

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT RILEY,

Claimant,

vs.

ARKANSAS BEST CORP.,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Insurance Carrier,  
Defendants.

File No. 1659289.01

## ARBITRATION DECISION

Headnotes: 1803, 2907

Claimant Robert Riley filed a petition in arbitration on August 12, 2021, alleging he sustained an injury to his right shoulder on December 31, 2018, while working for Defendant Arkansas Best Corporation ("ABF"). ABF and its insurer, Defendant Ace American Insurance Company ("Ace American") filed an answer on August 31, 2021.

An arbitration hearing was held *via* Zoom video conference on August 11, 2022. Attorney Jerry Jackson represented Riley. Riley appeared and testified. Attorney Stephen Spencer represented ABF and Ace American. Steven Ryan appeared and testified on behalf of ABF and Ace American. Joint Exhibits ("JE") 1 through 5, and Exhibits 1 through 4, and A through C were admitted into the record. The record was held open until August 26, 2022, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

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

**STIPULATIONS**

1. An employer-employee relationship existed between ABF and Riley at the time of the alleged work injury.

2. Riley sustained an injury, which arose out of and in the course of his employment with ABF on December 31, 2018.

3. The alleged injury is a cause of temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. The alleged injury is a cause of permanent disability.
6. The disability is a scheduled member disability to the shoulder.
7. The commencement date for permanent partial disability benefits, if any are awarded, is August 13, 2019.
8. At the time of the alleged injury Riley's gross earnings were \$1,262.65 per week, he was married and entitled to two exemptions, and the parties believe his weekly rate is \$801.14.
9. Prior to the hearing claimant was paid 24 weeks of permanent partial disability benefits at the rate of \$801.14.
10. Costs have been paid.

### **ISSUES**

1. What is the extent of disability?
2. Is claimant entitled to recover the cost of the independent medical examination under Iowa Code section 85.39?
3. Should costs be assessed against either party?

### **FINDINGS OF FACT**

Riley is married and lives in Lacona, Iowa. (Transcript:9) At the time of the hearing he was 60. (Tr.:9)

Riley works for ABF. (Tr.:9) On December 31, 2018, Riley sustained an injury to his right shoulder while working for ABF. (Tr.:9) Riley testified, "I slipped on – there was ice on the truck and I slipped and I grabbed the handle and I fell down into the yard while holding the handle, and I think that's how it tore. (Tr.:10)

According to Jacqueline Stoken, D.O.'s independent medical examination report, the day of the accident Riley went to the emergency room at Iowa Methodist for treatment. (Ex. 1:2) X-rays did not show any fractures or dislocations and he was discharged with a referral to an orthopedic surgeon for additional evaluation. (Ex. 1:2)

On January 8, 2019, Riley attended an appointment with Jason Sullivan, M.D., an orthopedic surgeon. (JE 1:1) Riley explained his work injury and reported he had been unable to lift his arm since the accident. (JE 1:1) Dr. Sullivan examined Riley, ordered x-rays, and assessed him with a right shoulder injury, noting he suspected a rotator cuff tear. (JE 1:1) Dr. Sullivan ordered magnetic resonance imaging and imposed restrictions of no use of the right arm. (JE 1:1, 4)

Riley returned to Dr. Sullivan on January 22, 2019. (JE 1:5) Dr. Sullivan informed Riley the right shoulder magnetic resonance imaging showed a full-thickness supraspinatus and infraspinatus rotator cuff tear retracted to the level of the glenoid. (JE 1:5) Dr. Sullivan recommended a right shoulder rotator cuff repair with possible subacromial decompression, distal clavicle excision, and biceps tenodesis and imposed restrictions of no use of the right arm with sit down work only with no standing or walking. (JE 1:5, 7)

On February 11, 2019, Dr. Sullivan performed a right arthroscopic rotator cuff repair, right subpectoralis biceps tenodesis, and subacromial decompression. (JE 1:8) Dr. Sullivan listed a postoperative diagnosis of a right full thickness massive rotator cuff tear and partial tear and medial subluxation of the long head of the biceps. (JE 1:8)

Riley attended a follow-up appointment with Dr. Sullivan on February 19, 2019. (JE 1:10) Dr. Sullivan found he was doing well, ordered him to remain in a sling for three weeks before commencing physical therapy, and restricted him from working. (JE 1:10-11)

On March 19, 2019, Riley returned to Dr. Sullivan's office, and he was examined by Emily Palmer, PA-C. (JE 1:12) Palmer documented Riley was doing very well with minimal pain and she ordered physical therapy. (JE 1:12)

Riley attended an appointment with Dr. Sullivan on May 21, 2019. (JE 1:13) Dr. Sullivan documented Riley was attending physical therapy and could start working on strengthening. (JE 1:13) Riley stated he was anxious to return to work and Dr. Sullivan released him to return to light duty work with restrictions of no overhead lifting and lifting up to 10 pounds at waist level. (JE 1:13)

On July 2, 2019, Riley returned to Dr. Sullivan. (JE 1:15) Dr. Sullivan noted Riley had active forward flexion to 150 degrees, external rotation to "only about 40 degrees," internal rotation "to about 30 degrees," a hard endpoint, and "5/5 rotator cuff strength." (JE 1:15) Dr. Sullivan recommended an additional six weeks of physical therapy to work on flexibility and strengthening. (JE 1:15) Following surgery Riley attended 35 physical therapy sessions. (Tr.:10-11)

Riley attended an appointment with Dr. Sullivan on August 13, 2019, reporting he believed he was stronger, his pain was much better, and he believed he was ready to return to full duty work. (JE 1:16) Dr. Sullivan documented Riley had active forward flexion to 160 degrees, internal rotation to 30 degrees, external rotation to 70 degrees, abduction to 160 degrees, extension to 50 degrees, and 5/5 strength. (JE 1:16) Dr. Sullivan noted Riley's range of motion had improved, but he still had some stiffness with rotational movements. (JE 1:16) Dr. Sullivan found he had negative Neer's and Hawkins tests, no pain with O'Brien's or Jobe's tests, a negative belly press and lift off, negative Yergason's and Speeds tests, no sulcus sign, and no subluxation with posterior force. (JE 1:16) Dr. Sullivan released Riley to return to full duty on August 19, 2019, without restrictions. (JE 1:16-18)

When Riley returned to full duty he returned to the same position he held with ABF before the work injury. (Tr.:16) At the time of the hearing Riley was performing the

same job duties. (Tr.:16-17) Riley testified he has not advised ABF he has any restrictions for his right shoulder. (Tr.:17)

On September 26, 2019, Dr. Sullivan opined Riley reached maximum medical improvement for his right shoulder on August 13, 2019. (JE 1:19). Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Sullivan opined:

[a]s a result of his last visit, he had forward flexion to 160 degrees, equating to 1% impairment rating; internal rotation to 30 degrees, equating to 4% impairment rating; abduction to 160 degrees, equating to 1% impairment rating. This totals 6% impairment rating to the right upper extremity which equates to a 4% body as a whole permanent impairment rating. . . He has no restrictions going forward and I do not anticipate any future medical care.

(JE 1:19)

Dr. Stoken, a physiatrist, conducted an independent medical examination for Riley on March 3, 2020, and issued her report on March 5, 2020. (Ex. 1) Dr. Stoken examined Riley and reviewed his medical records. (Ex. 1) Dr. Stoken documented Riley complained of aching and shooting right shoulder pain, which is worse with lifting, probing and shifting gears, and better with rest. (Ex. 1:1, 5)

On examination, Dr. Stoken documented Riley had flexion to 140 degrees, extension to 50 degrees, adduction to 20 degrees, abduction to 120 degrees, internal rotation to 50 degrees, and external rotation to 50 degrees. (Ex. 1:5) She found he had positive Hawkins, Neer, and supraspinatus tests of the right shoulder, 5+/5 muscle strength, except for flexion and abduction which were 4/5. (Ex. 1:5)

Using the AMA Guides, Dr. Stoken opined,

Chapter 16, figure 16-1b, page 437, he has 10% Impairment of the Left [sic] Upper Extremity due to deficits in ROM.

Using the *Guides*, Chapter 16, table 16-35, page 510, he has 6% Upper Extremity Impairment due to deficits of flexion strength, 3% Upper Extremity Impairment due to deficits in abduction strength.

Using the *Guides*, Combined Values Chart, page 604, in combining the above impairments of 10% + 6% + 3% = 18% Left [sic] Upper Extremity Impairment.

(Ex. 1:6) Dr. Stoken's report contains typographic errors referring to the left shoulder. She conducted an independent medical examination for claimant's stipulated right shoulder injury, documented with her range of motion findings at page 9 of Exhibit 1.

Dr. Stoken assigned Riley permanent restrictions of avoiding repetitive work at or above shoulder level, avoid lifting more than 25 pounds on a frequent basis, 35 pounds on an occasional basis, and 50 pounds on a rare basis, finding he is capable of engaging in the medium category of work. (Ex. 1:7)

ABF and Ace American provided Dr. Sullivan with a copy of Dr. Stoken's independent medical examination and requested his opinion. (Ex. A:3) On April 23, 2020, Dr. Sullivan sent a letter stating he was not present for Dr. Stoken's examination, but stated he did not agree with the impairment she awarded, noting

[r]ange of motion measurements are subjective, they do hinge upon the patient's cooperation. I do assess both active and passive range of motion, and typically only specifically cite the difference between the 2 when they are not the same. Passive range of motion is that which the joint can be moved without the patient's own participation. Active range of motion is under the patient's voluntary control. In my experience, Mr. Riley's range of motion is within a normal variance slightly toward the more stiff end of the spectrum. I did not place him on restrictions, nor would I at this point. I believe he can return to any activities as he wishes.

(Ex. A:3-4)

Riley's attorney sent Dr. Stoken a letter on June 7, 2021, enclosing copies of letters between Dr. Sullivan and counsel for ABF and Ace American, and requesting her opinion. (Ex. 2:1)

On June 21, 2021, Dr. Stoken sent Riley's counsel a response letter, as follows.

**1. Per the AMA Guides, is it proper to combine impairment measurements for strength deficit with the impairments from range of motion measurements?**

Yes. In the *Guides*, Chapter 16, page 508, 16.8a Principles – In a rare case, if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately.

**2. Figure 16-1b states that for the shoulder, the impairments for flexion/extension plus adduction/abduction plus internal rotation/external rotation should be added, which you (I) did. Based on that, in your opinion, was Dr. Sullivan's final impairment rating incomplete because he did not measure, or at least document measurements of those range of motions?**

Yes, Dr. Sullivan's final impairment rating is incomplete because he did not measure, or at least document measurements of range of motions for shoulder extension, external rotation, and adduction. He has not followed the *Guides* impairment rating system.

**3. Do you agree that range of motion measurements are subjective?**

In the measurement of the range of motion, several repetitions of that range of motion are done and measured with a goniometer. In this

instance, which is the way that I was taught to measure range of motion accurately, the range of motion measurement is not subjective.

**4. Would using a goniometer as you (I) do in measuring the ranges of motion be more objective than estimating the degrees by estimating them visually?**

Yes. Please refer to the answer to #3 above.

**5. The August 8, 2019, physical therapy notes from Katie Graham, PT states that Robert had attended 35 physical therapy session over the past 4.5 months. After being in physical therapy that long and then being measured by your [sic] seven months later, would that possibly explain some of the greater loss of motion that you measured in Robert? I would note that Ms. Graham had measured Robert's flexion at 150 degrees several days before Dr. Sullivan described it at 160 degrees.**

Yes, it is typical for a patient's range of motion to diminish after a period of time. This can be due to increase in pain, inflammation and/or not maintaining their range of motion home exercise program.

(Ex. 2:3-4)

On June 16, 2022, Dr. Sullivan reevaluated Riley's right shoulder. (Ex. A:5) Riley informed Dr. Sullivan he did not believe he could trust his right shoulder and has not attempted to do so because he is worried about tearing it again. (Ex. A:5) Dr. Sullivan documented if claimant re-tore it again it would be a "much more difficult situation for him," found claimant did not have pain at rest, some pain with overhead lifting, claimant denied weakness, and reported his shoulder was stiff. (Ex. A:5) Dr. Sullivan opined there had been no change in the status of claimant's shoulder over the last three years when he was declared to be at maximum medical improvement, he had no new injury, and he had been working for ABF in his normal capacity. (Ex. A:5)

Dr. Sullivan documented Riley's right shoulder had forward flexion to 160 degrees, internal rotation to 30 degrees, external rotation to 80 to 90 degrees, abduction to 160 degrees, 5/5 abduction strength, 5/5 internal and external rotation strength, and 5/5 supination strength and biceps flexion strength with full elbow and wrist range of motion. (Ex. A:5) Dr. Sullivan found Riley was neurovascularly intact, his scapular motion was symmetric with the contralateral side coming into forward flexion with no scapular winging, and found there was no evidence of any atrophy in the infraspinatus or supraspinatus fossa. (Ex. A:5) Dr. Sullivan found his permanent impairment rating remains the same noting his range of motion "is essentially the same as it was" when he declared him to be at maximum medical improvement. (Ex. A:6)

Riley testified Dr. Stoken used a gauge to measure his range of motion and Dr. Sullivan did not. (Tr.:13, 20) Riley testified the physical therapist also measured his range of motion periodically during his treatment. (Tr.:14-15)

Riley has not sought any medical care for his right shoulder since Dr. Sullivan released him in August 2019. (Tr.:18) At the time of the hearing Riley was not taking any medication for his right shoulder. (Tr.:18-19)

Ryan is the service center manager for ABF. (Tr.:21) He started with ABF six-and-a-half years ago and has been the service center manager since April 2020. (Tr.:21) Ryan is Riley's supervisor. (Tr.:22) Ryan testified he was unaware Riley was having issues with his right shoulder until the week before the hearing. (Tr.:22) Ryan relayed during the time he has been Riley's manager, Riley has performed his normal duties without any accommodations. (Tr.:22-23)

## **CONCLUSIONS OF LAW**

### **I. Extent of Disability**

The parties stipulated Riley sustained a permanent injury to his right shoulder caused by the work injury, a scheduled member. Under Iowa Code section 85.34(2)(n) 400 weeks is the maximum number of weeks of compensation for loss of a shoulder.

Iowa Code section 85.34(2)(x) provides when determining functional disability under Iowa Code section 85.34(2)(n), the "the extent of loss or percentage of permanent impairment shall be determined solely" by using the AMA Guides adopted by the Iowa Workers' Compensation Commissioner. In April 2008, the Commissioner adopted the AMA Guides 5th Edition for determining extent of loss or percentage of impairment for permanent partial disabilities not involving a determination of reduction in an employee's earning capacity. 876 IAC 2.4; Iowa Admin. Code Supp. r. 2.4 (April 28, 2008).

Two experts have provided impairment ratings in this case Dr. Sullivan, a treating orthopedic surgeon, and Dr. Stoken, a physiatrist who conducted an independent medical examination for Riley. Dr. Sullivan assigned Riley a six percent right upper extremity impairment for deficits in loss of range of motion. (JE 1:19) Dr. Stoken assigned Riley an 18 percent right upper extremity impairment for deficits in loss of range of motion and strength. (Ex. 1:6)

Dr. Sullivan has superior training to Dr. Stoken, he treated Riley over time, and performed surgery on him. Dr. Sullivan also examined Riley more recently than Dr. Stoken. Dr. Sullivan opined range of motion findings are subjective. Dr. Stoken disagreed, noting she uses a goniometer in recording range of motion findings, which provides objective measurements. Chapter 16 of the AMA Guides directs the examiner to record the examiner's findings using a goniometer. Dr. Sullivan's report and correspondence do not indicate he used a goniometer in obtaining his range of motion findings.

Dr. Sullivan based his impairment rating on his findings from his examination on August 13, 2019. (JE 1:16) While he did provide findings for extension and external rotation on August 13, 2019, he did not include any adduction findings as directed by Chapter 16 of the AMA Guides from his August 13, 2019 examination, September 26,

2019 rating, or June 16, 2022 examination. (JE 1:16-19; Ex. A:5) Dr. Stoken followed the AMA Guides and provided complete range of motion findings.

For these reasons I find Dr. Stoken's opinion to be more persuasive than Dr. Sullivan's opinion. I find Riley has sustained an 18 percent functional loss to his right shoulder, entitling Riley to 72 weeks of permanent partial disability benefits, at the stipulated weekly rate of \$801.14, commencing on the stipulated commencement date of August 13, 2019.

## **II. Independent Medical Examination**

Riley seeks to recover the \$1,800.00 cost of Dr. Stoken's independent medical examination. (Ex. 4:2) Iowa Code section 85.39(2)(2018), provides:

2. 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. . . . 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. Sullivan opined Riley sustained a 6 percent right upper extremity impairment on September 26, 2019. Riley disagreed with the rating and he retained Dr. Stoken to conduct an independent medical examination after Dr. Sullivan provided his rating. Riley sustained a compensable injury in this case. AFB and Ace American have not presented any evidence her fee is unreasonable. I find Riley has complied with the requirements of Iowa Code section 85.39 and AFB and Ace American should reimburse Riley for the \$1,800.00 cost of Dr. Stoken's independent medical examination.

## **III. Costs**

Riley also seeks to recover the \$100.30 filing fee and the \$200.00 cost of Dr. Stoken's June 21, 2021 supplemental report. (Ex. 4:1) 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 certificated 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 practitioners' 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 rule allows for the recovery of the filing fee and the cost of an expert report. I find ABF and Ace American should be assessed Riley's costs.

### ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay Claimant 72 weeks of permanent partial disability benefits, at the stipulated weekly rate of eight hundred one and 14/100 dollars (\$801.14), commencing on the stipulated commencement date of August 13, 2019.

Defendants are entitled to a credit for all benefits paid to date.

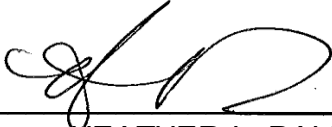
Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall reimburse claimant eighteen hundred and 00/100 dollars (\$1,800.00) for the cost of Dr. Stoken's independent medical examination under Iowa Code section 85.39.

Defendants shall reimburse claimant one hundred and 30/100 dollars (\$100.30) for the filing fee, and two hundred and 00/100 dollars (\$200.00) for the cost of Dr. Stoken's June 21, 2021 report under 876 IAC 4.33.

Defendants 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 30<sup>th</sup> day of September, 2022.

  
\_\_\_\_\_  
HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served as follows:

Jerry Jackson (via WCES)

Stephen Spencer (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.