BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MIKE REYNOLDS, Claimant, vs. HY-VEE, INC., Employer, and EMC PROPERTY & CASUALTY, Insurance Carrier, Defendants.	File No. 5046203 ARBITRATION DECISION Head Note No.: 1803

FILED
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WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant, Mike Reynolds, filed a petition in arbitration seeking workers' compensation benefits from Hy-Vee, Inc., employer, and EMC Property & Casualty, insurance carrier, both as defendants, as a result of a stipulated injury sustained on April 17, 2013. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on September 17, 2015, in Des Moines, Iowa.

At the time of evidentiary hearing, claimant offered exhibits 1 through 11 and defendants offered exhibits A through U. Due to duplication within the exhibit materials, the parties offered to provide a supplemental copy of the exhibits which eliminated the duplication. On October 9, 2015, the undersigned received "combined" exhibits from the parties, enumerating claimant's exhibits 1 through 11 and defendants' exhibits A through S. The evidentiary record therefore consists of claimant's exhibits 1 through 11, defendants' exhibits A through S, and the testimony of the claimant and Dave Bolling. The parties submitted post-hearing briefs, the matter being fully submitted on October 27, 2015.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's industrial disability;
2. The extent of defendants' credit for weekly indemnity benefits paid; and
3. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

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

Claimant's testimony was forthright and consistent as compared to the evidentiary record and his deposition testimony. Claimant was personable and his demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 49 years of age at the time of evidentiary hearing. He is married and resides in Waterloo, Iowa. Claimant's formal education is limited to the 7th grade, at which time claimant quit school due to familial obligations. Claimant has not obtained a high school equivalency degree or GED. He is left-hand dominant. (Claimant's testimony; Exhibit 10, Deposition Transcript pages 69-70) Claimant's work history consists of tree trimming, construction, concrete labor, painting, framing, cooking, production line, and custodial work. He has obtained supervisory experience in some of these roles. (Claimant's testimony; Ex. 10, Depo. Tr. pp. 19-20)

Claimant sustained relevant injuries prior to beginning his employment with defendant-employer. Claimant testified he strained his right shoulder while trimming a tree. (Claimant's testimony; Ex. 10, Depo. Tr. pp. 8-9) He also suffered with a non-work related low back injury in 2010 which required surgical intervention. (Claimant's testimony) Claimant also admitted to a history of overusing prescribed narcotic medications, a fact reflected in his medical records. (Ex. 5, pp. 1-2; Ex. 10, Depo. Tr. pp. 14-15, 18; Ex. D, pp. 1-2)

While in the employ of former employer, Tyson, claimant suffered an alleged injury to his neck on June 29, 2006 and an alleged injury to his right upper extremity on January 10, 2007. Claimant described his injuries as a cervical fusion and tennis elbow. (Claimant's testimony; Ex. 10, Depo. Tr. p. 11) In connection with the right upper extremity injury, Tyson authored a letter to claimant dated June 21, 2007. By the letter, Tyson indicated Dr. Broghammer had imposed permanent restrictions of no use of vibratory tools with the right hand and no forceful repetitive gripping/squeezing of the right hand. Claimant was notified he would be provided 30 days of continued restricted duty, during which he could look for a new permanent position within his restrictions. (Ex. N, pp. 4, 6)

In connection with both alleged injuries, claimant underwent an independent medical evaluation with Farid Manshadi, M.D. Dr. Manshadi noted claimant had sustained a neck injury on June 29, 2009, for which Dr. Abernathey performed a C6-C7 anterior cervical discectomy, osteophytectomy, and instrumented allograft fusion. He further noted Dr. Abernathey ultimately recommended no restrictions and opined

claimant sustained a 9 percent whole person impairment. (Ex. L, p. 2, 3) Dr. Manshadi noted claimant had undergone an FCE in connection with the neck injury, which found the following limitations: a maximum lift to shoulder level of 50 pounds occasionally and 25 pounds frequently; overhead lifting of 35 pounds occasionally and 15 pounds frequently; and limitation of prolonged overhead work to limit aggravation of symptoms. (Ex. L, p. 3)

Dr. Manshadi opined claimant suffered with neck pain post-surgery and likely right ulnar nerve neuropathy. With respect to claimant's neck condition, Dr. Manshadi opined claimant sustained a permanent impairment of 15 percent whole person and adopted the FCE restrictions. With respect to claimant's right upper extremity condition, Dr. Manshadi opined claimant sustained a combined 15 percent upper extremity impairment and recommended restrictions of avoidance of any activity which required constant flexion and extension of the right elbow and/or continuous gripping with the right hand, and a maximum continuous lift of 5 to 10 pounds. (Ex. L, pp. 4-6)

Claimant and Tyson entered into a compromise settlement agreement approved by this agency on July 14, 2009. The compromise settlement applied to both the neck and right upper extremity conditions, resolving both claims for a total of $30,000.00. (Ex. K, pp. 1-3) Claimant also resolved a claim against the Second Injury Fund of Iowa in connection with the right upper extremity condition via compromise settlement approved by this agency in the amount of $5,000.00. (Ex. K, pp. 5-7)

On July 10, 2007, claimant was terminated by Tyson after he called in sick for three days, but was observed driving "Shag service" for a trucking company on Tyson property. When confronted, claimant admitted he called in sick and admitted to working as a truck driver on those days. Claimant indicated it was not an appropriate thing to do, but indicated he needed a job and income because he was about to be on bid walk from the plant. Tyson terminated claimant for misrepresentation of the reason he had called in. Claimant also lost his job at the trucking company as a result of the incident. (Claimant's testimony; Ex. N, p. 1)

Claimant applied for work at defendant-employer and was hired on a part-time basis on November 13, 2011. He began as an employee in the Italian Department, making and stocking food, as well as cleaning. Claimant earned $8.50 per hour. On February 11, 2013, claimant transitioned into the position of full time night stock manager. Claimant supervised five to seven employees and was tasked with unloading trucks, rotating products, cleaning the store, and stocking shelves, produce and dairy cases. Claimant earned $12.36 per hour. (Claimant's testimony; Ex. 10, Depo. Tr. pp. 5-8; Ex. O, pp. 2-4) Claimant testified he did not believe he possessed permanent work restrictions to his neck or right arm when he began work at defendant-employer. (Claimant's testimony; Ex. 10, Depo. Tr. p. 12)

While working as a night stock manager on April 17, 2013, claimant sustained a stipulated injury to his right shoulder. Claimant explained he cut plastic surrounding a stack of boxes. When he did so, several boxes fell, with one striking claimant on the right shoulder. (Claimant's testimony; Ex. 10, Depo. Tr. pp. 20-23)

Claimant immediately sought care at the Covenant Medical Center (Covenant) Emergency Department. He expressed complaints of right shoulder pain after a pallet fell on him. Claimant reported feeling as if something had "popped" and noted tingling down his arm. (Ex. 7, p. 1) X-rays revealed no fracture, but degenerative changes of the right acromioclavicular joint. Claimant was prescribed Lortab/Vicodin and restricted from lifting for a minimum of three to four days. (Ex. 7, pp. 4-6)

On May 2, 2013, claimant presented to Allen Hospital for evaluation. He was diagnosed with a right rotator cuff tear and an MRI was ordered. Claimant was granted the ability to control his own activities at work and received prescriptions for Lortab and Tramadol. (Ex. 4, pp. 4-5) Claimant presented to the Covenant Emergency Department on May 5, 2013 with complaints of right shoulder pain. He received a morphine injection and prescriptions for robaxin and meloxicam. (Ex. 7, p. 10)

On May 13, 2013, claimant underwent an MRI of his right shoulder. The radiologist read the results as demonstrating a partial tear of the subscapularis, supraspinatus, and infraspinatus tendons, as well as severe chondromalacia of the glenohumeral joint. (Ex. 6, p. 1) The following day, he returned to Allen Hospital and received diagnoses of a partial rotator cuff tear and chondromalacia of the shoulder. Work restrictions were imposed and claimant was issued a referral for orthopedic evaluation. (Ex. 4, pp. 8-9)

On May 28, 2013, claimant presented to Covenant Clinic for orthopedic evaluation by Richard Naylor, D.O. On examination, Dr. Naylor noted limited range of motion and limited strength of the right shoulder. He opined x-rays revealed moderate degenerative joint disease, type 2 acromion, and a high riding humeral head. Dr. Naylor opined claimant's MRI findings were consistent with a partial thickness rotator cuff tear and moderate to severe degenerative joint disease of the glenohumeral joint. Dr. Naylor initiated a course of conservative treatment. He performed a cortisone injection and prescribed medications and a course of physical therapy. Dr. Naylor imposed work restrictions of a maximum occasional lift of 5 pounds and no lifting at or above shoulder height. (Ex. 3, pp. 1, 3, 5-6)

Claimant ultimately underwent arthroscopic intervention on his shoulder. On July 2, 2013, Dr. Naylor performed a right shoulder arthroscopy with subacromial decompression, debridement of a type 1 SLAP, debridement of a partial thickness tear in the supraspinatus, chondroplasty of the glenohumeral joint, and Kenalog cortisone injection to the glenohumeral joint. (Ex. 3, p. 11; Ex. 7, pp. 15-16) Dr. Naylor subsequently opined claimant's arthritis had been permanently exacerbated by the stipulated work injury of April 17, 2013. (Ex. 3, pp. 23-24) Post-surgery, Dr. Naylor

prescribed medications and physical therapy. He imposed work restrictions of no use of the right arm. (Ex. 3, p. 9) Claimant continued to follow up with Dr. Naylor, whose course of care included additional physical therapy and gradually lessening work restrictions. (Ex. 3, pp. 11, 14, 16)

On July 19, 2013, claimant procured pain medication and a pain management referral from his personal physician due to complaints of back pain. (Ex. 5, pp. 3-4)

On September 4, 2013, claimant presented to the Covenant Emergency Department with complaints of right shoulder pain. Claimant indicated he had telephoned Dr. Naylor's office with no reply. Emergency Department personnel made a return appointment for claimant with Dr. Naylor. Claimant did not receive any prescription narcotics, but underwent a morphine injection. (Ex. 7, pp. 20-21)

At follow up on September 6, 2013, Dr. Naylor recommended an arthrogram of claimant's shoulder. He also ordered continued medications, physical therapy, and work restrictions. (Ex. 3, pp. 20-22) Claimant underwent the right shoulder arthrogram on September 12, 2013, which revealed moderate to severe degenerative arthropathy of the glenohumeral joint. (Ex. 7, p. 23)

On September 15, 2013, claimant presented to the Covenant Emergency Department after he ran out of pain medication. He received a prescription for Vicodin. (Ex. 7, pp. 25, 27) On September 30, 2013, claimant received a prescription for pain medications from his personal physician for right shoulder pain. (Ex. 5, pp. 5-6)

Claimant returned to Dr. Naylor on October 22, 2013, in follow up of the right shoulder arthrogram. After reviewing the results, Dr. Naylor recommended an MRI. He imposed continued work restrictions, referred claimant for a pain management consultation, and prescribed Celebrex and Tramadol. (Ex. 7, p. 35) On October 28, 2013, claimant underwent the right shoulder MRI ordered by Dr. Naylor. The radiologist read the results as revealing extensive degenerative arthropathy, subcortical cyst formation involving the humeral head and glenoid, and tendinopathy of the rotator cuff. (Ex. 6, p. 11)

Following the stipulated work injury, claimant intermittently returned to work as night stock manager, working within his restrictions. When he did not work, defendants paid claimant temporary benefits. (Claimant's testimony; Ex. 10, Depo. Tr. pp. 41-43) In October 2013, claimant's assistant night stock manager, Tom, approached claimant regarding a potential change in job duties. Claimant testified Tom proposed the idea of claimant working solely on floors, while allowing a recently rehired night stock manager to become the full time night stock manager. Claimant testified he informed Tom he was willing to give up his managerial position so long as he did not lose his benefits or rate of pay; in fact, claimant testified he believed the proposed change was a good idea. Tom and the former night manager then discussed the issue with their supervisor, Dave Bolling. (Ex. 10, Depo. Tr. pp. 44, 46-49) Claimant testified he went through with the transfer, but when he received his first paycheck in November 2013, he had been paid

at a rate of $10.50 per hour, as opposed to $12.36. Claimant testified he discussed the issue with Mr. Bolling and his rate of pay was increased to $11.00 per hour. (Ex. 10, Depo. Tr. pp. 57-60)

On November 15, 2013, claimant presented to the emergency room at Allen Hospital and reported he reinjured his right shoulder at work the prior night when he lifted a heavy object. Claimant received a Toradol injection. (Ex. 6, pp. 4, 6) Claimant returned to the Allen Hospital emergency room on November 18, 2013. Claimant reported he had attempted to return to the Occupational Health department, but was told he needed preapproval to be treated. Claimant also represented Dr. Naylor was no longer providing him treatment. Claimant received a prescription for Vicodin. (Ex. 6, pp. 13, 15) On November 21, 2013, claimant returned to the Allen Hospital emergency room. It was noted claimant had already taken all 30 Vicodin prescribed at the prior visit. Claimant described pain at a level 10 on a 10-point scale. Staff refused to provide additional pain medication. (Ex. 6, pp. 16, 18)

At the referral of Dr. Naylor, on December 18, 2013, claimant presented to the University of Iowa Hospitals & Clinics (UIHC) for evaluation with James Nepola, M.D. Dr. Nepola assessed degenerative joint disease of the right glenohumeral joint, likely exacerbated by the work injury. Dr. Nepola recommended an ultrasound guided diagnostic glenohumeral joint injection to confirm the diagnosis. Dr. Nepola imposed work restrictions. (Ex. 2, pp. 1, 5)

On January 21, 2014, claimant returned to Dr. Nepola and reported no relief with the diagnostic injection. Claimant underwent subacromial and acromioclavicular injections in the clinic, which yielded significant pain relief and improved range of motion. Due to the results of these procedures, Dr. Nepola recommended a diagnostic arthroscopy with distal clavicle resection and subacromial decompression. Pending surgery, claimant remained under work restrictions. (Ex. 2, p. 9) Dr. Nepola noted an assessment of right subacromial impingement and acromioclavicular joint arthritis. (Ex. 2, p. 27)

On February 27, 2014, Dr. Nepola performed arthroscopy with distal clavicle resection, subacromial decompression, and biceps tenotomy. Following surgery, Dr. Nepola recommended claimant make use of a sling for comfort and perform range of motion as tolerated. (Ex. 2, pp. 31-42) Claimant continued to follow up with Dr. Nepola. The post-operative course of care included medication use, physical therapy, and work restrictions. (Ex. 2, pp. 39-41, 47, 49, 56, 59-60)

During the summer of 2014, claimant also received care for a knee condition, culminating in a total knee replacement. (Claimant's testimony)

At follow up with Dr. Nepola on July 29, 2014, Dr. Nepola recommended continued work restrictions and physical therapy. Due to continued symptomatology, he also recommended an ultrasound guided glenohumeral joint injection. (Ex. 2, p. 69) Claimant underwent the recommended injection and returned to Dr. Nepola on

August 26, 2014, at which time claimant reported no right shoulder pain. (Ex. 2, pp. 74-75) However, when claimant returned to Dr. Nepola on September 16, 2014, claimant reported his full pain had returned immediately after the lidocaine wore off from the injection. Dr. Nepola opined claimant received no lasting relief from the injection. Dr. Nepola recommended a CT scan. (Ex. 2, pp. 76, 79)

Claimant underwent the recommended CT scan on October 28, 2014. The radiologist opined the scan revealed moderate degenerative changes of the glenohumeral joint with subchondral sclerosis, large subchondral cysts, and osteophytes. (Ex. 2, p. 81) Claimant returned to Dr. Nepola the same date, at which time Dr. Nepola opined the CT scan revealed a cyst in the glenoid area and a hole in the humeral head, evidence of significant degeneration of the humeral head and glenoid. Claimant and Dr. Nepola discussed treatment options. Dr. Nepola informed claimant a total shoulder replacement was an option, but cautioned it would likely not last his lifetime and he would likely need a revision replacement in the future. Claimant elected to proceed with a total shoulder replacement. (Ex. 2, pp. 85-86)

In November 2014, claimant testified he was called in to defendant-employer by Mr. Bolling. Claimant indicated a corporate loss-prevention representative was also present. He was confronted for stealing a package of cupcakes, Gatorade from a fountain machine, and a couple packs of cigarettes. Claimant admitted he did so and apologized for his mistake; he promised to behave more ethically if allowed to keep his job. Mr. Bolling made the decision to terminate claimant's employment with defendant-employer, effective November 8, 2014. Claimant admitted at the time he took the items, he was aware that defendant-employer's policy for stealing made termination likely. (Claimant's testimony; Ex. 10, Depo. Tr. pp. 77-79; Ex. C, p. 2; Ex. O, p. 1)

On December 3, 2014, Dr. Nepola performed a right shoulder arthroplasty. Following surgery, claimant was removed from work and continued to follow up with Dr. Nepola. (Ex. 2, pp. 95-96, 99-100, 102-103) At follow up on January 13, 2015, Dr. Nepola ordered a course of physical therapy and imposed activity restrictions. (Ex. 2, p. 110) Thereafter, Dr. Nepola continued to recommend additional physical therapy and gradually reduced activity restrictions. (Ex, 2, pp. 122, 130, 138-140, 146-148) Claimant underwent physical therapy from January 22, 2015 to June 4, 2015. (Ex. 8; Ex. 9)

On June 5, 2015, claimant returned to Dr. Nepola for evaluation. Dr. Nepola opined claimant was "progressing well" with respect to motion and strength. He lessened claimant's work restrictions to a maximum 50-pound lift. (Ex. 2, p. 154) Dr. Nepola also noted:

> We discussed long-term activity modification with a total shoulder replacement to avoid uncontrolled decelerative forces such as splitting wood, digging post holes, using a jackhammer, or large Rototiller. Otherwise he can do what he is able to do when he is released from care.

(Ex. 2, p. 154)

Claimant returned to Dr. Nepola on June 23, 2015. Claimant reported continued pain of the right posterior shoulder, but great improvement over his condition prior to the replacement surgery. (Ex. 2, p. 159) With respect to claimant's activities, Dr. Nepola noted:

> We discussed long-term care to shoulder following a replacement. He should avoid uncontrolled decelerative forces such as using a jackhammer or maul. He should avoid chipping ice with the right arm or using a large rototiller. He can lift whatever he can lift.
>
> ...
>
> [Claimant] does not have lifting restrictions. He should not use a jackhammer or manual tools that would jolt the shoulder such as a sledgehammer.

(Ex. 2, p. 162)

On July 15, 2015, claimant provided supplemental deposition testimony. Claimant testified since his termination by defendant-employer, he had been performing individual side jobs, mowing grass, pulling weeds, gardening, and cutting down a tree with a pole saw. Claimant estimated he had earned about $275.00 in these jobs. (Claimant's testimony; Ex. 10, Depo. Tr. pp. 80-83) Claimant admitted he had made no other effort to find employment as he was uncertain what jobs he was capable of performing and had been spending significant time with his hospitalized newborn child. (Claimant's testimony; Ex. 10, Depo. Tr. pp. 83-84) Claimant indicated he possessed ideas for potential employment, including obtaining his CDL to drive truck regionally, as well as potentially parleying his side jobs into his own "handyman" business. (Ex. 10, Depo. Tr. pp. 85, 88-89) Claimant testified he was pleased with Dr. Nepola's care and believed his restrictions had been appropriate. (Ex. 10, Depo. Tr. p. 91)

Defendants' counsel authored a letter to claimant's counsel dated July 31, 2015. Defendants' counsel indicated defendants' position was that claimant's intentional theft of multiple items and resulting termination is "equivalent to refusal of suitable work." (Ex. C, p. 1)

On August 4, 2015, at the arranging of claimant's attorney, claimant presented to board certified physiatrist, Farid Manshadi, M.D. (Ex. 1, p. 14) Dr. Manshadi performed a records review. (Ex. 1, pp. 7-10) Dr. Manshadi also interviewed claimant, who complained of right shoulder pain at a level 3 or 4 on a 10-point scale. Claimant also reported an inability to lift heavy objects with his right arm extended, the ability to reach only to his right buttock with his right hand, and difficulty with overhead activities with the right arm. Additionally, claimant reported activities of daily living take longer and he is unable to perform certain chores, while other chores require

overcompensation with the left arm. (Ex. 1, p. 10) Dr. Manshadi performed a physical examination of claimant, during which he noted limited right shoulder range of motion. (Ex. 1, p. 10)

Following records review, interview and examination, Dr. Manshadi opined claimant had not achieved maximum medical improvement (MMI) for his right shoulder, but would likely do so within the next three to four months. As a result of the total shoulder arthroplasty, Dr. Manshadi opined claimant sustained a 24 percent right upper extremity impairment per the AMA Guides to the Evaluation of Permanent Impairment. Dr. Manshadi opined claimant sustained an additional 16 percent right upper extremity impairment due to range of motion deficits. In total, Dr. Manshadi opined a combined impairment of 36 percent right upper extremity. Dr. Manshadi recommended permanent restrictions of avoidance of any activities which require repetitious overhead activity, avoidance of vibratory tools such as a Rototiller, maul, or jackhammer, and avoidance of lifting more than 2 to 3 pounds with the right arm extended. Dr. Manshadi opined claimant was capable of lifting up to 30 to 40 pounds with his right arm at his side. With respect to further treatment, Dr. Manshadi recommended claimant continue to follow up with Dr. Nepola. He opined claimant may require use of pain medications and future shoulder revision surgery was a possibility. (Ex. 1, p. 11)

On September 8, 2015, claimant returned to Dr. Nepola for evaluation. Claimant reported doing "very well." Claimant further indicated he had a job opportunity and requested a full duty release. (Ex. 2, p. 167) Dr. Nepola placed claimant at MMI and advised him to return in one year for repeat x-rays and evaluation. (Ex. 2, p. 169) With respect to claimant's activities, Dr. Nepola opined:

> [Claimant] has no lifting restrictions. He should avoid jarring activities such as post hole digging, sledge hammering, jack hammering, etc...

(Ex. 2, p. 169)

Claimant testified Dr. Nepola advised him to lift from ground level with his elbows at his sides and to avoid repetitive overhead activity until his strength had improved. (Claimant's testimony)

The arbitration hearing took place on September 17, 2015. At the time of evidentiary hearing, claimant had only recently been released from care by Dr. Nepola. Claimant had not secured formal employment, but testified he had continued to perform odd jobs. Claimant testified he was actively searching for work, having applied for work at a former restaurant employer and also at a company which assembled sub-frames for houses. Claimant testified he considered working as a professional handyman. Claimant testified he also was considering pursuing truck driver school, as he believed he could possibly secure a driving job through a family member. (Claimant's testimony)

Claimant testified he continued to suffer with symptoms of his right shoulder. He described pain and difficulty with movements of his right arm out to his side, behind his back, and above shoulder level. Claimant testified he continues to have weakness of the right arm, but Dr. Nepola advised him he would become stronger with time. Accordingly, claimant completes his recommended home exercises daily. Claimant testified he believes Dr. Nepola is a great physician and he possesses tremendous respect for Dr. Nepola. Claimant expressed belief Dr. Nepola's restrictions most accurately reflect his abilities. (Claimant's testimony)

Dave Bolling, store director for defendant-employer, testified at evidentiary hearing. Mr. Bolling testified claimant continued in his role of night stocking manager until claimant expressed interest in working as a custodian. Mr. Bolling testified claimant continued to work for defendant-employer within his restrictions, until claimant was terminated for theft. Mr. Bolling acknowledged that claimant apologized for his actions and described claimant as a good employee. However, Mr. Bolling explained he has "zero tolerance" with respect to stealing and has fired many employees on this basis. Mr. Bolling further explained the decision on whether or not to terminate an employee rests solely with him. (Mr. Bolling's testimony)

Mr. Bolling's testimony was clear, direct, and consistent with the evidentiary record. His demeanor gave the undersigned no reason to doubt his veracity. Mr. Bolling is found credible.

CONCLUSIONS OF LAW

The first issue for determination is the extent of claimant's industrial disability.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

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.

Claimant was 49 years of age on the date of evidentiary hearing. His formal education ceases in the 7th grade; he has undergone no additional formal or vocational education or training. Given his limited educational background, a large portion of the labor market has been and remains unavailable to claimant. Claimant's work history includes tree trimming, construction, concrete labor, painting, framing, cooking, production line, and custodial work, as well as his work for defendant-employer. The majority of the positions, especially tree trimming, construction, concrete labor, and framing, are quite physical in nature.

As a result of a stipulated work injury on April 17, 2013, claimant underwent an extensive course of care of his right shoulder. Claimant's treatment included two arthroscopic procedures and ultimately culminated in a right total shoulder arthroplasty on December 3, 2014. Two physicians have offered opinions on the extent of claimant's permanent impairment and/or need for permanent restrictions.

Dr. Nepola served as claimant's treating physician and performed the second arthroscopic procedure on February 27, 2014 and the total shoulder arthroplasty on December 3, 2014. Dr. Nepola's course of active care stretched from December 2013 to September 8, 2015, when Dr. Nepola placed claimant at MMI. Dr. Nepola remains claimant's authorized physician, with claimant expected to require periodic follow up.

On September 8, 2015, Dr. Nepola released claimant from active care. At that time, Dr. Nepola opined claimant required no lifting restrictions, but should avoid jarring activities such as post hole digging, sledge hammering, jack hammering, and like activities. This opinion is consistent with prior opinions offered by Dr. Nepola with respect to long-term activity modifications necessary as a result of claimant's total shoulder replacement. Dr. Nepola's prior comments regarding long-term protection of the shoulder are valid regardless of the date commemorated and accordingly, are properly considered included in Dr. Nepola's opinion of necessary permanent restrictions. Such restrictions include the need to avoid uncontrolled decelerative forces or jolting of the shoulder such as splitting wood, digging post holes, chipping ice, or using a jackhammer, large rototiller, or maul. Dr. Nepola did not opine as to the extent of claimant's permanent functional impairment.

Dr. Manshadi opined claimant sustained permanent functional impairment as a result of the stipulated work injury. Specifically, Dr. Manshadi opined claimant sustained a 24 percent right upper extremity impairment as a result of the total shoulder

arthroplasty. Dr. Manshadi opined claimant also sustained an additional 16 percent right upper extremity impairment as a result of range of motion deficits. Dr. Manshadi recommended permanent restrictions of avoidance of any activities which require repetitious overhead activity, avoidance of vibratory tools such as a rototiller, maul, or jackhammer, and avoidance of lifting more than 2 to 3 pounds with the right arm extended. Dr. Manshadi opined claimant was capable of lifting up to 30 to 40 pounds with his right arm at his side. At the time Dr. Manshadi offered his opinions, Dr. Manshadi indicated claimant had not yet achieved MMI and would likely do so in three to four months' time.

Claimant testified Dr. Nepola advised him to lift from ground level with his elbows at his sides and to avoid repetitive overhead activity until his strength had improved. Claimant testified at the time of evidentiary hearing, he continued to have difficulty with range of motion and weakness of the shoulder; however, he acknowledged Dr. Nepola advised claimant he would become stronger with time. Claimant testified he possesses respect for Dr. Nepola and is pleased with Dr. Nepola's care to date. Furthermore, claimant testified he believes Dr. Nepola's restrictions most accurately reflect his functional abilities.

Due to Dr. Nepola's status as claimant's treating surgeon, with a history of providing two years of care to claimant, the undersigned believes Dr. Nepola is more familiar with claimant's physical condition and abilities than Dr. Manshadi. Claimant himself testified to his confidence in Dr. Nepola and further testified he believes Dr. Nepola's restrictions are accurate. Accordingly, the undersigned adopts the restrictions set forth by Dr. Nepola.

Dr. Manshadi's opinion on the functional impairment sustained by claimant is unrebutted. By virtue of undergoing total shoulder arthropathy, the AMA Guides recommends a minimum 24 percent upper extremity impairment per Table 16-27. This is precisely the amount opined by Dr. Manshadi. The undersigned finds this impairment rating appropriate. This opinion is equivalent to 14 percent of the whole person.

I am troubled, however, by Dr. Manshadi's opinion with respect to the extent of permanent impairment sustained as a result of deficits in range of motion. I do not doubt his computation; however, I question the methodology of rating based on range of motion measurements completed prior to claimant's placement at MMI. Until an individual is placed at MMI, one assumes the potential for improvement in a condition remains. However, claimant was ultimately placed at MMI by Dr. Nepola only approximately one month later and continued to complain of range of motion limitations at the time of hearing. Therefore, I believe claimant likely sustained permanent impairment as a result of decrements in range of motion, but am unconvinced the decrements are as severe as noted by Dr. Manshadi.

Following the stipulated work injury, claimant returned to work at defendant-employer in his preinjury position, albeit under restrictions. Claimant was able to complete his duties as night stock manager and continued to earn the same wage as

preinjury. Claimant then voluntarily left his management position to accept a custodial position. Although there is some dispute regarding the impetus of this transition and claimant's wage, claimant acknowledges defendant-employer did not force him to step down from his managerial position into the custodial position. Claimant then subsequently performed his custodial duties in a more than satisfactory manner. There is no indication claimant would not have remained in the employ of defendant-employer at the time of hearing, had it not been for his termination for stealing. Therefore, claimant has not proven a loss of earnings as a result of the work injury.

Claimant remained unemployed at the time of evidentiary hearing. His unemployed status is due in large part to his ongoing care with Dr. Nepola, dating until September 9, 2015, and the hospitalization of claimant's newborn son. Claimant himself admitted he had not engaged in an extensive work search due to these factors. In the week between Dr. Nepola's release and the arbitration hearing in this matter, claimant had completed two job applications. He further expressed interest in obtaining a CDL license and driving regionally, with a family member likely able to facilitate claimant's employment at a company. Claimant's work restrictions do not appear to contravene claimant's pursuit of a truck driving position; however, the restrictions do render a number of his preinjury, manual labor positions unavailable. Claimant is eager and motivated to work; he is optimistic about returning to work.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 45 percent industrial disability as a result of the stipulated work-related injury of April 17, 2013. Such an award entitles claimant to 225 weeks of permanent partial disability benefits (45 percent x 500 weeks = 225 weeks), commencing on the stipulated date of November 18, 2013, as interrupted by payment of temporary disability benefits. The parties stipulated the proper rate of compensation is $429.58.

The next issue for determination is the extent of defendants' credit for weekly indemnity benefits paid. The parties agree claimant has been paid weekly indemnity benefits during the course of his treatment; he continued to receive weekly indemnity benefits as of the date of evidentiary hearing. The relevant questions with respect to the extent of defendants' credit are: (1) whether the weekly benefits paid during certain claimed periods is properly considered temporary disability benefits or permanent disability benefits and (2) whether defendants are entitled to credit for those benefits paid against the ultimate award in this case.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the

employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

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.

Claimant claims entitlement to healing period benefits from July 2, 2013 to July 8, 2013. Claimant underwent the first arthroscopic surgery with Dr. Naylor on July 2, 2013; following surgery, Dr. Naylor imposed restrictions on claimant's activities. During the claimed period, claimant is entitled to healing period benefits pursuant to Iowa Code section 85.34(1). By review of the included payment log, it appears defendants paid claimant weekly indemnity benefits for this period in the amount of $433.11. (Ex. Q, p. 1)

Claimant also claims entitlement to healing period benefits from February 27, 2014 through September 8, 2015. On February 27, 2014, claimant underwent right shoulder arthroscopy with Dr. Nepola. Following surgery, claimant was restricted in his activities. Claimant remained restricted until he was terminated on November 8, 2014. As claimant remained under active temporary work restrictions during this period, claimant is entitled to temporary disability benefits pursuant to Iowa Code section 85.33(2) or 85.34(1), whichever is applicable, from February 27, 2014 through November 8, 2014.

The central dispute on this issue is whether claimant is entitled to healing period benefits following his termination on November 8, 2014, up through Dr. Nepola's placement of claimant at MMI on September 8, 2015. There is no dispute claimant remained under Dr. Nepola's active treatment during this period and remained under activity restrictions, even undergoing right total shoulder arthroplasty on December 3, 2014. Defendants argue, however, that claimant's termination for the intentional acts of stealing from defendant-employer is tantamount to refusal of suitable work and therefore, disqualifies claimant from receipt of temporary disability benefits pursuant to Iowa Code section 85.33(3). Therefore, defendants argue any weekly indemnity benefits paid during this period are properly considered permanent partial disability benefits.

For misconduct to disqualify a person from compensation, the misconduct must be tantamount to refusal to perform the offered work. The misconduct must be serious and the type of conduct that would cause any employer to terminate any employee. The misconduct must have a serious adverse impact on the employer. The misconduct must be more than the type of inconsequential misconduct that employers typically overlook or tolerate. Brodigan v. Nutri-Ject Systems, Inc., File No. 5001106 (App. April 13, 2004); Wortley v. Lowe's Home Centers, Inc., File No. 1298582 (App. December 22, 2006). An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action. Franco v. IBP, Inc., File No. 5004766 (App. February 28, 2005).

Claimant's actions in eating a package of cupcakes, drinking Gatorade from a fountain, and taking cigarettes demonstrated poor judgment. Claimant himself acknowledged his behavior was incorrect. When confronted by defendant-employer, claimant admitted his mistakes, apologized, and promised to use better judgment in the future if allowed to keep his job. Mr. Bolling made the decision to terminate claimant.

Although Mr. Bolling's decision to terminate claimant may be justifiable, I do not believe claimant's actions were severe enough to warrant disqualification of claimant from receipt of temporary disability benefits for a period his entitlement to such benefits would have been otherwise clear. Claimant stole from defendant-employer, yes. However, I am unconvinced that virtually any employer would have terminated any employee for such conduct. The value of the products taken by claimant likely totaled less than $20.00. When confronted, claimant admitted the mistake, apologized, and promised to be more ethical in the future. There is no evidence claimant had been subject to any prior discipline and Mr. Bolling described claimant as a good employee. Under these circumstances, some sort of lesser discipline may very well have been imposed by many other employers.

Although claimant testified he had knowledge that employees could be subject to termination for stealing, I am unconvinced that claimant's behavior rose to such a level that he would have known he would be guaranteed termination. When confronted, claimant promised to be more ethical in the future if allowed to keep his job. If claimant knew termination was guaranteed for stealing such as he committed, I doubt claimant would have requested to remain employed. Furthermore, Mr. Bolling testified he alone possessed the power of deciding whether or not to terminate claimant and indicated he had a zero tolerance policy for stealing. Mr. Bolling's testimony inadvertently supports the proposition that not all managers, with defendant-employer or in the labor market generally, would have immediately terminated claimant for such misconduct.

Claimant did not embezzle or steal pallets of product; he took a package of cupcakes, drank Gatorade from a fountain, and took a couple packs of cigarettes. To punish such behavior with not only the loss of a job but also with the loss of temporary

benefits to which he would have been entitled as a result of a work injury, would result in a disproportionately large penalty to claimant.

It is therefore determined claimant's misconduct is not tantamount to a refusal of suitable work which would disqualify claimant from receipt of temporary disability benefits. Claimant is entitled to healing period benefits from November 8, 2014 through September 8, 2015. Any weekly benefits paid by defendants during this period are properly considered healing period benefits and not permanent partial disability benefits.

The next question with respect to the credit issue is the extent of defendants' credit for benefits paid. The parties stipulated claimant's proper rate of compensation was $429.58. If, in payment of temporary disability benefits, defendants overpaid due to a higher initial computation of rate, defendants are entitled to a credit for overpayment of those temporary disability benefits against the current award of permanent partial disability benefits. Iowa Code section 85.34(4); *See* McBride v. Casey's Marketing Co., File No. 5037617 (Remand February 9, 2015); *See also* Love v. Agrizone, Inc., File No. 5048328 (Arb. January 26, 2016); Mollett v. W.N. Morehouse Truck Line, File No. 5048745 (Rehearing April 13, 2016). Defendants shall also receive a credit for the amount of any benefits properly considered permanent partial disability benefits paid to date against the total award of permanent partial disability benefits in this file.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $100.00 filing fee; $6.48 service fee; and claimant's deposition transcript costs in the amounts of $108.00 and $87.49. Claimant provided evidence of payment of the $100.00 filing fee (Ex. 11, p. 3) and of $108.00 for claimant's first deposition transcript (Ex. 11, pp. 4-5). Although claimant requested taxation of the cost of claimant's second deposition transcript in the amount of $87.49, supplied documentation reveals only charge and payment of $36.00 regarding the second deposition transcript. (Ex. 11, pp. 6-7) There is no proof of payment of the claimed $6.48 service fee.

Claimant has established payment of the $100.00 filing fee, as well as for transcription costs in the amounts of $108.00 and $36.00. These are allowable costs and are taxed to defendants. Defendants are not taxed with the cost of service of claimant's petition, nor any claimed cost associated with claimant's second deposition over the cost of $36.00, as claimant has not demonstrated proof of these costs. Defendants are therefore taxed with costs in the amount of $244.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing on the stipulated date of November 18, 2013, as interrupted by payment of temporary disability benefits, at the weekly rate of four hundred twenty-nine and 58/100 dollars ($429.58).

Defendants shall pay accrued weekly benefits in a lump sum.

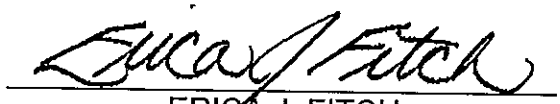
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall receive credit for benefits paid as set forth in the decision.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 in the amount of two hundred forty-four and no/100 dollars ($244.00).

Signed and filed this 10th day of May, 2016.



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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.