BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RURY GONZALEZ,

Claimant,

vs.

DE SU HOLSTEINS LLC,

Employer,

and

AMERICAN HOME ASSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5063749

ARBITRATION

DECISION

Head Note Nos.: 1803, 3000

STATEMENT OF THE CASE

Claimant, Rury Gonzalez, filed a petition for arbitration against De Su Holsteins, LLC, as the employer, and American Home Assurance Company, as the insurance carrier. The undersigned heard this case on April 4, 2019, in Des Moines, Iowa.

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

The evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1 through 19, and Defendants' Exhibits A through C, and E through G. Claimant testified on his own behalf and called his wife, Lesly Martinez-Gonzalez, and friend, Jose Martinez, to testify. Defendants called no witnesses. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed their post-hearing briefs on May 17, 2019, at which time the case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of industrial disability;

2. The proper commencement date for permanent disability benefits;

3. The claimant's gross weekly earnings and applicable weekly compensation rate, if benefits are awarded;

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

FINDINGS OF FACT

As of the date of hearing, Rury Gonzalez, was a 24-year-old, right-hand dominant gentleman. Mr. Gonzalez was born in Mexico. He immigrated to the United States in 2012. Claimant is domiciled in Postville, Iowa; however, he currently lives in Colorado Springs, Colorado for work. Mr. Gonzalez attended twelve years of school in Mexico before dropping out to help raise his siblings. Mr. Gonzalez is in the process of obtaining a GED. This is the extent of claimant's educational background. (Claimant's testimony).

An interpreter was present at hearing. Claimant testified he can read the English language better than he can write it. Likewise, he can hear and understand the English language better than he can speak it. Claimant receives work instructions in English. To assist in his learning, claimant's wife normally speaks to him in English at home. (Hearing Transcript, pages 106-107). Claimant has attended English as a Second Language (ESL) courses in the United States.

Mr. Gonzalez's employment history is set forth in Claimant's Exhibit 6, pages 2 through 3. Claimant's employment history primarily includes physical labor type jobs in the construction industry. Claimant worked at Fettchether Concrete and Webb Concrete as a seasonal laborer in 2012 and 2014, respectively. He worked for Matt Benda Concrete as a laborer from approximately 2014 to 2016. Mr. Gonzalez has also worked as a farmhand. Claimant worked for Johanningmeire Dairy, milking cows, from approximately 2012 to 2014. (Exhibit 6, p. 3).

Claimant began working as a farmhand for the defendant employer in approximately October 2015. (JE1, p. 4(B)). Claimant was required to perform multiple tasks for the defendant employer, including mixing feed for cows, knocking down and cutting hay, cleaning out barns by shovel or skid loader, and operating machinery. The evidentiary record does not contain an official job description. According to claimant, his job duties required him to lift more than 50 pounds. Claimant has not worked for the defendant employer since the date of injury. (See Ex. C, p. 3, Depo. pp. 7-8).

At the time of hearing, Mr. Gonzalez was working for Sunflower Landscapes in Colorado Springs, Colorado. Claimant's willingness to leave his home in Iowa to live with his uncle and work in Colorado speaks to his motivation. Mr. Gonzalez began working for Sunflower Landscapes in June 2018 as a laborer. (Ex. G, p. 1). Claimant testified he was provided the opportunity because his uncle is friends with the owner. Claimant considers his position light duty. Claimant testified he plants flowers, spreads mulch, sets up PVC pipe for irrigation, and picks up trash. In addition, claimant works as a runner, driving to various locations and picking up flowers and other work-related materials. (Hr. Tr., pp. 98-99). Claimant's current employment is full-time. He routinely works between 35 and 45 hours per week. Claimant's rate of pay varies between $14.00 and $17.00 per hour. (Ex. G, p. 1). Claimant received a $2,500.00 bonus for not missing any shifts. (Id.). Claimant plans to continue in this role for the foreseeable future. (Hr. Tr., pp. 125-126).

Information pertaining to claimant's employment with Sunflower Landscapes was not revealed until sometime after October 2018. This information was not available to claimant's treating physicians until after October 2018. Further, claimant's own expert was not aware of claimant's employment with Sunflower Landscapes. Claimant provided no plausible excuse for this omission. Due to this omission, I do not afford significant weight to claimant's testimony as it pertains to his current functional abilities and job duties.

Mr. Gonzalez sustained a stipulated injury to his left shoulder while performing his normal work activities on May 25, 2016. Claimant was cleaning out a barn when he slipped on manure, fell, and landed on his left shoulder. Claimant immediately noticed his shoulder was out of place. He subsequently manipulated his left arm until his shoulder moved back into a normal position. (JE1, p. 1).

Claimant presented to the emergency department at Winneshiek Medical Center on the date of injury, where he was diagnosed with an anterior dislocation of the left shoulder. On examination, claimant exhibited good strength and movement in the left elbow, wrist, and hand. (Ex. JE-1, pp. 1-4). Defendants subsequently referred Mr. Gonzalez to Kristen Heffern, ARNP. (Ex. JE1, p. 4A).

When claimant's symptoms did not resolve with conservative care, Ms. Heffern ordered an MRI of the left shoulder, with and without contrast, including arthrogram. (Ex. JE-1, pp. 4(d)-4(f)). The MRI occurred on June 23, 2016, and revealed an anterior labral tear, a posterior labral tear, a superior glenohumeral ligament tear, and a rotator interval biceps tendon sprain. The MRI did not reveal evidence of a SLAP tear or a rotator cuff tear. (Ex. JE-1, pp. 6-7). In light of this report, defendants referred claimant to orthopedic surgeon, Richard Naylor, M.D.

Dr. Naylor first evaluated Mr. Gonzalez on July 5, 2016. Dr. Naylor assessed shoulder instability and recommended surgical intervention. (JE-2, pp. 1-2). Claimant underwent a left shoulder arthroscopy and Bankart repair on July 26, 2016. (JE-2, p. 4).

Unfortunately, the surgery did not provide symptomatic relief for Mr. Gonzalez. A repeat MRI, dated November 23, 2016, revealed re-demonstration of an anterior labral tear, posterior labral detachment, and a chronic humeral head Hill-Sachs deformity. The rotator cuff and biceps tendon appeared normal. (JE1, p. 10).

Despite the above findings, Dr. Naylor initially felt claimant was progressing well. Claimant exhibited full range of motion and his strength was improving. He recommended claimant continue with physical therapy for another six weeks, at which point he would return claimant to half-days of full-duty work. (JE2, p. 15).

When claimant did not progress through physical therapy as expected, Dr. Naylor performed a left shoulder arthroscopy, subacromial decompression, debridement of a Type I SLAP tear, and debridement of a partial-thickness rotator cuff tear on February 27, 2017. (JE3, p. 3).

Dr. Naylor provided post-operative care. Claimant progressed slowly during his recovery period, both in terms of range of motion and strength. Given a lack of rotator cuff etiology, Dr. Naylor could not explain why claimant experienced difficulty when attempting to raise his arm. (JE2, p. 24).

By August 2017, claimant had achieved 166 degrees of active shoulder flexion, and he was showing improvement with his strengthening regimen without increased pain. Nevertheless, claimant continued to complain of generalized fatigue and occasional pain with activity. (See JE1, p. 14).

Dr. Naylor administered a cortisone injection on August 9, 2017. (JE2, p. 28). When the injection failed to alleviate claimant's pain, Dr. Naylor opined claimant's pain and limited strength were disproportionate to his clinical findings. He referred claimant on for a functional capacity evaluation (FCE) and a repeat MRI.

Pursuant to Dr. Naylor's referral, claimant presented for an FCE on October 15, 2017. The FCE report documented self-limiting behaviors which resulted in the inability of the physical therapist to identify claimant's maximum work abilities. (JE-4, p. 2). While the report does not establish active versus passive testing, it is noted that claimant's range of motion was within functional limits on extension, internal rotation, and external rotation. It is also noted that claimant had a range of motion of 165 degrees on forward flexion and abduction. For comparison, claimant's forward flexion and abduction in January 2018 was 165 degrees and 140 degrees, respectively. Claimant registered the same range of motion when examined by Arnold Delbridge, M.D., in August 2018. (Ex. 2, p. 4).

The November 2, 2017, MRI report revealed no recurrent anterior inferior glenohumeral ligament tears. It did not clearly demonstrate a chondral cartilage defect in the glenoid. There was no evidence of a rotator cuff tear, no findings of bone marrow edema or humeral head impaction, and no acute changes in the subscapularis or biceps tendon. (JE1, pp. 11-12).

After reviewing the updated MRI, Dr. Naylor reiterated claimant's ongoing pain, limited range of motion, and limited strength were out of proportion to his clinical findings and the updated MRI report. Dr. Naylor recommended a second orthopedic evaluation. Dr. Naylor informed claimant he would see him again if Dr. Nepola determined there was nothing that could be done surgically. (JE2, p. 34).

Prior to the November 20, 2017, appointment wherein Dr. Naylor reviewed claimant's updated MRI, Dr. Naylor drafted an impairment letter to defendants. Dr. Naylor provided an impairment rating of 11 percent to the left upper extremity. Dr. Naylor provided permanent restrictions of no repetitive use at or above shoulder level, no lifting more than 5-10 pounds away from the body, and no lifting more than 15-20 pounds close to the body. (JE2, p. 36).

Following the issuance of Dr. Naylor's November 20, 2017, letter, defendants drafted and produced an Auxier letter, notifying claimant that his benefits would end on April 10, 2018. (Ex. B, p. 8). Mrs. Gonzalez testified claimant did not start looking for alternative employment until claimant's workers' compensation benefits ended. Claimant did not submit any applications for employment between the date of injury and the date of hearing; rather, claimant asserts he contacted his past employers by telephone to inquire about potential job openings.

Defendants complied with Dr. Naylor's recommendation for a second opinion and directed claimant to James Nepola, M.D., at the University of Iowa Hospitals & Clinics for an orthopedic evaluation. Dr. Nepola evaluated claimant on January 16, 2018. (JE5, p. 1). Claimant told Dr. Nepola he did not experience any improvement in his shoulder following the initial surgical intervention; however, his symptoms improved significantly following the second surgery. Nevertheless, claimant continued to complain of pain with certain activities. He denied any numbness or tingling down the left upper extremity. Claimant relayed he does not experience significant symptoms at rest. Dr. Nepola opined claimant's diagnoses were causally related to the original work injury on May 25, 2016. He believed it was likely claimant had reached MMI; however, he opined it was possible claimant's pain could improve over time. Dr. Nepola opined claimant could consider diagnostic injections to localize the pain generator in the shoulder, with further treatment recommendations pending a positive response to the injection. Dr. Nepola opined there would be no further surgical and/or treatment recommendations if the diagnostic injection did not localize the shoulder joint as the main pain generator. (JE5, p. 4).

Claimant returned to Dr. Nepola on February 20, 2018, to undergo the diagnostic injections in the hopes of identifying the source of claimant's ongoing pain. When the injections did not provide relief, Dr. Nepola did not make any additional treatment recommendations. He opined there was no surgical intervention that could be reliably performed to decrease claimant's ongoing issues. Dr. Nepola made no diagnoses with respect to claimant's left shoulder. Dr. Nepola did not provide an impairment rating or assign permanent restrictions. (JE5, pp. 8-10).

At hearing, and through his post-hearing brief, claimant asserted that Dr. Nepola recommended a third diagnostic injection. (Hr. Tr., pp. 61-62). Further, claimant asserts Dr. Nepola told him he would perform surgery to improve claimant's range of motion and decrease his pain. (Hr. Tr., pp. 61-64). These assertions are not supported by the evidentiary record. Dr. Nepola makes no reference to a third injection in his medical records. Claimant testified he decided against the alleged third injection after experiencing an episode of atrial fibrillation days after receiving two injections from Dr. Nepola's office. (See JE1, pp. 16-19). Unlike the medical record noting claimant's wife had called to request the first set of injections (JE5, p. 7), Dr. Nepola's records do not contain any reference to a telephone call or electronic correspondence from claimant declining the alleged third injection.

Claimant has not presented for medical treatment related to his left shoulder since Dr. Nepola released him on February 20, 2018. (Ex. C, p. 5, Depo p. 14). Claimant is not taking any prescription medications. He does take ibuprofen and other over-the-counter medications as needed. Claimant did not describe his current symptoms at hearing; he did, however, describe his limitations. At deposition, claimant's greatest complaints were fatigue, weakness, and pain associated with increased activity. Claimant has repeatedly denied experiencing any numbness or tingling in the left upper extremity.

After being discharged from further care by Dr. Nepola, Mr. Gonzalez obtained an independent medical examination, performed by Dr. Delbridge, on August 2, 2018. (Ex. 2). This is the most recent medical examination detailed in the evidentiary record. Dr. Delbridge collected and reviewed x-rays of claimant's left shoulder. He opined claimant's AC joint looked reasonably good with no degenerative changes. Neurological examination of the left upper extremity revealed symmetrical reflexes. Claimant's cervical range of motion was good. Dr. Delbridge made a note that claimant had a firm grip, bilaterally. Dr. Delbridge did not make a specific diagnosis, but opined claimant sustained either a new injury or material aggravation causing additional impairment on the date of injury. Dr. Delbridge declared maximum medical improvement (MMI) to have occurred on January 1, 2018; he did not provide any analysis as to how he landed on January 1, 2018, as the date claimant reached MMI. (Ex. 2, p. 6).

On the basis of weakness and loss of motion, Dr. Delbridge assigned 8 percent impairment to the left upper extremity. Dr. Delbridge assigned an additional 10 percent impairment to the left upper extremity for an apparent loss in grip strength. (Ex. 2, pp. 4-5). Dr. Delbridge's opinion with respect to grip strength is unrebutted.

The above impairment ratings combined for an impairment rating of 17 percent to the left upper extremity, or 10 percent to the whole person. (Ex. 2, p. 5).

Instead of assigning permanent restrictions, Dr. Delbridge filled out an "Estimated Functional Capacity Evaluation for Work Tolerance" chart provided to him by claimant's counsel. This chart would become the focal point of two subsequent reports. The first

section of the chart, titled "Activity," provides claimant should never lift or carry over 50 pounds. It goes on to provide claimant can lift and carry up to 25 pounds, occasionally; 15 pounds, frequently; and 10 pounds, constantly. The second section of the chart, titled "Lift," provides claimant should never lift or carry anything weighing over 20 pounds. (Ex. 2, p. 7).

Dr. Delbridge drafted an addendum to his report on December 27, 2018, in response to a letter from claimant's counsel seeking clarification of claimant's permanent restrictions. Dr. Delbridge opined that if claimant's progress is monitored closely, he could probably lift up to 50 pounds, occasionally. He did not envision claimant lifting or carrying anything over 50 pounds in the foreseeable future. Later in the report, Dr. Delbridge opines claimant's restrictions on pushing and pulling should not be more than double claimant's lifting restriction; "so his absolute max on pulling and pushing would be 100 [pounds]." He then definitively states claimant can lift and carry 50 pounds, occasionally. (Ex. 4, p. 1).

In what appears to be a final attempt to receive clarification on claimant's permanent restrictions, counsel for claimant reached out to Dr. Delbridge via e-mail, one month prior to hearing. I do not find the exchange persuasive. Counsel's e-mail contains several leading questions that are dismissive of the December 2018 addendum. Dr. Delbridge limits claimant's handling abilities with the left hand to "occasional," due to claimant's grip strength, and he restricts claimant's lifting to 20 pounds, as opposed to the original 25 and subsequent 50-pound restrictions. (Ex. 17).

Considering the opinions of Dr. Naylor and Dr. Delbridge, I note Dr. Naylor is claimant's treating surgeon. He examined claimant on multiple occasions, including intra-operatively. In most cases, such factors would lend credence to Dr. Naylor's ultimate opinion. However, in the instant case, Dr. Naylor's final opinion raises a number of questions. Dr. Naylor assigned impairment ratings and restrictions prior to his final examination of claimant; moreover, he provided said ratings and restrictions prior to reviewing the November 2, 2017, MRI report; a diagnostic report he alone ordered.

Another issue with Dr. Naylor's final report is how he calculated claimant's permanent impairment. Dr. Naylor utilized claimant's forward flexion and abduction measurements "[from] his last exam." According to Dr. Naylor, claimant exhibited 140 degrees of motion for both flexion and abduction "at his last examination." However, these measurements do not match up with the measurements claimant demonstrated at any appointment that could reasonably be considered claimant's "last exam." Prior to the November 20, 2017, letter, claimant's last examination with Dr. Naylor occurred on September 25, 2017. At the September 25, 2017, appointment, claimant's forward flexion and abduction were 150 degrees. (JE2, p. 31). Going back to his August 9, 2017, appointment with Dr. Naylor, claimant's forward flexion and abduction were 170 degrees. (JE2, p. 28). This range of motion is consistent with the 166-degree measurement documented by claimant's physical therapist on August 8, 2017, and the 165-degree measurement documented in the October 2017 FCE report. (JE1, p. 14).

Put another way, the measurements used by Dr. Naylor do not accurately reflect claimant's range of motion on or near the date of the final report.

It is equally as difficult to afford the opinions of Dr. Delbridge a significant amount of weight. Dr. Delbridge evaluated claimant on a one-time basis for the purposes of litigation. Without re-examining claimant or reviewing any updated medical records, Dr. Delbridge amended his proposed permanent restrictions twice following communications with claimant's counsel. Additionally, Dr. Delbridge was unaware of claimant's full-time employment with Sunflower Landscapes subsequent to his work for defendant employer. It is difficult to accept Dr. Delbridge's comments on how claimant's considerable fatigue and lack of endurance would impact his overall ability to work when claimant's payroll summary with Sunflower Landscapes reflects his ability to consistently work 40 hours per week.

Both opinions contain notable flaws. Fortunately, the two experts agree on a basic set of factors. They also reach similar conclusions with respect to claimant's overall impairment. All three experts agree claimant has ongoing pain with activity. Drs. Naylor and Delbridge agree claimant has sustained permanent impairment based on decreased range of motion in the left shoulder. Lastly, all three agree no further treatment is warranted at this time.

Having considered the competing medical opinions, I find the impairment ratings expressed by Dr. Delbridge to be more convincing than the opinions of Dr. Naylor. Dr. Delbridge is the only expert in this case that had the opportunity to examine claimant after he had returned to full-time employment. For physical examination purposes, I am less concerned with whether Dr. Delbridge knew of claimant's new employment. The fact claimant's range of motion measurements and ongoing complaints in Dr. Delbridge's IME report match those outlined in Dr. Nepola's pre-Sunflower Landscapes records is telling. Dr. Delbridge's IME was also conducted months after claimant was released from Dr. Nepola's care. His examination is the most recent record in the evidentiary record.

That being said, I cannot accept the rushed opinions contained in Dr. Delbridge's March 7, 2019, e-mail correspondence to accurately reflect claimant's functional capacity. Dr. Delbridge does not justify his change in opinion with any additional or updated analysis. Moreover, the shorthand responses essentially nullify the December 27, 2018, addendum, wherein Dr. Delbridge crafted his own opinion and provided significant analysis for each of his findings. While I do not expressly adopt the restrictions outlined in the December 27, 2018, addendum; I do find that the restrictions outlined in the December 27, 2018, addendum more accurately represent claimant's functional abilities than any other report purporting the same. I find that claimant has a 10 percent permanent impairment of the whole person and he is capable of lifting between 25 and 50 pounds, on an occasional basis.

Having reached the above factual findings, I must consider claimant's loss of future earning capacity caused by the May 25, 2016, work injury.

Jose Martinez, claimant's brother-in-law, was called to testify as a character witness for claimant. Mr. Martinez spoke highly of claimant's work ethic; however, his testimony regarding the same cannot be afforded a significant amount of weight. Mr. Martinez's opinion is based on a small sample size. Mr. Martinez's observations of claimant are limited to one summer of seasonal employment. (Hr. Tr., p. 20). Mr. Martinez also described a conversation he had with claimant in May 2018. According to Mr. Martinez, claimant was trying to find employment. It is not clear from Mr. Martinez's testimony whether claimant expressly asked for a job, or whether Mr. Martinez was simply seeing if he could help. Regardless, after speaking with claimant, Mr. Martinez did not believe he could hire claimant. (Hr. Tr., pp. 18-19). Mr. Martinez was unaware of claimant's employment with Sunflower Landscapes. (Hr. Tr., p. 20). In terms of his recent observations, Mr. Martinez volunteered that he, his dad, and claimant cut down a tree the weekend prior. Mr. Martinez testified claimant helped by picking up small limbs and sticks. (Hr. Tr., p. 22).

Lesly Martinez-Gonzalez, claimant's wife, was also called to testify on claimant's behalf. (See Hr. Tr., pp. 24-83). Ms. Martinez-Gonzalez testified to claimant's functional abilities and how those abilities have changed since the date of injury. (Hr. Tr., pp. 25-28). Ms. Martinez-Gonzalez also explained how she assisted claimant in his job search efforts. (Hr. Tr., pp. 41-47). Ms. Martinez-Gonzalez testified she and claimant would call and speak with potential employers as a team. Ms. Martinez spoke extensively about her conversations with claimant's current employer, Sunflower Landscapes. (Hr. Tr., pp. 46-51). Lastly, Ms. Martinez-Gonzalez testified to conversations she held with Dr. Naylor and Dr. Nepola. (Hr. Tr., pp. 53-66).

Mr. Gonzalez obtained a vocational expert report from Barbara Laughlin, M.A. (Ex. 12). Ms. Laughlin conducted an employability assessment of claimant; she did not actively provide claimant with vocational services or attempt to place him in alternative employment. Utilizing the restrictions provided by Dr. Delbridge, Ms. Laughlin opined claimant had sustained a 100 percent occupational loss of all semi-skilled and skilled occupations, and a 99.5 percent occupational loss of unskilled occupations. Utilizing the restrictions of the October 2017 FCE, Ms. Laughlin opined the percentages would decrease to 90.6 percent and 75.8 percent, respectively. Utilizing the restrictions provided by Dr. Naylor, Ms. Laughlin opined the percentages would decrease to 74.8 percent and 58.3 percent, respectively. (Ex. 12, pp. 9-10). Ms. Laughlin conducted a labor market survey. She identified several alternate employment opportunities. She estimates claimant can earn between $9.54 and $21.04 per hour as a median wage in the various positions she identified. (Ex. 12, pp. 10-12).

I do not find Ms. Laughlin's report helpful in assessing claimant's employability. First and foremost, the three scenarios detailed in the report do not logically follow the evidentiary record. For example, it is puzzling how Scenario #3 could utilize "the restrictions of the FCE", when the only FCE in the record did not assign any restrictions. Moreover, it does not logically follow that Dr. Delbridge's restrictions would yield the highest occupational loss, when Dr. Naylor's restrictions are the same, if not more restrictive, depending upon which of Dr. Delbridge's three opinions are utilized.

Second, while Ms. Laughlin factored claimant's position with Sunflower Landscapes into her assessment, she inaccurately provides claimant's employment with Sunflower ended on January 31, 2019. At hearing, claimant testified he is not looking for work because he plans to return to Sunflower at the end of April, 2019. (Hr. Tr., pp. 125-126; Hr. Tr., p. 100). Moreover, the report inaccurately reflects claimant started working for Sunflower Landscapes in November 2018.

Claimant is employed, albeit in a light-duty position, and he intends to continue working at Sunflower Landscapes. Claimant's current hourly rate is higher than it was on the date of injury, although he is working less hours at Sunflower than he was at the defendant employer. If claimant were to lose his position at Sunflower, or if he decided to seek alternate employment, he would clearly be at a disadvantage when compared to other workers without any impairment or permanent restrictions. Fortunately, claimant's dominant, right shoulder is not limited in any way. Claimant's job possibilities were limited prior to this injury given his language barrier, educational limitations, and work history. Supplementing these factors with physical restrictions is going to make finding alternate employment in a competitive labor market all the more difficult.

Fortunately, at 24 years of age, claimant is a young worker with the opportunity to retrain. Claimant is proactively searching for ways to make him a more attractive candidate in the work force. Claimant is in the process of obtaining his GED. Claimant has taken ESL classes and he works on his English when at home with his wife. Claimant's work history and timesheets demonstrate that he is a hard worker once he commits to an employer. He is seemingly well connected and respected in his community.

Defendants call claimant's credibility into question. Claimant's credibility concerns stem from his October 2018 deposition, wherein claimant was asked several times, in several different ways, whether he was currently employed. Claimant answered each question in the negative. As previously discussed, it was later determined claimant was, in fact, employed on the date of his deposition. At the arbitration hearing, claimant defended himself, asserting he misunderstood the questions and/or the interpreter did not translate the questions properly. Neither explanation is convincing. Some leeway is afforded to claimants with language barriers in these situations; however, it is hard to imagine a scenario in which a professional interpreter would fail to convey defendants' question on multiple occasions. To illustrate, counsel for defendants asked:

> Are you working? (Ex. C, p. 3, Depo. p. 6)
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> Have you worked anywhere since De Su Holsteins? (Ex. C, p. 3, Depo. p. 6)
>
> Are you applying for work? (Ex. C, p. 3, Depo. p. 6)
>
> What source of income do you have? (Ex. C, p. 3, Depo. p. 8)

Do you make any money right now? (Ex. C, p. 3, Depo. p. 8)

Have you done any jobs for cash since you had the shoulder injury? (Ex. C, p. 3, Depo. p. 8)

You're not working, correct? (Ex. C, p. 5, Depo. p. 16)

And you have not filled out any job applications, correct? (Ex. C, p. 5, Depo. p. 17)

In addition to the above work-related questions, claimant was asked a number of questions about his day-to-day life. Claimant testified he helps out around the house and/or runs errands with his wife. (Ex. C, p. 5, Depo. p. 16). Claimant testified that if his wife is at work, he does not do anything throughout the day. While this testimony may be true for times when he is not in Colorado, the testimony is deceiving in that it portrays claimant as unemployed and living with his wife in Iowa. This line of questioning was an opportunity for claimant to divulge his Colorado employment and he consciously chose not to. Moreover, claimant's wife was present at the deposition and had the opportunity to interject or correct claimant's testimony after the deposition. Claimant did not make any attempt to correct the deposition transcript. Similarly, claimant and his wife did not discuss claimant's employment at Sunflower Landscapes with Dr. Delbridge.

An individual does not have to be familiar with the workers' compensation system to appreciate the fact information pertaining to subsequent employment would be relevant to a workers' compensation claim. I do not believe claimant's untruthfulness was the result of genuine confusion. Instead, I find it likely that claimant was being untruthful out of fear that his subsequent employment would negatively impact his workers' compensation claim. I find claimant knowingly omitted his subsequent employment with Sunflower Landscapes.

Claimant's omission colors his testimony regarding his functional abilities and current job duties as unreliable.

Along those same lines, defendants question the veracity of claimant's subjective pain complaints. The notable differences between claimant's subjective pain complaints and the objective medical evidence is a cause for concern. Throughout his 2017 medical records, Dr. Naylor discusses how claimant's subjective complaints were disproportionate to the objective medical findings. In addition, claimant's FCE returned incomplete due to claimant's self-limiting. Lastly, Dr. Nepola was unable to localize claimant's pain generator in the shoulder through two diagnostic injections.

Claimant has not legitimately tested the labor market since sustaining the injury in question. Claimant's current employment is the result of a close family connection. Prior to obtaining his current employment, claimant contacted former employers and family friends to look for work. He admittedly did not submit any applications with any

prospective employers. Moreover, it appears claimant's wife was the driving force behind claimant's job search. It cannot be said claimant carried out a legitimate work search. It is worth noting claimant did not start looking for work until the middle of April 2018. He began employment with Sunflower Landscapes in June 2018. Once claimant began actively searching for work, he was employed within six weeks.

Considering Mr. Gonzalez's age, educational background, employment history, residual symptoms, permanent impairment ratings, permanent work restrictions, his demonstrated ability to return to work, his motivation level, his language barrier, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Gonzalez has proven he sustained a 45 percent loss of future earning capacity as a result of the May 25, 2016, left shoulder injury.

Having found claimant sustained a 45 percent industrial disability, the next issue to be decided is the commencement date for claimant's PPD benefits.

Claimant asserts a commencement date of February 21, 2018. Defendants assert a commencement date of August 9, 2017. Claimant does not rely on the medical opinions of any particular expert; rather, he relies on the medical record as a whole and Dr. Nepola's February 20, 2018, release date. Defendants rely on the medical opinions of Dr. Naylor, who, on June 12, 2017, estimated he would place claimant at MMI at his next follow-up appointment on August 9, 2017.

At the August 9, 2017, appointment, Dr. Naylor administered a cortisone injection and referred claimant for a functional capacity evaluation. On September 25, 2017, Dr. Naylor recommended claimant obtain an updated MRI and, potentially, a second opinion depending on the outcome of the MRI report. Prior to his final appointment with claimant, Dr. Naylor, again, recommended claimant seek an updated MRI before proceeding with MMI and permanent restrictions. Claimant was subsequently referred on to Dr. Nepola for a second opinion. According to claimant and his wife, Dr. Nepola was confident he could improve claimant's condition, although such optimism is not expressed in his medical records. During claimant's treatment with Dr. Nepola, claimant underwent two rounds of diagnostic injections. Defendants continued to authorize the treatment recommendations of Dr. Nepola despite his status as a second opinion physician. As claimant was treating with Dr. Nepola, it was evident both parties had a reasonable expectation of improvement. Although claimant did not improve, the expectation of improvement existed as different modalities were utilized to treat claimant's ongoing complaints. Therefore, I find claimant reached MMI as of February 20, 2018.

The parties dispute the rate at which claimant's weekly benefits should be paid. Claimant asserts that he had average gross weekly earnings prior to the injury date totaling $682.44. Defendants contend that the claimant's average gross weekly earnings totaled $631.60.

Review of the parties' respective positions on this issue reveals the primary dispute is whether the wages for the week ending April 26, 2016, should be considered representative of claimant's typical earnings and included in the calculation of claimant's average gross weekly wages. On the week ending April 26, 2016, claimant worked 99.5 hours. He contends this should be excluded and replaced by another week. Defendants contend this week is representative of claimant's typical earnings.

Claimant's wage records are contained in Exhibit 8. These records demonstrate a fairly consistent pattern of hours worked. Between January 1, 2016, and April 12, 2016, claimant's total hours worked on a bi-weekly basis ranged from 119.25 to 132.50. This range results in an average of 126.61 hours worked. For the pay period ending April 26, 2016, claimant only worked 99.5 hours (27 hours less than average). For the pay period ending May 14, 2016, claimant worked 175.75 hours (49 hours more than average). At trial, claimant was asked on direct examination about the hours worked for the pay period ending April 26, 2016. Claimant was asked if it was normal for him to work 99.5 hours over the course of two weeks. Claimant explained the pay period ending April 26, 2016, was low because he had asked to take two days off for personal reasons.

Claimant's wage records are fairly unique. Claimant was paid on a semi-monthly schedule; however, his paychecks were not the same from pay period to pay period because he was paid on an hourly basis. It cannot be said that claimant received a fixed paycheck on a routine schedule, such as on the 1st and 15th of the month. Rather, his pay periods were sporadic and seemingly tied to hours worked per pay period. But for the week containing 175.75 hours, it would be reasonable to assume claimant's pay periods ended whenever he reached approximately 125 hours. With this in mind, I agree with defendants that Section 85.36(6) is most applicable.

Of the wage records in evidence, claimant's pay periods range from 12 to 18 days per period. Despite this wide range of days per pay period, claimant's hours worked per pay period remain consistent; again, ranging from 119.25 to 132.50 (5 of 7 weeks range from 124.5 to 129.5). For the purposes of rate calculation, I am most concerned with hours worked per pay period versus the average of hours worked per day (hours divided by days in pay period). This is because the record does not include any information as to claimant's typical schedule. Relying on the total hours worked per pay period results in the most consistent outcome and accurately singles out the outlying 99.5 and 175.75 hour periods discussed above. In contrast, if we were to use the average of hours worked per day, we would have to consider discarding the pay periods ending January 12, 2016, and February 11, 2016, as these pay periods only contained 12 days each, and result in a skewed average of hours worked per day, despite the fact the hours worked per pay period are consistent with 7 of the 9 pay periods available in the record.

Moreover, to utilize the average of hours worked per day, we would necessarily have to assume claimant not only worked every day of every pay period, but that his assigned hours substantially increased or decreased based upon the length of a

seemingly arbitrary pay period. Utilizing the total hours worked per pay period more accurately reflects claimant's customary wages. Excluding the known outliers, claimant could reasonably anticipate each check he received would reflect wages tied to 119.25 to 132.5 hours worked. Due to the fact claimant's rate calculation requires a significant amount of legal analysis, the remainder of this discussion will take place in the conclusions of law section.

Lastly, the parties listed medical mileage as a disputed issue on the hearing report. Neither party briefed the issue and I did not receive notification from either party that the issue had been resolved. I find that claimant incurred mileage for transportation to and from medical appointments necessary to treat his May 25, 2016, injury. I find that the summary and itemization of mileage contained in Exhibit 19 accurately reflects the mileage claimant traveled for the listed appointments.

CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work-related left shoulder injury on May 25, 2016. The parties have further stipulated that the injury resulted in permanent disability. As such, the main dispute between the parties is the extent of permanent disability sustained as a result of the May 25, 2016, work injury.

The parties appropriately stipulate that this injury involves an unscheduled injury that should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). 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).

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

Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

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 sustained a work-related injury to his non-dominant, left shoulder which required two surgical procedures. Dr. Naylor provided an impairment rating of 11 percent to the left upper extremity. Dr. Delbridge originally provided an impairment rating of 8 percent to the left upper extremity; however, he added an additional 10 percent impairment to the left upper extremity for loss of grip strength. The combined values resulted in an assessment of 17 percent impairment to the left upper extremity, or 10 percent impairment to the whole person. With the exception of loss of grip strength, both physicians appear to have utilized the same methodology in reaching these ratings.

Dr. Naylor estimated permanent restrictions of no repetitive use at or above shoulder level, no lifting greater than 5-10 pounds away from the body, and no lifting greater than 15-20 pounds close to the body. As discussed in the findings of fact, Dr. Delbridge provided three different reports with respect to permanent restrictions. I found the December 2018 addendum most accurately reflects claimant's abilities. I further found claimant's actual lifting abilities likely fall within the range of 25 to 50 pounds on an occasional basis.

Claimant was 24 years of age on the date of the evidentiary hearing. Claimant attended 12 years of schooling in Mexico; he did not receive the equivalent of a high school diploma. He is in the process of obtaining his GED. Claimant has attended ESL courses, but is not fluent in the English language. The primary focus of his working career, including his time spent with the defendant employer, has been manual labor-type positions. Currently, this line of work best suits claimant's aptitudes and interests. This line of work maximizes claimant's earning potential.

Claimant remains employed in such a position, albeit with a different employer, earning a higher rate of pay than he earned at the time of his work injury. He is allegedly handling light-duty work activities for his current employer. Claimant works 35-45 hour weeks; which is significantly less than the number of hours he consistently worked for the defendant employer. Claimant has not missed work with his current employer due to the alleged lingering effects from his work injury. Claimant's timesheets for both the defendant employer and Sunflower Landscapes reflect a hard-working individual. His pursuit of a GED and ESL courses also reflects positively on his work ethic.

Having considered claimant's age, the situs and severity of the injury, permanent impairment, permanent restrictions, ability to return to gainful employment, motivation

level, educational background, employment history, language barriers, and all other industrial disability factors identified by the Iowa Supreme Court, I find that claimant sustained a 45 percent industrial disability as a result of the work-related injury of May 25, 2016. This entitles claimant to two hundred (twenty-five 225) weeks of permanent partial disability benefits.

The parties dispute the proper commencement date for permanent disability. Permanent partial disability benefits commence on the earliest date when claimant returns to work, is medically capable of performing substantially similar work, or achieves maximum medical improvement. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981).

Having found there was a reasonable expectation of improvement until Dr. Nepola released claimant on February 20, 2018, I conclude claimant's healing period terminated on February 20, 2018. Therefore, I also conclude that permanent partial disability benefits commenced on February 21, 2018.

The next issue to be determined is the proper weekly rate at which all benefits in this case should be paid. Specifically, the parties dispute claimant's gross weekly earnings at the time of the injury. 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 subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Section 85.36(6) states, "[i]f the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings."

The Iowa Supreme Court provided an in-depth analysis of what qualifies as "customary earnings" in the case of Jacobson Transp. Co. v. Harris, 778 N.W.2d 192 (Iowa 2010). Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or typical for that employee [...] An employee need not justify the weekly variance with a particular explanation. The amount of the variance alone, by the magnitude of its departure from the usual earnings of the employee, may suffice to justify the exclusion of a week's earnings from the weekly rate calculation. (Id.).

In Jacobson, the commissioner averaged the earnings of the claimant truck driver for thirty weeks prior to the injury. The commissioner then focused on the thirteen weeks of earnings prior to the injury, throwing out three weeks in which earnings were markedly less than average. The Supreme Court of Iowa rejected the employer's argument that it was irrational to exclude the lowest weeks without also excluding the highest weeks. In that particular case, the high weeks were not unusually high when compared to the rest of the claimant's earning history.

The test to determine whether a week is representative is whether the claimant's earnings during each particular week was customary for that particular employee given his or her earning history as a whole.

I do not find either party's calculation convincing. There is no evidence in the record of claimant's work schedule, or how many days claimant worked each pay period. As discussed above, it is more appropriate to utilize the total hours worked per pay period as opposed to the average of hours worked per day in each pay period to determine claimant's customary earnings.

With this in mind, I am excluding the pay period ending April 26, 2016, and the pay period ending May 14, 2016, from consideration in claimant's rate calculation as both pay periods are unrepresentative of claimant's customary earnings. I find the seven consecutive pay periods extending from January 1, 2016, to April 12, 2016, most accurately reflect claimant's customary earnings. These seven pay periods include 102 days, or 14.57 weeks. Total wages for the seven consecutive pay periods equals $9,401.56. Taking total wages ($9,401.56) divided by total weeks (14.57) results in an average weekly wage (AWW) of $645.21. According to the rate book covering July 1, 2015 to June 30, 2016, a married individual with two exemptions, earning an AWW of $645.21, has a workers' compensation rate of $430.29.

Period	Hours	Wage		Gross Pay
N/A	175.75	$10.75		$1,889.31
N/A	99.5	$10.75		$1,069.63
1	128.75	$10.75		$1,384.06
2	125.5	$10.75		$1,349.13
3	129.5	$10.75		$1,392.13
4	124.5	$10.50		$1,307.25
5	126.25	$10.50		$1,325.63
6	132.5	$10.50		$1,391.25
7	119.25	$10.50		$1,252.13
	Avg.	126.61	Total	$9,401.56

With the above analysis in mind, I find the gross weekly wage to be $645.21. This calculation is reasonable and it fairly reflects claimant's customary earnings immediately prior to the date of injury.

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

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $645.21, and relying upon the parties' stipulations that he is married and entitled to two exemptions, and using the Iowa Workers' Compensation Manual with effective dates of July 1, 2015 through June 30, 2016, I determine that the applicable weekly rate for benefits in this case is $430.29.

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 cost of the filing fee ($100.00). The cost of the filing fee is an allowable cost and is taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing on February 21, 2018 at the weekly rate of four hundred thirty and 29/100 dollars ($430.29).

Defendants shall pay all accrued benefits in a lump sum.

Defendants shall receive credit for benefits paid.

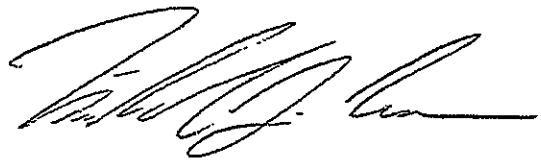
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 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 percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall provide claimant future medical care for all treatment causally related to his left shoulder injury.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 3rd day of July, 2019.



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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.