BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARWIN SMIDT, Claimant, vs. JKB RESTAURANTS, LC, Employer, and ACCIDENT FUND NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5067766 ARBITRATION DECISION Head Note Nos.: 1402.40, 1703, 1803, 1803.01, 2502, 2907

STATEMENT OF THE CASE

Darwin Smidt, claimant, filed a petition for arbitration against JKB Restaurants, L.C. (hereinafter referred to as "McDonalds"), as the employer and Accident Fund National Insurance Company as the insurance carrier. This case came before the undersigned for an arbitration hearing on March 31, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via Court Call with claimant appearing remotely from his attorney's office, defense counsel appearing remotely, and the court reporter also appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 5 through 10, and Defendants' Exhibits A through F.

Claimant testified on his own behalf. No other witnesses testified at trial. The evidentiary record closed at the conclusion of the evidentiary hearing on March 31, 2020.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on April 21, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties completed a hearing report prior to the commencement of hearing and submitted the following disputed issues for resolution:

1. Whether claimant sustained injuries to his right shoulder, left hip, and/or neck as a result of the April 18, 2018 work injury.

2. Whether the claimant's work injury should be compensated with permanent disability benefits as a scheduled member injury to the left shoulder injury, as a bilateral shoulder injury, or as an unscheduled injury.

3. The extent of claimant's entitlement to permanent disability.

4. Whether claimant is entitled to reimbursement to some or all of his independent medical evaluation fee pursuant to Iowa Code section 85.39.

5. Whether defendants are entitled to a credit for overpayment of temporary total disability, or healing period, benefits.

6. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Darwin Smidt, claimant, is a 63-year-old gentleman, who completed the tenth grade. Mr. Smidt was placed in special education when in school and dropped out of school after the tenth grade. However, claimant was able to obtain a GED in 1999. He obtained a Class B commercial driver's license (CDL) in 2012, which qualifies him to operate large equipment such as a dump truck. The Class B CDL does not qualify him to drive semis. Mr. Smidt is a right-hand dominant gentleman. (Transcript, pages 15-17)

Claimant has a significant medical history that includes a prior surgical repair of a large right rotator cuff tear and a significant injury to claimant's right middle finger. (Joint Exhibit 1, pp. 1-10) Both resulted in permanent functional impairment. (Joint Ex. 1, p. 10; Claimant's Ex. 5, pp. 78, 92) Although Mr. Smidt testified that he has no recollection of a prior fractured pelvis, his medical records note the occurrence and he appears to have reported the injury to physicians as a result of a motorcycle accident in

the 1980s. (Tr., pp. 49-50; Exhibit 1, p. 1; Joint Ex. 2, p. 58) I find that the pelvic fracture occurred. In spite of his prior injuries, Mr. Smidt was working for McDonalds in Nevada, Iowa, without permanent medical restrictions when he sustained an injury on April 18, 2018.

Mr. Smidt testified that his work history includes mainly construction and farming positons. (Tr., p. 31) However, he has also performed work as a forklift driver, a car detailer, and his maintenance job with McDonalds. (Claimant's Ex. 8, pp. 107-108) Other than his Class B CDL, Mr. Smidt does not possess specific employment skills. He has held mainly low skill-level positions throughout his career and, given his age and educational limits, is not likely to seek or be successful at further educational or vocational training.

As noted, claimant sustained an admitted injury while working at McDonalds on April 18, 2018. (Hearing Report) After speaking with his supervisor in the office, Mr. Smidt fell over boxes that had fallen onto the floor. In doing so, he lost his balance, fell forward, and struck his left arm or shoulder on a supporting beam. (Tr., p. 21) He reported the injury immediately and the employer sent him to urgent care for treatment on the same date as the injury.

At urgent care on the date of injury, Mr. Smidt reported tripping and hitting his left shoulder against a steel support beam. He reported on the date of injury that he did not hit his head or lose consciousness. He also denied any headache or neck pain on the date of injury. (Joint Ex. 1, p. 11) The urgent care provider evaluated claimant and identified a normal cervical (neck) spine examination. (Joint Ex. 1, p. 12) Urgent care referred Mr. Smidt for evaluation and treatment through an occupational medicine specialist. (Joint Ex. 1, p. 12)

Lacreasia Wheat Hitchings, M.D., evaluated Mr. Smidt at the McFarland Clinic Occupational Medicine Clinic on April 20, 2018. (Joint Ex. 1, p. 21) Dr. Hitchings did not refer to any complaints of neck, right shoulder, left hip, or other symptoms beyond the left shoulder. Dr. Hitchings diagnosed a left shoulder strain and left trapezius strain. (Joint Ex. 1, p. 21)

Ultimately, Dr. Hitchings ordered a left shoulder MRI, which was performed on May 10, 2018. The MRI demonstrated full-thickness tears of the supraspinatus and infraspinatus tendons. (Joint Ex. 1, pp. 25-26) Following the MRI, Dr. Hitchings referred Mr. Smidt to David K. Sneller, M.D., an orthopaedic surgeon. (Joint Ex. 1, p. 29)

Dr. Sneller evaluated claimant on May 21, 2018. He diagnosed claimant with a large chronic rotator cuff tear with retraction and atrophy of some of the rotator cuff tendons in the left shoulder area. (Joint Ex. 1, p. 29) Dr. Sneller's note indicates that claimant did report neck pain and right arm pain at the May 21, 2018 evaluation. Dr. Sneller's note also records he discussed with claimant that he had a chronic, pre-existing rotator cuff tear in the left shoulder that was aggravated by the recent work

injury. (Joint Ex. 1, p. 29) Claimant denied any recollection of this conversation at trial, but I find the medical record was prepared close in time to the evaluation and is accurate as to the conversation Dr. Sneller had with claimant on May 21, 2018. (Tr., p. 49) Dr. Sneller recommended against surgical intervention for the left rotator cuff tears due to the atrophy and retraction of the tendons. (Jt. Ex. 1, p. 29)

Dr. Sneller attempted some injections and physical therapy to improve claimant's symptoms. (Joint Ex. 1, pp. 31-33) Dr. Sneller released claimant from further care on September 26, 2018 and opined that maximum medical improvement would be achieved in April 2019. (Joint Ex. 1, p. 33) Dr. Sneller released Mr. Smidt to return to regular duty work without permanent medical restrictions related to his torn left rotator cuff. (Joint Ex. 1, p. 34)

On March 29, 2019, claimant sought evaluation by his personal physician, Kirk K. Peterson, M.D. Dr. Peterson noted chronic left hip and left shoulder pain, which claimant relayed were both related to a work accident that occurred in April 2018. (Joint Ex. 4, p. 76) Dr. Peterson noted significant pain and decreased range of motion in claimant's left hip. (Joint Ex. 4, p. 76) Dr. Peterson opined that the left hip pain was "related to fall at work" and stated that it is "clearly a work-related injury." (Joint Ex. 4, p. 77) Dr. Peterson also opined that it is unlikely that the left hip pain will resolve because of its duration. (Joint Ex. 4, p. 77)

On April 17, 2019, Dr. Sneller issued a report confirming that claimant was at maximum medical improvement, required no permanent work restrictions for the April 18, 2018 work injury, and assigning a 16 percent permanent functional impairment of the left upper extremity, which he calculated was equivalent to 10 percent of the whole person. (Joint Ex. 1, pp. 35-36)

Mr. Smidt sought an independent medical evaluation, performed by John D. Kuhnlein, D.O., on August 7, 2019. Dr. Kuhnlein issued his report on February 10, 2020. (Claimant's Ex. 5) Dr. Kuhnlein found claimant to be a poor historian, which was consistent with claimant's lack of recollection and variances between claimant's trial testimony and his medical records. (Claimant's Ex. 5, p. 88) Dr. Kuhnlein noted differences between the claimant's medical records and claimant's memory, such as his prior pelvic fracture. (Claimant's Ex. 5, p. 83)

Dr. Kuhnlein notes that claimant reported he fell on his left hip and sustained a closed head injury, as well as striking his left shoulder on the date of injury. Dr. Kuhnlein also records claimant's assertion of a right shoulder injury on the date of injury. However, ultimately, Dr. Kuhnlein concluded that he could not definitely causally connect the left hip, head injuries, or right shoulder to the April 18, 2018 work injury. Dr. Kuhnlein opined that those injuries potentially could be causally related if additional information, consistent with claimant's current version of the events, were identified. However, Dr. Kuhnlein ultimately declined to definitively causally connect a head injury, a right shoulder, or a left hip injury to the April 18, 2018 work events. (Claimant's Ex. 5,

pp. 88-89) Dr. Kuhnlein also noted that claimant sustained a biceps rupture months after the initial work injury. (Claimant's Ex. 5, p. 90)

Dr. Kuhnlein did concur with Dr. Sneller, opining that the April 18, 2018 work events aggravated claimant's pre-existing left rotator cuff tears. (Claimant's Ex. 5, p. 88) Dr. Kuhnlein opined that claimant achieved maximum medical improvement for the left shoulder area injury on September 26, 2018. (Claimant's Ex. 5, p. 91) Dr. Kuhnlein opined that claimant sustained 20 percent permanent functional impairment of the left upper extremity, or the equivalent of 12 percent of the whole person. (Claimant's Ex. 5, p. 91)

Dr. Kuhnlein recommended permanent work restrictions for claimant's injury. Specifically, Dr. Kuhnlein recommended claimant limit lifting to no more than 20 pounds on an occasional basis from floor to shoulder height and that Mr. Smidt avoid all work over shoulder level. (Claimant's Ex. 5, p. 92)

The initial disputed factual issue for me to decide is whether claimant has proven a work injury, or material aggravation, to his right shoulder, left hip, or neck as a result of the April 18, 2018 work injury. No physician provides a definitive causation opinion connecting claimant's alleged neck or right shoulder injuries to the events of April 18, 2018. I find that claimant failed to prove an injury, or material aggravation, of any pre-existing conditions of the neck or right shoulder.

With respect to the left hip, claimant produces the opinion of Dr. Peterson, his family physician, in support of this claim. As noted above, Dr. Peterson opines that claimant's left hip injury and condition is "clearly a work-related injury." (Joint Ex. 4, p. 77) However, it is unclear (and improbable since he does not mention them) whether Dr. Peterson has any of claimant's prior records pertaining to his motorcycle accident in the 1980's, including reference to a broken pelvis. It is also unclear (and again improbable) whether Dr. Peterson has any of claimant's medical records from the date of injury and shortly thereafter.

I find it improbable that an urgent care physician, an occupational physician, and an orthopaedic surgeon all failed to document significant and ongoing complaints of left hip symptoms from claimant. Rather, like Dr. Kuhnlein, I note the contemporaneous medical records fail to disclose significant or ongoing left hip symptoms. I accept Dr. Kuhnlein's opinions in this case as the most convincing and credible. I specifically find that claimant failed to prove a causal connection between the April 18, 2018 work injury and his current hip symptoms and condition.

Dr. Kuhnlein appears to have had most, if not all, of claimant's prior relevant medical records. His analysis is reasonable. I concur with his finding and comment that claimant is a poor historian. I concur with Dr. Kuhnlein's analysis that additional evidence was necessary for claimant to establish the right shoulder, neck and left hip injuries as work-related. I also find Dr. Kuhnlein's work restrictions to be reasonable and appropriate. It is not likely that claimant is able to return to full-duty work with a full-

thickness, irreparable left rotator cuff tear. Therefore, I find Dr. Kuhnlein's restrictions applicable and appropriate and specifically find that claimant is not capable of lifting more than 20 pounds on an occasional basis and that claimant should not work above shoulder level.

With respect to claimant's left shoulder area, I find that claimant has proven he sustained a material aggravation of a pre-existing full-thickness rotator cuff tear as a result of his trip and fall at work on April 18, 2018. Specifically, claimant sustained material aggravations that involve the infraspinatus and supraspinatus rotator cuff tendons. (Joint Ex. 1, pp. 25-26, 29; Claimant's Ex. 5, p. 88)

Dr. Sneller refers to claimant's injury as being to the left shoulder. However, he provides no analysis or explanation of the anatomy of the shoulder joint or supporting and surrounding anatomic parts. On the other hand, Dr. Kuhnlein provides a very specific explanation of the anatomy of the shoulder and surrounding and supporting anatomy. Dr. Kuhnlein explains:

> Because of its design, the shoulder joint is the most mobile joint in the body using the body as a stable base so the joint can perform multiple activities in multiple planes of action. Multiple structures that originate on the body side of the joint cross the shoulder joint to attach to the humerus.
>
> The shoulder joint itself is the glenohumeral joint, the space between the glenoid fossa of the scapula (on the proximal or torso side of the body), and the ball of the humerus (on the arm side of the joint). The clavicle originates at the sternoclavicular joint at the sternum and terminates near or over the glenohumeral joint. The acromion is a part of the scapula on the proximal or torso side of the joint extending to articulate with the distal end of the clavicle, forming an acromioclavicular joint (ACJ) that overlies the glenohumeral joint….
>
> The glenoid labrum is a fibrocartolaginous rim-shaped structure around the margin of the glenoid (part of the scapula) on the torso side of the body where the humerus fits. The labrum serves to make the cavity in which the humerus operates deeper, effectively making the joint larger, and making it harder for the humerus to dislocate. The long head of the biceps tendon (LHBT) usually inserts on the glenoid fossa of the scapula… In this case, a proximal biceps rupture occurred in late July 2018. It appears that the biceps rupture occurred three months after the injury [in] question. The long head of the biceps tendon was not mentioned in the May 10, 2018 MRI scan.
>
> Many of the muscles that make the arm function at the shoulder joint originate on the proximal or torso side of the body, to connect to the humerus on the arm side of the joint. Tendons connect muscles from the proximal or torso side of the body to the humerus side of the joint, for

> example with the deltoid muscle, the rotator cuff muscles, and both heads of the biceps muscle.
>
> The anatomy of the muscles originating on the torso side of the body makes the arm function more efficiently so that it can perform multiple activities in multiple planes of action, and with greater power because of the anatomic design.
>
> Much of the muscular "engine" that moves the shoulder joint itself is located on the torso side of the body. Without this structural design, the structures distal to the shoulder joint would not work as efficiently as they do to allow the arm to perform useful activities.
>
> The May 10, 2018 MRI scan showed a full-thickness tear of the supraspinatus tendon with proximal retraction and a full thickness infraspinatus tear with significant proximal retraction. Fluid was noted tracking back along the infraspinatus tendon to the musculotendinous junction, with edema and atrophy of the infraspinatus muscle noted. No surgery was performed in this case.
>
> As this is an aggravation of a pre-existing condition with an aggravation of pre-existing pathology on the torso side of the body, I believe that this would most appropriately be a whole person impairment.

(Claimant's Ex. 5, pp. 89-91)

Dr. Kuhnlein also provides some anatomic drawings with his report that demonstrate the origins and termination points of the supraspinatus and infraspinatus tendons and muscles. These drawings clearly demonstrate the rotator cuff tendons and corresponding muscles originating on the proximal side of the glenohumeral joint, near the clavicle and overlaying what is typically referred to as the shoulder blade, or scapula, and terminating near or perhaps on the distal side of the glenohumeral joint. (Claimant's Ex. 5, pp. 90-91) There is no contrary medical evidence or explanation of the anatomic structures surrounding the glenohumeral joint. Therefore, I accept Dr. Kuhnlein's medical explanation of the anatomic structures, including and surrounding the glenohumeral joint. Claimant has proven that the torn rotator cuff tendons originate with their corresponding muscles proximal to the glenohumeral joint.

Claimant sustained material aggravations of previously torn supraspinatus and infraspinatus tendons in the left shoulder. Both tendons retracted proximally, or toward the torso. Dr. Kuhnlein also explained fluid, edema and atrophy of the infraspinatus toward the proximal side of the glenohumeral joint. Again, I accept these medical explanations of the anatomic injuries claimant sustained.

Dr. Sneller provides a permanent impairment rating for claimant's injury, but does not specify how he determined that impairment rating. Dr. Sneller provides no analysis or reference to convince me that his impairment rating was offered pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Joint Ex. 1, p. 35) By contrast, Dr. Kuhnlein offered specific reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. I accept Dr. Kuhnlein's impairment rating and find that Mr. Smidt sustained a permanent functional impairment equivalent to 20 percent of the left arm, or 12 percent of the whole person. (Claimant's Ex. 5, p. 91)

Following his April 18, 2018 work injury, Mr. Smidt returned to work at McDonalds. However, he was suspended from work on July 24, 2018, pending an investigation of sexual harassment charges against him. (Defendants' Ex. E, p. 2) During the pendency of that investigation, the restaurant was sold. The new owner required background checks on all employees. Given claimant's prior felony convictions, he did not pass the required background checks. The employer informed claimant that he would not be retained or hired as part of the new management. (Tr., pp. 33-34; Defendants' Ex. E, p. 2) Accordingly, claimant's employment with McDonalds was involuntarily terminated by the employer.

Defendants urge that claimant committed sexual harassment against a co-worker. Defendants contend that such conduct is tantamount to a refusal of suitable work and should disqualify claimant from receipt of industrial disability benefits. In this respect, I find that Mr. Smidt certainly may have been guilty of sexual harassment. However, the investigation into those allegations was never completed and a formal finding or termination based upon sexual harassment allegations was never completed. I decline to find that Mr. Smidt committed the acts that were alleged without further investigation or proof against him. Rather, claimant was terminated because the employer sold its business and the subsequent owner was not willing to retain claimant as an employee. Therefore, it is obvious that claimant's termination was involuntary, initiated by the employer, and not related to the sexual harassment allegations against claimant.

Following his termination from McDonald's, Mr. Smidt applied for and was granted unemployment benefits. He sought employment and ultimately was able to locate part-time employment with Vincent Trucking. (Tr., p. 38) While working at McDonalds, claimant earned $10.50 per hour but worked approximately 40 hours per week. (Tr., p. 33) The parties stipulated that his average gross weekly earnings at the time of his injury were $397.67. (Hearing Report) In his new employment with Vincent Trucking, claimant earns $22.00 per hour performing snow removal and $15.00 per hour driving a dump truck. However, he testified that he receives only about 20 hours of work per week. (Tr., pp. 39-40) Therefore, I find that claimant's weekly earnings with Vincent Trucking at the time of the arbitration hearing are less than his earnings with McDonald's on the date of injury.

Neither party introduced evidence as to claimant's intention to retire or a date when he expected to retire. At the age of 63, claimant is clearly approaching what society typically considers a normal retirement age. However, claimant sought additional employment after this injury and there is no reason to believe that he was going to retire in the next couple of years. Regardless, given his age, it is likely that claimant would retire within approximately ten years of the date of the hearing.

Mr. Smidt is a motivated worker. He sought alternate employment and has returned to work since the date of injury. As noted previously, his educational and vocational background does not make further training or movement into new vocational skill sets likely. I found that claimant requires permanent work restrictions, including a 20-pound occasional lift restriction and no work at or above shoulder level. These restrictions likely make return to the construction or maintenance positions difficult, if not impossible. Claimant may be able to return to some laborer positions and has demonstrated the ability to drive a dump truck.

Considering claimant's age, proximity to retirement, work history, educational background, permanent impairment, permanent work restrictions, motivation, and inability to return to some types of work for which he was previously qualified to perform, along with all other factors of industrial disability previously identified by the Iowa Supreme Court, I find that Mr. Smidt sustained a 40 percent loss of future earning capacity as a result of his April 18, 2018 work injury.

Defendants seek a credit for overpayment of temporary total disability (TTD) benefits. Defendants introduce payment records, reflecting payment of TTD benefits at the weekly rate of $301.00. I find these records are accurate and that defendants paid the benefits, as recorded in Defendants' Exhibit A. Defendants' overpaid weekly temporary total disability benefits, given the stipulated weekly rate of $259.70.

Defendants challenge claimant's independent medical evaluation fees. Defendants introduced medical billing statements, reflecting charges for other physicians to provide permanent impairment ratings. None of these billing statements provide context for the charges. It is unknown whether those charges were asking a treating physician to provide an impairment rating or represent charges for an independent medical evaluation. Certainly, as claimant argues, it is reasonable to anticipate that a treating physician, familiar with a worker's medical history and having had multiple opportunities to evaluate the injured worker, would have much less time, effort, and expense involved in providing an impairment rating.

On the other hand, a physician performing an independent medical evaluation must review a claimant's past medical records (and potentially other pertinent documents or videos), perform an examination of the claimant, and draft a written report providing medical responses. It is very unlikely that any physician would be willing to perform numerous hours of review, examination, and report drafting at the level of the charges submitted by defendants as representative of impairment rating charges. I find

that the invoices introduced by defendants are unreasonably low estimates of what it costs to obtain a permanent impairment rating via an independent medical evaluation in Iowa.

Having reviewed Dr. Kuhnlein's report, I note that he opined his charges were reasonable under the circumstances and in the area of his practice. (Claimant's Ex. 5, p. 93) I find that Dr. Kuhnlein's charges are reasonable under the circumstances and for this geographic area to perform an independent medical evaluation and render an impairment rating.

CONCLUSIONS OF LAW

The initial disputed issue submitted by the parties is whether claimant sustained a neck, right shoulder, and/or left hip injury as a result of claimant's trip and fall at work on April 18, 2018. 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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Having found the opinion of Dr. Kuhnlein to be most convincing, as well as the relative absence of reports of symptoms or treatment of the neck, right shoulder, and left hip in the initial medical records and in Dr. Sneller's medical records, I found that claimant failed to prove he sustained an injury or material aggravation of the right shoulder, neck, or the left hip as a result of the events of April 18, 2018. Accordingly, I conclude that claimant failed to carry his burden of proof to establish a work-related injury to the neck, right shoulder, or left hip on April 18, 2018. I conclude that no benefits are due or owed for the alleged neck, right shoulder, or left hip injuries.

The parties stipulate that claimant sustained a material aggravation and injury to the left shoulder area on April 18, 2018. Claimant asserts that the injury extends beyond the left shoulder into the body as a whole. Specifically, claimant argues that the affected areas from this injury are proximal to the glenohumeral joint and, as such, the injury should be determined to be an unscheduled injury compensated with industrial disability pursuant to Iowa Code section 85.34(2)(v) (2017). Defendants contend that the injury is limited to the left shoulder and should be compensated as a scheduled member injury pursuant to Iowa Code section 85.34(2)(n) (2017).

Prior to July 1, 2017, injuries to the shoulder were considered proximal to the arm, extending beyond the arm, and compensated with industrial disability as an unscheduled injury pursuant to prior Iowa Code section 85.34(2)(u) (2016). See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). 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 injuries on a 400-week schedule. Iowa Code section 85.34(2)(n) (2017). 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).

Claimant contends that the legislature did not define what constitutes the "shoulder" or provide guidance as to the anatomic parts that are to be considered a "shoulder." Claimant contends that the "shoulder" delineated in Iowa Code section 85.34(2)(u) (2017) refers to the glenohumeral joint. Therefore, Mr. Smidt asserts that the injuries he sustained involve tendons and body parts that are proximal to the glenohumeral joint and necessarily extend beyond the glenohumeral joint, or "shoulder." Defendants contend that prior decisions of this agency consider rotator cuff tears to be "shoulder" injuries and that claimant's injuries should be compensated as scheduled member injuries of the shoulder pursuant to Iowa Code section 85.34(2)(n) (2017).

The Iowa Supreme Court made it clear in Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 1177, 38 N.W.2d 161, 163 (1949) that when the injury "extended beyond the scheduled area, the schedule of course does not apply." The Court noted, "where there is injury to some scheduled member and also to parts of the body not included in the scheduled," the injury is not compensated under a scheduled member analysis. Id.

The question to be determined in this case is whether the injuries to claimant's rotator cuff, and specifically the supraspinatus and infraspinatus tendons, constitute "shoulder" injuries or should be considered injuries to anatomic body parts proximal to the shoulder and compensated as unscheduled injuries. This is relatively untested before the agency with no known decisions from the Iowa Workers' Compensation Commissioner, the district courts, or the Iowa appellate courts interpreting what anatomic body parts constitute the "shoulder" pursuant to Iowa Code section 85.34(2)(n).

This agency has issued at least five deputy-level decisions considering post-July 1, 2017 "shoulder" injury claims. In three of those decisions, it appears that no argument was made, or no supporting medical evidence was introduced, to establish that the injury extended beyond the "shoulder" to become an unscheduled injury. See Arroyo v. Smithfield Foods, Inc., File No. 5066288 (Arbitration Decision, February 6, 2020); Agee v. EFCO Corp., Inc., File No. 5065304, 5064099 (Arbitration Decision, October 22, 2019); Hospardsky v. Quaker Oats Co., File No. 5061912 (Arbitration Decision, October 30, 2019). In two recent decisions, a deputy commissioner specifically considered whether torn rotator cuff tendons were "shoulder" injuries or unscheduled injuries to the body as a whole. In Chavez v. Technology, L.L.C., File No. 5066270 (Arbitration Decision, February 5, 2020) and Deng v. Farmland Foods, Inc., File No. 5061883 (Arbitration Decision, February 25, 2020), the deputy commissioner concluded that rotator cuff tendons attach proximal to the glenohumeral joint and are unscheduled injuries, not shoulder injuries. The injuries in Chavez and Deng were both rotator cuff injuries. In Chavez, the injured worker tore the infraspinatus and supraspinatus tendons, similar to this case. In Deng, the injured worker suffered a torn infraspinatus tendon. Both those cases also appear to have had relevant medical opinions that documented and explained the relative anatomy of the shoulder joint and surrounding structures.

This agency and the courts have had to consider similar issues with respect to different body parts in the past. For instance, carpal tunnel injuries involve the wrist. Disputes arose before this agency whether carpal tunnel injuries were "hand" injuries or "arm" injuries pursuant to Iowa Code section 85.34(2). Ultimately, carpal tunnel and wrist injuries were determined to be proximal to the hand and compensated as "arm" injuries. Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005). Injuries to the hip were determined to be proximal to the leg and determined to be unscheduled injuries. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lbr Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Injuries involving the joint between the finger and the hand were determined to be hand injuries. Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005).

As noted, injuries to the shoulder area, including rotator cuff tears, were previously considered and determined to be proximal to the arm and considered unscheduled injuries prior to the 2017 statutory changes. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). The courts and this agency have held that injuries proximal to the scheduled member are awarded based upon the more proximal

body part, or as an unscheduled injury if the injury extends beyond all scheduled members. Id.; Miranda v. IBP, File No. 5008521 (Appeal Decision, August 2, 2005). Therefore, the legal question to be answered in this case is whether tears of two rotator cuff tendons (the infraspinatus and supraspinatus tendons) constitute a "shoulder" injury or an unscheduled injury.

When conducting statutory interpretation, the goal is to determine the intent of the legislature. When the plain language of the statute is clear as to its meaning, courts apply the plain language and do not search for legislative intent beyond the express terms of the statute. Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014). A statute is only ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015).

Statutes should be read as a whole, rather than looking at specific words or phrases in isolation. Id. Moreover, when making statutory changes, the legislature is deemed to have known and understood the status of the law, including any interpretations made by this agency and the Iowa Supreme Court as to existing statutes. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (as amended); State v. Fluhr, 287 N.W.2d 857, 862 (Iowa 1980). When enacting the 2017 amendment, the legislature presumably understood that shoulder injuries were previously compensated as unscheduled injuries and that limiting a shoulder injury to a scheduled injury would result in significantly less compensation to an injured worker. Therefore, the legislature made a conscious decision to add the "shoulder" as a scheduled member injury, rather than compensate it as an unscheduled injury.

Presumably, the legislature was also aware that rotator cuff injuries were previously awarded as unscheduled injuries because they were proximal to the arm. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 262 (Iowa 1995). In Nelson, the Iowa Supreme Court did not discuss the anatomy but referred to the injury as a "shoulder" injury. Therefore, as defendants argue, it is possible that the legislature intended that rotator cuff injuries should be compensated as "shoulder" injuries. However, in 2017, the legislature also should have been aware that anatomic parts proximal to the specified scheduled member have been determined to be compensable to the more proximal body part or body as a whole. Id.

With this in mind, the legislature likely understood that the rotator cuff tendons and corresponding muscles attach proximal to the glenohumeral joint. With this understanding, it is also possible that the legislature decided to allow prior legal analysis to govern torn rotator cuff injuries as proximal to the glenohumeral, or "shoulder," joint.

As noted, this agency and the courts have interpreted legislative intent and determined the specific meanings of various portions of Iowa Code section 85.34(2). For instance, this agency has had to clarify when injuries are considered finger versus hand injuries, hand versus arm injuries, and leg versus whole body injuries. The generic language used in other subsections of Iowa Code section 85.34(2) have

required context, definition, and judicial interpretation. Yet, in spite of this history, the legislature elected to use relatively generic language to include the "shoulder" as a scheduled member when amending Iowa Code section 85.34(2).

The legislature certainly did not delineate the anatomic parts of the body that constitute the "shoulder" within the terms of the statute. As the Iowa Court of Appeals noted, "Medical terminology used to describe an area of the body is not always compatible with the statutory terminology used to described [sic] an area of the body to classify a scheduled injury. This can present a problem when distinguishing scheduled losses from unscheduled losses." Prewitt v. Firestone Tire & Rubber Co., 564 N.W.2d 852, 854 (Iowa App. 1997). Yet, the legislature also must have known that, in prior case law, this agency and the courts have determined that when in doubt, the law is interpreted to the benefit of the worker. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). If this analysis is followed to its logical conclusion, the legislature in 2017 knew that any body parts proximal to the "shoulder" joint would result in an injury being compensated to the whole person yet chose not to incorporate or specifically include rotator cuff injuries as "shoulder" injuries.

As was explained in greater detail earlier in this decision, the anatomy of the shoulder was explained by Dr. Kuhnlein stating, "The shoulder joint itself is the glenohumeral joint." (Claimant's Ex. 5, p. 89) Dr. Kuhnlein further explained that "[m]any of the muscles that make the arm function at the shoulder joint originate on the proximal or torso side of the body, to connect to the humerus on the arm side of the joint. Tendons connect muscles from the proximal or torso side of the body to the humerus side of the joint." (Claimant's Ex. 5, p. 90) Given the undisputed anatomic descriptions provided by Dr. Kuhnlein, the 2017 statutory amendment, at best, leaves doubt and ambiguity as to what constitutes a "shoulder" pursuant to Iowa Code section 85.34(2)(n) (2017).

On the other hand, an injured worker is likely to report "shoulder" pain when experiencing a torn rotator cuff injury. Physicians order an MRI of the "shoulder" to diagnose torn rotator cuff tendons. "Shoulder" surgeons repair torn rotator cuff injuries. Even Dr. Sneller simply refers to claimant's injury as a shoulder injury. (Joint Ex. 1, p. 29) Tears of the infraspinatus and supraspinatus (two tendons of the rotator cuff) are often referred to as shoulder injuries in medical records, by physicians, by patients, and by this agency. See May v. Menard, Inc., File No. 5041559 (Arbitration Decision, June 2, 2015) (affirmed by agency in December 2016).

Defendants urge:

> This Agency and the Iowa Supreme Court have found that injuries to the structures surrounding the glenohumeral joint constitute injuries to the shoulder that were previously treated as unscheduled injuries under former Iowa law that was applicable only to injuries occurring prior to July 1, 2017. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner

> Report 281 (App. 1982). Therefore, similar injuries should still be considered injuries to the "shoulder" and should be compensated as a scheduled member injury pursuant to the statutory change in Iowa Code section 85.34(2)(n).

(Defendants' Post Hearing Brief, page 11)

Yet, review of the Alm decision reveals no reference to the rotator cuff, infraspinatus tendon, or the supraspinatus tendon or related muscles. Instead, the Iowa Supreme Court noted, "The doctor who treated claimant testified he suffered a fracture of the distal end of the collar bone where it joins the shoulder blade, together with injuries to the soft tissue of the shoulder and two hernias." Alm, 240 Iowa at 1176, 38 N.W.2d at 162. It is possible that the Court intended to reference the rotator cuff as part of the "soft tissue of the shoulder," but that is certainly not apparent in the Court's actual language. "Soft tissue of the shoulder" also could mean the labrum that surrounds the glenohumeral joint, bursa, the biceps tendon, or other adjacent structures, not necessarily specific to or limited to the rotator cuff tendons. The Court certainly made no analysis of the anatomic structures of the "shoulder." Nor did the Alm Court attempt to define specifically what structures represented the "shoulder." Instead, the Court simply noted that the injuries involving the shoulder were not considered scheduled member injuries of the arm. Alm, 240 Iowa at 1177, 38 N.W.2d at 163.

In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Comm'r Report 281 (Appeal Decision 1982), a deputy commissioner acting on delegation from the commissioner cited Alm and held that "An injury to the shoulder is an injury to the body as a whole." Interestingly, the injury in Nazarenus involved a torn rotator cuff. No analysis of the anatomy of the shoulder was provided, but the deputy commissioner assumed that a torn rotator cuff was a "shoulder" injury. This agency precedent has been long cited by this agency and suggests that a torn rotator cuff should be included within the definition of a "shoulder." Presumably, the legislature could have had this precedent in mind when it amended Iowa Code section 85.34(2) and included the "shoulder" as a scheduled member.

However, long after Nazarenus was decided and nine years prior to the statutory amendment at issue, in Farmer v. Second Injury Fund of Iowa, File No. 5021559 (Appeal, November 20, 2008), the Iowa Workers' Compensation Commissioner noted, "the deltoid muscle is part of the muscle complex which operates the shoulder joint." While the Commissioner was, obviously, not addressing the specific anatomic structure or delineating the specifics of the "shoulder" in 2008, the Commissioner nonetheless recognized a difference between the "shoulder joint" and the "muscle complex" which operates the shoulder joint. As explained by Dr. Kuhnlein, the rotator cuff tendons attach to their corresponding muscles, which are all proximal to the glenohumeral joint. The "muscle complex" described by the commissioner in 2008 likely includes the biceps, triceps, as well as the rotator cuff muscles, all attached to the glenohumeral joint and surrounding structures by tendons.

The Commissioner's 2008 description of the anatomic structures and operations of the anatomic structures are similar to the medical explanations provided by Dr. Kuhnlein in this case and suggest that there is a difference between the "shoulder" and the surrounding anatomic parts (muscle complex) that operate the shoulder. Again, carrying this to the logical conclusion, the legislature was aware of this pre-existing definition by the Iowa Workers' Compensation Commissioner and elected not to modify this definition or clearly define what constitutes a "shoulder."

The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, offers permanent impairment for loss of range of motion, loss of strength, and joint replacement of the shoulder. Range of motion and strength ratings necessarily would be affected by tendons and muscles (such as the rotator cuff) that make the shoulder joint operational. However, the Guides do not define what constitutes a shoulder and, in fact, evaluate the shoulder impairment as an upper extremity, or arm. The Guides are not terribly insightful or helpful in determining whether a torn rotator cuff is a shoulder injury or an injury proximal to the shoulder joint. Ultimately, I conclude that the language selected by the Iowa legislature and enacted as Iowa Code section 85.34(2)(n) is ambiguous as to whether a "shoulder" includes the rotator cuff tendons and corresponding muscles.

When a statute leaves ambiguity as to its meaning or intent, it has long been the law of Iowa that a statutory provision in the Iowa Workers' Compensation Acts should be interpreted liberally in favor of the injured worker. Bluml v. Dee Jay's, Inc., 920 N.W.2d 82 (Iowa 2018); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015); Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58 (Iowa 2015); Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230 (Iowa 2014); Ewing v. Allied Const. Services, 592 N.W.2d 689 (Iowa 1999); Myers v. F.C.A. Services, Inc., 592 N.W.2d354 (Iowa 1999); Danker v. Wilimek, 577 N.W.2d 634 (Iowa 1998); Haverly v. Union Const. Co., 18 N.W.2d 629, 236 Iowa 278 (1945); Conrad v. Midwest Coal Co., 3 N.W.2d 511, 231 Iowa 53 (1942); Miranda v. IBP, Inc., File No. 5008521 (Appeal, August 2, 2005). As the Iowa Supreme Court stated, "[t]he primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit." McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

Ultimately, the Iowa Workers' Compensation Commissioner and likely the Iowa Supreme Court are going to have to give the statutory language some context and define the parameters of what constitutes a "shoulder" pursuant to Iowa Code section 85.34(2)(n). Given the uncertainty and ambiguity left by the generic term "shoulder" used in the statutory amendment, I apply the overriding principle of workers' compensation statutory interpretation. Specifically, I conclude that it is appropriate and required that I interpret Iowa Code section 85.34(2)(n) liberally for the benefit of the injured worker. Bluml v. Dee Jay's, Inc., 920 N.W.2d 82 (Iowa 2018).

In this instance, applying such an interpretation, I found that the rotator cuff tendons and corresponding muscles attach and originate proximal to the glenohumeral joint. Unscheduled injuries are compensated on a 500-week schedule and the industrial disability award can exceed the permanent functional impairment, while "shoulder" injuries are compensated on a 400-week schedule and are limited to the functional impairment rating. Iowa Code section 85.34(2)(n), (v), (x). Therefore, I conclude that it is beneficial for claimant if his injury is compensated as an unscheduled injury.

Given that the injured anatomic structures (rotator cuff tendons and muscles) attach and originate proximal to the glenohumeral joint and that retraction of these tendons was proximal to the glenohumeral joint, I conclude that the injuries to claimant's supraspinatus and infraspinatus tendons result in an injury proximal to the shoulder joint. Therefore, I conclude that claimant has proven his injury results in an injury to the body as a whole, or an unscheduled injury. Unscheduled injuries are compensated pursuant to Iowa Code section 85.34(2)(v) (2017).

Iowa Code section 85.34(2)(v) provides that unscheduled injuries should be compensated based upon a 500-week schedule. However, amendments in 2017 changed the traditional industrial disability analysis in at least a couple of ways. First, industrial disability is not awarded if the claimant "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." Iowa Code section 85.34(2)(v) (2017).

In this case, defendants contend that claimant returned to work and was terminated as a result of sexual harassment allegations against him. However, I found that the greater weight of the evidence in this case demonstrated that Mr. Smidt was suspended and under investigation for sexual harassment allegations. However, disciplinary action, or termination, were not undertaken by the employer based on those allegations. Instead, the employer sold the business. The new owner of the business performed background checks and declined to retain claimant as an employee. Therefore, the employer upon the sale of its business involuntarily terminated Mr. Smidt. Given that Mr. Smidt earned less per week at the time of trial than he did at the time of his injury, I conclude the termination of his employment by the employer qualifies Mr. Smidt to pursue industrial disability benefits based upon any reduction in his earning capacity. Iowa Code section 85.34(2)(v).

The 2017 statutory amendments also change prior case law, which held that proximity to retirement did not reduce an injured worker's industrial disability. See Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). As revised, Iowa Code section 85.34(2)(v) requires the agency to "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."

Neither party introduced specific evidence of the number of years claimant was anticipated to continue working into the future. Given claimant's age and proximity to the typical retirement age, I found that claimant is likely to retire within approximately ten years and that fact is considered in determining his loss of earning capacity and industrial disability. See Iowa Code section 85.34(2)(v) (2017).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Having considered all of the traditional industrial disability factors outlined by the Iowa Supreme Court, as well as the newly statutory factor of proximity to retirement, I found that Mr. Smidt proved a 40 percent loss of future earning capacity as a result of the April 18, 2018 work injury. This qualifies Mr. Smidt to receive a 40 percent industrial disability award pursuant to Iowa Code section 85.34(2)(v).

Unscheduled injuries are compensated on a 500-week schedule. Iowa Code section 85.34(2)(v). Therefore, claimant is entitled to an award of 200 weeks of permanent partial disability benefits (40 percent of 500 weeks).

Defendants asserted a credit for overpayment of temporary partial disability benefits. Claimant did not resist that request or contest the amount of benefits paid to claimant. I found that defendants overpaid weekly temporary disability benefits and that the amount of benefits paid to claimant was accurately detailed in Defendants' Exhibit A.

The parties should be able to calculate the amount of benefits payable and actually paid to determine the amount of the overpayment credit. If there remains dispute as to this issue, the parties should request rehearing on this limited issue for calculation of the exact overpayment credit. However, defendants are awarded credit for overpayment of their temporary total disability, or healing period, benefits pursuant to Iowa Code section 85.34(4), against the award of permanent partial disability benefits in this decision.

Claimant also seeks award of his independent medical evaluation charges pursuant to Iowa Code section 85.39. Defendants do not challenge that reimbursement in some amount is owed pursuant to Iowa Code section 85.39. However, defendants challenge the amount that should be ordered to be reimbursed.

In 2017, the Iowa legislature also amended section 85.39. As part of that amendment, the legislature inserted a provision that provides, "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." Iowa Code section 85.39(2) (2017).

Defendants introduced, over objection, several invoices from local physicians to render a permanent impairment rating. No context was provided for the impairment rating invoices. Claimant challenged those invoices as likely being obtained from treating physicians that already knew the claimant's medical history, have evaluated claimant numerous times, and simply need to write a short report detailing permanent impairment. Defendants contend that the invoices provide a range of reasonable fees for impairment ratings in this locale.

I found the fees charged by Dr. Kuhnlein were reasonable in this locale for the services rendered. Dr. Kuhnlein performed a record review, evaluation of claimant, and prepared a detailed independent medical evaluation report. He opined that his charges were reasonable and I found that the charges were reasonable. Therefore, I conclude that defendants should be ordered to reimburse the entirety of Dr. Kuhnlein's independent medical evaluation fees pursuant to Iowa Code section 85.39.

Finally, claimant seeks assessment of costs. Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. Having already awarded claimant's independent medical evaluation pursuant to Iowa Code section

85.39, it does not need to be addressed as a cost. The only other cost is claimant's filing fee ($100.00). Claimant has prevailed and assessment of his cost is reasonable pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on April 18, 2019.

All weekly benefits shall be payable at the stipulated weekly rate of two hundred fifty-nine and 70/100 dollars ($259.70) per week.

Interest shall be payable on all past-due weekly benefits 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. Apr. 24, 2018).

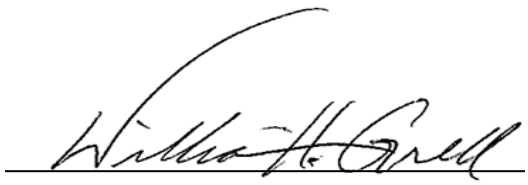
Defendants are entitled to a credit, pursuant to Iowa Code section 85.34(4) against the award of permanent partial disability benefits for all overpayment of temporary total, or healing period, benefits established by Defendants' Exhibit A.

Defendants shall reimburse the entirety of Dr. Kuhnlein's independent medical evaluation fee of three thousand eight and 00/100 dollars ($3,008.00) as documented in Claimant's Exhibit 7.

Defendants shall reimburse claimant's filing fee of one hundred and 00/100 dollars ($100.00) as a cost of this proceeding.

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

Signed and filed this __6th__ day of May, 2020.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Corey Walker (via WCES)

Laura Ostrander (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.