BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROSA CHAVEZ, Claimant, vs. MS TECHNOLOGY, LLC, Employer, and WESTFIELD INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5066270 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1108, 1803, 1803.1

STATEMENT OF THE CASE

This is a petition in arbitration. The contested case was initiated when claimant, Rosa Chavez, filed her original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on September 28, 2018. Claimant alleged she sustained a work-related injury on February 5, 2018. Claimant alleged the work injury affected her right shoulder, neck and right upper extremity. (Original notice and petition, amended original notice and petition)

For purposes of workers' compensation, MS Technology, LLC, is insured by Westfield Insurance Company. Defendants filed their answer on October 15, 2018. They also filed several subsequent amended answers. (As a point of reference, the company was previously known as Stine Seed Company.)

The hearing administrator scheduled the case for hearing on October 1, 2019. The hearing took place at Iowa Workforce Development in Des Moines, Iowa. The undersigned appointed Ms. Janice Doud as the certified shorthand reporter. She is the official custodian of the records and notes. Ms. Melyna Mosher was sworn to translate the proceedings from English to Spanish.

Claimant testified on her own behalf. Ms. Angie Umthun also testified. She is the quality control director for the lab. The parties offered joint exhibits1 through 5. Claimant offered exhibits 1 through 7. Defendants offered exhibits A through E. The

proffered exhibits were admitted as evidence in the case. The original transcript was filed with the Division of Workers' Compensation on October 18, 2019.

Post-hearing briefs were filed on November 15, 2019. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

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

2. Claimant sustained an injury on February 5, 2018 which arose out of and in the course of her employment;

3. The parties agree the injury resulted in both temporary and permanent disability to the left lower extremity;

4. Temporary or healing period benefits are no longer in dispute;

5. The parties agree the weekly benefit rate is $459.33 per week;

6. The parties agree the commencement date for the payment of permanent disability benefits is April 16, 2019;

7. Defendants have waived any affirmative defenses;

8. Medical benefits are no longer in dispute;

9. Defendants will pay the independent medical examination pursuant to Iowa Code section 85.39;

10. Prior to the hearing date, defendants have paid twenty-four (24) weeks of permanent partial disability benefits in the amount of $459.33 per week for a total of $11,023.92 paid in permanency benefits; and

11. Claimant has paid certain costs and defendants do not dispute those costs have been paid.

ISSUES

The issues presented are:

1. Whether claimant sustained an injury to her shoulder only;
2. Whether claimant sustained any injuries beyond the shoulder;

3. Whether claimant sustained a scheduled member injury or an injury to the body as a whole;
4. The extent of permanency to which claimant is entitled.

FINDINGS OF FACT

This deputy, after listening to the testimonies of claimant and Ms. Umthun at hearing, after judging the credibility of the two people who testified, and after reading the transcript, the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is a 61-year-old married mother of five adult children. She is right-hand dominant. Claimant was born and educated in Mexico. Her highest level of education was the third grade. Claimant does not speak, read or write English. She has never attended any schooling in the United States. In the early 1990's, claimant worked at a pork processing plant performing assembly line work with a knife. She worked as a homemaker.

In 2010, claimant commenced employment with the present employer. She was hired as a "grinding lab technician". (Claimant's exhibit 3) The duties are varied and detailed in claimant's exhibit three. Each day, claimant is involved with cleaning activities in the lab.

On February 4, 2018, claimant was mopping the lab. The bucket had its own wringer system but the wringer was broken. Claimant had to exert extreme force when squeezing the water out of the mop. As she was squeezing, she heard a pop in her right shoulder. She felt immediate pain.

Claimant reported the work injury to Ms. Angie Umthun, the director of quality control for the lab. Ms. Umthun directed claimant to see a medical provider of her own choosing. On March 8, 2018, claimant presented to Mercy Family Care in Perry, Iowa. Claimant described the mopping incident to the medical provider. (Joint Exhibit 1, page 16) Jason Noble, PA-C, examined claimant's right shoulder. The physician assistant referred claimant to Todd Peterson, D.O., an orthopedic surgeon at Capital Orthopedics. (Jt. Ex. 2, p. 37)

Dr. Peterson examined claimant on April 12, 2018 because of her right shoulder complaints. (Jt. Ex. 2, p. 37) Claimant reported pain on both the anterior and posterior aspects of her right shoulder with the pain radiating down her right arm. (Jt. Ex. 2, p. 37) Dr. Peterson noted:

> …Active range of motion. 140° of flexion. 90° of abduction. 30° of external rotation. Internal rotation to the sacrum. Pain over the biceps

> tendon. Mild pain over the AC joint. Pain over the lateral epicondyle of the humerus. Pain with speed's test. Good strength, but pain with empty can test. Pain with Hawkin's test. Significant pain with cross body test.

(Jt. Ex. 2, p. 38)

Dr. Peterson diagnosed claimant with:

> **Impression:**
>
> RIGHT Pain in right shoulder
>
> RIGHT Impingement syndrome of right shoulder
>
> RIGHT Secondary osteoarthritis, right shoulder
>
> RIGHT Unspecified rotator cuff tear or rupture of right shoulder, not specified as traumatic
>
> RIGHT Pain in right elbow

(Jt. Ex. 2, p. 38)

Dr. Peterson recommended magnetic resonance imaging (MRI). (Jt. Ex. 2, p. 39) He reviewed the results of the MRI. The results demonstrated why surgery was the best modality to approach:

> The MRI indicates a full thickness rotator cuff tear that has retracted to the level of the glenoid, severe AC arthrosis, tendonitis and tearing of the biceps tendon. There was mild atrophy of the supraspinatus. We could try to manage symptoms with corticosteroid injections and physical therapy. However, conservative treatment would not heal the tear, and the severity of the tear could potentially advance. The only definitive treatment would be a shoulder arthroscopy with rotator cuff repair, biceps tenotomy, subacromial decompression, and distal claviculectomy…

(Jt. Ex. 2, p. 42)

Initially, defendants denied the surgery. However, they later approved it. Dr. Peterson performed the surgery on July 11, 2018 at West Lakes Surgery Center. (Jt. Ex. 5, p. 69) The procedures performed were:

> **PROCEDURES PERFORMED:**
>
> Right shoulder arthroscopy with arthroscopic repair of the rotator cuff tendon of the supraspinatus, infraspinatus, and subscapularis tendons; extension

> debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, subacromial decompression.

(Jt. Ex. 5, p. 69)

> Dr. Peterson noted during the surgery:
>
> …A subacromial bursectomy was then done which showed some subacromial scar tissue present. A subacromial bursectomy and subacromial decompression was done with a shaver on the underside to remove the areas of scar tissue and fraying that was seen between the anterior aspect of the supraspinatus and the undersurface of the anterior acromion. This was decompressed, and attention was then paid to the massive rotator cuff tear. This was a large U- shaped tear. There was a posterior flap, and some of the infraspinatus tendon and teres minor were still attached posteriorly, but this was a large tear including the entire supraspinatus and around 80% of the infraspinatus…

(Jt. Ex. 5, p. 70)

Claimant returned for post-surgical care on July 26, 2018. (Jt. Ex. 2, p. 48) Claimant reported wearing her sling at all times. (Jt. Ex. 2, p. 49) The physician assistant examined claimant. She was neurovascularly intact distally to the right upper extremity. The incisions were healing well. There were no signs of infections and claimant was doing well. (Jt. Ex. 2, p. 49)

Pursuant to a request from defendants, claimant presented to Stephen A. Ash, M.D., for an independent medical examination. The examination occurred on August 23, 2018 at Iowa Ortho on Laurel Street in Des Moines, Iowa. Previous to the examination. Dr. Ash had reviewed a number of claimant's medical records. (Defendants' Exhibit A, page 1) Defendants posed a number of questions to Dr. Ash with respect to claimant's request for workers' compensation benefits. In his report of August 23, 2018, Dr. Ash explained his expert opinions. He wrote in relevant portion:

> …
>
> Please provide your opinion on whether any work-related injury to the bilateral shoulders and elbows on February 5, 2018, remains a substantial causal, contributing, accelerating, or aggravating factor to any current condition and/or physical complaints. Please explain the basis of your opinion.
>
> **Answer:** Rotator cuff tears become more prevalent as people age. Over the age of 60, 25% of people with no shoulder pain have a cuff tear. It is possible that Ms. Chavez, prior to any complaints, had a cuff tear. It is also possible that she could have developed a tear based on her complaints of pain in December 2017. It is also possible that if she

> slipped and fell on the ice, as was described in the clinic note above, she could have sustained a rotator cuff tear then. It is also possible that the incident at work with the mop bucket could have produced a rotator cuff tear. It is impossible for me to definitively apportion which event was more significant in causing her cuff tear. Given the patient's stated history, the mop bucket incident could have been a significant contributor to her objective shoulder problems.

(Ex. A, pp. 2, 3)

Dr. Ash opined Dr. Peterson provided reasonable and necessary medical care to claimant. (Ex. A, p. 3) Dr. Ash also opined work restrictions should be left to Dr. Peterson. (Ex. A., p. 3) In a subsequent report, Dr. Ash opined:

> In response to your February 20, 2019, letter regarding Rosa Chavez it is impossible to know whether her rotator cuff tear was causally-related to the February 5, 2018, mop incident. This was explained in detail during my IME letter in response to Question #4. Please contact me if I can be of further assistance.

(Ex. A, p. 7)

Dr. Peterson's staff returned claimant to work on modified duty effective August 27, 2018. (Jt. Ex. 2, p. 50) Claimant was restricted from lifting anything greater than five pounds. (Jt. Ex. 2, p. 50) The restrictions were modified on October 11, 2018. Claimant was allowed to lift ten pounds with the right arm. (Jt. Ex. 2, p. 51) Four months post-surgery, claimant remained neurovascularly intact distally to the right upper extremity. (Jt. Ex. 2, p. 53) The right shoulder range of motion was 175° of flexion, 150° of abduction, and internal rotation to L4. (Jt. Ex. 2, p. 53)

Dr. Peterson opined claimant reached maximum medical improvement on November 8, 2018. (Jt. Ex. 2, p. 57) Additionally, Dr. Peterson opined claimant had a permanent partial impairment in the amount of six percent to the right upper extremity. (Jt. Ex. 2, p. 57) An impairment of six percent to the upper extremity equals four percent to the body as a whole pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 5th Ed., page 439.

Dr. Peterson indicated he calculated the rating as follows:

> Based on the ***AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition,*** I believe she sustained a partial permanent impairment. Based on Figures 16-40, 16-43, 16-46 and Table 16-35 of Upper extremity strength and Range of Motion, Ms. Chavez would have a 6% right upper extremity impairment.

(Jt. Ex. 2, p. 57)

Claimant exercised her right to an independent medical examination pursuant to Iowa Code section 85.39. On May 13, 2019, Sunil Bansal, M.D., M.P.H., examined claimant, after reviewing relevant medical records. (Claimant's exhibit 1) Dr. Bansal opined claimant had a 40 percent loss of abduction in the right shoulder and a 20 percent flexion strength loss as compared to the left. (Cl. Ex. 1, p. 7) Dr. Bansal opined claimant had a 10 percent permanent impairment to the right upper extremity. The rating equaled a 6 percent rating to the body as a whole. The independent medical examiner based his opinion on the AMA Guides to the Evaluation of Permanent Impairment, 5th Ed. Figures 16-40 through 16-46, when he compared the right shoulder to the left one. (Cl. Ex. 1, p. 8) Dr. Bansal opined claimant should not lift greater than 10 pounds with her right arm. (Cl. Ex. 1, p. 10)

Counsel for claimant posed the following question to Dr. Bansal:

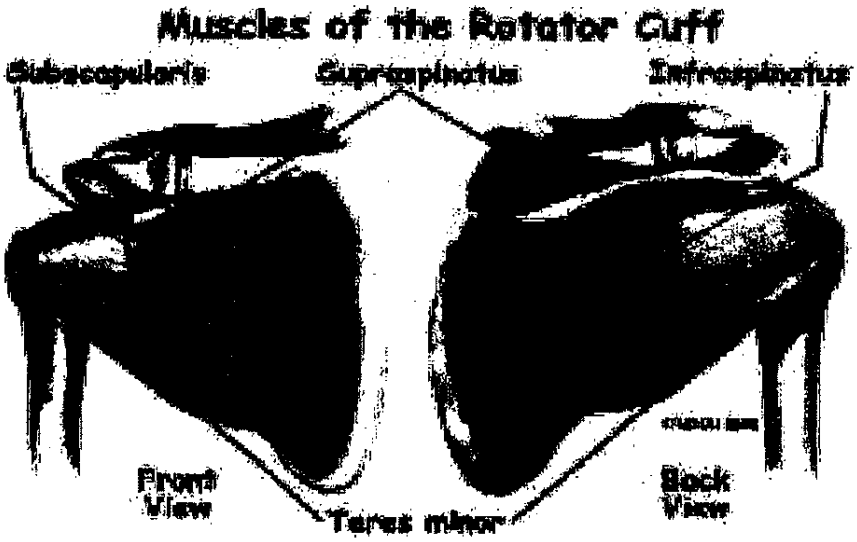
> 7. In your opinion, is Ms. Chavez's injury proximal to her glenohumeral joint?

Dr. Bansal offered a succinct reply. He included an illustration too.

> Yes. Ms. Chavez tore multiple rotator cuff tendons. The rotator cuff tendons attach to the scapula as noted in the following illustration and are all proximal to the glenohumeral joint.

(Cl. Ex. 1, p. 10)

Dr. Bansal also provided an illustration to explain his opinion. The illustration is duplicated below:



(Cl. Ex. 1, p. 10)

Claimant returned to work for MS Technology, LLC. She testified she was released to return to work without restrictions. During her arbitration hearing, claimant testified her employer allowed claimant to select the jobs she felt she was able to perform. Claimant also testified her co-workers were very helpful. They assisted claimant with physically demanding chores. At the time of her arbitration hearing, claimant was still employed by MS Technology, LLC.

CONCLUSIONS OF LAW AND RATIONALE

PERMANENT PARTIAL DISABILITY BENEFITS

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Pursuant to the Iowa Workers' Compensation Act, permanent partial disability is compensated for a loss or a loss of use of a scheduled member under Iowa Code section 85.34(2) (a)-(u) (2017) or for a loss of earning capacity under section 85.34(2)(v) (2017). The extent of scheduled member benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993). It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a)-(t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All American, Inc., 290 N.W.2d 348 (Iowa 1980).

The Iowa Legislature modified Iowa Code section 85.34 in 2017. Subsection 85.34(2) (On) was added. The subsection is now renumbered to 85.34(2)(n) (2018). It reads:

> For the loss of a shoulder, weekly compensation is paid based on four hundred weeks.

The Iowa Legislature also added Iowa Code section 85.34(2)(w). It provides the manner for determining functional disability or loss of percentage of permanent impairment. The subsection provides:

> w. In all cases of permanent partial disability described in paragraphs "a" through "f", or paragraph "u' when 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 "t", or paragraph "u" when determining functional impairment and not loss of earning capacity.

With respect to case law regarding the new shoulder statute, there has been minimal interpretations at the administrative level. In Agee v. EFCO, Corp. Inc., File Nos. 5065304, 5064099, (Arb. Dec. October 22, 2019), a deputy workers' compensation commissioner determined a shoulder injury should be calculated according to the schedule. The rationale behind the deputy's decision was:

> Claimant urges a finding that the February 21, 2018, injury extends beyond the right shoulder. No medical provider has rendered an opinion that the February 21, 2018 injury extends beyond the shoulder. Surgery was performed on claimant's right shoulder. Both Dr. Galles and Dr. Bansal have analyzed the permanent impairment pursuant to the AMA Guides using impairment ratings for the shoulder. It is found that claimant has proven a permanent injury to the right shoulder but has not demonstrated by a preponderance of the evidence that the February 21, 2018 injury extends beyond the right shoulder.

Agee at page 7.

Later in the same arbitration decision, the deputy expounded:

> The Iowa legislature enacted significant amendments to the Iowa workers' compensation laws, which took effect in July 2017. As part of those amendments, the legislature specified that injuries to the shoulder should be compensated as scheduled member injury on a 400-week schedule.

> Iowa Code section 85.34(2)(n) (2018). It has long been understood that an injury must be compensated as a scheduled injury if the legislature saw fit to list the injured body part in Iowa Code section 85.34(2) (a-(u). Williams v. Larson Construction Co., 255 Iowa 1149, 125 N.W. 248 (1963). Having found that claimant did not prove his February 21, 2018, injury extended beyond the right shoulder. [sic] I conclude that the injury should be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(n) (2018).

Agee, at page 10. (It is noted for the record, this case was not appealed. It became final agency action.)

In another arbitration decision, decided just days following Agee, a different deputy held there were no expert opinions to support a finding that a November 1, 2017 work injury extended beyond the shoulder. In Hospodarsky v. Quaker Oats Company, File No. 5061912, (Arbitration Dec. October 30, 2019), the deputy concluded:

> The next question is the extent of disability. Under the statutory change, shoulder injuries are considered to be functional rather than industrial disabilities. A shoulder injury is based on a four-hundred-week schedule. The evidence supports a finding of a shoulder injury rather than a whole body injury. There are no expert opinions that support a finding that the November 1, 2017, injury extended beyond the shoulder. Therefore, the determination of extent must be measured by examining the claimant's functional loss.

Hospodarsky at page 7.

> The same deputy continued on page 9 of her decision in Hospodarsky:
>
> While the Supreme Court has not examined the current statute, based on past precedent, the legislature's designation of the shoulder injury as a functional loss is within their power. Therefore, claimant's shoulder loss will be examined as a functional loss. Dr. Hart assigned a 4 percent impairment of the right upper extremity while Dr. Mathew assessed a 20 percent upper extremity impairment. Claimant testified that she works the same job and has no formal accommodations or restrictions; however, she has made personal modifications due to weakness in her shoulder. Dr. Mathew is a physical and rehabilitation expert. His restrictions were based on his opinions regarding claimant's ability to function on a day-to-day basis. Because of his expertise, his opinion regarding claimant's functional use of her shoulder is given more weight. Based on the foregoing expert opinions and claimant's own testimony, it is determined she has sustained a 20 percent functional impairment of her left shoulder arising out of the work injury.

Hospodarsky at page 9. (It is noted for the record, this case was not appealed, and became final agency action.)

In claimant's post-hearing brief, her attorney made some compelling arguments to show why claimant's work injury was an injury to the body as a whole and not a scheduled member injury. Claimant's counsel discussed case law prior to the 2017 legislative changes for calculating a permanent disability to the shoulder. The attorney wrote in relevant part:

> There are several prior agency decisions defining what a "shoulder" is and which parts of anatomy are considered body as a whole (aka unscheduled) injuries.
>
> The wrist is the joint between the arm and the hand just as a **shoulder is the joint between the arm and the trunk** or the hip is the joint between the leg and the trunk. It is now well established that a **loss of function in a joint is compensated as a part of the proximal [body site] side of the joint**, not as a loss of the member on the distal [arm side] side of that joint. Second Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995); Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Nazarenus v. Oscar Mayer &Co., II Iowa Industrial Comm'r Report 281 (App. February 24, 1982); Godwin v. Hicklin G.M. Power, II Iowa Industrial Comm'r Rep 170 (App. August 7, 1981).

Miranda v. IBP/Tyson Foods, Inc., File No. 5008521, 2005 WL 1842567 (App. Dec. 8/2/2005) (emphasis added). See also,

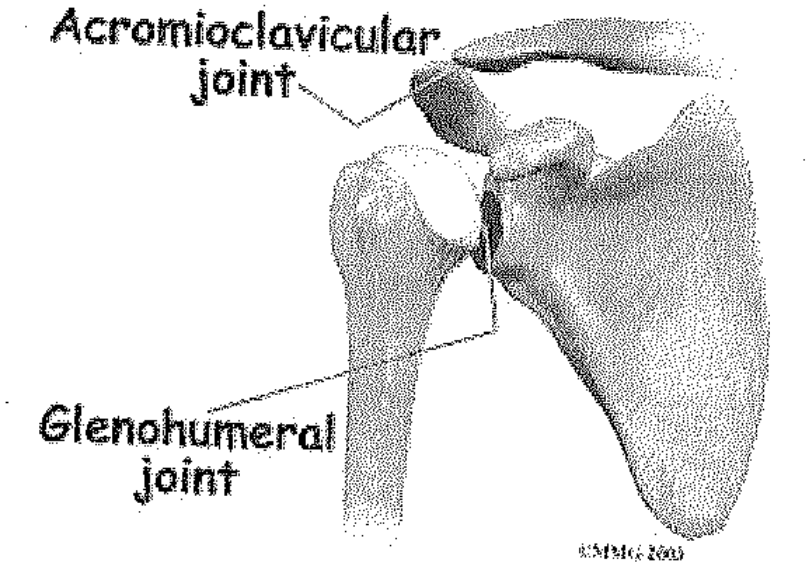
> Haffner v. Electrical Systems, File No. 955542 (App. Dec. 2/25/94) (Applying Alm and Dailey, discussing Gray's Anatomy, and holding: "The gleno-humeral joint is the dividing line between the arm and the body at the shoulder joint. Parts of the body distal to that joint are the arm. **Parts of the body proximal to that joint belong to the body as a whole.** The gleno-humeral joint is where the head of the humerus forms a socket (or joint) with the gleno-cavity of the scapula. The parts of the arm in that vicinity are the greater tuberosity, lesser tuberosity and bicipital groove. **Parts of the body as a whole in that vicinity are the acromion (sp.0 process the clavicle and the coracoid process. …**The parts of the body excised or removed were members of the body as a whole, more specifically, **the distal end of the clavicle, the anterior and inferior aspect of the acromion and the coracoacromial ligament,** which are parts of the body as a whole. None of these body parts are parts of the arm.")

> Pack v. Firestone Tire & Rubber Co., File No. 865057, p. 10-11 (Arb. Dec. 9/29/1994) ("The dividing line between the arm and the body as a whole for workers compensation purposed is the **gleno-humeral joint**. This is a ball and socket joint. The ball is the head of the humerus of the arm. The socket is the gleno-cavity of the scapula, which is on the body side of the shoulder joint. Everything distal to the gleno-humeral joint is the arm. **Everything proximal to the gleno-humeral joint belongs to the body as a whole.** This clarification of this issue was reaffirmed, defined and promulgated again by the industrial commissioner in the case of Haffner v. Electrical Systems, File no. 955542 (Appeal Dec. February 25, 1994). In this case, the humerus and greater tuberosity are distal to the gleno-humeral joint and are parts of the arm. At the same time the acromioclavicular joint, the lateral clavicle, the anterior and lateral acromion, the coracoacromial ligament, the coracoid, the clavicle, the subscapularis muscle and the teres major muscle mentioned in the surgical report are all parts of the body as a whole because they are located **proximal to the gleno-humeral joint.**")

(emphasis added).

Claimant's counsel continued to argue in her brief:

A "shoulder has been defined to be the ball and socket joint between the arm (humerus) and the trunk (scapula) which is medically called the glenohumeral joint as shown in the following medical diagram:



> If the word "shoulder" is not ambiguous under the 2017 amendments, then 85.34(2)(n) only applies to anatomical structures of the "shoulder" which is the glenohumeral joint (injuries to the humeral head [ball] or gleno-cavity [socket], or arthritis in the glenohumeral joint). The legislature chose to use the word "shoulder" as opposed to a wide variety of specific parts of human anatomy. The above cited case law supports that work injuries sustained to or affecting the area **proximal (nearer to the center of the body) to the glenohumeral joint area are to be compensated as body as a whole injuries** under the catch-all provision in Iowa Code § 85.34(2)(v). Therefore, it is presumed that the legislature knew how the word "shoulder" had been defined and their intent is to only change compensation for injuries that affect the glenohumeral joint only as defined by prior case law.

(Claimant's post-hearing brief pages 4-8)

The present case is distinguishable from both the Agee case, and the Hospodarsky case. Here, there is one expert, who explained claimant's work injury on February 5, 2018 was not a scheduled member injury to the shoulder. The rationale given was the injury went beyond the shoulder and into the body as a whole. Dr. Bansal opined claimant's injury was proximal to her glenohumeral joint. (Cl. Ex. 1, p. 10) Dr. Bansal indicated claimant tore multiple rotator cuff tendons. The evaluating physician reported the rotator cuff tendons were attached to the scapula. The tendons were proximal to the glenohumeral joint. The tendons were attached to the body as a whole. The work injury contributed to damage that affected the body as a whole. The included illustration, showed where the attachments occurred. (Cl. Ex. 1, p. 10)

Then there was the July 11, 2018 operative report. Dr. Peterson noted in his report, there was a massive rotator cuff tear. It was "a large U-shaped tear." (Jt. Ex. 5, p. 70) Specifically, Dr. Peterson wrote:

> There was a posterior flap, and some of the infraspinatus tendon and teres minor were still attached posteriorly, but this was a large tear including the entire supraspinatus and around 80% of the infraspinatus.

(Jt. Ex. 5, p. 70) The procedure itself involved changes to the body as a whole. Surgery impacted the whole body even though Dr. Peterson rated claimant's injury to the right upper extremity only.

According to the opinion and illustration provided by Dr. Bansal, plus the operative report supplied by Dr. Peterson, claimant's work injury was proximal to the glenohumeral joint. It is the determination of this deputy workers' compensation commissioner; claimant has sustained an injury to her body as a whole.

The salient issue to address is whether claimant is entitled to have her permanency benefits calculated by the industrial method or whether claimant is only

entitled to have her permanency calculated by the functional impairment/loss method per the 2017 legislative changes to Iowa Code section 85.34 (2) (u). The relevant portion of the subsection provides:

> u. In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If 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 resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code section 85.34(2)(u).

There is crucial language under the 2017 legislative changes to 85.34(2)(u) that involves industrial disability when an employee returns to work following an injury. The language is whether the injured worker receives the same or greater salary, wages or earnings than the employee received at the time of the injury. It is noted section 85.34(2)(u) does not require the finder of fact to calculate a post-injury 13-week average weekly wage to determine whether an injured worker earns the same or greater wages. Any discussion of an average weekly wage exists in Iowa Code section 85.36 and requires consideration of pre-injury earnings not post-injury earnings. A post-injury average weekly wage analysis for determining whether an injured worker returns to work at the same or greater wages is not necessary. To determine whether an injured worker earns the same or greater earnings depends on the totality of the evidence presented at the hearing.

Claimant testified she returned to work at MS Technology, LLC. Her job title remained the same. She kept the position of laboratory technician. Dr. Peterson returned claimant to work without any restrictions. Claimant received a small raise after she returned to work. She earned more per hour post-injury than she earned prior to the work injury. The employer never refused claimant a scheduled raise. Claimant worked all overtime offered to her upon her return to work. Often, she worked 50 to 52 hours per week. The employer never refused overtime hours to claimant. However, claimant's gross earnings were not necessarily greater than what she had earned prior to her right shoulder injury. The gross earnings received after the work injury were not the result of claimant's work injury. She worked the same hours as other employees in

the lab. Claimant's gross earnings were a reflection of market trends affecting the company. Claimant's job injury had no bearing on her ability to earn wages.

According to Ms. Umthun, the Director of Quality Control in the lab, claimant had not requested any accommodations since she returned to work. Ms. Umthun testified the employees always decided among themselves what task each employee was going to perform on a given day.

It is the determination of the undersigned; claimant is earning the same or greater wages as contemplated by the 2017 statute. As a consequence, claimant is to be compensated for her functional impairment.

Since claimant is to be compensated for her functional impairment, Iowa Code section 85.34(2)(w) is applicable. The subsection provides:

> w. In all cases of permanent partial disability described in paragraphs "a" through "t', or paragraph "u" when 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 "t', or paragraph "u" when determining functional impairment and not loss of earning capacity.

(Iowa Code section 85.34(2)(w).

There are two impairment ratings provided in this case. The treating orthopedic surgeon, Dr. Peterson, rated claimant as having a six percent permanent impairment to the right upper extremity or a four percent impairment to the body as a whole. The ratings are based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Ed., Tables, 16-35, 16-40, 16-43, and 16-46. (Jt. Ex. 2, p. 57) A four percent impairment to the body as a whole equates to 20 weeks of permanent partial disability benefits.

Dr. Bansal, the independent medical examiner, provided the second permanent impairment rating. Dr. Bansal rated claimant as having a ten percent permanent impairment to the right upper extremity or a six percent permanent impairment to the body as a whole. Dr. Bansal based his ratings on the same tables in the AMA Guides, as did Dr. Peterson. When the ten percent impairment is converted to a body as a whole impairment, the rating is six percent impairment to the body as a whole. A six percent impairment to the body as a whole equates to 30 weeks of permanent partial disability benefits.

It is the determination of this deputy; Dr. Bansal had the most accurate impairment rating for claimant. Dr. Bansal provided in detail how he arrived at his impairment rating. He provided the loss of abduction and flexion strength loss for the right shoulder as compared to the left one. He also provided the precise percentage point for every loss in range of motion. On the other hand, Dr. Peterson only provided his end result. He did not explain how he calculated the sum of 6 percent to the right upper extremity/four percent to the body as a whole. The undersigned is persuaded; Dr. Bansal's rating best reflects claimant's functional impairment.

Claimant has a permanent partial disability to his body as a whole in the amount of six percent to the body as a whole. Defendants shall pay unto claimant thirty (30) weeks of permanent partial disability benefits. The parties stipulated claimant's permanent partial disability benefits commenced on April 6, 2019. She was previously paid 24 weeks of permanency benefits at the stipulated weekly benefit rate of four hundred fifty-nine and 33/100 dollars ($459.33) per week. Defendants shall take credit for all benefits paid prior to the date of the hearing.

Accrued benefits shall be paid in a lump sum, together with interest, as allowed by law. All interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

Claimant supplied the costs in her exhibit 7. At the arbitration hearing, defendants agreed they would pay the cost of the independent medical examination pursuant to Iowa Code section 85.39.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party

> utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The costs detailed were:

Deposition of claimant	$74.80
Filing fee	$100.00
Certified Mail	$6.74

Defendants are liable for the aforementioned costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant thirty (30) weeks of permanent partial disability benefits commencing from April 16, 2019 and payable at the rate of four hundred fifty-nine and 27/100 dollars ($459.27).

Accrued benefits, shall be paid in a lump sum together with interest as detailed in the body of the decision.

Defendants shall take credit for all benefits paid prior to the date of the hearing.

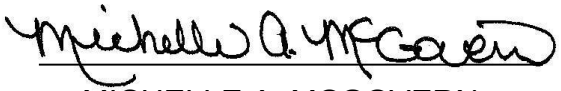
Defendants shall pay the costs of the independent medical examination as agreed prior to the commencement of the arbitration decision.

Defendants shall pay the costs to litigate as detailed in the body of the decision.

The attorneys of record, if they have not already done so, shall register within seven (7) days of this order in the Workers' Compensation e-Filing System (WCES) and as a participant in this case to receive future filings from this agency.

Defendants shall file all reports as required by law.

Signed and filed this 5th day of February, 2020.



MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Lori Scardina Utsinger (via WCES)
Erin Tucker (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.