

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

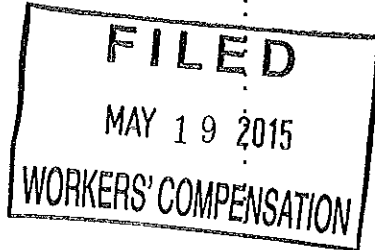
JEFFREY SINDELAR,

Claimant,

vs.

UNIVERSITY OF IOWA,  
STATE OF IOWA,

Self-Insured,  
Employer,  
Defendant.



File No. 5046829

ARBITRATION

DECISION

Head Note Nos. 1804; 1700

STATEMENT OF THE CASE

Jeffrey Sindelar, claimant, filed a petition in arbitration seeking workers' compensation benefits from University of Iowa, a self-insured employer. Deputy Workers' Compensation Commissioner Erin Pals presided at the hearing which was held on March 10, 2015, in Waterloo, Iowa.

Claimant was the only witness testifying live at trial. The evidentiary record also includes Claimant's Exhibits 1-18 and Defendant's Exhibits A-C. Defendant offered exhibit D, a vocational assessment, but this was objected to by claimant as untimely and unfairly prejudicial because it was provided to claimant the day before the hearing, not 30 days prior as required by 876 IAC 4.19(3)(d). Because claimant received the proposed exhibit the day before the hearing, claimant did not have the opportunity to verify the information in the report or respond to the report. Because claimant was unfairly prejudiced by the late report, it was excluded from evidence. The parties submitted a hearing report at the commencement of the evidentiary hearing. Prior to the commencement of the hearing the parties notified the undersigned that the parties would resolve the issue of medical mileage on their own. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties request the opportunity for post-hearing briefs which were submitted on April 13, 2015.

## ISSUES

The parties submitted the following issues for resolution:

1. The extent of permanent disability claimant has sustained as a result of the April 15, 2009 injury.
2. The extent, if any, of defendant's entitlement to a credit against the award of weekly benefits for the payment of long-term disability and other benefits pursuant to Iowa Code section 85.38(2);
3. Whether claimant is entitled to payment of medical expenses.
4. Assessment of costs.

## FINDINGS OF FACT

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

At the time of hearing Mr. Sindelar was 59 years of age. He is married and lives in Newhall, Iowa. He graduated from high school in 1973. After graduation he attended Kirkwood Community College for approximately six months where he took general courses. From approximately 1973 to 1988 he worked as a union heat and frost insulator. (Exhibit 14, page 1) He worked insulating steam and refrigeration pipes in eastern Iowa. This work required extensive overhead work and extensive pulling with both arms. (Testimony)

In 1988, Mr. Sindelar began working at the University of Iowa ("University") as an area mechanic. Mr. Sindelar worked at the University from 1988 until his injury. During his employment at the University, Mr. Sindelar underwent additional training at Kirkwood and other locations. He took these classes because he wanted to be very good at his job and these classes improved his skills and knowledge. These courses were not required and did not increase his pay.

In his position at the University, Mr. Sindelar performed general maintenance, plumbing, electrical, and HVAC work. At the time of the injury, Mr. Sindelar was in charge of three buildings; the field house, the medical research facility, and the pharmacy annex. He "did everything" for those three buildings. He changed lights, performed work in the restrooms, fixed cupboards, desks, locks, and performed work above the ceilings. This job required substantial overhead work. (Testimony)

It should be noted that Mr. Sindelar has a history of non-work related right shoulder injuries. In June of 2005, Jeffrey M. Nassif, M.D., performed surgery on his right shoulder to repair an anterior shoulder fracture. (Ex. 2) In July of 2005, Fred Pilcher, M.D., performed a debridement of the right shoulder and a repair of the rotator cuff. (Ex. 5, p. 1) Dr. Pilcher performed an additional surgery to remove hardware and repair the rotator cuff. (Ex. 5, p. 3) Mr. Sindelar returned to work and was able to work without restrictions after all of these surgeries. (Testimony)

On April 15, 2009, a water pipe burst in the basement of the medical research facility, a 1920's building. At the time of the burst, Mr. Sindelar was in the pump room. Someone came into the pump room screaming that there was water. By the time he got to the hallway, ceiling tiles were already falling; there were already 20 to 30 tile on the floor and several inches of water on the floor. The valves in the building were very old and difficult to turn. In order to turn a valve he had to use a pipe wrench and really "jerk" on the wrench because the valves had "limed." It was also difficult to turn the valves because he was standing on a ladder, not anything solid. After he had turned approximately 20 valves the water still had not stopped. He had one last valve left to turn and if that did not work he would have to turn the water off to the hospital. He had to violently push and pull with his upper extremities with as much force as he could muster. He was able to get the last valve to move and successfully stop the leak so he did not have to turn off the water supply to the hospital. While he was performing these tasks he did not feel much pain. However, once he was home his right shoulder was so painful he would have "liked to die." (Testimony)

Mr. Sindelar reported the injury the next day and his employer sent him to the workers' compensation clinic. On April 16, 2009, Mr. Sindelar reported the work injury to Laurence J. Fuortes, M.D. He also reported that he has chronic pain in his right shoulder since he fell at home approximately four years ago. At the April 16, 2009, visit the impression was right shoulder pain, most consistent with bicipital tendinitis or acromioclavicular strain. There was no evidence of a rotator cuff tear. He was restricted to not lifting more than 5 pounds frequently with his right arm or 10 pounds occasionally. He was also restricted from above shoulder work. (Ex. 3, pp. 1-3)

An MRI was performed on April 22, 2009. The MRI revealed: 1) large full-thickness tear of the supraspinatus tendon repair, retracted; 2) infraspinatus and subscapularis tendinopathy; 3) geographic region of abnormal signal within the posterior aspect of the humeral head, most compatible with avascular necrosis; 4) high-riding humeral head. (Ex. 4)

On May 7, 2009, he was referred to Dr. Pilcher. (Ex. 3, pp. 10-11) He was seen by Dr. Pilcher on May 11, 2009. Dr. Pilcher noted the patient's prior shoulder problems and that Mr. Sindelar had been doing fairly well until the recent work injury. Dr. Pilcher assessed him with a rotator cuff tear with arthropathy, proximal migration of humeral head. He recommended arthroscopic surgery which was performed on July 2, 2009. (Ex. 5, p. 5-7) The operative report states there was a complete tear of the rotator cuff. (Ex. 5, p. 7) Following surgery Mr. Sindelar underwent physical therapy. (Ex. 6) Dr. Pilcher released him to return to light duty/office work on November 2, 2009. (Ex. 5, p. 11) Mr. Sindelar continued to experience pain and have difficulty with his right shoulder. In December of 2009 his restrictions changed to no pushing/pulling/lifting more than 10 pounds and no above-shoulder reaching. (Ex. 5, p. 14) The University returned Mr. Sindelar to an area mechanic with accommodations. (Testimony) By February of 2010, Dr. Pilcher changed Mr. Sindelar's restrictions to lifting up to 60 pounds but no raising his arm above waist-level. He also recommended continued physical therapy. (Ex. 5, p. 15) At the June visit, Dr. Pilcher noted Mr. Sindelar was having difficulty getting back

to his regular job and the doctor felt it would be impossible for Mr. Sindelar to return to his regular job. (Ex. 5, p. 19)

Dr. Pilcher placed Mr. Sindelar at maximum medical improvement (MMI) on July 30, 2010. He assigned 18 percent right upper extremity impairment or the equivalent of 11 percent body as a whole impairment. Dr. Pilcher assigned permanent restrictions of no pushing/pulling/lifting more than 60 pounds and no work above chest-level. (Ex. 5, p. 21)

At the request of his attorney, Mr. Sindelar saw Farid Manshadi, M.D., for an independent medical examination (IME) on January 13, 2011. As a result of that examination and review of prior medical records Dr. Manshadi issued an IME report on February 14, 2011. (Ex. 1, pp. 1-4) Dr. Manshadi is board-certified in physical medicine. He opined that Mr. Sindelar sustained 13 percent impairment of the upper extremity. He agreed with the permanent restrictions assigned by Dr. Pilcher. (Ex. 1, p. 4)

Mr. Sindelar continued to work at the University with restrictions. Due to increasing pain he underwent additional physical therapy at Performance Therapies in December of 2010. (Ex. 6, p. 4) He returned to see Dr. Pilcher in June of 2011. His shoulder continued to be painful and his range of motion was limited. Dr. Pilcher returned him to work with the same restrictions he had issued in June of 2010. (Ex. 5, p. 23-24)

On October 25, 2011, Mr. Sindelar saw James Nepola, M.D. at the University of Iowa Hospitals and Clinics (UIHC). He had worsening right shoulder pain. An MRI of the shoulder was ordered. Dr. Nepola restricted Mr. Sindelar from using his right arm above his shoulder level. (Ex. 7, p. 5) The MRI was carried out in December and revealed a massive tear of the supraspinatus and infraspinatus tendons with muscle retraction. The MRI also showed superior migration of the humeral head, with almost complete obliteration of the acromiohumeral space. Dr. Nepola recommended additional surgical treatment. (Ex. 7, pp. 7-10) Mr. Sindelar was seen at the UIHC again in February. The notes reflect that he was having difficulty doing his job because most of his work was overhead. (Ex. 7, p. 12)

On February 29, 2012, Dr. Nepola operated on Mr. Sindelar's right shoulder. The following procedures were performed: 1. Right shoulder diagnostic arthroscopy; 2. Right shoulder latissimus dorsi tendon transfer; 3. Right shoulder partial rotator cuff repair; 4. Open reduction and internal fixation of right shoulder greater tuberosity avulsion fracture. (Ex. 7, pp. 22-24) Mr. Sindelar returned for his post-op appointment on April 10, 2012. At that point, he was released to return to work with no use of his right arm, he was to wear his sling at all times, and could only perform sedentary work. (Ex. 7, pp. 29-31) Mr. Sindelar did not return to work because the University was not able to accommodate these restrictions.

When Mr. Sindelar saw Dr. Nepola in May he reported he had been experiencing increased headaches since his surgery. Dr. Nepola felt the headaches were likely due to tension in his trapezius muscles due to co-contraction. He was again assigned restrictions that the University could not accommodate. (Ex. 7, p. 32-34) Mr. Sindelar began additional physical therapy in June. (Ex. 6, pp. 6-7) He returned to see Dr. Nepola at the end of July. Dr. Nepola stated the goal was for Mr. Sindelar to be able to use his right arm with reduced pain, but it was not likely that he would be able to pitch baseballs or lift heavy objects. (Ex. 7, pp. 38-42) Due to the University's inability to accommodate his restrictions, Mr. Sindelar remained off work.

On September 11, 2012, Mr. Sindelar returned to see Dr. Nepola. He reported almost daily headaches. Dr. Nepola asked him to schedule an appointment with his primary care provider to evaluate the headaches. Dr. Nepola was concerned about possible abnormal pathology such as an aneurysm or mass. Dr. Nepola restricted him to no lifting more than 25 pounds from floor to chest height with both arms on an occasional basis, no lifting or reaching above shoulder height with the right arm, and no repetitive reaching away from his body with his right arm. (Ex. 7, p. 45) The University was not able to accommodate these restrictions.

Mr. Sindelar returned to Dr. Nepola on October 23, 2012 with worsening shoulder pain. Dr. Nepola injected the right subacromial space and his pain improved. Dr. Nepola recommended additional physical therapy and discussed possible removal of the screw from his shoulder. (Ex. 7, pp. 47-50). When Dr. Nepola saw him the following month it was determined that the screw needed to be removed. This was performed along with a release of the subacromial space on February 22, 2013. (Ex. 7, p. 60) Following surgery the prior clicking noise in his shoulder was gone but he still experienced headaches. He underwent additional physical therapy. He was restricted to no reaching above chest height, no repetitive reaching away from his body, no lifting more than 5 pounds with his right arm, lifting only to be done with his elbow by his side. (Ex. 7, pp. 62-63) Mr. Sindelar was not able to return to work. He continued to experience pain in his shoulder and undergo therapy. (Ex. 7, pp. 67-70; Ex. 6, pp. 16-17)

Dr. Nepola placed Mr. Sindelar at MMI on July 30, 2013. He assigned 18 percent upper extremity impairment. He assigned permanent restrictions of no lifting more than 5 pounds with the right arm up to chest-level, no repetitive reaching above chest-height with the right arm, no repetitive extended reaching out from the body with the right arm, no lifting above chest-height or with the arm extended away from the body with the right arm, and occasional lifting only with the right arm, with his elbow near the side. (Ex. 7, pp. 80, 84-85, 87) With regard to future treatment, Dr. Nepola has also indicated that Mr. Sindelar may require anti-inflammatory medications, injections, physical therapy, and even a shoulder arthroplasty or reverse total shoulder arthroplasty. (Ex. 7, p. 84)

In August of 2013, Mr. Sindelar saw his primary care physician, Greg Hayes, M.D., for his headaches and right shoulder pain. The doctor noted that an October 2012 CT scan was unremarkable. He prescribed Lortab and amitriptyline for headaches and shoulder pain. (Ex. 8, pp. 1-3) By September, Mr. Sindelar reported that the amitriptyline helped his most severe headaches; however, his headaches had not gone away. Dr. Hayes recommended he switch to nortriptyline. (Ex. 8, pp. 3-5) In November, Mr. Sindelar reported that the nortriptyline helped both his headaches and shoulder pain but he did not want to continue the medication because it gave him notably loose stools when taken with hydrocodone. Dr. Hayes recommended Cymbalta instead of the nortriptyline. (Ex. 8, p. 5) Unfortunately, Mr. Sindelar continued to experience headaches. In December, Dr. Hayes recommended he try Neurontin for his headaches and right shoulder pain. By February 2014, the Neurontin had reduced both his shoulder pain and headaches. However, the Neurontin seemed to cause acid reflux. Dr. Hayes recommended he simply take Lortab for the shoulder pain and headaches. (Ex. 8, pp. 8-14)

Mr. Sindelar saw Dr. Manshadi for a second IME on March 20, 2014. It was Dr. Manshadi's opinion that the right shoulder had significantly worsened since the February 2012 shoulder surgery. Dr. Manshadi felt that the headaches were likely "a result of the co-contractions by the right upper trapezius" and therefore a result of his April 15, 2009 work injury. He assigned Mr. Sindelar 21 percent permanent impairment of his right upper extremity. Dr. Manshadi also agreed with Dr. Manshadi's permanent restrictions and added the restriction of no lifting more than 2 to 5 pounds with the right arm.

Mr. Sindelar returned to see Dr. Hayes in April of 2014. At that time he was only taking Neurontin and Lortab for his headaches and shoulder pain. The medication was effective. He also recommended another round of physical therapy for the right shoulder. He returned to see Dr. Hayes again in July. According to the notes, the higher doses of Neurontin gave him acid reflex and Lortab made him feel fatigued. Dr. Hayes recommended he wean himself off Lortab, stop taking Neurontin, and try Lyrica for his headaches and shoulder pain. However, the August notes indicate that the Lyrica caused him to have panic attacks at night. Dr. Hayes recommended he stop the Lyrica and return to Neurontin. (Ex. 8, pp. 15-22) Mr. Sindelar continued to see Dr. Hayes for medication management.

On October 7, 2014, Mr. Sindelar returned to see Dr. Nepola with increasing pain and stiffness in his right shoulder. Dr. Nepola gave him a corticosteroid injection into his right subacromial space. The injection completely resolved his shoulder pain and headaches. (Ex. 7, pp. 86-90) However, the relief only lasted a little less than one month. Dr. Nepola recommended additional physical therapy. (Ex. 7, pp. 92-94) Mr. Sindelar attended therapy and continued to follow-up with Dr. Nepola. He reported that the therapy was helpful. (Ex. 7, pp. 95-106)

On March 2, 2015, Dr. Nepola sent a letter to the adjuster in this matter. He stated that Mr. Sindelar's permanent restrictions were: "no lifting more than 5 pounds occasionally with the right arm, no repetitive reaching above chest height with the right arm." Additionally, he stated, "Mr. Sindelar has considerable limitations with the right upper extremity, and therefore should have a permanent restriction of no lifting more than 20-25 pounds with both hands up to the level of chest height on an occasional basis. He should not do any 2-handed lifting above chest height." (Ex. A, p. 2)

At hearing, Mr. Sindelar testified that he continues to experience constant right shoulder pain which he rates as a 6-7/10. He also has limited mobility in his shoulder. He testified that his pain is made worse by emotional stress. He also has intense and nearly daily headaches. He is not able to work with this right arm higher than chest level. He cannot put dishes up into a cupboard or scratch his mid-back. He has to bob and weave to put his coat on. Mr. Sindelar cannot change the radio station in his vehicle with his right arm. When he drives he holds the bottom of the steering wheel with this right hand. His shoulder pain also interferes with his sleep. At the hearing, he demonstrated the lack of mobility in his right upper extremity. When he attempted to raise his right arm in front of him, he was unable to lift it to even the half-way point and his arm shook during his attempt. He attempted to hold his right arm straight to the side with his elbow straight but was unable to lift it even half way up. Mr. Sindelar appeared to give his full effort in lifting his upper extremity and he was clearly in pain while trying to lift his upper extremity.

There is no dispute that Mr. Sindelar's injury is not a scheduled member injury and should be compensated on an industrial disability basis; the dispute is the extent of his industrial disability due to the injury. In this case, I find the opinions of Dr. Nepola regarding permanency and restrictions carry the most weight. Dr. Nepola is an orthopaedic surgeon who has seen and treated Mr. Sindelar over a substantial amount of time. Dr. Nepola has opined that as a result of the work injury Mr. Sindelar has sustained 18 percent upper extremity impairment which is the equivalent of 11 percent of the whole body. Therefore, I find that as a result of the April 15, 2009 work injury, Mr. Sindelar has sustained 11 percent impairment of his body as a whole. He has assigned permanent restrictions of "no lifting more than 5 pounds occasionally with the right arm, no repetitive reaching above chest height with the right arm." Additionally, he stated, "Mr. Sindelar has considerable limitations with the right upper extremity, and therefore should have a permanent restriction of no lifting more than 20-25 pounds with both hands up to the level of chest height on an occasional basis. He should not do any 2-handed lifting above chest height." (Ex. A, p. 2) Therefore, I further find that these are the restrictions for Mr. Sindelar due to his April 15, 2009 work injury.

As previously noted, the University was not able to accommodate Mr. Sindelar's permanent restrictions. The University offered him a 90-day program that gave him first pick of openings at the University. Mr. Sindelar testified he logged into the Hawk website to see a listing of current merit job openings at the University. He said if there was an opening that caught his eye he would call and inquire about the job. He testified that there was a posting for a position of locksmith that he felt he might be able to

perform with some accommodation. However, before he could obtain the appropriate paperwork the position was removed from the list. According to Mr. Sindelar, most of the openings were outside of his 5 pound right upper extremity weight restriction. He was not able to find any work through the University's program. (Testimony)

In May of 2013, he applied for long-term disability (LTD) benefits through Principal, the State's LTD carrier, due to his shoulder injury. (Ex. B) His application was approved. He received benefits retroactively effective April 26, 2013 and received benefits through February 28, 2014. Benefits were terminated at that time because Principal felt he no longer met the definition of disabled. (Ex. B) Principal also made payments to Mr. Sindelar's TIA-CREF retirement account. Payments are set forth in Exhibit B, page 19. Principal also attempted to help Mr. Sindelar find a job. They assisted him with writing his résumé. Mr. Sindelar compiled a list of jobs that he applied for from December of 2013 through February 13, 2014. (Ex. 13, pp. 1-2) Mr. Sindelar testified that there were additional jobs that Principal felt he could perform but he did not agree and thus did not apply for those jobs. Mr. Sindelar did not believe he was qualified or capable of performing all the jobs that Principal had him apply for. For example, he did not feel he could perform the claims specialist job at Toyota because he did not have the required computer skills. He testified that his computer skills are limited. He types slowly, relies on his wife to send emails, and is not familiar with basic software such as Microsoft Office. The only job offer he received was for a job located in Denver, Colorado. (Testimony)

Mr. Sindelar testified that he did not like the résumé Principal helped him write because he felt the résumé lied. In early October 2013, Mr. Sindelar contacted the State of Iowa Vocational program on his own and they helped him to write what he felt was a more truthful résumé. He took a 5 day program on résumés. He testified that he learned a lot about trying to find a job, such as how to apply for jobs and complete mock applications. (Testimony; Ex. 14)

Despite all of his efforts, he has not received any job offers in Iowa. It is noted that he has not applied for any jobs since 2014. He has been approved for social security disability benefits and is receiving \$734.00 per month in benefits. (Testimony)

Mr. Sindelar went to Vocational Rehabilitation Services for job placement assistance. He identified occupations he could perform such as environmental compliance officer, real estate agent, and insurance claims adjuster. (Ex. 14, p. 3) He also completed a Career Scope Assessment test that showed spatial aptitude of 97 percent and 71 percent in general learning. (Ex. 14, p. 3) He also expressed an interest in gardening and is currently pursuing this interest. He has obtained his certificate in Master Gardening. Mr. Sindelar has taken the initiative to learn about organic farming. He has also been trying to learn how to sell and market his product. He continues to work with Vocational Rehabilitation to try to open his own business. He has attended seminars for fruit growers. Mr. Sindelar has even been in contact with local stores and schools to discuss selling produce to them. (Ex. 14) Mr. Sindelar owns 13 acres of land. He rents 8 acres and he has berries on the remaining acres. Since



April of 2009, 15 rows of berries have been planted on Mr. Sindelar's property. Each row of berries is 150 feet long. His objective is to have a farm to school project with the Vinton Shellsburg Community School District. He is also interested in growing fruit to market to restaurants and Co-ops. However, he testified that this endeavor is not going well because his arm simply cannot tolerate the picking. He has done some of the planting but his adult sons do the rest of the planting. Due to his arm problems, he has switched his focus to a U-Pick operation. He has also dwarfed his plants to make it easier on his arm. However, his crops take three to five years to mature. Some of his berries are just now becoming ripe. He also has bees to help pollenate his plants. Unfortunately, he does not sell any honey because one hive of bees died last winter. He recently spoke with the ISU extension office and they have given him the idea of raising root stock because they believe there is more money to be made in the root stock business.

Mr. Sindelar contends that he is permanently and totally disabled as a result of his work injury. His permanent work restrictions prevent him from returning to work at the University. His restrictions also prevented him from being capable of performing any other opening he might otherwise be capable of performing at the University. He further argues that his work history involved primarily two-handed, physically demanding labor which also required significant overhead work. He points out that his post high school education and experience is specialized to HVAC, electrical work, and building automation. His restrictions also preclude him from returning to any of his prior employment. Unfortunately, his restrictions also prevent him from returning to the type of work that his numerous years of training and experience otherwise would qualify him. (Testimony)

Defendant argues that he is not permanently and totally disabled. Defendant points out that Vocational Rehabilitation identified positions for Mr. Sindelar such as environmental compliance officer, real estate agent, and insurance claims adjuster. Defendant is also critical of the fact that Mr. Sindelar has not applied for a job since 2014 and instead has focused his attention on his berry business. However, the record demonstrates that Mr. Sindelar has demonstrated that he is motivated to try to return to the workforce. He has participated in four vocational rehabilitation programs. First, he took part in the University's 90-day program which gave his priority for job openings. However, he was only able to identify one position that he thought he might be able to perform with some accommodation. That position was no longer available once Mr. Sindelar was able to obtain the necessary paperwork. Second, he also participated in the vocational program offered by Principal. Through this program he applied for over 25 jobs without success. It was during this program that the counsel recommended he pursue "master gardener" certification; Mr. Sindelar followed through with this suggestion. Third, he sought vocational services through Iowa Workforce Development who encouraged him to find a way to turn gardening into a career. Fourth, since October of 2013, Mr. Sindelar has been working with a vocational rehabilitation counselor, Todd Ohnesorge at Iowa Vocational Rehabilitation Services. Mr. Sindelar has taken an aptitude test which confirmed his greatest interest was in plants/animals. (Ex. 14, p. 3) He continues to meet with Mr. Ohnesorge monthly to discuss his career

goals. Despite all of his efforts Mr. Sindelar has only received one job offer and that offer would have required him to move to Denver, Colorado. He has been unable to obtain employment since the University terminated him in September of 2013. It is telling to the undersigned that after working for the University for approximately 25 years even an employer as large as the University was not able to accommodate his restrictions.

To his credit, Mr. Sindelar has made great efforts to become self-employed. He has started growing a variety of berries that he hopes to sell as "U-Pick" crops to the public. In order to do this, he relies heavily on his wife and adult sons to help him plant and manage his acreage. He has also done his best to accommodate his physical limitations. For example, he has "dwarfed" his trees so he does not have to perform overhead work. Despite all of his efforts he is yet to earn any significant income from his horticultural or beekeeping ventures. Further, there is no guarantee that his berry business will ever become commercially viable or a source of significant, dependable income.

Mr. Sindelar has sustained a physical impairment which has resulted in severe permanent restrictions. Due to the work injury, Mr. Sindelar has lost his ability to perform the type of work he was performing at the University and the work he performed prior to the University. The permanent restrictions placed on Mr. Sindelar due to the work injury and the condition of his shoulder prevent him from returning to the work he performed during his adult life. I find that the work restrictions imposed because of claimant's right shoulder injury will have a very profound effect on Mr. Sindelar's ability to find employment. Mr. Sindelar faces significant obstacles to finding work given his age, educational background, work history, and permanent physical restrictions. Additionally, he has been out of the workforce since 2013. I find that despite his desire and motivation to return to the workforce his ability to return to work and earn a living has been severely impacted by the work injury. Considering the situs and severity of claimant's injury, the length of his healing period, his motivation level, age, education, employment background, ability to retrain, permanent impairment, permanent restrictions, and all other industrial disability factors outlined by the Iowa Supreme Court, I find that Mr. Sindelar is permanently totally disabled as a result of the work injury.

We now turn to the issue of credit. The University is asserting a credit under Iowa Code sections 70A.20 and 85.38(2) for the long-term disability benefits that have been paid. Specifically, the University asserts it is entitled to a credit for the benefits paid by the LTD carrier while Sindelar was receiving permanent partial disability benefits. The University points out that long-term disability benefits are available to state employees for permanent disabilities pursuant to Iowa Code section 70A.20. Pursuant to that Code section, LTD payments are to be reduced by the amount of any workers' compensation benefits received. Consequently, they qualify for a credit under Iowa Code section 85.38(2) because they are benefits which should not have been paid if claimant had rights to workers' compensation benefits.

This issue was recently addressed by this agency. See Harney v. University of Iowa, File No. 5036605, (Appeal July 17, 2014). In Harney, the agency held that the defendants were entitled to a credit for the LTD benefits paid. However, the State was not entitled to credit for the TIAA CREF payments. The agency ruled that the TIAA CREF payments were not listed as long-term disability payments and therefore the State has not shown entitlement to a credit under the statute which disallows such benefits. Based on the Harney decision I find the University is not entitled to a credit for the payments listed in Exhibit B, page 19 as TIAA CREF benefits.

With regard to the payment listed as LTD benefits, the agency held that not all of the LTD payments qualify for the credit. Because weekly workers' compensation benefits are not subject to income or payroll taxes, the amount of credit that can be given to employers for prior payments of salary in lieu of compensation or payments pursuant to salary replacement group program such as long-term non-occupational disability benefits under Iowa Code section 85.38(2) is the net remaining after deducting payroll and income taxes on such wages or benefits. Harney, (citations omitted). Therefore, it would be improper to allow a before-tax credit for a payment of wages in lieu of compensation or non-occupational disability benefits. Under the Harney decision the defendant should be entitled to a credit for the net LTD benefits claimant received.

In the Harney decision the agency was able to ascertain the total amount of LTD payments that were made while claimant was also receiving weekly workers' compensation benefits. Although the record in that case failed to include claimant's federal and state tax returns the agency used an effective income tax rate of 10 percent to arrive at the State's credit amount. Unfortunately, in the present case the University provided a table of LTD benefits paid which is ambiguous as to the amount of benefits paid. (Ex. B, p. 19) One column is listed as "Payment Amount" another column is listed as "Net Payment Amount." There is no explanation as to what those amounts represent. Curiously, the total for the net payment amount is greater than the payment amount. Because the University has failed to prove the amount of LTD payments made the undersigned is unable to find that the University is entitled to a credit for those benefits.

The next issue to be determined is whether claimant is entitled to payment of the unauthorized medical care. Specifically, Mr. Sindelar is seeking payment for the expenses set forth in Exhibit 16. The expenses are for treatment he sought with Dr. Hayes for his headaches and right shoulder pain. Mr. Sindelar argues he is entitled to payment because the care is causally connected to his work injury, Dr. Nepola was an authorized treating physician and the one who recommended Mr. Sindelar see Dr. Hayes, and the care was reasonable and beneficial. The State seemingly argues that it never abandoned care and the care received by Dr. Hayes was not beneficial; thus, claimant is not entitled to payment for those expenses.

The evidence demonstrates that Mr. Sindelar's headaches began after the work injury, more specifically after the authorized February 2012 surgery. Dr. Nepola opined that his headaches were "likely from tension in the trapezius musculature due to co-

contracture." (Ex. 7, p. 34) Dr. Manshadi agreed with this opinion and as such felt the headaches were a result of the work injury of April 15, 2009. (Ex. 1, p. 8) Furthermore, the corticosteroid injection that Mr. Sindelar received in his shoulder on October 7, 2014, helped both his shoulder pain and headaches. This supports claimant's argument that the headaches are linked to his shoulder condition. (Ex. 7, p. 87) The State has not offered any expert opinion to dispute the causal connection between the work injury and the headaches. Therefore, I find that the headaches are causally connected to the work injury. As claimant points out it is also undisputed that he began treating for his headaches with Dr. Hayes at the suggestion of the authorized treating physician, Dr. Nepola. Also, the treatment provided by Dr. Hayes did at least partially relieve some of the headache symptoms. Therefore, I find that claimant is entitled to payment of the medical expenses set for in Exhibit 16.

### CONCLUSIONS OF LAW

The parties agree that Mr. Sindelar sustained a compensable injury on April 15, 2009 and as a result of that injury is entitled to industrial disability. The parties further agree that any permanent disability benefits should commence on July 30, 2013. (Hearing Report) It is claimant's burden to prove the extent of his entitlement to benefits.

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 Decision, 529 (App. March 26, 1985); Peterson v. Truck Haven

Care, Inc., Vol. 1 No. 3 Industrial Commissioner Decision, 654 (App. February 28, 1985).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Having found that claimant is not capable of returning to work and that he is totally incapacitated from returning to any work at this time, I conclude that Mr. Sindelar is permanently and totally disabled. I reach this conclusion under the traditional industrial disability analysis. Mr. Sindelar has proven by a preponderance of the evidence that he is permanently and totally disabled when all of the industrial disability factors identified by the Iowa Supreme Court are considered. Defendant owes claimant permanent total disability benefits from the stipulated date of July 30, 2012 to the present and continuing into the future until such time as Mr. Sindelar is no longer totally disabled.

The next issue to be addressed is whether defendant is entitled to a credit for payments made by the LTD carrier. Based on the above findings, I conclude the State has failed to prove entitlement to a credit for the LTD benefits paid.

Next, we address the issue of past medical expenses. 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). Based on the above findings, I conclude that claimant is entitled to payment of past medical expenses as set forth in Exhibit 16.

Finally, we turn to the issue of costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Ultimately, claimant prevailed on the majority of disputed issues in this case. Therefore, I conclude that it is reasonable and appropriate to assess claimant's costs. Claimant is seeking costs set forth in Exhibit 18.

I conclude that it is appropriate to assess claimant's filing fee (\$100.00) pursuant to 876 IAC 4.33(7). I conclude that it is appropriate to assess claimant's service fee (\$6.48) pursuant to 876 IAC 4.33(3).

Claimant is seeking the cost of obtaining medical records from six different medical providers and from the Social Security Administration. I conclude that these are not costs which are allowed pursuant to 876 IAC 4.33. Therefore, I conclude that it is not appropriate to assess these costs.

Finally, claimant is seeking reimbursement in the amount of \$1,100.00 for the second IME and report from Dr. Manshadi dated May 5, 2014. Claimant is seeking this as an IME under Iowa Code section 85.39. The Iowa Supreme Court has recently ruled that the plain reading of section 85.39 limits the injured worker to one IME, regardless of the number of leading examinations obtained by the employer or its insurance carrier. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009). Because claimant had a prior IME with Dr. Manshadi, I find it is not appropriate to assess the cost of the second IME to the defendant. In the alternative claimant seeks reimbursement for the second IME as a cost. The Iowa Court of Appeals recently indicated that an Independent Medical Exam is not a cost allowed by rule 4.33. See Des Moines Area Regional Transit Authority v. Young, No. 14-0231, filed October 1, 2014 (Iowa Ct. App.). Unpublished, 856 N.W.2d 383 (Table). I acknowledge that this case is currently pending before the Iowa Supreme Court. However, based on the current status of the Young case, I find it is not appropriate to award Dr. Manshadi's IME bill as a cost.

#### ORDER

#### THEREFORE, IT IS ORDERED:

Defendant shall pay claimant permanent total disability benefits at the stipulated rate of five-hundred sixty-nine and 03/100 dollars (\$569.03) per week, payable from July 30, 2013 to present and continuing until claimant's total disability ends.

Any accrued benefits shall be paid in a lump sum.

Defendant shall pay interest pursuant to Iowa Code section 85.30 on any benefit paid after they became due.


Defendant shall receive a credit for all workers' compensation benefits paid to date.

Defendant shall reimburse claimant for any medical expenses paid by claimant and shall otherwise satisfy all other medical expenses summarized and contained in claimant's Exhibit 16.

Defendant shall reimburse claimant's costs as outlined in the Conclusions of Law section of this decision.

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 19<sup>th</sup> day of May, 2015.

  
ERIN Q. PALS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies To:

William G. Nicholson  
Attorney at Law  
PO Box 637  
Cedar Rapids, IA 52406-0637  
[wnich@rushnicholson.com](mailto:wnich@rushnicholson.com)

Julie A. Burger  
Assistant Attorney General  
Special Litigation  
Hoover State Office Bldg.  
Des Moines, IA 50319-0106  
[jburger@ag.state.ia.us](mailto:jburger@ag.state.ia.us)

EQP/kjw

**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.