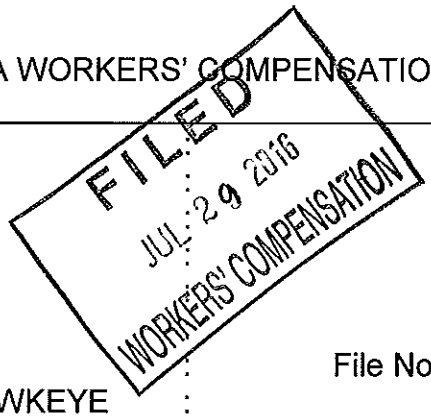
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



GARY W. NIBBELINK, Claimant, vs. ATLAS VAN LINES INC./HAWKEYE MOVERS OF DAVENPORT, INC., Employer, and ARCH INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 5052534, 5055369 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803

STATEMENT OF THE CASE

Gary Nibbelink, the claimant, seeks workers' compensation benefits from defendants, Atlas Van Lines Inc./Hawkeye Movers of Davenport, Inc., the alleged employer, and its insurer, Arch Insurance Co., as a result of alleged injuries on February 4, 2012 and March 7, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on May 18, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on June 10, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. Joint exhibits were marked 1A-14N. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex 1-2:4." Citations to a transcript of testimony such as "Tr-4:5," either in a deposition or at hearing, shall be to the actual page number(s) of the original transcript, not to page number of a copy of the transcript containing multiple pages.

In his post-hearing brief, claimant now asserts that he is not claiming additional weekly or medical benefits for the March 7, 2013 injury to the left arm stating that he has been paid his entitlement to benefits for that injury. According to the hearing report

for this injury, claimant was paid 7.5 weeks of permanent partial disability benefits for a 3 percent permanent partial loss of use to the left arm.

The parties agreed to the following matters in a written hearing report submitted at hearing concerning the February 4, 2012 injury:

1. On February 4, 2012, claimant suffered an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional temporary total or healing period benefits.

3. The work injury was a cause of some degree of permanent industrial disability to the body as a whole, the extent of which remains in dispute.

4. If I award permanent partial disability benefits, they shall begin on January 10, 2014.

5. At the time of the work injury, claimant's gross rate of weekly compensation was $819.00. Also, at that time, he was married and entitled to two exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $540.30 according to the workers' compensation commissioner's published rate booklet for this injury.

6. The fees charged by the provider for the requested medical expenses for chiropractic care are fair and reasonable. Defendants assert they were neither necessary, nor authorized.

7. Prior to hearing, defendants voluntarily paid 72.5 weeks of permanent disability benefits at the stipulated weekly rate for this work injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to additional permanent disability benefits; and

II. The extent of claimant's entitlement to additional medical benefits.

After hearing, claimant requested that I take administrative notice of a publication by FamiliesUSA related to new federal poverty guidelines for 2016, attached to claimant's post hearing brief. Also attached were federal poverty guidelines for 2015. Defendants object to this new evidence on grounds that discovery was closed prior to hearing according to agency rules and the hearing assignment order, and consideration of this information would be unfairly prejudicial.

The issue of the relevance of this new material constitutes unfair surprise at this late stage of the proceedings, and I will not consider the evidence. Claimant has not shown that this material was not previously available to claimant. In any event, the material sought to be considered lacks probative value in the determination of the issues in this case. While an odd-lot doctrine showing does involve a showing of the inability to obtain "gainful" employment, the use of federal poverty guidelines at a particular income level has little value in this assessment because there is a dispute as to whether claimant's current income represents his current earning capacity. Second, claimant's proposed use of the income level involved is for two persons. This assumes that claimant's spouse is also totally disabled and, if so, using such an income level for two persons to find claimant odd lot would improperly place liability for her disability upon the defendants.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Gary, and to the defendant employer as Hawkeye.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Gary credible.

Gary is 72 years old and currently lives in Sun Lakes, Arizona. (Transcript-7, 45) He graduated from high school in 1962. He attended American Institute of Business for 14-15 months studying salesmanship, accounting and business management, but received no degree. He then went into the Air National Guard for six years (March 1963-March 1969) serving primarily as a photo intelligence analyst with the rank of staff sergeant.

Gary began working for Hawkeye Movers, which is primarily owned and operated by his brother-in-law in the early 1970's. He explained that he was not formally employed, but was on the board of directors as vice president, and when his brother needed somebody to fill in as a truck driver or sales person he would do so. Thereafter, he started working as an over-the-road trucker. He worked for nine years for Vanderhart Transfer & Storage until 1974. Thereafter, Gary worked as a heavy truck salesman until 1979, then sold bearings and transmissions for Bearings Service Company in Cedar Rapids until 1982. Gary then worked as a sales manager for Safely Moving & Storage for two years.

Gary decided to pursue a religious career and attended Central Bible College in Springfield, Missouri from 1983 through 1986 and received a degree in bible studies. He then attended Assemblies of God Theological Seminary from 1986 through 1988. He obtained a Master's degree in biblical literature from the Assemblies of God Theological Seminary. (Tr-7, 52) After completing his religious education, Gary became a pastor in Waterloo, Iowa from 1988 through 1992. In 1993, Gary was employed full-time as a professional van operator (PVO) at Hawkeye for 6-9 months.

There is no dispute that this job required not only driving a semi tractor-trailer (van) and a valid commercial drivers' license, but loading and unloading heavy cargo along with handling the paperwork involved. Gary then left driving and became crusade director for two years. (Tr-46:47) Subsequently, Gary became lead pastor of the Holland Christian Reform Church in Holland, Iowa. (Tr-18:19)

In March 2009, Gary returned to Hawkeye as a full-time PVO. However, Gary remained as lead pastor. He was a full-time PVO Monday through Friday and performed his pastoral duties on weekends. At some point in time in 2009, Gary's position as pastor ended when the church closed due to lack of attendance. (Tr-20:21)

Following his right shoulder injury in February 2012, Gary continued driving for Hawkeye until September 20, 2013. Although he had medical restrictions, Gary was able to have others perform the necessary loading and unloading activities. However, Hawkeye eventually required a fully-able PVO, and Gary moved to full-time sales work at Hawkeye, on a commission basis with no set salary, after September 20, 2013. This involved soliciting moving jobs and estimating the cost and truck space required for a move. (Tr-22)

Gary continued to work in sales for Hawkeye until September 2015. Gary testified that his earnings from sales at Hawkeye were 20-30 percent less than his earnings from driving. (Tr-23) Gary left Hawkeye in September 2015 to accept a position as lead pastor at the Oasis of Grace Assembly of God church in Sun Lakes, Arizona. (Tr-24) The particulars of this lead pastor position and claimant's income from this position will be further discussed later on in this decision.

The disputed medical condition upon which Gary is basing his claim for industrial disability involves the right shoulder. Gary asserts that he had no right shoulder problems or right shoulder treatment prior to the stipulated injury on February 4, 2012. (Tr-26, 29) There is no evidence in the record to refute that claim. I find that Gary had no right shoulder symptoms or disability prior to the February 4, 2012 work injury. Gary admits to prior chiropractic care for some back problems, but states that the only chiropractic care he received for his right shoulder was after the February 4, 2012 work injury. (Tr-27:28)

Gary testified that on February 4, 2012, he was unloading a shipment. While standing on a crate inside the trailer (van), he stepped onto a ladder and the ladder slid out from under him, causing him to fall 8-10 feet to the floor of the van on his right side. (Tr-25) He cut his right hand and started noticing through the day that his right shoulder hurt. (Tr-26)

As he was injured while away from home, Gary's first treatment was not until he saw his family doctor, Frank Lamp M.D., on March 6, 2012. Treatment was delayed until he returned home because he had trouble finding a doctor who had a parking space for his "big rig." (Tr-32) Dr. Lamp's assessment was right shoulder strain, and he prescribed an anti-inflammatory medication (NSAID). When Gary's right shoulder

symptoms persisted he took Gary off work on March 19, 2012. An MRI for the right shoulder was ordered on April 10, 2012, which according to Dr. Lamp was abnormal possibly due to his fall at work. The doctor then recommended referral to an orthopedic surgeon. (Ex. 1A-8:15) In June 2012, Dr. Lamp evaluated complaints in Gary's right wrist which he diagnosed as DJD or degenerative joint disease and provided treatment consisting of another NSAID, an injection, and a brace. (Ex. 1A-17)

The MRI on April 14, 2012 indicated severe osteoarthritis at the glenohumeral joint and AC joint with findings likely to represent small partial-thickness tears. Full-thickness disruption could not be identified, but small full-thickness pinhole type tears could possibly be present, but no fluid is seen in the subacromial bursa or subdeltoid bursa to suggest this. (Ex. 2B-2) Dr. Lamp opined that these findings are consistent with an acute injury form the fall. (Ex. 1A-26)

At the request of defendants, Gary's right shoulder condition was evaluated by David Kirkle, D.O., an occupational medicine physician, on April 20, 2012. Dr. Kirkle saw Gary for the first time on April 20, 2012. Dr. Kirkle's assessment was right shoulder contusion/strain along with two non-work related conditions: right shoulder AC joint osteoarthritis and right elbow epicondylitis. The doctor recommended treatment of the strain. (Ex. 3C-1:3)

Upon referral by Dr. Lamp, Gary was evaluated by Robert Bartelt, M.D., an orthopedist, on April 26, 2012. Dr. Bartelt's assessment was right shoulder pain/strain status post fall with arthritis and right elbow epicondylitis. Dr. Bartelt then injected the right shoulder and elbow and recommended continued conservative care consisting of additional injections, medications and physical therapy. (Ex. 5E-1:3)

At the request of defendants, Gary's right shoulder was evaluated on May 29, 2012 by Thomas Gorsche M.D., an associate of Dr. Bartelt. The doctor was requested to provide his opinions on diagnoses and their causal relationship to the fall injury on February 4, 2012 and his treatment recommendations. In these office notes, the doctor stated that he found the epicondylitis was resolved. He diagnosed right shoulder arthritis and impingement syndrome as well as swelling in the right wrist. (Ex. 6F-5) In a report to defendants' claims representative, the doctor stated he did not believe the right wrist symptoms were related to the injury. Due to some success from injection therapy, albeit temporary, the doctor recommended continued injections as treatment for the work injury. The doctor states the MRI findings show a chronic arthritis condition, but stated that it is medically possible for Gary to have suffered a temporary exacerbation of his arthritis. The doctor stated that his findings are consistent with a subacromial bursitis, but some symptoms may be related to the underlying arthritis. The doctor opined that Gary should reach MMI (maximum medical improvement) from his injury in 4-6 weeks, and he did not anticipate Gary would suffer permanent impairment from the injury. The doctor added that he felt Gary could perform his driving job given the description of the job by the nurse case manager. (Ex. 6F-15:17)

Dr. Kirkle treated Gary over the next few weeks with medications, physical therapy and work restrictions. (Ex. 3C-1:8) However, on June 4, 2012, Dr. Kirkle opined that Gary had reached MMI for the shoulder strain and that his continued symptoms were not work related and only related to the underlying arthritis, and the doctor released Gary back to full duty. (Ex. 3C-10:11) Gary testified that Dr. Bartelt and Dr. Kirkle's treatment did not alleviate his right shoulder symptoms. (Tr-35)

Dr. Gorsche began following Gary for his right shoulder problems in July 2012. Gary was continuing to drive for Hawkeye. Dr. Gorsche over the next few months administered three injections to the right shoulder and none were effective, and he released Gary to be seen as needed on November 29, 2012. The doctor reports that Gary at his last visit could not grasp that his current symptoms were not related to the work injury because he was asymptomatic before his fall. (Ex. 6F-13) There are no further opinion reports from Dr. Gorsche on causation other than his initial views in May 2012.

In March 2013, Gary suffered the elbow injury which generated the claim that Gary's attorney now states is resolved. He was primarily treated by Dr. Bartelt for this injury.

Defendants sought evaluation of Gary's right shoulder condition by David Tearse, M.D., an orthopedist and clinical professor at the University of Iowa Hospitals and Clinics in May 2013. Dr. Tearse opines that Gary suffered an aggravation of his underlying arthritis condition from his fall at work in 2012 requiring additional treatment in the form of injections and physical therapy. (Ex. 8H-11) He recommended work restrictions. (Ex. 8H-12)

Dr. Tearse treated Gary's right shoulder from October 2013 until January 10, 2014, when the doctor opined that Gary had reached MMI. Based on a valid functional capacities evaluation (FCE) which indicated Gary gave maximum effort, Dr. Tearse opines that Gary now has a permanent restriction limiting his lifting at the light-medium physical demand level and that Gary has suffered a 13 percent permanent partial impairment to the body as a whole under the AMA Guides, fifth edition, as a result of his work injury. (Ex. 8H-4) According to the FCE, Gary is unable to lift greater than 10 pounds with two hands to shoulder and overhead and is unable to lift greater than 40 pounds above waist level. The evaluator found Gary incapable of returning to his driving job at Hawkeye due to the loading and unloading required of drivers. (Ex. 12L)

Gary has most recently been treated by a chiropractor in Arizona at Dlugas Chiropractic between December 9, 2015 and March 17, 2016. According to the reports of this treatment, it was to address Gary's ongoing shoulder symptoms.

At the request of his attorney, Gary's disability from the right shoulder injury was evaluated by Robin Sassman M.D., an occupational medicine physician in February 2016. Dr. Sassman agrees with the views of Dr. Tearse. (Ex. 14N)

On February 2, 2015, Kent Jayne, M.A., a vocational specialist, prepared a vocational economic assessment in which he stated Gary was in need of further pain management in conjunction with evaluation by psychology or psychiatry, and may benefit from multi-disciplinary approach including psychiatric/psychological component with counseling appropriate to his level of tolerance as medically indicated. He said given Gary's current limitations, it is unlikely that any feasible vocational rehabilitation plan would have a reasonable likelihood of success in returning him to competitive employability absent a significant increase in his physical and vocational capacities. (Ex. 3, p. 20)

On March 17, 2016, Mr. Jayne prepared a report update to add the March 7, 2013 injury and add that Gary was not capable of performing a sales only job with Hawkeye Movers, and was hired as a pastor at Oasis of Grace Assembly of God church in Arizona. He said Gary's compensation included pay annualized to $9,727.32 for salary and $19,200.00 for housing allowance for a total of $28,927.32. From this, Mr. Jayne stated Gary had a percentage loss from his pre-injury earnings, adjusted for inflation, of 22 percent. He referenced an additional employee earnings report showing annualized salary of $12,162.00 and annualized housing allowance of $21,680.00. (Ex. 3-21:23) On April 15, 2016, Mr. Jayne issued an addendum indicating Gary's current annual net loss is $15,043.65, equal to 40.5 percent. (Ex-3-26:27)

Gary testified currently his right shoulder continues to be painful. He testified he cannot pick up his grandsons. He takes OTC Advil to sleep at night. He sees Caitlin DLugas, D.C. in Sun Lakes, Arizona. (Tr. 38) She is working on getting calcium deposits out of his neck. He sees her every seven to ten days. He testified this treatment does help. It eliminates his symptoms for seven to ten days at a time. He tries to go weekly. (Tr. 39) If he waits longer, he starts to get headaches again. (Tr. 40) He said he cannot lift his right arm much above shoulder height and his strength is reduced. (Tr. 42) He said he could still do power transmission sales at this time. (Tr. 47)

Gary testified that he continues to possess a commercial driver's license, but claims he cannot drive because he is unable to pass a physical with his current lifting limitations because he cannot lift up to 50 pounds. His brother-in-law who continues to own and operate Hawkeye agrees. Gary admitted he has not tried to get his DOT physical renewed or even ask how much he must be able to lift to pass the DOT physical. He agreed there are many jobs in the truck driving business that are no-touch or no-load. He has not applied for any of those. (Tr-24, 50:51)

I find the work injury of February 4, 2012 is a cause of a 13 percent permanent impairment to the body as a whole. I, also, find as a result of this work injury, he is now limited to light-medium work. These findings are based on the more convincing views of Dr. Tearse and Dr. Sassman. The views of doctors in this case that Gary's continuing problems are due to the underlying arthritis in the right shoulder fails to explain how this is the case when Gary had no right shoulder problems before the injury and has

continued problems since. Additionally, the views of Dr. Gorsche are unclear. He provided an initial report on what he anticipated would happen, but no final report.

I am unable to find that claimant is totally disabled. His only physician imposed work restrictions are against light-medium work, not all work. Gary is a well-educated person and has considerable experience in sales work. He was personable and articulate at hearing. Admittedly, his current income as a pastor is low, but I cannot agree with Gary's attorney that I should disregard his housing allowance as salary or wages. This is not for a travel expense, but for a personal living expense for him and his wife. If housing was provided in kind rather than by a monetary allowance, it would still be considered as income from employment for assessing industrial disability. I also do not find that his current income is representative of his earning capacity. When he left Hawkeye, he did so voluntarily. While his choice of a religious occupation may be laudable, it is his choice, and the workers' compensation system is not designed to subsidize a choice of occupation.

On the other hand, he has suffered a significant disability to the use of his body and can no longer work as a PVO as a result of the permanent restrictions on his activity caused by the February 4, 2012 work injury. This was the highest paying job he has ever held. However, I cannot accept the assertion that Gary is prohibited from all driving jobs. In this agency's experience, many driving jobs are available in the labor market that would fit into Gary's physical restrictions, such as parts delivery, chauffer, no-touch over-the-road jobs, etc. There has been no convincing showing that DOT regulations require lifting up to 50 pounds to obtain a DCL as long as the evaluating physician and the driver believes that the driver can safely operate the vehicle. Essentially, driver jobs are employer specific, and the employer sets the physical requirements based on the type of work that is to be performed.

From examination of all of the factors of industrial disability, it is found that the work injury of February 4, 2012 was a cause of a 50 percent loss of earning capacity.

I find the expense of chiropractic care at the Dlugas Chiropractic, PLLC in the amount of $315.00 to constitute reasonable and necessary treatment of Gary's ongoing right shoulder symptoms.

CONCLUSIONS OF LAW

I. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125

N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

In this case, the parties agreed that if I found the work injury to be a cause of permanent impairment, the disability is to be compensation industrially.

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earnings capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from what ever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons, start with a 100% earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependant upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless

examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

In the case sub judice, I found that claimant suffered a 50 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 250 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 50 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, I found claimant's chiropractic care in Arizona to address his chronic right shoulder condition to be reasonable and necessary. Defendants deny they authorized such care, but at the time claimant received this treatment, defendants had denied responsibility for the condition treated and therefore had no right to choose or direct the care. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119 (Iowa 2003); West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999); Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, Vol. I, No. 3, Industrial Commissioner Decisions, 611 (March 27, 1985); Barnhart v. MAQ Incorporated, I Iowa Industrial Comm'r Report 16 (App. March 9, 1981).

Costs will be assessed to defendants.

ORDER

File No. 5055369 (DOI March 7, 2013):

Claimant shall take nothing further.

File No. 5052534 (DOI February 4, 2012):

1. Defendants shall pay to claimant two-hundred fifty (250) weeks of permanent partial disability benefits at the stipulated rate of five hundred forty and 30/100 dollars ($540.30) per week from the stipulated date of January 10, 2014. Credit shall be given for the previous payment of seventy-two point five (72.5) weeks.

2. Defendants shall pay the medical expenses at Dlugas Chiropractic PLLC in the amount of three-hundred fifteen and 00/100 dollars ($315.00).

3. Defendants shall pay accrued weekly benefits in a lump sum.

4. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

5. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

6. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 29th day of July, 2016.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.