

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FLOYD HOWARD,

Claimant,

vs.

TYSON FRESH MEATS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 21700249.01

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1803, 2907

Claimant filed a petition in arbitration on March 15, 2021, alleging he sustained injuries to his bilateral shoulders while working for Defendant Tyson Fresh Meats, Inc. ("Tyson") from overuse on October 1, 2020. Tyson filed an answer on April 19, 2021.

An arbitration hearing was held *via* Zoom video conference on May 3, 2022. Attorney Brian Keit represented Howard. Howard appeared and testified. Attorney Jason Wiltfang represented Tyson. Joint Exhibits ("JE") 1 through 5 through and Exhibits 1 through 5 and A through F were admitted into the record. The record was held open through June 10, 2022, for the receipt of post-hearing briefs. The briefs were received and the records was closed.

Before the hearing the parties submitted a Hearing Report, listing stipulations and issues to be decided. Tyson waived all affirmative defenses. The Hearing Report Order was entered at the conclusion of the hearing adopting the parties' stipulations.

STIPULATIONS

1. An employer-employee relationship existed between Tyson and Howard at the time of the alleged injury.
2. Howard sustained a cumulative injury, which arose out of and in the course of his employment with Tyson and manifested on July 9, 2020.
3. Howard's entitlement to temporary benefits is no longer in dispute.
4. Howard is earning the same or greater pay than he was at the time of the alleged injury and if the alleged injury is a cause of permanent disability, the disability is not an industrial disability.

5. The commencement date for permanent partial disability benefits, if any are awarded, is February 27, 2021.

6. At the time of the alleged injury Howard's gross earnings were \$921.29 per week, he was single and entitled to one exemption, and the parties believe his weekly rate is \$578.82.

7. Costs have been paid.

ISSUES

1. What is the nature of the injury?
2. Is the alleged injury a cause of permanent disability?
3. If the injury is a cause of permanent disability, what is the extent of disability?
4. Is Howard entitled to recover the cost of the independent medical examination?
5. Should costs be assessed against either party?

FINDINGS OF FACT

Howard lives alone in Waterloo. (Exhibit D:3; Transcript at 8) Howard graduated from high school and has attended less than a year of college classes. (Ex. D:4; Tr.:8) Howard is right-hand dominant. (Ex. 2:3)

Howard worked for Tyson twice. (Ex. D:5; Tr.:10) From 1997 through 2000, Howard worked for Tyson until Tyson terminated his employment. (Tr.:10) In 2015, Tyson hired Howard. (Ex. D:5; Tr.:9) Howard does not have a job assignment and works as a "no jobber." (Tr.:10-11)

On July 30, 2020, Howard informed Tyson he injured his bilateral shoulders and neck when pulling and picking up trollies and from using force when deshacking hogs. (JE 5:29)

Howard attended an appointment with Robert Gordon, M.D., Tyson's on-site physician on August 8, 2020. At that time Howard was working "indexing hogs" and "de-shackling hogs." (JE 1:1) Howard reported around July 9, 2020, he began experiencing cervical pain and bilateral shoulder girdle region pain. (JE 1:1) Howard reported the job of indexing hogs required him to push, pull, and untangle hogs while they were on the overhead trolley system. (JE 1:1) While de-shackling hogs he had to take the shackles off hogs, which required him to push and pull on the hogs, and also bothered his cervical region and bilateral shoulder girdle regions. (JE 1:1) Howard relayed before July 9, 2020 he had problems in the same areas of his body, but his

issues improved and he began having symptoms again on July 9, 2020. (JE 1:1) Dr. Gordon examined Howard, listed an impression of bilateral cervical pain, most consistent with myofascial pain and bilateral shoulder girdle region pain, prescribed Mobic, ordered physical therapy, and imposed restrictions of no lifting, pushing, or pulling over five pounds with each upper extremity independently and no activity above shoulder level. (JE 1:2)

Howard returned to Dr. Gordon on August 18, 2020, reporting his cervical and bilateral shoulder regions had improved. (JE 1:3) Dr. Gordon documented he spoke with Howard's physical therapist and the physical therapist reported Howard had done well with therapy and he was compliant with his home exercise program. (JE 1:3) Howard relayed he had only received seven Mobic tablets and he was not taking the medication because it ran out. (JE 1:3) Howard complained of pain in his cervical region and bilateral shoulder girdle region, but reported his symptoms and function had improved. (JE 1:3) Dr. Gordon prescribed Mobic, continued Howard's physical therapy, and imposed restrictions of no lifting, pushing, or pulling over 10 pounds with each upper extremity independently and no activity above shoulder level. (JE 1:4)

On September 1, 2020, Howard attended a follow-up appointment with Dr. Gordon reporting he was much improved, and while he had full range of motion and excellent strength in his shoulders, he was still experiencing an aching sensation in his shoulders. (JE 1:5) Howard reported he thought Mobic might be aggravating his asthma and he requested to use Aleve. (JE 1:6) Dr. Gordon continued Howard's physical therapy, discontinued his Mobic, and imposed restrictions of no lifting, pushing, or pulling over 15 pounds with each upper extremity. (JE 1:6)

On September 8, 2020, Dr. Gordon issued an opinion letter noting Howard had undergone 13 physical therapy sessions. (Ex. C:1) Dr. Gordon documented on examination Howard had full range of motion and strength in his right shoulder in all planes with tenderness that was mild in the right posterior glenohumeral region, full range of motion and strength in his left shoulder with no tenderness. (Ex. C:1) Dr. Gordon documented Howard had reached maximum medical improvement for his bilateral shoulder girdle region pain, and he released Howard to full duty without any restrictions or permanent impairment. (Ex. C:1-2)

Howard returned to Dr. Gordon on October 13, 2020. (JE 1:7) Dr. Gordon noted he had discharged Howard from care on September 1, 2020 because he was doing well with his bilateral shoulders. (JE 1:7) Howard relayed since his last appointment he had moved to "pulling snouts" and "shaving hogs," which had increased his bilateral shoulder pain. (JE 1:7) Dr. Gordon documented he spoke with the superintendent, Jerome Renken, and Howard's supervisor, Casey Stealey, and they reported the "Shaving Hogs" job does not require any work above shoulder level. (JE 1:7) Dr. Gordon listed an impression of bilateral shoulder girdle region pain with increasing pain, recommended shoulder x-rays, recommended Howard use Aleve, and found Howard could continue with the job "shaving hogs." (JE 1:7-8)

On October 27, 2020, Howard attended an appointment with Dr. Gordon, complaining of bilateral shoulder pain. (JE 1:9) Dr. Gordon noted the x-rays showed mild to moderate degenerative changes in each shoulder and a “small cystic lesion within the glenoid, which was likely degenerative in etiology.” (JE 1:9) Dr. Gordon found Howard had excellent functionality in his bilateral shoulders, discussed the imaging with Howard, and discharged him to full duty. (JE 1:9)

Howard underwent left and right shoulder magnetic resonance imaging ordered by Dr. Gordon on November 23, 2020. (JE 1:11) For the left shoulder, the reviewing radiologist listed an impression of:

1. Moderate to severe osteoarthritic degenerative changes of the glenohumeral articulation, with a near circumferential labra tear, glenoid rim remodeling, subchondral cystlike change and marginal osteophytosis.
2. Tendinosis of the supraspinatus with an insertional rim rent as above.
3. Tendinosis of the infraspinatus with a tiny interstitial tear at the myotendinous junction.
4. High-grade intraarticular tendinosis of the biceps.
5. Moderate to severe osteoarthropathy of the AC joint with subacromial bursitis.
6. Small glenohumeral effusion with mild synovitis.

(JE 3:26) For the right shoulder, the radiologist listed an impression of:

1. Moderate to severe degenerative changes of the glenohumeral articulation, with a near circumferential labral tear, multifocal subchondral cystlike change, glenoid rim remodeling and caudal osteophytosis.
2. High-grade undersurface tear of the insertional supraspinatus with mild muscle belly atrophy.
3. Mild to moderate tendinosis of the infraspinatus without a tear.
4. High-grade intraarticular tendinosis of the biceps with extra articular tenosynovitis.
5. Moderate to severe osteoarthropathy of the AC joint.
6. Small to moderate glenohumeral effusion with synovitis.

(JE 3:25)

Howard returned to Dr. Gordon on December 1, 2020. (JE 1:11) Dr. Gordon documented the results of the imaging and noted Howard reported Mobic was helping him and he was performing "shaving hogs" full duty. (JE 1:11) Dr. Gordon documented Howard reported his symptoms were worse since his last appointment, worse on his left side than his right side. (JE 1:12) Dr. Gordon recommended an orthopedic consultation, prescribed Mobic, and found Howard could perform "shaving hogs" full duty. (JE 1:12)

On December 10, 2020, Howard attended an appointment with Thomas Gorsche, M.D., an orthopedic surgeon, complaining of bilateral shoulder pain, worse on the left than the right. (JE 2:13) Dr. Gorsche documented Howard reported his symptoms began when he was working on the trolley removing hogs off jammed hooks. (JE 2:13) Dr. Gorsche reviewed Howard's imaging and documented the imaging showed "moderate to severe degenerative changes, some humeral head subluxation partial tearing and degeneration of the rotator cuff but nothing that needs to be treated surgically at this time." (JE 2:13) Dr. Gorsche documented on the left Howard had 120 degrees of flexion and 90 degrees of abduction and on the right he had 110 degrees of abduction and 100 degrees of flexion. (JE 2:14) Dr. Gorsche assessed Howard with right shoulder primary osteoarthritis, right shoulder pain, unspecified chronicity, left shoulder primary osteoarthritis, and left shoulder pain, unspecified chronicity. (JE 2:14) Dr. Gorsche recommended and administered Marcaine and Depo-Medrol injections into both shoulders, found Howard had degenerative changes that are "primarily arthritis," discussed his findings with Howard, and stated he could continue his job as a shaver. (JE 2:15)

Howard returned to Dr. Gorsche on January 6, 2021, reporting his left shoulder was 80 percent better following the injection and his right shoulder was good for a while, but had become more painful. (JE 2:16) Howard relayed he had been shaving hogs at work and even reaching over his head, but he had some popping on the right side. (JE 2:16) Dr. Gorsche assessed Howard with primary osteoarthritis of the right and left shoulders and administered injections into his bilateral shoulders. (JE 2:17)

On February 11, 2021, Howard attended a follow-up appointment with Dr. Gorsche reporting he had a difficult time performing repetitive, above-shoulder work. (JE 2:18) Dr. Gorsche documented he believed it would be better if Howard performed a job below chest level and imposed a permanent restriction of no work above chest level. (JE 2:18)

Dr. Gorsche responded to a check-the-box letter from Tyson on January 27, 2021, documenting he found Howard reached maximum medical improvement on February 11, 2021 and opining Howard had not sustained a permanent impairment from the injury using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"). (JE 2:20)

On February 15, 2021, Dr. Gorsche responded to a second letter from Tyson listing Howard's current diagnosis as degenerative joint disease of both shoulders. (Ex. B:1) Dr. Gorsche opined Howard's work for Tyson exacerbated his underlying

degenerative joint disease, noting Howard's pain with range of motion is an objective finding indicating his physical condition was altered, the condition was a temporary aggravation, and Howard remained at maximum medical improvement. (Ex. B:1-2) Dr. Gorsche recommended a permanent restriction of no work above chest level. (Ex. B:2)

Tyson sent Howard a letter on March 12, 2021, stating medical providers had found he had reached maximum medical improvement without any permanent impairment and if he disagreed with the determination, he could request an independent medical examination that Tyson would pay for. (Ex. F:1)

Mark Taylor, M.D., an occupational medicine physician, conducted an independent medical examination for Howard on June 28, 2021, and issued his report on July 30, 2021. (Ex. 2) On exam, comparing the right to left shoulder, Dr. Taylor found Howard had 115 and 120 degrees of flexion, 60 and 60 degrees of extension, 120 and 120 degrees of abduction, 25 and 25 degrees of adduction, 30 and 35 degrees of internal rotation, and 60 and 60 degrees of external rotation. (Ex. 2:8) He also noted palpation revealed tenderness just inferior to the lateral tip of the acromion bilaterally, Howard was tender over the bilateral posterior glenohumeral areas and over the bilateral upper trapezius and supraspinatus regions, and on the left side he was tender across the glenohumeral joint and the bicipital groove. (Ex. 2:8-9) Dr. Taylor documented strength testing "revealed perhaps slight weakness of abduction," associated with pain, he had a positive Neer's and Hawkins' test bilaterally, and Jobe's testing was positive on the left, but negative on the right. (Ex. 2:9)

For the right shoulder, Dr. Taylor diagnosed Howard with right shoulder arthralgia with partial rotator cuff tearing, moderate to severe glenohumeral arthritic changes with near-circumferential labral tearing, high grade tendinosis of bicep tendon with extra-articular tenosynovitis, moderate to severe AC arthropathy, and a small to moderate glenohumeral effusion with synovitis. (Ex. 2:9) For the left shoulder, Dr. Taylor diagnosed Howard with left-sided partial shoulder arthralgia with rotator cuff tearing, moderate to severe glenohumeral arthritic changes with near-circumferential labral tearing, high-grade tendinosis of biceps tendon, moderate to severe AC arthropathy, subacromial bursitis, and a small glenohumeral effusion with mild synovitis. (Ex. 2:9)

Dr. Taylor noted Howard did not report having any prior shoulder injuries or problems before he worked for Tyson and that he developed bilateral pain while he was working performing tasks that included activities at or above shoulder level and reaching out away from his body with his arms extended away from the body, and that he engaged in forceful pushing and pulling-type movements at work. (Ex. 2:9) Dr. Taylor opined:

[g]iven the history, and the currently available medical records, it is my opinion Mr. Howard's work activities represented a substantial contributing factor to the onset of his bilateral symptoms. He was found to have multiple abnormalities, including arthritic changes, as well as synovitis and bursitis, labral tearing, and rotator cuff tearing. Dr. Gorsche described it

as a temporary aggravation of a pre-existing condition. Had Mr. Howard developed the symptoms and then returned to his asymptomatic baseline, I would have agreed. Unfortunately, Mr. Howard has remained symptomatic over both shoulder areas. This could be viewed as a “lighting-up” due to the fact that he was not previously symptomatic as far as the abnormalities noted on MRI, but he then became and remained symptomatic.

(Ex. 2:9) Using the AMA Guides, Dr. Taylor opined:

[t]urning to Figures 16-40, 16-43, and 16-46, on pages 476-479, Mr. Howard will be assigned 12% right and 11% 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 only the maximum value for each movement was utilized in assigning a rating. These values are generally in keeping with the values obtained by Dr. Gorsche.

As per Table 16-3, on page 439, both sides convert to 7% whole person impairment. When combined, as per the Combined Values chart on page 604, the result is 14% whole person impairment. I did not identify other objective findings for which to assign additional impairment. Should he undergo further treatment, then the rating may need to be revisited.

(Ex. 2:9-10)

Dr. Taylor recommended restrictions of avoiding work above chest/shoulder level, to limit lifting activities with the arms as close to the body as possible to lessen the strain over the glenohumeral regions, and infrequent crawling. (Ex. 2:10) Dr. Taylor did not recommend any additional treatment. (Ex. 2:10)

CONCLUSIONS OF LAW

I. Permanent Impairment

To receive workers’ compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee’s injuries arose out of an in the course of the employee’s employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs “in the course of employment” when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those

duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties stipulated Howard sustained a cumulative work injury arising out of and in the course of his employment with Tyson, which manifested on July 9, 2020. Tyson disputes the injury caused Howard to sustain a permanent impairment, which raises an issue of causation.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). “A cumulative injury is deemed to have occurred when it manifests – and ‘manifestation’ is that point in time when ‘both the fact of the injury and the causal relationship of the injury to the claimant’s employment would have become plainly apparent to a reasonable person.’” Baker, 872 N.W.2d at 681. The Iowa Supreme Court has held:

a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant’s employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred.

Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). The stipulated injury in this case is not a traumatic injury, but rather a cumulative injury that developed over time. Again, the issue is whether the injury resulted in a temporary or permanent impairment.

Three physicians have provided opinions on permanency, Dr. Gordon, a physician who works for Tyson in the plant, Dr. Gorsche, a treating orthopedic surgeon, and Dr. Taylor, an occupational medicine physician who performed an independent medical examination for Howard. Drs. Gordon and Gorsche found Howard did not sustain a permanent impairment to his bilateral shoulders. Dr. Taylor found the work injury was a substantial contributing factor to the onset of Howard’s bilateral shoulder symptoms causing a permanent impairment. (Ex. 2:9) Dr. Taylor noted while Howard had multiple abnormalities, including arthritic changes, synovitis and bursitis, labral tearing, and rotator cuff tearing, unlike his symptomatology prior to the work injury in this case, Howard did not return to baseline, and he continued to be symptomatic. (Ex. 2:9) Dr. Taylor supported his opinions using objective testing from a goniometer. Neither Dr. Gordon nor Dr. Gorsche documented all of the range of motions findings comparing Howard’s right and left shoulders to support their conclusions or indicated they used a goniometer. Moreover, Howard’s credible testimony at hearing and the record support he has not returned to his asymptomatic baseline. I find Howard has established he sustained a permanent impairment to his bilateral shoulders caused by the work injury.

II. Nature of the Injury and Extent of Disability

The parties dispute the nature of the injury. Tyson avers claimant’s injury to his bilateral shoulder falls under Iowa Code section 85.34(2)(t). Claimant avers his injury falls under Iowa Code section 85.34(2)(v), separately from the functional loss provisions.

In 2017, the legislature amended Iowa Code section 85.34. One of the changes involved the shoulder. The legislature enacted Iowa Code section 85.34(2)(n), which provides compensation “[f]or the loss of a shoulder” is limited to 400 weeks, as a

scheduled injury. Before this change, an injury to a shoulder was compensated industrially because it was not expressly listed as a scheduled injury. Iowa Code § 85.34(a)-(u); Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252-53 (Iowa 2012).

In Carmer v. Nordstrom, Inc., File No. 1656062.01, 2021 WL 6206792 (Iowa Workers' Comp. Comm'n. Dec. 29, 2021), Workers' Compensation Commissioner Joseph Cortese, II, found an injury to the bilateral shoulders should be compensated industrially under Iowa Code section 85.34(2)(v). The Commissioner noted Iowa Code section 85.34(2)(t), provides that the "loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such." The loss of two of the enumerated members is not classified as an industrial loss under Iowa Code section 85.34, but is compensated based on 500 weeks like other unscheduled industrial losses. The Commissioner expressly found when the legislature added the "loss of a shoulder" to the list of scheduled injuries, it did not modify Iowa Code section 85.34(2)(t) to include an injury to two shoulders caused by a single accident. In Carmer, the Commissioner expressly rejected Tyson's argument in this case, finding Iowa Code section 85.34(2)(t) did not include an injury to both shoulders caused by a single accident.

Under Carmer and the express text of the statute, Tyson's argument Howard's loss to his bilateral shoulders falls under Iowa Code section 85.34(2)(t) lacks merit. The nature of the injury falls outside of Iowa Code sections 85.34(2)(n) and (2)(t).

The parties stipulated Howard returned to work earning the same or greater salary, wages, or earnings than he received at the time of the injury. Under Iowa Code section 85.34(2)(v),

[i]f an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment rating resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Thus, under the statute, because Howard returned to work earning the same or greater salary, wages, or earnings than he received at the time of the injury, his recovery is limited to his functional loss.

Compensation or functional loss for scheduled injuries is determined by taking the number of weeks allowed for a complete loss of the body part or scheduled member, multiplied by the extent or percentage of impairment determined using the AMA Guides. Iowa Code § 85.34(2)(x). The Workers' Compensation Commissioner has adopted the AMA Guides 5th Edition for evaluating permanent impairment. 876 IAC 2.4.

Dr. Taylor is the only physician who provided an impairment rating under the AMA Guides in this case. Dr. Taylor assigned Howard a 14 percent whole person impairment under the AMA Guides for his injury to his bilateral shoulders. (Ex. 2:10) Multiplying this percentage by 500 weeks, equals 70 weeks of permanent partial disability benefits. Howard is entitled to 70 weeks of permanent partial disability benefits at the stipulated rate of \$578.82, commencing on the stipulated commencement date of February 27, 2021.

III. Independent Medical Examination

Howard seeks to recover the \$2,797.00 cost of Dr. Taylor's independent medical examination. (Ex. 2:13)

Iowa Code section 85.39(2) (2020), provides, in part:

[i]f 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. . . . 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.

Dr. Taylor, conducted his independent medical examination on June 28, 2021, after Dr. Gorsche opined on January 27, 2021 that Howard had not sustained a permanent impairment. (JE 2:19; Ex. 2)

The Iowa Court of Appeals recently addressed this issue in Kern v. Fenchel, Doster & Buck, P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021).

In Kern, the defendants' expert found there was no causation. Kern disagreed with the opinion and sought an independent medical examination at the defendants' expense. The Commissioner found Kern was not entitled to recover the cost of an independent medical examination. The Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39. Dr. Gorsche opined Howard did not sustain any permanent injury caused by the work injury. Howard disagreed and sought an independent medical examination with Dr. Taylor. Under Kern, Howard is entitled to recover the \$2,797.00 cost of Dr. Taylor's independent medical examination from Tyson.

IV. Costs

Howard seeks to recover the \$92.45 cost of his deposition transcript and the \$103.00 filing fee. (Ex. 1:1-2) Tyson avers the parties should bear their own costs.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certified shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the costs Howard seeks. I find Tyson should reimburse Howard \$92.45 for the cost of his deposition transcript and the \$103.00 for the cost of the filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay Claimant seventy (70) weeks of permanent partial disability benefits, at the stipulated rate of five hundred seventy-eight and 82/100 dollars (\$578.82), commencing on the stipulated commencement date of February 27, 2021.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendant shall reimburse Claimant for the two thousand seven hundred ninety-seven and 00/100 dollars (\$2,797.00) cost of Dr. Taylor's independent medical examination.

Defendant shall reimburse Claimant ninety-two and 45/100 dollars (\$92.45) for the cost of the deposition transcript and one hundred three and 00/100 dollars (103.00) for the cost of the filing fee.

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

Signed and filed this 15th day of July, 2022.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Brian Keit (via WCES)

Jason Wiltfang (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.