BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK J. HEITMAN, Claimant, vs. SEATON CORP. d/b/a STAFFING HOLDINGS, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JAN 20 2016 WORKERS' COMPENSATION	File No. 5060002 ARBITRATION DECISION Head Note Nos.: 1402.30, 1801, 2501, 2502, 2907, 3001

STATEMENT OF THE CASE

Mark Heitman, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Seaton Corporation d/b/a Staffing Holdings, Inc. (hereinafter referred to as "Seaton"), as the employer, and New Hampshire Insurance Company, as the insurance carrier. Hearing was held on July 15, 2015.

Claimant was the only witness to testify at hearing. The evidentiary record also includes claimant's exhibits 1 through 16 and defendants' exhibits A through M. Exhibits L and M were received into the evidentiary record after the live hearing and were permitted as rebuttal exhibits pursuant to an evidentiary ruling entered by the undersigned at the time of hearing.

Claimant filed a motion to reopen the record and attempted to introduce another exhibit after defendants' submission of exhibits L and M. In a ruling filed September 10, 2015, the undersigned overruled claimant's motion to reopen the evidentiary record. The proposed exhibit attached to claimant's motion to reopen the record is not received into the evidentiary record or considered in rendering this arbitration decision.

The parties also submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations.

Counsel for the parties requested an opportunity to submit post-hearing briefs. After two extensions were granted on those briefing deadlines, this case was considered fully submitted to the undersigned upon the service of the parties' post-hearing briefs on November 2, 2015.

ISSUE

The parties submitted the following disputed issues for resolution:

1. Whether the claimant's brachial plexopathy is causally related to the March 31, 2013 work injury at Seaton.

2. Whether claimant is at maximum medical improvement such that permanent disability can be determined at this time, including the date when permanent disability benefits should commence.

3. If claimant is not at maximum medical improvement, whether he is entitled to additional temporary disability, or healing period benefits, including a claim for a running healing period.

4. Whether the March 31, 2013 work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

5. Claimant's applicable gross average weekly earnings immediately prior to the March 31, 2013 work injury and the corresponding weekly worker's compensation rate.

6. Whether claimant is entitled to an award of past medical expenses.

7. Whether claimant is entitled to reimbursement of a medical examination fee pursuant to Iowa Code section 85.39.

8. Whether claimant is entitled to alternate medical care into the future.

9. Whether claimant should be ordered to pay defendants' cancellation fee for an independent medical examination with Michael Cullen, M.D.

10. Whether defendants should be ordered to pay costs as a sanction for inappropriately denying requests for admissions.

11. Whether claimant's entitlement to weekly benefits should be suspended and/or forfeited during the period of his refusal to attend an evaluation by Dr. Cullen pursuant to Iowa Code section 85.39.

12. Whether costs should be assessed against either party.

Claimant also submitted a penalty benefit claim pursuant to Iowa Code section 86.13. Defendants moved to bifurcate that claim, asserting it was raised or clarified just prior to trial. In an oral ruling made at the time of hearing, the undersigned bifurcated the penalty issue for a hearing at a later date. Therefore, the penalty issue is preserved but not discussed or resolved in this decision. Claimant is permitted to raise the penalty issue via a new original notice and petition for review-reopening.

FINDINGS OF FACT

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

Mark Heitman sustained a personal injury while performing his work duties at Seaton Corporation on March 31, 2013. Mr. Heitman was hired through Seaton Corporation but was performing his work duties at the Proctor & Gamble plant in Iowa City. On March 31, 2013, Mr. Heitman was lifting a vat lid on a large container when he experienced symptoms in his right shoulder. He testified that he felt a "tear" in his right shoulder and felt the shoulder pop "in and out" when he lifted the lid. (Claimant's testimony)

Claimant immediately notified the employer of his injury and was sent to the emergency room at the University of Iowa Hospitals and Clinics on the date of the injury. The emergency room physician placed claimant on restricted duty work with his right arm in a sling. (Exhibit 2, pages 1-3) Claimant returned to light duty work at Proctor & Gamble. (Claimant's testimony)

The employer referred claimant to an occupational medicine physician, Patrick Hartley, M.D., at UI Health Works, L.L.C. At the first couple of evaluations at Dr. Hartley's office, claimant was evaluated by a nurse practitioner. However, her symptoms did not resolve and she was evaluated by Dr. Hartley on April 18, 2013. (Ex. 1)

Dr. Hartley performed an injection in claimant's right shoulder. Unfortunately, the injection did not provide beneficial results and claimant continued to complain of pain as well as numbness and tingling from his right shoulder down to the tips of his fingers on the right hand. Dr. Hartley's office referred claimant to an orthopaedic surgeon, James Nepola, M.D. (Ex. 1)

Dr. Nepola recommended an MRI of claimant's right shoulder as well as his neck. Dr. Nepola attempted additional injections in claimant's right shoulder and referred claimant for an EMG of his right upper extremity. (Ex. 2, p. 4-41) The EMG was performed by Sunny R. Kim, M.D. on August 29, 2013. The EMG demonstrated "an axonal R upper trunk brachial plexopathy." (Ex. 3)

Following the EMG, Dr. Nepola again recommended a neck MRI. Defendants denied the recommended MRI. Instead, defendants scheduled claimant for an

evaluation with another orthopaedic surgeon, Tyson Cobb, M.D., who evaluated claimant on December 11, 2013. Dr. Cobb opined that the neck MRI was reasonable and appropriate but that any neck treatment was not related to the March 31, 2013 work injury. Dr. Cobb also opined that "the shoulder pathology is consistent with the stated injury and would be work related." (Ex. A, p. 2)

Claimant continued to treat with Dr. Nepola into March 2015. At that time, Dr. Nepola recommended a repeat EMG test as well as evaluation by a neurologist at the University of Iowa Hospitals and Clinics to assess whether claimant sustained a brachioplexus injury. Defendants did not authorize the neurology evaluation, but Dr. Nepola went ahead and referred claimant to Dr. Apurva Shah, a neurologist, for evaluation. (Ex. 2, pp. 72, 80) Dr. Shah did not accept claimant or agree to evaluate him because he was leaving the University of Iowa. Therefore, Dr. Nepola recommended and referred claimant for evaluation by a neurosurgeon, Matthew Howard, M.D.

Dr. Howard evaluated claimant on June 9, 2015. Dr. Howard concurred that the 2013 EMG demonstrated evidence of plexopathy. He noted that the right shoulder MRI demonstrated evidence of a supraspinatus tear, which was ruled out by orthopaedics. Dr. Howard recommended evaluation by Dr. Reddy, a neurologist at the University of Iowa Hospitals and Clinics as well as a repeat EMG. (Ex. 2, p. 83)

On July 1, 2015, claimant underwent a repeat EMG performed at the University of Iowa Hospitals and Clinics. The EMG demonstrated a brachial plexus injury and was consistent with the prior EMG performed in August 2013. (Ex. 2, p. 102; Ex. 3)

On July 6, 2015, claimant was evaluated by Chandan G. Reddy, M.D., a neurologist. Dr. Reddy opined that claimant's condition was a "Right-sided brachial plexus injury in March 2015 (sic), with recovery." (Ex. 2, p. 105) Dr. Reddy did not recommend significant ongoing medical intervention for the plexopathy, but opined that claimant would likely continue to experience improvement with time. (Ex. 2, p. 106)

Claimant obtained an independent medical evaluation, which was performed by Farid Manshadi, M.D., on June 4, 2015. Dr. Manshadi concluded "it is my opinion that Mr. Heitman has suffered a right shoulder injury, not only involving the rotator cuff tendons, but in addition he has suffered a brachial plexus injury, specifically the upper trunk." (Ex. 5, p. 9) Dr. Manshadi concluded that claimant had not sustained any neck injury as a result of the March 31, 2013 incident at work, however.

As of the date of hearing, claimant was scheduled to continue his treatment through Dr. Nepola with his next appointment scheduled to occur on July 28, 2015. Obviously, since that evaluation occurred after the date of the arbitration hearing, the results of that evaluation are not known or considered in rendering this decision.

Pursuant to the undersigned's verbal order at the arbitration hearing, defendants obtained supplemental reports from Dr. Cobb and Michael Cullen, M.D. In a report

authored by defense counsel and dated August 3, 2015, Dr. Cobb opined that he concurred with the diagnosis of a brachial plexopathy. (Ex. L, p. 40) However, Dr. Cobb opined that the brachial plexopathy was neither caused nor significantly aggravated by the work injury in 2013. (Ex. L. p. 41) Interestingly, Dr. Cobb conceded that it was possible the 2013 work injury was a cause of a temporary aggravation of claimant's right shoulder condition. (Ex. L, p. 41) No explanation was offered to address the potential differences in the causation opinions between Dr. Cobb's initial report in December 2013 and his latest report authored after the arbitration hearing.

Following his evaluation on July 28, 2015, Dr. Cullen authored a report. He opined:

> Mr. Mark Heitman is a predominantly right-handed individual with a reported lifting incident occurring March 31, 2013 with subsequent right shoulder pain and complaints of neurologic dysfunction. Electromyography and nerve condition studies were consistent with an upper brachial plexopathy proximal to the clavicle. Physical examination at this time is consistent with those findings.
>
> It should be noted that the described provocative activities are exactly opposite that which would be expected to produce the aforementioned plexus abnormality (i.e. should be forced depression of the shoulder and opposite distraction of the neck). Furthermore, shoulder pathology would be at a distinctly different location as to the identified neurologic pathology. Furthermore, if the incident of March 31, 2013 were explanatory, I would have expected resolution sometime prior to the second EMG/NCV testing performed in the summer of 2015 (i.e. in excess of two years removed from the purported offending event). I would question whether this gentleman has an alternative neurologic explanation although it is not apparent at this juncture. Furthermore, I would have expected resolution of neurologic symptoms at this point in time if the incident of March 31, 2013 was causal.

(Ex. M, p. 5) Dr. Cullen opined that the temporal relationship between claimant's symptoms and the development of his brachial plexopathy is not a reliable factor in determining causation. (Ex. M. p. 6)

The initial disputed factual issue is whether claimant sustained a brachial plexus injury as a result of his work injury on March 31, 2013. Having considered all of the physicians' opinions pertaining to this issue, I find the opinion of Dr. Reddy to be most convincing on this issue. Dr. Reddy diagnosed claimant with "Right-sided brachial plexus injury in March 2015 (sic)." (Ex. 2, p. 105) Dr. Reddy's opinions are temporally consistent with the March 31, 2013 work injury being the cause of the brachial plexus injury. Dr. Reddy specifically references the EMG testing performed on claimant and his opinions are also most consistent with the findings of both EMG tests.

Similarly, Dr. Howard notes claimant "suffered an injury at work in August 2013 while lifting and this was associated with pain in the shoulder area followed by weakness." (Ex. 2, p. 82) Dr. Howard noted the findings of the prior EMG demonstrated plexopathy and recommended the second EMG and referral to Dr. Reddy. Dr. Howard's suspicions appear to have been consistent with and confirmed by Dr. Reddy and the second EMG. In this sense, Dr. Howard's opinions and recommendations also bolster and confirm the ultimate diagnosis and causation opinion offered by Dr. Reddy.

Dr. Reddy's opinions are bolstered and supported by those offered by Dr. Manshadi. Although he does not offer a specific causation opinion in this record, in April 2015 Dr. Nepola noted that claimant has "right upper extremity weakness and shoulder pain after a work-related injury." (Ex. 2, p. 72) Although not as specific as I would prefer, it appears that Dr. Nepola also concurs that claimant's ongoing symptoms at least as of April 2015 are the result of a work-related injury. In this sense, Dr. Nepola's opinions also support and bolster those outlined by Dr. Reddy.

All physicians appear to ultimately conclude that Mr. Heitman has a brachial plexus injury. None of the competing medical opinions provide an explanation for the cause or timing of claimant's brachial plexus injury. I also find it interesting and troubling that Dr. Cobb believes the March 2013 injury may have caused a temporary aggravation while Dr. Cullen opines that the alleged mechanism of injury is the exact opposite of what would be expected to produce the brachial plexus injury.

Dr. Cullen's causation opinions appear to be contrary to the causation opinions of Dr. Cobb (temporary aggravation possible) as well as the causation opinions expressed by Dr. Reddy, Dr. Howard, Dr. Nepola, and Dr. Manshadi. Ultimately, I accept the opinions of Dr. Reddy, as supported and bolstered by the opinions of Dr. Nepola, Dr. Howard, Dr. Manshadi, and the EMG results. Therefore, I find that claimant has proven he sustained a brachial plexus injury as a result of the March 31, 2013 work injury.

The next disputed factual issue for resolution is whether claimant has achieved maximum medical improvement from his March 31, 2013 injury. Again, I find Dr. Reddy's opinion to be most convincing on this issue. Dr. Nepola and Dr. Howard both recommended neurologic evaluation. Dr. Reddy was the treating physician to whom Dr. Howard referred claimant. Dr. Reddy evaluated claimant as a treating physician. He was the last physician and only neurologist to evaluate claimant prior to the date of the hearing. Although Dr. Cullen is also a neurologist and he evaluated claimant after the date of the arbitration hearing, I found the opinions of Dr. Reddy to be more convincing in this case.

Dr. Reddy opined that claimant's symptoms had persisted longer than expected. However, Dr. Reddy further opined, "I expect he will continue to make recovery as time proceeds." (Ex. 2, p. 106) He further opined, "It looks like whatever injury he did have, at the time, is self-limited, and things will continue to improve over time." (Ex. 2, p. 106) Having found Dr. Reddy's opinions to be convincing, I find that claimant is likely to

improve with additional time. Given the anticipated medical improvement, I find that Mr. Heitman has not yet achieved maximum medical improvement as of the date of the arbitration hearing.

Claimant asserts a claim for temporary disability, or healing period benefits. Specifically, claimant asserts a claim for temporary disability benefits from May 18, 2015 through May 24, 2015 and from June 18, 2015 through the date of the hearing and continuing into the future. In this respect, I accept the parties' stipulation that claimant was off work during the asserted temporary disability period of time. (Hearing Report)

In April 2015, Dr. Nepola imposed work restrictions that included a 10-pound lifting restriction with the right arm and a 30-pound limit on lifting with both arms. (Ex. 2, p. 80) In June 2015, Dr. Nepola imposed work restrictions that include limiting lifting at 10 pounds with the right arm and with the elbow at the side, 30-pound lifting with both arms and elbows at the side, and no repetitive reaching away from the body or overhead. (Ex. 2, p. 88) The restrictions imposed by Dr. Nepola would preclude claimant from performing substantially similar work to that which he performed on or immediately before March 31, 2013. (Ex. 6; Claimant's testimony)

Dr. Manshadi opined that claimant requires work restrictions that include avoidance of lifting more than 40 pounds with the right upper extremity as well as avoidance of repetitious reaching at shoulder height or overhead. (Ex. 5, p. 10) Dr. Reddy acknowledged the work restrictions already in place by Dr. Nepola and indicated, "I have no added restrictions to what restrictions he already has." (Ex. 2, p. 106)

I find the opinions of Dr. Nepola and Dr. Reddy pertaining to claimant's current physical restrictions to be convincing and find that claimant was not capable of substantially similar employment during the above period of time during which claimant asserts a claim for temporary disability benefits. I further find that claimant was not capable of substantially similar employment as of the date of hearing. I make no findings or predictions about whether claimant will ultimately require permanent work restrictions.

Mr. Heitman seeks an award of medical expenses, which are contained at exhibit 14. Having reviewed those medical expenses and the corresponding medical records, I find that the expenses listed in exhibit 14 are reasonable and necessary medical treatment for claimant's March 31, 2013 work injury. I find that the medical expenses identified in exhibit 14 are causally related to the March 31, 2013 work injury.

Similarly, I find that claimant's transportation expenses contained in exhibit 13 are causally related to the March 31, 2013 work injury. I find that the expenses were incurred by claimant and are reasonable expenses necessitated to obtain medical treatment for the alleged work injury.

Mr. Heitman also seeks an order for alternate medical care. Specifically, he seeks an order that future medical care of his brachial plexus injury be through Dr.

Reddy at the University of Iowa Hospitals and Clinics. I find that the defendants have denied the brachial plexus injury and have not offered any medical care for that condition. Defendants' denial of medical care for that condition has not resulted in an offer of either reasonable or convenient medical care for the brachial plexus injury. I find that the care recommended and offered through Dr. Reddy is reasonable and appropriate. I find that Dr. Reddy would be able to offer reasonable and convenient medical care for the brachial plexus injury into the future.

The parties also submit the issue of claimant's gross average weekly wages for determination as a disputed issue. Claimant offers his rate calculations at exhibit 11. Defendants offer their rate calculations at exhibit K.

The primary rate dispute between the parties appears to be whether four weeks of earnings should be included within the gross average weekly wage calculations. Claimant contends that the weeks ending March 3, 2013, February 3, 2013, January 6, 2013 and December 30, 2012 are not representative of claimant's customary earnings prior to the date of injury. Defendants contend that claimant's weekly earnings fluctuated significantly prior to the alleged injury date and that claimant has not proven the wages for the challenged weeks are not representative of his customary earnings.

The parties presented very little evidence relevant to this disputed issue. The parties introduced claimant's payroll records. (Ex. 11, p. 2; Ex. K, p. 1) Claimant testified briefly about these issues during cross-examination and on redirect examination. On cross-examination, claimant conceded that his hours and earnings fluctuated each week prior to the date of injury. On redirect examination, claimant testified that he was regularly scheduled to work 40 hours per week before the date of injury.

Having considered claimant's testimony and the relevant wage records, I find that claimant has offered no explanation why he worked certain weeks less than 40 hours and other weeks worked more than 40 hours. Although he testified that he was regularly scheduled to work 40 hours per week, his payroll records demonstrate that he did not work exactly 40 weeks in any of the weeks urged to be used by either party.

The payroll records demonstrate that claimant hours worked and wages fluctuate significantly week to week. Some weeks he worked in excess of 40 hours. Other weeks, claimant worked fewer than 40 hours. Claimant offered no explanation of any personal reasons why he was absent from scheduled work during any of the disputed weeks. Claimant offered no evidence to establish that work was available to other employees during the "short" weeks he challenges as being non-representative. I find that claimant failed to prove the challenged weeks were not typical.

Instead, I find that claimant's hours of work and respective wages fluctuated weekly. I find that the evidence in this case suggests that all of the weeks contained in defendants' calculations at exhibit K, page 2 are representative of claimant's customary earnings immediately prior to the date of injury. Having reviewed defendants'

calculations, I find them to be accurate and find that claimant's gross average earnings immediately preceding the March 31, 2013 work injury were $575.43 per week. The parties' stipulations that claimant was married and entitled to three exemptions at the time of the work injury are accepted. (Hearing Report)

Defendants urge suspension or forfeiture of weekly benefits for claimant's failure to attend an evaluation with Dr. Cullen. Claimant contends that the request for Dr. Cullen's evaluation was not at a reasonable time and place. Defendants contend that the evaluation with Dr. Cullen was scheduled before claimant's evaluation with Dr. Howard. Defendants contend that claimant explicitly or implicitly scheduled the evaluation with Dr. Howard at the same time as the scheduled evaluation with Dr. Cullen. Presumably, defendants assert this was an intentional attempt to interfere with and avoid their evaluation with Dr. Cullen.

In reviewing the communications between counsel, it appears that claimant gave notice of the conflict and requested rescheduling of the evaluation with Dr. Cullen with a reasonable advance notice. I find that it is unreasonable to require claimant to forego treatment to attend a one-time evaluation. Claimant's request to reschedule was reasonable and I find that claimant always agreed to attend an evaluation with Dr. Cullen. His only request was to not schedule Dr. Cullen's evaluation at a time when claimant was also scheduled to obtain medical treatment. Even if Dr. Cullen's appointment was scheduled first, I find that it was unreasonable to refuse to reschedule that evaluation. I specifically find that claimant never refused to submit to an evaluation with Dr. Cullen. He only asked for it to be rescheduled to a more convenient time.

CONCLUSIONS OF LAW

The initial disputed issue is whether the brachial plexus injury claimant has is causally related to the March 31, 2013 work injury. Defendants admit that claimant sustained a right shoulder injury but deny that the brachial plexus injury is causally related. All physicians appear to concur that there was an injury to claimant's brachial plexus. However, there is disagreement between the medical experts as to whether that injury is causally related to the March 31, 2013 work injury.

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).

Having considered the competing medical opinions, I ultimately accepted the medical opinions of Dr. Reddy, Dr. Manshadi, Dr. Howard and Dr. Nepola as the most convincing. Having found that claimant's brachial plexus injury was causally related to or materially aggravated by the March 31, 2013 work injury, I also found that the brachial plexus injury arose out of and was causally related to the March 31, 2013 work injury.

Having determined that the brachial plexus injury is causally related to the March 31, 2013 work injury, I must determine whether claimant is entitled to temporary disability, healing period, and/or permanent disability benefits. The Iowa Supreme Court has explained the interplay between temporary disability benefits and permanent disability benefits as follows:

> Normally, an industrial injury gives rise to a period of healing accompanied by loss of wages. 4 Larson § 80.03[2], at 80-5. During this period of time, temporary benefits are payable to the injured worker. Id. Generally, these benefits attempt to replace lost wages (and provide medical and hospitalization care) consistent with the broad purpose of workers' compensation: to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury. See also id. § 80.02, at 80-2 (recognizing distinctive feature of workers' compensation system to make awards for disability). In Iowa, these benefits are spelled out in Iowa Code sections 85.33, 85.34, and 85.37. These temporary benefits include temporary total disability benefits and healing-period benefits. They refer to the same condition, but have separate purposes depending on whether the injury leads to a permanent condition. Clark v. Vicorp Rests, Inc., 696 N.W.2d 596, 604-05 (Iowa 2005). If the injury results in a permanent partial disability, payments made prior to an award of permanent partial disability benefits are healing-period benefits. If the award does not result in permanent disability, the payments are called total temporary disability benefits. Id. at 604. Nevertheless, an award for healing-period benefits or total temporary

disability benefits are only temporary benefits and do not depend on a finding of a permanent impairment.

The period of healing is then followed by recovery or stabilization of the condition "and probably resumption of work." 4 Larson § 80.03[2], at 80-6. Any disability that remains after stabilization of the condition gives rise to "either a permanent partial or a permanent total award." Id. In other words, maximum physical recovery marks the end of the temporary disability benefits, and at that point, any permanent disability benefits can be considered.

This review of temporary and permanent disability awards reveals that a fundamental component of a permanent impairment is stabilization of the condition or at least a finding that the condition is "not likely to remit in the future despite medical treatment." American Medical Association, Guides to Evaluation of Permanent Impairment 27 (6th ed. 2008). In other words, stabilization is the event that allows a physician to make the determination that a particular medical condition is permanent. Municipality of Anchorage v. Leigh, 823 P.2d 1241, 1242 n. 3 (Alaska 1992) (" 'A physician can determine ... whether or not a particular medical condition has become permanent because it is static or well-stabilized.' " (quoting American Medical Association, Guides to Evaluation of Permanent Impairment, Preface at x (2d ed. 1984))).

The symmetry of the process reveals that a claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved. See 4 Larson § 80.03D[3] n. 10, at D80-43 to D80-48.2 (recognizing cases generally holding it is premature to award permanent impairment benefits when medical stabilization has not yet been reached). Until that time, only temporary benefits are available.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 200-201 (Iowa 2010).

The undersigned found that Mr. Heitman has not achieved maximum medical improvement as a result of the brachial plexus injury as of the date of the arbitration hearing. I found Dr. Reddy's opinions to be credible in this respect. Therefore, I conclude that claimant's assertion of a permanent disability is not yet ripe for determination. Gwinn, 779 N.W.2d at 200-201.

Having reached the conclusion that any claim for permanent disability is not yet ripe for determination, I must consider claimant's assertion of entitlement to temporary disability, or healing period, benefits. Claimant asserts, if he is not at maximum medical improvement, he is entitled to temporary disability from May 18, 2015 through May 24, 2015 and from June 18, 2015 through the date of the arbitration hearing. (Hearing

Report; Claimant's Post-Hearing Brief, p. 9) Defendants dispute entitlement to temporary disability benefits but stipulate that claimant was off work during the claimed period of time. (Hearing Report)

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this instance, it is not clear whether permanent disability has been or will be sustained. However, claimant remains in a healing period (or period of temporary disability) until one of the three events outlined above are achieved. Having found that Mr. Heitman has not achieved maximum medical improvement and given defendants' stipulation that claimant was not working during the claimed healing period, I must consider whether claimant was medically capable of returning to substantially similar employment he performed on the date of injury during his claimed period of temporary disability.

Based upon the restrictions imposed by Dr. Nepola, I found that Mr. Heitman was not medically capable of returning to substantially similar employment during the time period from May 14, 2015 through May 24, 2015 and from June 18, 2015 through the date of the arbitration hearing. Therefore, I conclude that Mr. Heitman is entitled to temporary total disability benefits for these periods of time and an award of a running healing period until such time as one of the three events outlined in Iowa Code section 85.34(1) is achieved.

Defendants contend that claimant's entitlement to weekly benefits was suspended and forfeited pursuant to Iowa Code section 85.39 when claimant failed to appear for an independent medical evaluation with Dr. Cullen, as requested by defendants. Iowa Code section 85.39 provides, in relevant part, "The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of suspension."

The Iowa Supreme Court has analyzed this statutory language and held that benefits are suspended but not forfeited during a period of refusal to attend an examination requested by the employer pursuant to Iowa Code section 85.39. McCormick v. North Star Foods, Inc., 533 N.W.2d 196, 198-199 (Iowa 1995) Therefore,

I conclude that the defendants' argument for forfeiture of benefits during the period of refusal is legally erroneous. Id.

Even if weekly benefits were suspended pursuant to Iowa Code section 85.39, those benefits would now be payable because claimant submitted to an evaluation with Dr. Cullen on July 29, 2015. However, the question of whether claimant's weekly benefits should have been suspended would affect the calculation of any interest benefits that may be owed. If weekly benefits were suspended and not payable during the period of refusal, defendants would not owe interest on the suspended benefits pursuant to Iowa Code section 85.30. Therefore, I will consider the defendants' argument that benefits should have been suspended during the period of claimant's asserted refusal to attend an examination by Dr. Cullen.

Iowa Code section 85.39 requires the employee to "submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state." Therefore, it is necessary to determine whether the employer requested an examination at a reasonable time and place when it requested claimant submit to an evaluation by Dr. Cullen.

Having found that it was not reasonable to expect claimant to forego medical treatment for his denied condition to attend an examination pursuant to Iowa Code section 85.39, I found that the employer failed to request an examination at a reasonable time. Having reached these findings, I conclude that the claimant was not unreasonable in requesting the rescheduling of Dr. Cullen's evaluation and that the suspension provision of Iowa Code section 85.39 never became effective in this case.

Nevertheless, even if a reviewing authority were to disagree with this factual finding and find that the employer's requested evaluation by Dr. Cullen was at a reasonable time and place, I further found that the claimant never refused to submit to an evaluation with Dr. Cullen. Instead, claimant asked for the evaluation to be rescheduled due to a reasonable conflict required for claimant to secure medical treatment. No prejudice ultimately befell defendants given the rescheduling and claimant always agreed to attend an evaluation with Dr. Cullen. Therefore, I conclude the suspension provision of Iowa Code section 85.39 did not apply. Defendants were not entitled to suspend weekly benefits after the date claimant was initially scheduled to be evaluated by Dr. Cullen. Interest is due for all past due benefits that accrued during the claimed period of suspension pursuant to Iowa Code section 85.30.

The next disputed issue is the proper rate of compensation at which weekly benefits should be awarded. Claimant asserted his gross average weekly wages prior to the date of injury were $654.00 and that he should receive a corresponding weekly compensation rate of $451.06. Defendants contend that claimant's gross average weekly wages prior to the date of injury were $575.43 and that the corresponding rate of compensation should be $383.62 per week. (Hearing Report)

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

Having found that Mr. Heitman was paid on an hourly basis, I conclude that Iowa Code section 85.36(6) is the applicable statutory section to be applied. Having determined that claimant's weekly wages fluctuated significantly and that those fluctuations were typical in his position with Seaton, I also found that the disputed weeks of March 3, 2013, February 13, 2013, January 6, 2013 and December 30, 2012 were customary and representative of claimant's gross average weekly wages. Therefore, I conclude those weeks should be included within the calculation of claimant's gross average weekly wages.

I found claimant's gross average weekly wages to be $575.43 prior to the date of injury. The parties stipulated that claimant was married and entitled to three exemptions on the date of injury. (Hearing Report)

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $575.43, relying upon the parties' stipulations as to claimant's marital status and entitlement to exemptions, and using the Iowa Workers' Compensation Manual (p. 57) with effective dates of July 1, 2012 through June 30, 2013, I determine that the applicable weekly rate for temporary total disability (healing period) benefits is $401.55.

Claimant also asserts a claim for past medical expenses pursuant to Iowa Code section 85.27. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary

transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant attaches his claimed medical expenses as exhibit 14. Having found the medical expenses contained in exhibit 14 to be causally related to the March 31, 2013 work injury, I conclude defendants are responsible for satisfying those expenses either directly with the providers or by reimbursing any third party payer or claimant. Krohn v. State, 420 N.W.2d 463, 464-465 (Iowa 1988); Iowa Code section 85.27.

Claimant also requests award of medical mileage related to his treatment for the March 31, 2013 injuries. Claimant's affidavit of transportation costs is introduced as exhibit 13. Having found exhibit 13 accurately sets for the medical mileage claimant traveled, I conclude defendants are obligated to reimburse claimant for the mileage expenses set forth in exhibit 13. Iowa Code section 85.27; 876 IAC 8.1(2).

In exhibit 13, claimant also requests parking expense he incurred while obtaining medical treatment at the University of Iowa Hospitals and Clinics. Claimant clearly demonstrates medical treatment at that facility on the date of his parking charges. I found that the parking expenses are reasonably necessary transportation expenses and conclude the parking expenses are to be reimbursed by defendants pursuant to Iowa Code section 85.27(1).

Mr. Heitman also seeks reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, claimant obtained an independent medical evaluation with Farid Manshadi, M.D., on June 4, 2015. Defendants had not obtained an impairment rating from any physician of their choosing prior to June 4, 2015, as claimant was continuing to seek medical treatment and had not yet been declared to be at maximum medical improvement by any physician. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843-844 (Iowa 2015). Therefore, claimant has failed to establish the

necessary pre-requisites to qualify for an employer-reimbursed examination pursuant to Iowa Code section 85.39.

Claimant seeks an order granting him alternate medical care. Specifically, claimant seeks an order designating the University of Iowa Hospitals and Clinics as the authorized medical provider for future brachial plexus injury treatment. At hearing, defendants denied liability for the brachial plexus injury. Defendants denied liability for the medical expenses related to claimant's evaluation and treatment of the brachial plexus injury.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision June 17, 1986).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner, 78 (Review-Reopening 1975).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In this case, defendants have denied liability for the brachial plexus injury. They offer no medical care for the condition despite the recommendations and referrals by their authorized physician, Dr. Nepola, for treatment of the brachial plexus injury. I found that the defendants' refusal of care for this injury was neither reasonable nor convenient for claimant. I found Dr. Reddy to be the most convincing physician on the issue of the brachial plexus injury. Dr. Reddy is a neurologist at the University of Iowa Hospitals and Clinics and appears qualified and ready to treat the brachial plexus injury. Therefore, I find that the most reasonable, convenient, suitable, and prompt medical care for the brachial plexus injury is through Dr. Reddy. Defendants will be ordered to authorize and provide medical care for the brachial plexus injury through and under the direction of Dr. Reddy.

Claimant seeks the assessment of costs as a sanction for defendants' denial of requests for admissions. Claimant introduced defendants' responses to requests for admissions as exhibit 15. Claimant's post-hearing brief asserts no argument as to which of the responses to request for admissions were made in bad faith. Claimant

offers no argument why sanctions should be imposed against defendants in this regard. Defendants' responses to requests for admissions are consistent with the position and arguments they offered at trial. While not accepted by the undersigned, I do not perceive that the responses to requests for admissions are egregious. Therefore, I find that defendants had reasonable grounds and evidence upon which they relied to believe that they might prevail at trial. I further conclude that defendants had sufficient grounds and reason for their denial of the requests for admissions such that I conclude sanctions are not appropriate. Iowa R. Civ. P. 1.517(3)(b)(3)-(4).

Defendants also seek sanctions for claimant's failure to attend the medical examination with Dr. Cullen on June 9, 2015. Defendants did not identify this as a disputed issue in their post-hearing brief or provide any legal authority as to how or why the $500.00 cancellation fee charged by Dr. Cullen should be assessed against claimant. I do not perceive an independent ground upon which this cancellation fee should be assessed. Moreover, having found that it was unreasonable to require claimant's attendance at Dr. Cullen's examination when claimant had treatment scheduled on the same date, I perceive no basis for assessing the cancellation fee against claimant.

Finally, claimant seeks assessment of his costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Claimant has prevailed on the primary disputed issues in this case. I conclude it is appropriate to assess claimants' costs against defendants.

Claimant's requested costs are reflected in exhibit 12. Claimant seeks assessment of his filing fee ($100.00). This is an appropriate cost and will be assessed pursuant to 876 IAC 4.33(7). Claimant also seeks his service fee upon defendants ($6.48). This is an appropriate cost and is assessed pursuant to 876 IAC 4.33(3). Claimant also seeks assessment of his deposition transcript totaling $100.50. Claimant's deposition transcript was introduced as an exhibit in this proceeding. I conclude this is a permissible cost and is assess the cost pursuant to 876 IAC 4.33(2).

Claimant's final requested cost is Dr. Manshadi's independent medical evaluation fee ($1,200.00). Having denied claimant's request for reimbursement of Dr. Manshadi's examination fee pursuant to Iowa Code section 85.39, I consider the request to assess Dr. Manshadi's fee as a cost.

Agency rule 876 IAC 4.33(6) provides that the cost of "obtaining no more than two doctors' or practitioners' reports" may be taxed as costs. Dr. Manshadi's report certainly may fall within this rule. In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846 (Iowa 2015), the Iowa Supreme Court stated, "the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition." The Court specifically held that the cost of the independent medical examination cannot be taxed as costs. Id. Nevertheless, the Court held that the cost of preparing the independent medical evaluator's fee can be assessed as a cost pursuant to Iowa Code section 86.40 and 876 IAC 4.33(6) Id. at 847.

The Young case was issued by the Iowa Supreme Court before this case proceeded to arbitration hearing. Therefore, it was known and applicable at the time of this hearing. Claimant did not offer any evidence to establish Dr. Manshadi's charges for drafting the litigation report as opposed to the charges for his evaluation. Given that claimant did not produce sufficient evidence to permit this breakdown of charges, I conclude that claimant has failed to establish the necessary information to assess the cost of Dr. Manshadi's report. Utilizing the agency's discretion, I conclude that Dr. Manshadi's fees should not be assessed as a cost under these circumstances.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant temporary total disability, or healing period, benefits from May 18, 2015 through May 24, 2015 and from June 18, 2015 through the date of the arbitration hearing and continuing into the future until the first qualifying event in Iowa Code section 85.34(1) occurs to terminate weekly benefits.

All weekly benefits shall be paid at the rate of four hundred one and 55/100 dollars ($401.55) per week.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30 and shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay, reimburse, and or otherwise satisfy all medical expenses and medical transportation expenses identified in claimant's exhibits 13 and 14.

Defendants shall authorize and pay for future medical treatment of claimants' brachial plexus injury through Dr. Reddy at the University of Iowa Hospitals and Clinics.

Claimant's asserted penalty benefit claim is bifurcated and shall be heard upon a new petition in conjunction with any review-reopening claim to assess and determine claimants' permanent disability, if any.

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 20th day of January, 2016.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/kjw

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.