BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
APR 25 2017
WORKERS COMPENSATION

MEHMED MIZIC,	:	
Claimant,	:	File No. 5055280
vs.	:	ARBITRATION
TYSON FRESH MEATS, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	Head Note Nos.: 1802, 1803, 2500, 2700

STATEMENT OF THE CASE

Mehmed Mizic, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendant, Tyson Fresh Meats, Inc., a self-insured employer. The arbitration hearing was held on January 19, 2017. The parties filed post-hearing briefs on March 1, 2017 and the matter was considered fully submitted at that time.

The evidentiary record includes Claimant's Exhibits 1 through 12, which were admitted without objection. Defendant offered Exhibits A through I, which were admitted without objection. Upon post-hearing review it was noted by the undersigned that Exhibit I is merely a reference to possible rebuttal evidence that was not introduced, and included no actual documents.

Claimant was the only witness called to testify at the hearing.

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

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to healing period benefits for the period of September 2, 2014 through January 25, 2015.

2. The extent of industrial disability.

3. The commencement date of permanency benefits.

4. Whether claimant is entitled to medical expenses identified in Exhibit 10.

5. Whether claimant is entitled to alternate medical care consisting of pain management as recommended by Joseph Chen, M.D. and/or Marc Hines, M.D.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 51 years old at the time of the hearing. (Transcript page 10) He was born in Bosnia and came to the United States in 1998. (Tr. p. 11)

This was a translated hearing. Claimant testified that he knows only a few basic words and phrases in English and he relies constantly on family members to interpret. (Tr. p. 13, 43-44) He has not taken any classes to improve his English, stating that he had children to feed and he could not attend classes and work at the same time. (Tr. p. 44) However, since being off work following this injury, he has not taken English classes or made other efforts to improve his English.

Claimant is right-hand dominant. (Tr. p. 71; Exhibit A, p. 1)

In Bosnia, claimant was trained as a carpenter. (Tr. p. 11) After working as a carpenter, his job transitioned into drafting blueprints and schematics for crafting wood products such as doors and kitchen cabinets. (Tr. p. 11, 38-39)

About a month after his arrival in the United States, claimant began working at BPI in Waterloo where he ran a machine grinding meat. (Ex. H, p. 1; Tr. p. 12) Although he testified that this was the only job he had at BPI, claimant's application for employment at Tyson indicates that he worked at BPI as a forklift driver. (Ex. H, p. 1) Claimant left this job to return to Europe for a few months. (Tr. p. 42; Ex, H, p. 1)

When returned to the United States from Europe he went to work at Bertch hoping, or expecting, to do a job involving kitchen cabinets, similar to the job he had in Bosnia. (Tr. p. 40) However, he was placed in a job working with sinks and involving "lots of chemicals." (Tr. pp. 40-41) Claimant left that job after a few months to work at Tyson. (Tr. pp. 40-41; Ex. H, p. 1)

Claimant was hired at Tyson Fresh Meats on November 15, 2001 and started work on November 20, 2001. (Ex. H, p. 1) He heard about Tyson "[b]ecause many Bosnians work there, and I did not really have any choice because I don't speak English." (Tr. p. 13) Claimant's job application indicates that he had a pre-employment physical, although he did not seem to recall it, and he testified that he was cleared to do any job in the plant. (Ex. H, p. 1; Tr. p. 13)

At Tyson Fresh Meats, claimant worked as an operator in the cooler where he was required to push and pull frozen hogs on an overhead conveyor line and pick up hogs that had fallen from the line using a two wheel cart. (Ex. 1, p. 1; Tr. pp. 13-16) The hogs weighed more than 200 pounds. (Tr. p. 16) Claimant estimated that about 40 to 50 hogs fell off the line during an ordinary eight hour shift. (Id.) Claimant worked this job for about 11 years. (Ex. A, p. 1; Tr. p. 18)

The parties stipulated in the hearing report that claimant sustained a work injury on December 18, 2013.

I find from the evidence presented that claimant continued to work his regular job after the stipulated injury on December 18, 2013.

On January 14, 2014, claimant was seen by Robert Gordon, M.D., of MOHA On-Site Physician Services, and reported that "he began noticing his symptoms in mid-December 2013," involving his left shoulder/left parascapular area, and pain going down his left arm, most notably in the forearm. (Ex. A, p. 1) Claimant believed the pain was job related and occurred over time. (Id.) The parties have stipulated that claimant sustained an injury that arose out of and in the course of his employment on December 18, 2013. Claimant was diagnosed with left forearm intersection syndrome, left flexor tendinitis of the forearm, and left shoulder/parascapular pain. (Id.) He was given Ultram and prednisone and placed on work restrictions of no lifting greater than 5 pounds and no work above chest height with the left arm, and only occasionally engage in wrist flexion or extension. (Id.)

Following this appointment with Dr. Gordon, claimant was placed on a light-duty job that involved inspecting the hogs for foreign substances on the carcasses. (Tr. pp. 20-21) It is unclear to the undersigned when claimant ceased working in this light duty position.

Claimant continued to have treatment with Dr. Gordon complaining of pain in his neck, left shoulder and left arm. (Ex. A, p. 3) He also had physical therapy with Accelerated Rehabilitation from January 27, 2014 through February 11, 2014 and again from April 24, 2014 through July 17, 2014. (Ex. 8)

An MRI of the cervical spine was obtained and revealed degenerative disc disease at C4-5 and C5-6 and "complex disc protrusion with endplate osteophyte with compression of ventral thecal sac and the anterior surface of the cord" at C5-6, along with mild to moderate left C4-5 and C5-6 neuroforaminal stenosis. (Ex. A, p. 4)

An MRI of the left shoulder showed "mild to moderate edema of os acromiale with moderate adjacent active AC joint arthropathy," and "mild rotator cuff peritendinitis and tendinosis," without a tear. (Id.)

Claimant was referred to a spine surgeon. (Ex. A, p. 5)

On March 31, 2014, claimant was seen by Chad Abernathey, M.D., who recorded that claimant had "a 3 month history of neck pain with radiation into the left upper extremity." (Ex. 3, p. 1) Dr. Abernathey concluded that a component of his neck and left shoulder and arm pain "is related to the degenerative changes at C4-5 and C5-6," and that "he also has shoulder pathology contributing to his presentation." (Id.) Therefore, Dr. Abernathey stated that claimant may not receive complete relief of his symptoms with a cervical fusion at C4-5 and C5-6. (Id.)

On April 8, 2014, Dr. Abernathey performed a multilevel cervical fusion at C4-5 and C5-6, and an anterior cervical discectomy and osteophytectomy. (Ex. 3, p. 4)

Claimant had follow-up care with Dr. Abernathey, who on June 9, 2014, reported that claimant "continues to demonstrate excellent relief of his pre-operative pain syndrome and is quite pleased which his surgical result." (Ex. 3, p. 3) Claimant was returned to work without restrictions, effective June 30, 2014.

The following day on June 10, 2014, claimant was seen by Thomas Gorsche, M.D. specifically for his left shoulder complaints. (Ex. 4, p. 1) Claimant advised that contrary to what Dr. Abernathey stated in his records, surgery did not relieve his pain, and he continued to have constant pain in his left shoulder at a level of 8 out of 10, which was made worse with any movement. (Ex. 4, p. 1) Dr. Gorsche noted positive Hawkins test, and reduced range of motion with forward flexion and abduction. (Id.) He then administered a subacromial injection and restricted claimant from any above shoulder work. (Ex. 4, p. 2) Claimant saw Dr. Gorsche again on July 2, 2014, at that time claimant indicated that the neck surgery may have "helped some of the neck pain," but his left upper extremity pain remained unchanged. (Ex. 4, p. 5) It is also noted that the injection he received at the previous visit, "gave him no relief, not even temporary." (Ex. 4, p. 5) Dr. Gorsche stated that claimant had pain with any abduction, forward flexion past 90 degrees with the left arm, but that the pain was "nonspecific and not related to the glenohumeral joint or subacomial space . . ." (Ex. 4, p. 5) He concluded that it was possible that the left shoulder complaints may be related to the cervical spine as claimant experienced no relief, not even temporary relief from the injection. (Ex. 4, p. 5)

On June 20, 2014, claimant was seen by his primary care provider, Peoples Community Health Clinic, and stated that he was having some shoulder pain since his cervical fusion surgery and had not returned to work yet. (Ex. 7, p. 1) His primary purpose for this visit was because he was feeling fatigued and light headed and he wanted his lipids and blood sugar checked. (Ex. 7, p. 2)

On September 2, 2014, claimant returned to see Dr. Gordon, following EMG studies that "revealed subtle findings suspicious for left C5 or C6 cervical radiculopathy." (Ex. A, p. 8) Claimant also had a repeat MRI on July 31, 2014, of the cervical spine. Compared to the previous MRI from February 18, 2014, it revealed post-operative changes and "no significant cord compression," and moderate to severe left-sided neuroforaminal stenosis, and mild compression of the ventral thecal sac and flattening of the anterior surface of the cord, which was unchanged from the prior exam.

(Id.) Dr. Gordon noted full passive range of motion of the cervical spine and difficulty assessing the "left shoulder range of motion due to differential in his range of motion." (Ex. A, p. 9) He also noted that "[h]is symptomology is not classic for a primary left shoulder disorder based upon my evaluation today." (Id.) Dr. Gordon stated his agreement with Dr. Abernathey concerning a return to work date of June 30, 2014. (Id.)

On October 8, 2014, Dr. Abernathey responded to a letter from the employer indicating his opinion that claimant reached maximum medical improvement (MMI) on October 8, 2014, sustained an 11 percent whole body impairment, and did not require any additional medical treatment for the spine. (Ex. 3, p. 5) There is no discussion or explanation provided for the date of MMI or the impairment rating.

Claimant continued to complain of pain in his left neck and shoulder and was seen by James Nepola, M.D. on November 11, 2014. (Ex. 5, p. 1) Dr. Nepola reviewed medical records and conducted an examination. (Ex. 5, pp. 1, 3) A left subacromial injection was administered and after waiting 45 minutes, claimant indicated that it provided no relief and his pain was unchanged. (Id.) Based on the unchanged symptoms, Dr. Nepola concluded that the os acromiale is not contributing to his current symptoms and that it is possible that "he is having some continued symptoms from the neck." (Ex, 5, p. 4) A referral was made for a functional capacity evaluation (FCE). (Id.)

The FCE was conducted by E-3 Work Therapy Services on November 21, 2014. (Ex. B, p. 1) The result was stated as follows:

> The overall classification of effort is invalid due to the client, Mehmed Mizic, performing inconsistently during a repeated measures protocol. The client failed to give maximum effort during today's FCE. Therefore, it is undeterminable at this time, safe, maximum lifting capabilities and/or functional capabilities.

(Id.)

Claimant was seen again by Dr. Gordon on December 3, 2014. (Ex. A, p. 10) Claimant complained of pain in his neck, left shoulder and pain, numbness and tingling down the entirety of his left upper extremity. (Id.) Dr. Gordon found claimant had excellent range of motion of his cervical spine, but complained of pain with movement. (Id.) Dr. Gordon also noted claimant had reduced left shoulder range of motion. (Ex. A, p. 11) Dr. Gordon stated that "I was not able to assess his strength due to breakaway phenomena," and that claimant's range of motion improved with observation when compared to direct examination. (Id.) Dr. Gordon confirmed his prior agreement with Dr. Abernathey that claimant was at MMI for his cervical spine. He also stated that claimant was at MMI for his left shoulder as well. Dr. Gordon acknowledged the invalid findings of the FCE, but based upon his evaluation of claimant, determined it was appropriate to assign permanent restrictions of: "[n]o lifting greater than 50 pounds from floor to waist; no lifting greater than 25 pounds above shoulder height, and no lifting greater than 25 pounds from waist to shoulder height." (Ex. A, p. 11) Dr. Gordon also

reviewed the job of cooler janitor, "including the job description and video," and stated "I do not believe this job falls within the restrictions that I have recommended for him." (Id.)

In December 2014, claimant testified that he went on a leave of absence, called a "bid walk." (Tr. p. 64) Bidding for jobs with this employer is based on seniority and about a dozen jobs came open for bid every Friday. (Id.) A list of those jobs that were available from December 18, 2014 through December 31, 2015, are contained in Exhibit H, pages 5 to 25. The list contains hundreds of jobs and approximately 300 or more of those jobs are indicated to have been within the restrictions assigned by Dr. Gordon. (Ex. H, pp. 5-25) However, the undersigned notes that the vast majority of the job titles do not have accompanying job descriptions and there is no evidence of claimant's seniority compared to co-workers. Nevertheless, claimant testified that he looked at those jobs weekly, but never bid on any of the available jobs. (Tr. p. 65)

On December 10, 2014, Dr. Gordon replied to a letter prepared by the employer indicating that he reviewed a digital presentation and job analysis of four different jobs and that he believed claimant could perform these jobs entitled: (1) Feed Stomach Machine; (2) Pull Spleens/Caul Fat; (3) Cut Gams; and, (4) Separate Stomachs. (Ex. A, pp. 12-13)

Claimant testified that he is unable to perform the four jobs identified by Dr. Gordon. (Tr. p. 65) Although, he admitted that no physician has told him that he cannot perform those jobs. (Id.) Claimant further stated that he cannot do any work with his left hand and therefore cannot do any of the jobs he previously performed at Tyson, "because every job requires two arms." (Tr. p. 36) When asked if he could work with his left hand, claimant responded: "[n]othing." (Id.) The undersigned notes that no physician has recommended restrictions eliminating claimant's use of his left arm or hand.

I find that claimant has made no reasonable effort or attempt to obtain employment for over two years since being placed at MMI by Dr. Gordon on December 3, 2014. I find that claimant is not motivated to return to gainful employment.

On January 25, 2015, Dr. Gordon responded to a letter from the employer stating that claimant had sustained zero permanent impairment from this injury, "with regards to a primary left shoulder disorder/condition." (Ex. A, p. 14)

On March 9, 2015, claimant was seen by a primary care provider, Carrie Berry, NP, at Peoples Community Health Clinic primarily for hypertension and hyperlipidemia and was given a refill of hydrocodone for neck pain. (Ex. 7, pp. 7-11) Claimant testified that he has received pain medication from Ms. Berry after Tyson stopped providing authorized treatment. (Tr. p. 35)

On August 21, 2015, claimant was seen by Marc Hines, M.D., for the purpose of an independent medical evaluation (IME), at the request of claimant's counsel. (Ex. 1, p. 1) Dr. Hines stated that claimant described difficulty in many areas, including

extended standing, sitting, lying down, interrupted sleep, difficulty driving, grasping and lifting with the left arm, difficulty using stairs, and even difficulty talking on the phone, showering and watching T.V. (Ex. 1, pp. 3-4) Dr. Hines noted claimant continued to have "significant shoulder difficulties, not all of which seem to be easily explained on the basis of his cervical difficulty." (Ex. 1, p. 7) He also stated that "I am not able at this time to explain the sensory loss which is slightly non-anatomic . . . ." (Id.) Dr. Hines notes that while his exam was not as thorough as an FCE, he found that claimant had valid test results concerning grip strength diminishment. (Ex. 1, p. 7)

Dr. Hines recommended a post-surgery cervical MRI and EMG of the left upper extremity. He stated that after surgery, claimant did not have a repeat MRI of the cervical spine. (Ex. 1, p. 7) However, that is not accurate. Dr. Gordon's records state that the "patient did have an MRI of the cervical spine," and "[t]his was a second MRI," and "was performed on 07/31/2014," and "it was compared to the MRI of 02/18/2014." (Ex. A, p. 8) Dr. Gordon noted that the repeat MRI showed, among other things, "no significant cord compression," and that the moderate to severe left-sided neuroforaminal stenosis is "unchanged" from the prior exam. (Id.) Dr. Hines also stated that claimant "did not have an EMG and nerve conduction velocity as nearly as I can determine." (Ex. 1, p. 8) This is also incorrect. Dr. Gordon noted that claimant had "the electrodiagnostic study performed of the left upper extremity that revealed subtle findings suspicious for left C5 or C6 cervical radiculopathy." (Ex. A. p. 8) Dr. Gordon further noted that the examiner believed that "this was due to resolving cervical nerve root injury from prior surgery, but active process was not excluded." (Id.) Therefore, it appears that Dr. Hines did not have, or did not consider, a complete medical history when considering claimant's condition and possible impairment.

Dr. Hines goes on in his IME report to opine that claimant sustained impairment based on depression, anxiety, the cervical spine and the shoulder totaling 48 percent to the whole person. (Ex. 1, p. 8) He assigned impairment ratings as follows: (1) 5 percent to the whole person for a Class 3 mild impairment of depression; (2) 10 percent to the whole person for a Class 3 moderate impairment of anxiety; (3) 15 percent to the whole person regarding the C4-5 fusion; (4) 15 percent to the whole person regarding the C5-6 fusion; (5) 10 percent to the whole person for the glenohumeral impairment; and, (6) 5 percent to the whole person for the acromioclavicular impairment. (Ex. 1, pp.8-9) I note that the medical records do not include prior diagnoses or treatment related to anxiety or depression and Dr. Hines did not have or did not consider the post-surgery MRI and EMG studies.

Dr. Hines also assigned restrictions which included: no work above shoulder height; occasional work at shoulder height; no lifting more than 40 pounds from floor to waist; no climbing; no extreme temperatures or vibration; no operating a clutch vehicle or heavy equipment; and no sustained or repetitive extension, flexion, rotation of his neck. (Ex. 1, p. 9)

Dr. Hines recommended further medical care involving an EMG of the left upper extremity, a cervical MRI, psychiatric follow-up and treatment for anxiety and depression, medication to assist with sleep and pain management. It is unclear how

Dr. Hines would modify these recommendations if he learned that the recommended EMG and MRI had already been accomplished and the results thereof.

On January 5, 2016, a little over a year after going on the "bid walk" leave of absence, claimant was terminated from his employment at Tyson. (Tr. pp. 29, 67)

On July 29, 2016, claimant was seen by Joseph Chen, M.D., for the purpose of an IME at the request of the employer. (Ex. D, p. 3) Dr. Chen noted that claimant stated that his pain was 8-9 out of 10, and he required help from his wife with showering. (Ex. D, p. 5) Dr. Chen stated concerning the left upper extremity that claimant has "essentially normal" range of motion with "[n]o shoulder instability with functional movements," no obvious atrophy and "[n]o consistent loss of sensation in cervical dermatomal, radial, median, or ulnar nerve distribution." (Ex. D, p 6) He also indicates that claimant had full range of motion of the cervical spine and no instability. (Ex. D, p. 5) Dr. Chen stated that claimant "has no shoulder pathology and shoulder surgery has not been recommended by 3 surgeons." (Ex. D, p. 6) He determined that claimant was at MMI and specifically disagreed with Dr. Hines' impairment methodology and conclusions. (Ex. D, p. 7) Dr. Chen assigned an 18 percent whole person impairment based on Table 15-5, page 392, placing claimant in the DRE Category III, to address "his two level anterior cervical discectomy and fusion." (Id.) Dr. Chen disagreed with assigning any impairment rating to his shoulder, because "there has been no identifiable shoulder pathology according to 3 orthopaedic shoulder surgeons." (Ex. D, p. 8) He also stated that he would not assign any impairment for anxiety or depression. (Id.)

When considering permanent restrictions, Dr. Chen noted the restrictions assigned by Dr. Hines, and the fact that Dr. Abernathey assigned no restrictions. He also refers to restrictions assigned by Dr. Gordon in the medical history portion of his report. Dr. Chen then goes on to assign a permanent restriction, of "only lifting up to 50 pounds on an occasional basis." (Id.)

Considering the functional impairment ratings I find that Dr. Abernathey, the treating spine surgeon, assigned 11 percent to the whole person. (Ex. 3, p. 5) Dr. Gordon, did not address the issue of an impairment rating concerning the cervical spine, but notes the 11 percent assigned by Dr. Abernathey relating to the cervical spine and offers no objection to that conclusion. (Ex. A, p. 14) Also, Dr. Gordon concluded that claimant did not have any permanent impairment for the left shoulder. (Id.) Dr. Gorsche did not state an opinion on permanency but concluded that the shoulder pain was "nonspecific and not related to the glenohumeral joint or subacromial space," and stated that it was "quite possible that the left upper extremity complaints are related to his cervical spine." (Ex. 4. p. 5) Dr. Nepola did not specifically address permanency, but stated that based on his evaluation that the os acromiale is not contributing to his current symptoms and that it is possible that "he is having some continued symptoms from the neck." (Ex. 5, p. 4) Dr. Chen assigned an 18 percent whole person impairment based on the cervical spine and did not assign any impairment for the shoulder. (Ex. D, pp. 7-8) Dr. Hines assigned 48 percent to the

whole person based on the cervical spine, the shoulder, depression and anxiety. (Ex. 1, pp. 7-8)

I find, based on the weight of the evidence that the impairment rating of 18 percent to the whole person assigned by Dr. Chen is the most appropriate. Dr. Chen gives a thorough assessment of the cervical spine impairment and rejects any impairment to the shoulder, which is supported by the findings of the remaining physicians, except for Dr. Hines. I give little weight to the opinion of Dr. Hines as it is apparent that he was not fully informed, or overlooked, the relevant post-surgery MRI and EMG. Obviously he believed that these tests were relevant because he recommended that the tests be done, unaware that they had already been accomplished.

Considering permanent work restrictions, Dr. Abernathey "gave him permission to return to work," without indicating any restrictions. (Ex. 3, p. 3) Dr. Gorsche advised claimant to "continue his light duty restrictions," but did not indicate that those should be permanent and he was not specifically asked to provide an opinion on permanent restrictions. (Ex. 4, p. 5) Dr. Nepola requested the FCE. (Ex. 5, p. 4) Despite the FCE being deemed invalid, Dr. Gordon, Dr. Chen and Dr. Hines assigned permanent work restrictions. I have stated above that Dr. Hines did not consider the relevant medical history when stating his opinions and have given his report little weight. Dr. Chen evaluated claimant on one occasion and following that evaluation, assigned permanent restrictions of lifting up to 50 pounds on an occasional basis. (Ex. 6, p. 6) Dr. Gordon, however, had the opportunity to see claimant over multiple visits over a long period of time, both before and after surgery. (Ex. A, p. 11) Dr. Gordon, assigned permanent restrictions of no lifting greater than 50 pounds from floor to waist and no lifting more than 25 pounds from waist to above shoulder height. (Ex. A, p. 11) I find that the restrictions assigned by Dr. Gordon are the most appropriate.

Claimant testified that he continues to have pain in his neck and in his arm and stated that he wants additional treatment to address the symptoms. (Tr. p. 33) Although I find that claimant continues to have some ongoing symptoms, I also find that claimant's testimony that he is unable to use his left arm at all, is not consistent with the greater weight of the medical evidence. (Tr. p. 63)

Claimant applied for Social Security Disability benefits on February 6, 2015, based on "[n]eck pain post surgery" and "[n]erve damage and pain in left arm." (Ex. F, p. 1) Claimant was initially denied benefits and has appealed that denial, although a hearing date has not yet been scheduled. (Tr. pp. 33-34)

At the time of the hearing, claimant continued to be unemployed, and had not worked since the light-duty inspection job at Tyson. (Tr. p. 34) Claimant testified that the pain "affects everything." (Id.) He stated that although he takes medication to help with sleep, he only gets about 2 hours of sleep per night.

The hearing report indicates that claimant seeks healing period benefits from September 2, 2014 through January 25, 2015. Claimant then argues in his brief that he

is entitled to a reduced healing period from September 2, 2014, through December 3, 2014. (Claimant's Brief, p. 22) The parties agree that claimant was off work during that period of time. (Hearing Report p. 1)

On September 2, 2014, Dr. Gordon saw claimant and recorded that Dr. Abernathey had released claimant to return to work as of June 30, 2014, and stated "I do concur with Dr. Abernathey." (Ex. A, p. 9) However, it is clear from the records that Dr. Abernathey's treatment and focus was on the cervical spine, not the left shoulder. He stated during his discussions with claimant that "I believe that he also has shoulder pathology contributing to his presentation. Therefore, I admonished him as to the possibility that he would not receive total relief of his pain with a cervical fusion . . . ." (Ex. 3, p. 1) Although on June 9, 2014, Dr. Abernathey returned claimant to work effective June 30, 2014, this was in the context of the cervical spine and not inclusive of the left shoulder. This conclusion is bolstered by the fact that claimant was seen the following day by Dr. Gorsche on June 10, 2014, specifically for the left shoulder, at an appointment arranged by the employer. (Ex. 4, p. 1) Further, defendant does not argue in its brief that Dr. Abernathey's release of June 30, 2014, was a release as to the whole injury and instead rely on the September 2, 2014 note of Dr. Gordon. (Defendant's Brief, p. 14)

Therefore, looking again at the medical record of September 2, 2014, from Dr. Gordon, the undersigned notes that there is no specific release to return to work, or discussion of MMI concerning the left shoulder. Rather, Dr. Gordon notes his agreement with the return to work date assigned by Dr. Abernathey, for the cervical spine.

On December 3, 2014, Dr. Gordon states, "I do agree with Dr. Abernathey that he is at MMI for his c-spine. He is also at MMI for his left shoulder . . . ." (Ex. A, p. 11) This is the first clear indication in the records that claimant had reached MMI concerning the left shoulder. Dr. Gordon also assigns permanent restrictions on the same date. (Id.)

I find that December 3, 2014 is the date upon which claimant reached MMI for the entirety of the work injury.

Concerning industrial disability, I have accepted the impairment rating assigned by Dr. Chen and the restrictions assigned by Dr. Gordon. Considering also claimant's limited proficiency with the English language, his age, education, work history, his lack of motivation to seek employment, and all other appropriate factors related to industrial disability, I find that claimant has sustained 40 percent industrial disability.

Regarding entitlement to medical expenses claimed in Exhibit 10, each of the expenses identified relate to charges incurred at People's Community Health Clinic from March 9, 2015 through May 2, 2016. Claimant testified that Carrie Berry, ARNP, at this clinic is where he goes for regular family medical care. (Tr. p. 66) He agreed that he saw Ms. Berry for high blood pressure, diabetes, cholesterol, and ordinary illnesses. (Tr. p. 66)

Reviewing the medical expenses in Exhibit 10 and the corresponding medical records in Exhibit 7, I find that the claimed expenses relate to specific visits, but that the visits are focused on general health concerns for which there is no clear causal opinion concerning the work injury. Claimant did have a hydrocodone prescription refilled at most, if not all of these appointments, but this refill does not appear to be the primary purpose of the visits. Therefore, although the hydrocodone refills may have been reasonable and beneficial to the claimant, it is clear that obtaining the refill was only a small portion of the overall reason for the visits and I am unable to find from the evidence provided what portion of the expense from the visits relates to said refills. Therefore, I must find that claimant has failed to carry his burden of proof in this regard. To find otherwise, would impose an expense on the employer for medical treatment that is clearly unrelated to the work injury.

Claimant seeks alternate care in the form of pain management. (Tr. p. 6) Dr. Hines recommended that claimant "have pain management", so "that he can have adequate pain control, particularly so that the patient is able to sleep." (Ex. 1, p. 9) Claimant testified as to his ongoing pain in his neck and arm. He continues to receive pain medication through his family health care provider.

Considering the opinions of the other treating and evaluating physicians regarding pain management, Dr. Gorsche offered no particular opinion. (Ex. 4, p. 5) Dr. Gordon did not offer a specific opinion on the issue of pain management. Dr. Neopla also did not offer such an opinion. Dr. Chen stated "I don't think Mr. Mizic is open towards any additional pain management options . . . ." (Ex. 6, p. 5) However, he did not indicate that pain management would be inappropriate or unhelpful for claimant. Claimant testified that he desires to seek additional care for pain relief. At this time, defendant has not authorized any medical care for pain management. I find that claimant has continuing symptoms and defendant's failure to authorize care is unreasonable. I find that the recommended care of pain management is reasonable and appropriate.

CONCLUSIONS OF LAW

The first issue is claimant's assertion of entitlement to temporary benefits for the period of September 2, 2014 through January 25, 2015. I note that in his brief claimant adjusted his claim to the period of time of September 2, 2014 through December 3, 2014. (Claimant's Brief, p. 22)

Defendant argues in its brief that claimant's assertion for temporary benefits may be improper because it alleges it was not raised prior to hearing. However, I note that the issue of "TTD" is identified in the claimant's Original Notice and Petition. Also, this issue was specifically identified at the outset of the hearing by the undersigned and defendant offered no objection, correction or clarification at that time. (Tr. pp. 3-8) I conclude that this issue is properly before the undersigned for determination.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to

work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. 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, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The period of time in question of September 2, 2014 through December 3, 2014, is post-surgery, and as stated above, the parties agreed in the hearing report that claimant was off work during this time. I have found above that claimant was not at MMI for the left shoulder on September 2, 2014 and was not at MMI for the entirety of the injury until December 3, 2014.

I also note that the restrictions assigned by Dr. Gordon, and upon which defendant relies to assert that there were jobs available for claimant, were not assigned until December 3, 2014.

I conclude that claimant is entitled to healing period benefits for the period of September 2, 2014 through December 3, 2014.

The second issue is the extent of industrial disability.

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

As stated above and for the reasons there given, I conclude that claimant has sustained 40 percent industrial disability.

The next issue is the commencement date of permanency benefits.

The Iowa Code provides in section 85.34(2) that: "[c]ompensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1." Healing period is discussed in Iowa Code Section 85.34(1) and terminates when one of three triggers occurs: the employee returns to work; the employee reaches MMI; or the employee is medically capable of returning to substantially similar employment that he/she was engaged in at the time of the injury.

I have found above that claimant continued to work his regular job following the stipulated date of work injury on December 18, 2013.

The Iowa Supreme Court in Evenson v. Winnebago Industries, Inc., No. 14-2097 (Iowa 2016) concluded that the claimant's return to work established the commencement of PPD benefits, which was not precluded by the fact that claimant was later entitled to additional temporary benefits when he was assigned restrictions that prevented claimant from working his regular hours. Evenson v. Winnebago Ind., Inc., No. 14-2097, at 22 (Iowa 2016). The Court found that "the commencement of Winnebago's obligation to pay PPD benefits cannot be delayed until after the TPD benefits subsequently terminated on the plain meaning of section 85.34." Evenson v. Winnebago Ind., Inc., No. 14-2097, at 25 (Iowa 2016).

Therefore, under Evenson I conclude that the appropriate commencement date for permanency benefits is December 19, 2013, the day after the stipulated work injury, when claimant returned to work, and thusly triggered commencement of permanent partial disability.

The next issue for determination is whether claimant is entitled to medical expenses identified in Exhibit 10.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The Iowa Supreme Court stated "We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

In the case at bar, I have found above that claimant had medication prescriptions refilled by his primary medical care provider, Carrie Berry, ARNP. However, those instances in which the prescription was refilled, were in conjunction with medical visits for other non-work related concerns such as hypertension and elevated white blood cell counts, among other things. Therefore, I am unable to determine from the evidence presented the cost associated with the potentially reimbursable medical expenses and therefore conclude that claimant has failed to carry his burden of proof on this issue.

The next issue is whether claimant is entitled to alternate medical care of pain management.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or

less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

I have found above that claimant does have some ongoing symptoms and defendant is not presently providing any medical treatment related thereto.

Defendant argues that the opinion of Dr. Chen should be given significant weight in this matter. (Defendant's Brief, p. 15) However, as stated above, Dr. Chen does not indicate that pain management is inappropriate or not potentially beneficial for claimant. Rather he concludes that it appeared to him that claimant was not open to receiving any pain management options. (Ex. 6, p. 5) However, claimant testified adamantly that he wanted to pursue this treatment.

I conclude that the failure to provide any medical care at the present time is unreasonable and the requested care of pain management is reasonable and appropriate.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendant in this matter as set forth in Exhibit 12.

ORDER

IT IS THEREFORE ORDERED:

Defendant shall pay healing period benefits for the period of September 2, 2014 through and including December 3, 2014.

Defendant shall pay claimant industrial disability benefits of two hundred (200) weeks, beginning on September 19, 2013 until all benefits are paid in full.

Defendant shall be entitled to credit for all weekly benefits paid to date.

All weekly benefits shall be paid at the stipulated rate of four hundred thirty-eight and 88/100 dollars ($438.88) per week.

All accrued benefits shall be paid in a lump sum.

Defendant shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendant shall promptly authorize an appropriate medical provider for the purpose of providing pain management services to claimant and notify claimant of the name and address of the provider within 14 days of the date of this decision.

Defendant shall pay costs as set forth in Exhibit 12

Defendant 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.

Signed and filed this 25th day of April, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/srs

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.