

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM PORTER,

Claimant,

vs.

LINCARE,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carriers,  
Defendants.

**FILED**

MAR 23 2016

WORKERS COMPENSATION

File No. 5048113

ARBITRATION DECISION

Head Note Nos.: 1801; 1803;

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, William Porter, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on December 18, 2014. Claimant alleged he sustained a work-related injury on November 17, 2011. (Original notice and petition.)

Lincare Holdings, Inc., and its workers' compensation insurance carrier, Liberty Mutual Insurance, filed their answer on February 2, 2015. They admitted the occurrence of the work injury. A first report of injury was filed on May 15, 2012.

The hearing administrator scheduled the case for hearing on September 9, 2015 at 8:30 a.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Brittney Sposeto, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Mr. David Lee Smith testified for defendant.

The parties offered exhibits. Claimant offered exhibits marked 1 through 8. Defendants offered exhibits marked A through D. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on October 15, 2015. The case was deemed fully submitted on that date.

### STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on November 17, 2011 which arose out of and in the course of his employment;
3. The injury resulted in both temporary and permanent disability;
4. Temporary benefits are no longer in dispute;
5. The permanent disability is an industrial disability;
6. The commencement date for the permanent partial disability benefits is January 8, 2013;
7. The parties believe the weekly rate is \$641.55 per week;
8. Medical benefits are no longer in dispute;
9. Defendants have withdrawn any affirmative defenses they may have had available; and
10. Prior to the hearing, claimant was paid 49.429 weeks of permanent partial disability benefits at the rate of \$624.59 per week.

### ISSUES

The issues presented are:

1. What is the extent of claimant's permanent disability?
2. What is the credit to which defendants are allowed to take with respect to temporary partial disability benefits?
3. What interest is owed to claimant; and;
4. What and to whom shall costs be taxed?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant and the other witness at hearing, after judging the credibility of both, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 40 years old and right-hand dominant. He is married with 2 minor children. Claimant graduated from Madrid High School with average grades. He did not seek any formal education beyond the high school level. He holds an Iowa commercial driver's license. At one time, he held a special license to transport hazardous materials.

On October 27, 2003, claimant commenced employment with the present employer. Initially, he was hired as a delivery person. Later, he was promoted to the senior service representative. "Lincare" is a company that sells, rents and distributes durable medical equipment, especially equipment for people with respiratory difficulties. The equipment is placed in apartments, homes, clinics, hospitals, and nursing homes.

Several of claimant's critical job duties included:

Make oxygen deliveries (cylinder and concentrator) and equipment checks on a daily route as determined by patient base and Lincare routing system. Deliveries may include refilling reservoirs with liquid oxygen from a van mounted tank.

Perform minor equipment repairs and preventative maintenance on equipment both in the home and at the center. For equipment repairs requiring other than minor repair work equipment is to be packaged for shipment to the manufacturer or their designee. Responsible for equipment maintenance per schedule recommended by the manufacturer.

Maintain company vehicles in clean and orderly manner. Make daily inspections and complete proper paperwork. Maintain established preventative maintenance schedule.

Clean rental equipment, when returned to the center, in accordance with the Lincare policies and procedures. Maintain cleanliness and organization of warehouse/storage area.

(Exhibit 8, page 1)

Claimant testified he had to lift and deliver cylinders and reservoirs of liquid oxygen. Claimant described them as:

A. They are anywhere from -- they're many different sizes, but anywhere from a -- I'd say maybe 3-foot tall by, you know, 9-inch diameter aluminum cylinder down to one that kind of resembles like an old Pepsi bottle. You know, it's probably 16 inches tall and -- I don't know -- 6 inches in diameter, 8 inches.

(Transcript, p. 29)

Q. What is the weight of the items you've just told us about?

A. The cylinders are anywhere from probably 3 or 4 pounds up to maybe -- oh, my gosh, it's been a while -- 15 pounds for the E-cylinders. Liquid oxygen reservoirs were anywhere from -- for the small travel size, probably around 50 pounds up to the C41s that are approximately 170 pounds.

Q. Did you load and unload those reservoirs as well?

A. Yes.

(Tr. p. 30)

On November 17, 2011, claimant sustained an injury to his left shoulder while he was lifting a 170 pound C41 reservoir up some steps at a customer's home. The injury was promptly reported to Mr. David Smith, the center manager.

Management directed claimant to Iowa Methodist Occupational Health and Wellness Clinic on the date of the work injury. (Ex. 1, p. 1) Michael J. Knipp, M.D., M.S., treated claimant for left shoulder pain. (Ex. 1, p. 1) Claimant was restricted from using his left arm. The physician prescribed medications. MRI testing was ordered.

James J. Choi, M.D., interpreted the results of the MRI as:

**Impression:**

1. Distal clavicle marrow edema with cortical irregularity. Findings are likely related to a nondisplaced fracture. There is no evidence for high-grade AC separation.

2. Intact rotator cuff.

(Ex. 1, p. 4)

Eventually, claimant was examined by James V. Nepola, M.D., an orthopedic surgeon at the University of Iowa Hospitals and Clinics. Dr. Nepola treated claimant conservatively, but eventually a subacromial decompression with a distal clavicle resection was performed. The surgical procedure occurred on April 10, 2012. (Ex. 2, p. 9) Claimant was not released to full duty work until January 8, 2013. After Dr. Nepola reviewed claimant's job duties, the surgeon released claimant without any work restrictions. Claimant was told to return to the clinic on an as needed basis. (Ex. 21, pp. 21-22)

On February 22, 2013, Dr. Nepola rated claimant as having a seven percent permanent impairment to the body as a whole for the left shoulder injury. (Ex. 2, p. 23) The orthopedic surgeon explained his rating process as follows:

To the nearest degree of medical certainty he has a permanent partial impairment rating of 12% of the upper extremity which is equivalent to 7% of the whole person according to the Guides to the Evaluation of Permanent Partial Impairment of the AMA, 5<sup>th</sup> Edition. This rating is derived from the loss of active forward flexion of the shoulder (1% upper extremity) and extension (0% upper extremity) per figure 16-40 on page 476, loss of active abduction (1% upper extremity) and adduction (0% upper extremity) per figure 16-43 on page 477, loss of active internal rotation (0% upper extremity), and distal clavicle resection arthroplasty (10% upper extremity) per table 16-27 on page 506 of the Guides. This is intended to be an assessment of his functional loss on January 8, 2013, and not intended to be combined with any previously assigned impairment rating. Mr. Porter was released to work without any restrictions. Further treatment for this injury could include non-steroidal anti-inflammatory medications, periodic corticosteroid injections, physical therapy, and possibly revision surgery.

(Ex. 2, p. 23)

Claimant returned to work in the same capacity as he held prior to the work injury. He earned \$962.80 per week which equates to \$24.07 per hour. Claimant asked if he could alternate driving his own vehicle with driving the company van. Permission was granted. He worked for approximately 11 months. In November of 2013, claimant was terminated for issues unrelated to his work injury.

Claimant successfully found another position with YRC Freight in February of 2014. Claimant is employed in telephone freight. He secures freight jobs to be picked up and delivered by YRC. Claimant is compensated by the hour. He earns approximately \$18.82 per hour. The hourly wage is substantially less than what he earned at Lincare.

On April 18, 2014, claimant participated in a functional capacity evaluation (FCE) with John Kruzich, MS, OTR/L. Mr. Kruzich deemed the FCE to be valid. The therapist opined claimant could work in the heavy category of labor as described in the Dictionary of Occupational Titles. (Exhibit D, page 1) Mr. Kruzich placed the following restrictions on claimant's work:

Waist to floor lifting – 55 lbs., occasionally

Waist to crown lifting (fixed hand position) – 30 lbs., occasionally

Bilateral carrying – 55 lbs., occasionally

Left unilateral carrying – 40 lbs., occasionally

Overhead work – Occasionally

(Ex. D, p. 1)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. On April 21, 2014, claimant presented to Sunil Bansal, M.D., M.P.H. Dr. Bansal reviewed medical records, and conducted a clinical examination of claimant. Dr. Bansal diagnosed claimant with:

**DIAGNOSIS:**

Left acromioclavicular joint ligament sprain.

Status post arthroscopy of the left shoulder, with distal clavicle resection and subacromial decompression.

(Ex. 3, p. 9) Dr. Bansal concurred with Dr. Nepola; claimant had reached maximum medical improvement on January 8, 2013.

Dr. Bansal rated claimant as having a permanent impairment to the body as a whole. The rating was explained as follows:

RANGE OF MOTION		UE impairment (%)
Flexion:	144 degrees.	3
Abduction:	155 degrees.	1
Adduction	33 degrees.	1
External Rotation:	70 degrees.	0
Extension:	40 degrees.	1

$$\% \text{ UE impairment} = 3+1+1+0+1+1 = 7\%$$

Total Combined Impairment+ 7+10= 16%UE= 10% BAW.

(Ex. 3, pp. 10-11)

Dr. Bansal agreed with the restrictions imposed pursuant to the FCE that occurred on April 18, 2014. However, Dr. Bansal added one other restriction. He restricted overhead lifting with the left arm to five pounds on an occasional basis and no frequent overhead lifting with the left arm. (Ex. 3, p. 11)

Claimant testified that at the time of his arbitration hearing, it was still difficult for him to lift objects over his head. He is no longer able to play golf. He has intermittent left shoulder pain.

## RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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.

Two physicians rated claimant's left shoulder. Dr. Nepola rated claimant as having a permanent impairment in the amount of seven percent to the body as a whole. Dr. Bansal rated claimant's shoulder at ten percent to the body as a whole. There is consistency between the two experts regarding the degree of physical impairment. Claimant is capable of working in the heavy category of labor. However, he is not able to work above his left shoulder level on a continuous basis.

Claimant earns less money at YRC Freight than he earned at Lincare. However, claimant's separation from Lincare had absolutely nothing to do with his work injury. His separation from the company was related to time keeping issues.

Claimant is 40 years old. Retraining is unlikely, but claimant is motivated to remain employed in the job he currently holds. He is not interested in leaving his current position.

After considering all of the factors involving industrial disability, it is the determination of the undersigned; claimant has sustained a permanent partial disability in the amount of twenty (20) percent. Defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of six hundred forty-one dollars and 55/100 (\$641.55) per week and commencing from January 8, 2013.

The parties admitted defendants were entitled to a credit of 49.429 weeks of permanent partial disability benefits. Defendants are also requesting a credit for an overpayment of temporary partial disability benefits.

Liberty Mutual made an overpayment of TPD in the amount of \$1,129.34:

1) 6/18/12-7/1/12 (2 weeks)

LM estimated income for claimant and that resulted in a \$770.52 payment for TPD, but the actual amount owed was \$467.49 resulting in an overpayment of \$303.03.



AWW:  $\$962.80 \times 2 = \$1,925.60$   
 $\$1,925.60 - \$1,224.36 = \$701.24 \times 2/3 = \$467.49$   
Paid at estimated wages resulting in TPD = \$770.52

2) 7/2/12-7/29/12 (4 weeks)

LM estimated income for claimant and that resulted in a \$1,541.08 payment for TPD, but the actual amount owed was \$714.77, resulting in an overpayment of \$826.31.

AWW:  $\$962.80 \times 4 = \$3,851.20$   
Claimant's actual wages: 7/2 – 7/15 \$1,427.01 and 7/16 – 7/29 \$1,352.04 = \$2,779.05

AWW:  $\$3,851.20 - \$2,779.05 = \$1,072.15 \times 2/3 = \$714.77$   
paid at estimated wages resulting in TPD = \$1,541.08  
Should have been paid = \$714.77  
Total TPD overpayment - \$826.31

Total TPD overpayment = \$1,129.34

There was an underpayment of TTD because of the rate issue; and it totaled \$477.30. The amount will be offset by the overpayment of TPD, leaving a balance in favor of Liberty Mutual for the temporary partial disability benefits.

Generally speaking, in arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

Defendants assert they should not have to pay interest on unpaid permanent disability benefits from the onset of permanent disability. Their argument is:

The WCC file will show that Claimant filed his original Petition on November 14, 2013. On January 30, 2014, the hearing was scheduled to proceed on May 22, 2014. Instead of proceeding to hearing in May 2014, Claimant chose to dismiss his petition in April 2014 and not file a new one until December 18, 2014. Thus, the hearing on this matter was delayed by Claimant until September 2015 – 15 months.

No additional expert reports were generated and Claimant did not seek treatment, nor did his condition change during those 15 months. Ex. C, tr. p. 10. Claimant admitted during his deposition that he knew of no reason why his petition was dismissed and not refiled for 8 months. Ex. C, tr. p. 13-14.

Because the delay in receiving his award was his or his attorney's choice, Defendants maintain that they should only be required to pay interest from the date benefits are to start, January 8, 2013, until the date the first hearing was scheduled, May 22, 2014.

(Defendants' post-hearing brief, pp. 5-6)

The undersigned is not persuaded by defendants' argument because pursuant to Rule 1.943 of the Iowa Rules of Civil Procedure, "A party may, without order of court dismiss the party's own petition, counter-claim, cross-petition or petition of intervention, at any time up until ten days before the trial is scheduled to begin."

In the present case, claimant had a hearing scheduled for May 22, 2014. Claimant voluntarily dismissed his petition on April 30, 2014 pursuant to Rule 1.943. No consequences resulted. Then under Iowa Code section 85.26 claimant had three years from the date of the last payment of weekly compensation benefits to file an original proceeding for benefits. Claimant filed the original proceeding within the three year time frame. Interest on unpaid permanent partial disability benefits is due from the onset of permanent disability.

Defendants shall take credit for all benefits previously paid, including any overpayments made due to any rate issues, or overpayments due to temporary partial disability benefits.

The final issue is costs to litigate. The deputy workers' compensation commissioner has discretion to tax costs. Dickenson v. John Deere Products Engineering, 395 N.W.2d 644, 647 (Iowa Ct. App. 1986). The subsequent costs are assessed to defendants:

Filing fee \$100.00

Service of Petition

#### ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits commencing from January 8, 2013 and payable at the rate of six hundred forty-one and 55/100 dollars (\$641.55) per week.

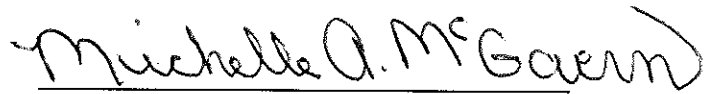
Accrued benefits shall be paid in a lump sum, together with interest at the rate allowed by law.

Defendants shall take credit for all benefits previously paid, including any overpayments.

Costs as established in the body of the decision are assessed to defendants.

Defendants shall file all reports as required by this division.

Signed and filed this 23<sup>rd</sup> day of March, 2016.



MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.