacity the worker suffered due to the work-related shoulder injury. Id.; Westling, 810 N.W.2d at 252.

In 2017, the legislature enacted a bill that made multiple changes to the statutory framework governing workers’ compensation in Iowa. See 2017 Iowa Acts ch. 23. As part of the 2017 amendments, the legislature expanded the schedule by adding the shoulder to the codified list of scheduled members. 2017 Iowa Acts ch. 23, § 7 (now codified at Iowa Code § 85.34(2)(n)). Under the statute, as amended, work injuries to the shoulder that occur on or after July 1, 2017, are treated as scheduled member injuries and the award of benefits is consequently limited in the interest of cost certainty and limiting controversies to the injured employee’s functional impairment.

The legislature did not define the term “shoulder” when it amended section 85.34(2). See 2017 Iowa Acts ch. 23, § 7. The Commissioner has found the “shoulder” is not limited to the glenohumeral joint. Deng v. Farmland Foods, File No. 5061883 (App. Sep. 29, 2020); Chavez v. MS Tech., LLC, File No. 5066270 (App. Sep. 30, 2020). The test is whether the affected body part is entwined with the glenohumeral joint and is important to the shoulder’s function. Id.; Chavez, File No. 5066270. Under agency precedent, injuries to the rotator cuff and labrum, as well as those that result in a subacromial decompression, constitute injuries to the shoulder under the statute. Id.; Chavez, File No. 5066270. Jay’s injury in the current case constitutes one to the shoulder and is therefore treated as a scheduled member under applicable Iowa law.

Another requirement the legislature added to the Iowa Workers’ Compensation Act in 2017 governs the determination of functional disability. Before the 2017 amendments, the agency could use all evidence in the administrative record, as well as agency expertise, when determining the permanent disability of an injured worker. See, e.g., Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 421 (Iowa 1994). Under agency rules before the 2017 amendments, the Guides were considered a “useful tool in evaluating disability.” Seaman v. City of Des Moines, File Nos. 5053418, 5057973, 5057974 (App. Oct. 11, 2019) (quoting Bisenius v. Mercy Med. Ctr., File No. 5036055 (App. Apr. 1, 2013)); see also Westling, 810 N.W.2d at 252. However, in cases involving

injuries on or after July 1, 2017, the Guides are now more than a tool; they are the sole means by which impairment may be determined.

[W]hen 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 "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(x).

Thus, the Iowa Workers' Compensation Act now limits the determination of what, if any, permanent disability Jay has sustained to only his functional impairment. In making that determination, the agency is prohibited from using lay testimony or agency expertise by Iowa Code section 85.34(2)(x). Under the statute, that determination must be made "solely by utilizing" the Fifth Edition of the Guides.

Table 16-27 on page 506 of the Guides provides that a ten percent impairment is used for distal clavicle resection. Dr. Vincent did not assign an impairment rating based on this table because he disagrees with the AMA's decision to include such a table in the Guides and the AMA's conclusion that the procedure merits an impairment rating at all. Dr. Vincent's opinion relates to a policy choice made by the AMA with respect to how this procedure should be treated with respect to permanent impairment. It is not the agency's place to second-guess the AMA on such decisions.

Indeed, as noted above, the legislature has mandated that determinations of functional impairment under the Iowa Workers' Compensation Act must be made solely by utilizing the Guides adopted for use by the Commissioner. The Commissioner has adopted the Fifth Edition, with which Dr. Vincent disagrees. Dr. Vincent is entitled to his opinion about AMA policy choices as reflected in the Guides, but his opinion does not govern determinations of functional impairment under Iowa law. The Fifth Edition of the Guides does. Consequently, Dr. Vincent's impairment rating is given less weight because he intentionally did not follow the Guides. For this reason, Dr. Taylor's opinion is more credible and is adopted.

Jay has met his burden of proof on permanent impairment. The weight of the evidence shows he sustained a fifteen percent permanent impairment to the shoulder. Under Iowa Code section 85.34(2)(n), which provides that permanent disability to the shoulder is weekly compensation during four hundred weeks, Jay's permanent functional impairment entitles him to sixty weeks of permanent partial disability benefits (four hundred weeks multiplied by fifteen percent equals sixty).

2. Rate.

The parties stipulated Jay's gross earnings at the time of the stipulated work injury were one thousand five hundred eight and 75/100 dollars. They also stipulated he was married and entitled to two exemptions. Based on the parties' stipulations, Jay's weekly workers' compensation rate is nine hundred fifty and 24/100 dollars.

3. Costs.

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

Under the administrative rules governing contested case proceedings before the Iowa workers' compensation commissioner, hearing costs shall include:

- Eighty-eight and 15/100 dollars for the cost of a deposition transcript, 876 IAC 4.33(2);
- Fourteen and 00/100 dollars for the cost of service of the original notice, Id. at 4.33(3);
- Two hundred eighty-five and 00/100 dollars for the cost of Dr. Taylor's rebuttal report, Id. at 4.33(6); and
- One hundred three and 00/100 dollars for the filing fee and WCES convenience charge, Id. at 4.33(7).

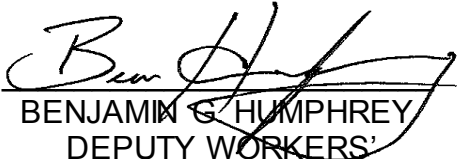
ORDER

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

- 1) The defendants shall pay to Jay sixty (60) weeks of permanent partial disability benefits at the rate of nine hundred fifty and 24/100 dollars (\$950.24) per week from the commencement date of June 8, 2020.
- 2) The defendants shall pay accrued weekly benefits in a lump sum.
- 3) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
- 4) The defendants are to be given a credit for benefits previously paid in the stipulated amount.

- 5) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 6) The defendants shall pay to Jay the following amounts for the following costs:
 - a) One hundred three and 00/100 dollars (\$103.00) for the filing fee and WCES convenience charge;
 - b) Fourteen and 00/100 dollars (\$14.00) for the cost of service of the original notice;
 - c) Eighty-eight and 15/100 dollars (\$88.15) for the cost of a deposition transcript; and
 - d) Two hundred eighty-five and 00/100 dollars (\$285.00) for the cost of Dr. Taylor's rebuttal report.

Signed and filed this 17th day of March, 2022.


BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Brian Keit (via WCES)

Aaron Oliver (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.