BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| RANDY NANK,<br><br>Claimant,<br><br>vs.<br><br>UNIVERSAL TANK – FABRICATION,<br><br>Employer,<br><br>and<br><br>TRAVELERS INDEMNITY INS. CO.,<br><br>Insurance Carrier,<br>Defendants. | FILED<br>JUN 20 2018<br>WORKERS COMPENSATION | File No. 5056865<br><br>ARBITRATION DECISION<br><br>Head Note Nos.: 1803, 1804, 1703, 2401, 2700, 3001 |

## STATEMENT OF THE CASE

Randy Nank, claimant, filed a petition in arbitration seeking workers' compensation benefits from Universal Tank and Fabrication (Universal) and its insurer, Travelers Indemnity Insurance Company as a result of an injury he allegedly sustained on January 25, 2015 and/or January 13, 2015 and/or January 20, 2015 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on October 19, 2017. The evidence in this case consists of the testimony of claimant, Joint Exhibits 1 – 3, Claimant's Exhibits 1 – 9 and Defendants' Exhibits A – I.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

*For the claimant's left shoulder:*

## ISSUES

Whether claimant sustained an injury on January 13, 2015 or January 20, 2015 which arose out of and in the course of employment to the left shoulder.

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability.

The claimant's gross earnings and weekly workers' compensation rate.

Whether claimant provided timely notice of an injury on January 13, 2015 or January 20, 2015.

Whether claimant is entitled to payment for costs.

Whether the defendants are entitled to a credit for an overpayment.

## STIPULATIONS

The parties stipulated that on January 12, 2015 claimant sustained an injury to his left shoulder that arose out of and in the course of his employment with Universal. That the January 12, 2015 injury caused temporary and permanent disability. Temporary benefits are not in dispute for the left shoulder. The parties stipulated that claimant's left shoulder injury is an industrial disability and that any permanent partial disability benefits should commence on April 18, 2017. The claimant was married and entitled to two exemptions. No affirmative defenses are being asserted for the January 12, 2015 left shoulder injury. The parties agree that defendants have made payment of temporary and permanent partial disability benefits and defendants are entitled to some amount of credit.

*For claimant's right shoulder.*

## ISSUES

Whether claimant sustained an injury on January 12, 2015; January 13, 2015 or January 20, 2015 which arose out of and in the course of employment to the right shoulder.

Whether the claimant has a temporary disability, and if so;

The extent of any temporary disability.

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability.

The commencement date for any permanent disability.

The claimant's gross earnings and weekly workers' compensation rate.

Whether claimant provided timely notice of an injury on January 13, 2015 or January 20, 2015.

Whether claimant is entitled to payment for costs.

Whether the defendants are entitled to a credit for an overpayment.

## STIPULATIONS

The parties stipulated claimant was an employee at the time of the alleged injury. The parties stipulated claimant has been off work since April 18, 2017 and that he is married and entitled to two exemptions. The parties agree that defendants have made payment of temporary and permanent partial disability benefits and that defendants are entitled to some amount of credit.

## FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

Randy Nank, claimant, was 58 years old at the time of his hearing. Mr. Nank did not graduate from high school. Mr. Nank obtained a GED. (Transcript page 17) Mr. Nank obtained a diploma as a machinist from a community college in 1978. (Exhibit B, p. 3) Mr. Nank's work history before his work with Universal varied, including tending cattle, unskilled oil refinery work and painting.

Claimant eventually purchased a painting contractor business and ran that business for about 14 years. Mr. Nank had about 22 years' experience in the painting business. (Tr. p. 24) Mr. Nank started working for Universal in January 2013. (Tr. p. 62)

Mr. Nank had a number of injuries prior to his work at Universal. In 1979 he had a motorcycle accident and broke his pelvis and damaged the sciatic nerve. (Tr. p. 25) Mr. Nank also developed a right side foot drop due to this accident. (Tr. p. 68) He had a car accident in 1981 and had a fracture in his C1 area. (Tr. p. 26) In 1995, Mr. Nank had a back injury while working for a painting contractor. (Tr. p. 28) Claimant injured his left foot while working for Universal on December 3, 2013. (Tr. p. 38) In February 2014 claimant was having bilateral pain in his elbows and arms. (Tr. p. 38) Claimant did not have any surgery for his left foot or bilateral arm injuries. (Tr. pp. 39, 40) Claimant said that he did not follow restrictions recommended by Robin Sassman, M.D. when she evaluated his work injuries. (Tr. p. 72)

At Universal, Mr. Nank was in the labor pool and did painting, hydro testing and other tasks. (Tr. p. 30) Mr. Nank described his work as active and physical. He said that in tightening openings on tanks for hydro testing he was required to use a lot of force. (Tr. pp. 41, 42) Mr. Nank said that this work began to affect his right shoulder and he started to use his left arm. In his deposition Mr. Nank said that he noticed clicking in his right shoulder on January 11, 2015. (Ex. C, p. 22) Mr. Nank said he had noticed soreness several months before this date in his right shoulder. (Ex. C, pp. 22, 23) Mr. Nank said that he noticed clicking in his left shoulder on January 12, 2015. (Ex. C, p. 24) Mr. Nank reported his left and right shoulder problems to a supervisor. (Ex. C, p. 25) While Mr. Nank said in his deposition he went to occupational health on

January 13, 2015 (Ex. C, p. 25), the record shows he went to occupational health for left and right shoulder pain on January 20, 2014. The report of that visit noted he had been experiencing pain for the last one to two weeks. (Joint Ex. 1, p. 1) Claimant testified that he was able to continue to work at Universal until April 18, 2015 and has not been able to return to work. (Tr. p. 45)

Mr. Nank had left shoulder surgery at the University of Iowa Hospitals and Clinics (UIHC) by James Nepola, M.D. on July 17, 2015. (Tr. p. 46) Mr. Nank had a second left shoulder surgery on April 14, 2016. (Tr. p. 46) Mr. Nank said that his left shoulder continues to cause him pain and the more he uses it the more pain he experiences. That his range of motion has diminished and his left shoulder can cause problems with sleeping. (Tr. p. 49) Mr. Nank said that since he has stopped working, while sore, he is doing a lot better. (Tr. p. 49)

Mr. Nank applied for and was found eligible for Social Security Disability benefits with an onset date of April 29, 2015. (Ex. 8, p. 32) Mr. Nank said that he could not return to work at Universal due to the physical nature of the work. He also did not believe he could return to work as a painting contractor. (Tr. pp. 52, 53) Mr. Nank has a CDL. He obtained his CDL so he could operate a boom truck for his painting. He has no training in commercial semi-trailer truck driving. (Tr. p. 57) Mr. Nank has not looked for work after his release from care by the UIHC. (Tr. p. 61) Mr. Nank saw a return to work expert at UIHC on March 8, 2016. At that visit, Mr. Nank expressed an interest in starting a business of preparing Cajun food. (JEx. 2, p. 68) Mr. Nank has not looked for work or applied for vocational services. (Tr. p. 79, Ex. C, p. 32) Mr. Nank testified that he worked about 45 – 50 hours a week in 2014 and 2015. (Tr. p. 59)

Jill Hunt, M.D. of Findley Occupational Health saw Mr. Nank on January 20, 2015 for his shoulders. Mr. Nank told Dr. Hunt that he noticed his shoulders were sore for a little over a year and that in the last week or two he noticed clicking in his left shoulder. (JEx. 1, p. 1) Dr. Hunt diagnosed, "Left shoulder pain with more mild right shoulder pain and bilateral paresthesias." (JEx. 1, p. 1) She provided restrictions regarding forceful gripping and overhead lifting. (JEx. 1, pp. 2, 3) Claimant had an MRI of the left shoulder on February 6, 2015. The impression was,

> 1. Findings suggestive of a partial thickness tear of the supra- and infraspinatus muscles.
>
> 2. Findings concerning for loose body in the subacromial bursa.
>
> 3. Degenerative fraying and tearing of the labrum with moderate degenerative changes at the glenohumeral joint and acromioclavicular joints.

(JEx. 1, p. 7) On February 10, 2015, Dr. Hunt wrote "He states that the pain in his left shoulder is so severe that he cannot sleep. He is also noting clicking in the left shoulder, which he states has increased since the 01/12/2015 [*sic*]. He does continue to awaken in the morning with numbness in his palm bilaterally, which then goes away

throughout the day. He is working under his current restrictions." (JEx. 1, p. 10) On March 3, 2015, Dr. Hunt's diagnosis was, "Bilateral shoulder pain, which has developed since working at Universal Tank and Fabrication." (JEx. 1, p. 14) On March 20, 2015, Dr. Hunt opined to the insurance carrier, Travelers, that Mr. Nank's bilateral shoulder condition was related to his work at Universal. (JEx. 1, p. 17)

Dr. Nepola examined Mr. Nank on April 14, 2015. Dr. Nepola's assessment was, "A 56-year old male with left shoulder pain after a work-related injury on January 12, 2015. X-rays show mild glenohumeral osteoarthritis. However, examination today is consistent with an overlying subacromial impingement and bursitis." (JEx. 2, p. 24) Mr. Nank received a subacromial injection on that date and an ultrasound-guided left glenohumeral injection on May 5, 2015. (JEx. 2, p. 27) On July 17, 2015, Dr. Nepola performed an operation on claimant's left shoulder. Dr. Nepola's post-operative diagnosis was "Left shoulder arthritis/degenerative changes." (JEx. 2, p. 32) The diagnostic arthroscopy revealed:

> 1-Rotator Cuff: intact supraspinatus and infraspinatus
> 2-GH joint: significant degenerative wear on the glenoid and humerus consistent with grade 3 and 4 osteoarthritis throughout
> 3-biceps tendon: intact
> 4-subscapularis: intact
> 5-anterior labrum/IGHL: degenerative changes with significant fraying
> 6-posterior labrum/IGHL: degenerative changes with significant fraying
> 7-superior labrum: degenerative changes with significant fraying
> There were 3 moderately sized osteocartilaginous loose bodies within the joint that were chronic appearing in nature with smooth and rounded edges.

(JEx. 2, p. 32) On August 25, 2015, Dr. Nepola noted that claimant has shoulder arthritis and he did not expect Mr. Nank to have a normal shoulder. (JEx. 2, p. 37) On October 20, 2015, Dr. Nepola noted bilateral shoulder pain. (JEx. 2, p. 49) On January 12, 2016, Dr. Nepola recommended a right shoulder MRI. (JEx. 2, p. 60)

Dr. Nepola wrote on November 12, 2015 that Mr. Nank's right shoulder was not work related, but was present for a year before he saw Mr. Nank. (Ex. A, p. 1)

A second shoulder surgery was recommended on March 8, 2016. (JEx. 2, p. 64) Dr. Nepola performed a left shoulder hemiresurfacing, Copeland, on April 14, 2016. On June 21, 2016, Dr. Nepola released claimant to work with a one pound left arm lifting restriction. (JEx. 2, p. 72) Dr. Nepola decreased Mr. Nank's restriction over time. On February 21, 2017, Dr. Nepola noted that at some time in the future Mr. Nank would need additional surgery. (JEx. 2, p. 78) On April 18, 2017, Dr. Nepola found Mr. Nank at maximum medical improvement (MMI) for his left shoulder and reserved imposing permanent restrictions pending a functional capacity examination (FCE). (JEx. 2, p. 83) Dr. Nepola provided a 23 percent whole body impairment rating for Mr. Nank's left

shoulder. (JEx. 2, p. 84) On April 18, 2017, Dr. Nepola provided restrictions. Dr. Nepola wrote,

> Randy J Nank has the following activity restrictions for his left shoulder: No repetitive reaching away from the body or above shoulder height with left arm. He can lift up to 12 pounds with his left arm with his left elbow at his side. He can lift up to 35 pounds with both arms while his elbows are at his sides.

(JEx. 2, p. 89) An FCE was conducted on May 8, 2017, deemed valid and found Mr. Nank met material handling demands of medium work. (JEx. 3, p. 90) The FCE found the following limitations in Mr. Nank;

1. Lifting capacities inconsistent with the demands of the job.
2. Gait deficit.
3. Diminished functional use of the upper extremities in work above chest level.
4. Diminished functional use of the upper extremities in work above shoulder level.
5. Diminished functional use of the upper extremities in work above the head.
6. Inability to tolerate sustained sitting.

(JEx. 3, p. 94)

I find that April 18, 2017 is the date Mr. Nank reached MMI for both shoulders.

On March 27, 2017, Robin Sassman, M.D. issued an independent medical examination (IME) report. Dr. Sassman's diagnosis was,

1. Left shoulder rotator cuff tear
   - Status post left shoulder arthroscopy, distal clavicle resection and subacromial decompression by James Nepola, M.D. on July 17, 2015.
   - Status Post left shoulder hemi-resurfacing, Copeland, on April 14, 2016, by James Nepola, M.D.
2. Right shoulder pain

(Ex. 3, p. 19) Dr. Sassman stated that claimant's left and right shoulder injuries were related to work Mr. Nank performed at Universal and noted one task, which requires him to push a metal pipe with his shoulders which was a substantial fact in his shoulder symptoms. (Ex. 3, p. 19) Dr. Sassman recommended an MRI of the right shoulder and wrote Mr. Nank was not at MMI for his right shoulder. (Ex. 3, p. 19) If no additional medical care was obtained for the right shoulder, Dr. Sassman said that the MMI date was April 14, 2017. (Ex. 3, p. 19) Dr. Sassman provided a 6 percent upper extremity impairment for the right shoulder and a 24 percent impairment rating for the left

shoulder. Using the combined values chart, she provided a 17 percent while person impairment rating. (Ex. 3, p. 20) Dr. Sassman recommended the following restrictions,

> Mr. Nank should limit lifting, pushing, pulling and carrying to 20 pounds at waist height using both arms together with his elbows at his sides. He should not lift, push, pull or carry above waist height or with his arm extended away from his body. He should not use vibratory of [*sic*] power tools. He should not climb ladders as he would be unable to maintain a three-point safety stance given his symptoms.

(Ex. 3, p. 20) I find these to be Mr. Nank's restrictions. Dr. Sassman charged a total of $3,977.50 for the IME. Of the total costs for this examination and report, $2,185.00 was spent in preparing the report. (Ex. 5, p. 28)

Lana Sellner, M.S, CRC, performed a vocational assessment of Mr. Nank on June 30, 2017. Ms. Sellner opined that Mr. Nank was able to perform up to the medium level of work. (Ex. B, p. 5) Ms. Sellner provided a "snap-shot" labor market survey and identified work that she believed Mr. Nank could perform. (Ex. B, p. 7) Jobs she identified claimant could perform were electronic/electrical assembly, retail sales, janitor, security guard and truck driver. (Ex. B, p. 7) Ms. Sellner, using the restriction from Dr. Sassman, stated,

> Given the occupations identified above, this consultant continues to opine he could do small driving positions such as delivery and courtesy driving. In addition, he would be able to perform some cleaning jobs that would require some modifications pending on the job with flexibility in breaks to allow him to sit.

(Ex. B, p. 9)

I find Mr. Nank injured both his left and right shoulders and has permanent impairment to both shoulders. The left shoulder is not disputed by the defendants. The defendants do dispute the right shoulder.

I find the opinions of Dr. Hunt and Dr. Sassman more convincing. Dr. Hunt saw Mr. Nank shortly after his injuries and diagnosed both a right and left shoulder injury. Dr. Nepola did not explain why Mr. Nank's right shoulder was not a cumulative trauma injury or whether his right shoulder symptoms could have been caused by using his shoulder to push on a pipe. Dr. Sassman's evaluation is more thorough in that respect. Mr. Nank has proven he has an injury to the right shoulder that arose out of and in the course of his employment at Universal.

I find that the date of Mr. Nank's right and left shoulder injuries is January 12, 2015. While there is some confusion in the record as to whether it could have been January 13, January 19 or January 20, 2015, it appears that January 12, 2015 is the best estimate of when Mr. Nank's injury manifested. I find that Mr. Nank had a left and right shoulder injury on January 12, 2015.

The defendants have calculated Mr. Nank's gross wages by using the 13 weeks immediately preceding his January 12, 2015 injury. (Ex. D, p. 1) A listing of weekly earnings for the 17 weeks before the January 12, 2015 injury shows 10 weeks with less than 40 hours, 15 weeks that included overtime and 1 week at 40 hours. Only 3 weeks included weeks of less than 30 hours. (Ex. D, p. 2) No weeks show Mr. Nank working 50 hours. Based upon the wage records and testimony I find that Mr. Nank would regularly work 32 or more hours per week. I have excluded weeks of less than 32 hours from his wage calculation.

The chart below shows the week's wages and bonus that were used to determine Mr. Nank's gross weekly rate. Using the representative weeks shown below and the rate book in effect at the time of the injury; I find that Mr. Nank's weekly workers' compensation rate is $505.72.

| Week # | Week Ending Date | Hourly Pay Rate | Total # Hours Worked | Bonus | Gross Wage | |
|---|---|---|---|---|---|---|
| 1 | 1/11/2015 | $17.90 | 32 | | $572.80 | |
| 2 | 12/20/2014 | $17.90 | 44 | | $787.60 | |
| 3 | 12/13/2014 | $17.90 | 45 | | $805.50 | |
| 4 | 11/29/2014 | $17.90 | 43 | | $769.70 | |
| 5 | 11/22/2014 | $17.90 | 45 | $14.43 | $819.93 | *750.10 bonus/52 weeks |
| 6 | 11/15/2014 | $17.90 | 45 | $14.43 | $819.93 | *750.10 bonus/52 weeks |
| 7 | 11/8/2014 | $17.90 | 45 | $14.43 | $819.93 | *750.10 bonus/52 weeks |
| 8 | 11/1/2014 | $17.90 | 36 | $14.43 | $658.83 | *750.10 bonus/52 weeks |
| 9 | 10/25/2014 | $17.90 | 43.5 | $14.43 | $793.08 | *750.10 bonus/52 weeks |
| 10 | 10/18/2014 | $17.90 | 44 | $14.43 | $802.03 | *750.10 bonus/52 weeks |
| 11 | 10/11/2014 | $17.90 | 45 | $14.43 | $819.93 | *750.10 bonus/52 weeks |
| 12 | 10/04/2014 | $17.90 | 45 | $14.43 | $819.93 | *750.10 bonus/52 weeks |
| 13 | 9/27/2014 | $17.90 | 44 | $14.43 | $802.03 | *750.10 bonus/52 weeks |
| | | | | Total | $10.091.22 | |

Exemption M-2

Rate $505.72

Defendants paid Mr. Nank for many weeks at the rate of $549.81. (Ex. E, pp. 1 – 4) Defendants overpaid Mr. Nank each week his weekly benefit payment exceeded $505.72. Defendants are entitled to a credit for benefits as set forth in the Rationale and Conclusions of Law section of the decision.

## RATIONALE AND CONCLUSIONS OF LAW

### Notice

The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Universal was aware of an injury to Mr. Nank's right and left shoulder no later than January 20, 2015; when he went to Dr. Hunt. Mr. Nank timely provided notice to Universal.

### Right shoulder

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when

performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

I previously found Mr. Nank has met his burden of proof that he has a right shoulder injury that arose out of and in the course of his employment. The convincing medical evidence of Dr. Hunt and Dr. Sassman is that he suffered a right shoulder injury at Universal. As Mr. Nank injured his right and left shoulder at the same time there are no additional temporary benefits for the right shoulder and he reached MMI at the same time as his left shoulder injury.

**Medical Care**

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).

As I have found the right shoulder to be a work related injury, defendants shall provide Mr. Nank medical care for this injury.

**Extent of Disability**

The parties have stipulated to a left shoulder injury and I have found a right shoulder injury. Shoulder injuries, at the time of these injuries, are treated as industrial disabilities.

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 R. Co., 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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

The FCE stated Mr. Nank had material handling ability of medium work. A look at the restrictions of Dr. Sassman as well as the limitations found in the FCE show Mr. Nank has significant limitations. The FCE found the following deficits:

1. Lifting capacities inconsistent with the demands of the job.
2. Gait deficit.
3. Diminished functional use of the upper extremities in work above chest level.
4. Diminished functional use of the upper extremities in work above shoulder level.
5. Diminished functional use of the upper extremities in work above the head.
6. Inability to tolerate sustained sitting.

(JEx. 3, p. 94) The vocational assessment by Ms. Sellner does not adequately identify how claimant can overcome his deficits found in the FCE and limitations of Dr. Sassman. Mr. Nank has not driven semi-trailers. He has limitations in sitting and a foot drop that make driving positions unsuitable. Walking and standing for security guard, retail, and assembly work would not meet his restrictions.

Mr. Nank has inability to tolerate sitting, has a gait deficit and diminished abilities to work above chest level. Mr. Nank's left arm is not able to perform the full range of light work. Claimant is limited in frequently using his left arm. He has a foot drop which limits climbing and walking. Mr. Nank has only a GED and a machinist certificate he earned in 1978. Mr. Nank's age is not a positive factor. He has had two left shoulder surgeries and will need a left shoulder replacement in the future. His primary occupations have been as either a laborer or painter. As a painter he was always performing physical work, even when he worked for himself. Mr. Nank's bilateral injuries are a severe limitation for his ability to work. Mr. Nank was found eligible for Social Security Disability which requires a finding that a claimant is unable to perform substantial gainful activity in the national economy.[1] Mr. Nank is not an invalid and can function around his house, but he is not able to perform work based upon his training, education, intelligence, and physical capacities.

Considering all of the factors for industrial disability, I find Mr. Nank is permanently and totally disabled.

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 the employee was injured as the employer regularly required for the work or employment. The various

[1] The determination of the Social Security Administration is not binding on this agency. It is relevant evidence to consider with all of the evidence.

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 is excluded, however. Section 85.36(6)

I found that clamant regularly worked more than 32 hours per week. While he worked many 45 hour weeks, the evidence submitted showed some variations. Looking at all of the wage records fairly shows weeks under 32 hours were not typical or representative of his weekly earnings. Mr. Nank's weekly workers' compensation rate is $505.72

**Credit**

Iowa Code section 85.34(4) provides:

> Credits for excess payments. If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

Iowa Code section 85.34(5) provides:

> Recovery of employee overpayment. If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee. An overpayment can be established only when the overpayment is recognized in a settlement agreement approved under section 86.13, pursuant to final agency action in a contested case which was commenced within three years from the date that weekly benefits were last paid for the claim for which the benefits were overpaid, or pursuant to final agency action in a contested case for a prior injury to the same employee. The credit shall remain available for eight years after the date the overpayment was established. If an overpayment is established pursuant to this subsection, the employee and employer may enter into a written settlement agreement providing for the repayment by the employee of the overpayment. The agreement is subject to the approval of the

> workers' compensation commissioner. The employer shall not take any adverse action against the employee for failing to agree to such a written settlement agreement.

This agency has held that under Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) the Court interpreted 85.34(5) to include all overpayments and that the credit can only be credited against a future claim against the same employer. See Boddicker v. UnityPoint Health Systems-St Luke's, File No. 5052922 (Arb. November 15, 2016). In Love v. Agri Zone, File No. 5048328 (Arb. January 26, 2016) this agency held that defendants are entitled to a credit of overpayment of temporary benefits against an award of permanent benefits relying upon McBride v. Casey's Marketing Co., File No. 5037617 (Remand February 9, 2015).

The Iowa Supreme Court noted in Deutmeyer "the deputy granted the employer a credit for the healing period overpayments, he denied Swiss Colony a credit for the excess permanent disability payments for this injury. The deputy determined that a credit can only be taken against any future entitlement to permanency benefits for a subsequent injury should claimant return to employment at Swiss Colony." Id. at 132.

Based upon that fact and the lack of any discussion of section 85.34(4) in the Deutmeyer decision, I believe the court did not preclude defendants from receiving the statutory credit under section 85.34(4).

I find that defendants are entitled to a credit for overpayment of any healing period benefits against the award of permanent benefits in this case. The defendants overpaid permanency benefits; therefore, defendants are entitled to a credit under 85.34(5) — if claimant has a subsequent injury with the same employer.

**Costs**

Iowa Code section 86.40 states:

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

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

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be . . . (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports . . . .

Dr. Sassman's report (not exam) is an allowable cost and in my discretion I award these costs of $2,185.00 to Mr. Nank.

## ORDER

Defendants shall pay claimant permanent total disability benefits from April 18, 2017 at the weekly rate of five hundred five and 72/100 dollars ($505.72) as long as claimant remains permanently and totally disabled.

Defendants shall provide medical care for claimant's right shoulder.

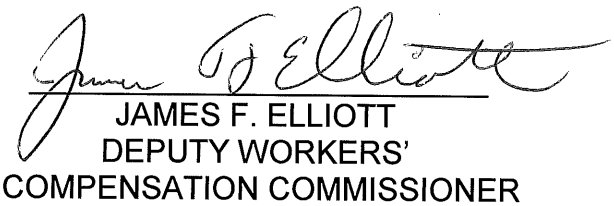
Defendants are entitled to a credit as set forth in this decision.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury plus two (2) percent. See: Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay two thousand one hundred eighty-five and 00/100 dollars ($2,185.00) for the cost of Dr. Sassman's report.

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

Signed and filed this 20th day of June, 2018.



JAMES F. ELLIOTT
DEPUTY WORKERS'
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**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.