BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 26 2016
WORKERS' COMPENSATION

WESLEY LOVE, Claimant, vs. AGRI ZONE d/b/a AGRIZONE, INC., Employer, and CALIFORNIA INSURANCE CO., Insurance Carrier, Defendants.	File No. 5048328 ARBITRATION DECISION Head Note Nos.: 1703; 1803

STATEMENT OF THE CASE

Claimant, Wesley Love, filed a petition in arbitration seeking workers' compensation benefits from Agri Zone, employer, and California Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on September 12, 2011. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on February 12, 2015, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 7, 9 through 17, and 19 through 24, defendants' exhibits A through K, and the testimony of the claimant and Louis Vierling. The parties submitted post-hearing briefs, the matter being fully submitted on March 6, 2015.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's industrial disability, including whether claimant is permanently and totally disabled;
2. Whether claimant is entitled to payment of various medical expenses;
3. Whether defendants are entitled to a credit for overpayment of temporary disability benefits against permanent partial disability benefits due as a result of the stipulated work injury of September 12, 2011;
4. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much; and
5. Specific taxation of costs.

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

FINDINGS OF FACT

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

Claimant's testimony was clear and consistent as compared to the evidentiary record and his deposition testimony. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. During the course of evidentiary hearing, claimant held his left arm at his side at all times, rested his left elbow/forearm on his leg, and often held his right hand either under his left armpit or on the outside of his left arm. Claimant's physical presentation was consistent with his expressed complaints. Claimant is found credible.

Claimant was 38 years of age at the time of hearing. He resides in Alden, Iowa. He is divorced and shares custody of his two minor sons. Claimant graduated high school in 1995; at the time of graduation, claimant had earned a 2.56 grade point average. (Claimant's testimony; Exhibit 9, page 170; Ex. 10, p. 173) In 1997, claimant earned an associate's degree in agribusiness from Ellsworth Community College. In college, claimant earned a 2.1852 grade point average. (Claimant's testimony; Ex. 9, p. 170; Ex. 10, p. 175) Claimant also earned a CNA certification and a CDL license. He is right-hand dominant. (Claimant's testimony; Ex. A, Depo. Tr. pp. 6, 7)

Claimant's relevant medical history includes a crush injury to his left arm after a forklift tipped onto his arm at work in August 2004. He was treated with Darvocet, ice, elevation, and home exercises. (Ex. G, pp. 1-2) Claimant testified he recovered fully and returned to work without restrictions. (Claimant's testimony) In 2006, claimant sustained a fracture to his neck as a result of participation in a mixed martial arts competition. Claimant underwent fusion surgery at C5-C6, after which claimant testified he was released without restrictions and returned to full duty employment. (Claimant's testimony; Ex. 6, pp. 151, 158) In 2007, claimant suffered a partial amputation of his right ring finger at work. The portion of finger was successfully reattached and claimant ultimately returned to work, full duty. Claimant labored under no permanent restrictions for any body part prior to his stipulated September 12, 2011 work injury. (Claimant's testimony)

Claimant's work history consists of farm labor, livestock care, truck driving and maintenance, loading of hogs, sales and route delivery driver, car sales, and grain hauling. (Ex. 9, pp. 171-172)

In 2007, claimant began work at defendant-employer. (Ex. 9, p. 172) Claimant identified himself as the assistant manager of defendant-employer. (Ex. A, Depo. Tr. p. 8) He indicated he acted as the owner's "right-hand" and performed a variety of tasks, essentially any task the hiring farmer required. Tasks included construction, loading

hogs, building fence or bins, mechanical work, and farm labor. He testified his duties were "extremely" heavy in nature and could require lifting of motors, wheels, tires, and equipment, as well as maneuvering livestock. (Claimant's testimony)

Claimant earned $16.00 per hour at the time of his work injury and testified he was to receive a raise to $18.00 near in time to the work injury. In addition to his hourly wage, claimant also received employer-provided benefits, including health insurance, a retirement savings account, and paid vacations and trips with his coworkers. Claimant testified he performed as much overtime as possible and his supervisor was able to count on him to work at all hours. Claimant described his employment at defendant-employer as his "best" job in his working career. (Claimant's testimony)

At work on September 12, 2011, claimant testified he was in the process of changing a reflector light located on the top of a tractor. In order to do so, he was required to stand on a fender and hold onto a bar attached to the tractor. While changing the reflector, claimant testified he lost his balance and initially caught himself with his left arm. He felt a pulling sensation in his arm, struck the tractor, and fell to the ground. Claimant testified he informed a coworker of the incident and proceeded to the emergency room. (Claimant's testimony)

Medical records reveal claimant was seen on that date at the Franklin General Hospital emergency department. Brian Hansen, D.O., assessed a left shoulder strain, but acknowledged the possibility of a labral or rotator cuff injury. Dr. Hansen prescribed Percocet and prednisone. (Ex. 1, p. 1) Claimant returned to Dr. Hansen on September 15, 2011. Due to claimant's continued symptomatology, Dr. Hansen indicated he suspected a ligamentous injury and referred claimant to Eric Potthoff, D.O., for evaluation. Dr. Hansen also issued prescriptions for Percocet and lorazepam. (Ex. 1, p. 3)

On September 16, 2011, claimant was seen at Mason City Clinic Orthopedics by Dr. Potthoff. Dr. Potthoff recommended left shoulder MRI and removed claimant from work pending follow-up. He also prescribed Percocet. (Ex. 2, pp. 10-11) Dr. Potthoff subsequently issued claimant a prescription for Lortab. (Ex. 2, p. 15)

Claimant underwent left shoulder MRI on September 23, 2011. The radiologist read the results as revealing tearing of the subscapularis tendon. (Ex. 2, p. 13) Following MRI, claimant returned to Dr. Potthoff on September 27, 2011. Dr. Potthoff reviewed the MRI and opined it revealed a tear to the subscapularis tendon of the rotator cuff. (Ex. 2, p. 17) After discussion of treatment options, claimant elected to proceed with left shoulder arthroscopy. (Ex. 2, p. 18)

On October 10, 2011, Dr. Potthoff performed diagnostic arthroscopy with open rotator cuff repair of the supscapularis tendon. (Ex. 2, pp. 19-20) Following surgery, Dr. Potthoff ordered use of a sling. On October 25, 2011, Dr. Potthoff recommended performance of pendulum exercises, issued prescriptions for Lortab and Celebrex, and advised claimant to follow-up in four weeks. Dr. Potthoff released to light duty, with no

activities using the left upper extremity and no driving due to claimant's use of narcotics. (Ex. 2, pp. 23-24)

Claimant returned to Dr. Potthoff on November 22, 2011. At that time, Dr. Potthoff recommended claimant discontinue use of the shoulder sling and begin a course of physical therapy. Dr. Potthoff released claimant to perform light duty work under restrictions of no pushing, pulling or carrying with the left upper extremity. He also continued claimant's prescription for Lortab. (Ex. 2, p. 26)

On February 14, 2012, claimant returned to Dr. Potthoff for follow-up. Claimant reported he no longer required pain medications, but reported some occasional numbness and tingling in the fingers of his left hand. (Ex. 2, p. 29) Dr. Potthoff recommended continued physical therapy and work restrictions of no lifting, pushing, pulling or carrying greater than 10 pounds up to waist level. (Ex. 2, p. 30)

At follow-up with Dr. Potthoff on March 29, 2012, claimant reported some popping sensations of the left shoulder. Claimant expressed belief his shoulder had been in better condition prior to advancing his physical therapy activities a couple months prior. Claimant also reported some numbness over the ulnar two digits of the left hand. (Ex. 2, p. 31) Dr. Potthoff opined claimant did not appear to be progressing with physical therapy. He also expressed doubt claimant would have reinjured his shoulder during therapy due to the placement of the tear. Dr. Potthoff noted claimant had reported a significant amount of pain throughout the course of his treatment, leading Dr. Potthoff to potentially relate some of claimant's complaints to his pain threshold. Dr. Potthoff raised possibility of a repeat left shoulder MRI to evaluate for re-tear and due to numbness and tingling of the digits, Dr. Potthoff recommended a neurology evaluation and an EMG. Dr. Potthoff deferred as to whether the neurological issue was work-related to the workers' compensation carrier. Due to lack of progress, Dr. Potthoff did not order further physical therapy. He continued claimant's light duty restrictions and recommended use of over-the-counter anti-inflammatories and Tylenol for pain as needed. (Ex. 2, p. 32)

Following the work injury, defendants promptly commenced payment of healing period/temporary total disability benefits. From commencement, the benefits were paid at the weekly rate of $689.97. (Ex. H, pp. 1-2) The parties subsequently stipulated to a weekly rate of $414.91. (*See* Hearing Report) Defendants paid at the higher weekly rate from September 13, 2011 through August 24, 2012. (Ex. H, pp. 1-3) The parties agreed the overpayment in rate resulted in an overpayment of $13,477.94. (*See* Hearing Report)

On November 27, 2012, claimant presented to the orthopedics department of the University of Iowa Hospitals and Clinics (UIHC) for evaluation by James Nepola, M.D. Following examination, Dr. Nepola recommended an arthrogram MRI of the left shoulder to evaluate the subscapularis tendon for a potential re-tear. Pending return following the MRI, Dr. Nepola issued restrictions of no lifting, pushing, or pulling more

than 1 pound with the left arm and no repetitive reaching away from the body or above chest height. (Ex. 3, p. 37)

Claimant underwent MRI arthrogram on January 10, 2013. (Ex. 4, p. 142) Claimant then returned to Dr. Nepola on January 29, 2013, who opined the MRI arthrogram revealed evidence of a recurrent subscapularis tear. Dr. Nepola recommended surgical intervention. (Ex. 3, p. 43)

Prior to surgery, Dr. Nepola evaluated claimant on May 21, 2013. At that time, Dr. Nepola spoke with claimant regarding the possible surgical procedures to be performed on the left shoulder, to which claimant expressed consent. With respect to claimant's hand numbness, Dr. Nepola opined this symptom was not likely related to the shoulder condition, but indicated the possibility existed that the symptoms were in fact related. Dr. Nepola noted claimant's history of prior neck surgery and indicated he would consider ordering an EMG in the future. (Ex. 3, p. 45)

On May 30, 2013, Melissa Meiners, M.D., performed a preoperative peripheral nerve block and paravertebral block. (Ex. 3, p. 48)

The following day, May 31, 2013, Dr. Nepola performed left shoulder arthroscopy with revision repair of a ruptured supraspinatus tendon and biceps tenotomy. The repair required placement of screws and anchor hardware. (Ex. 3, pp. 47, 58-60) Following surgery, Dr. Nepola prescribed hydromorphone and oxycodone-acetaminophen. He imposed restrictions of no use of the left upper extremity and use of a left shoulder sling at all times, with claimant off work pending follow-up. (Ex. 3, pp. 53-54)

On June 6, 2013, claimant returned to the UIHC orthopedics department and was evaluated by Rhonda Dunn, ARNP. Ms. Dunn noted claimant's pain level was controlled on the current prescription medications. She also noted claimant voiced understanding he was expected to taper off these medications, the hydromorphone particularly. Ms. Dunn advised claimant to keep his left arm in an immobilizer at all times, except for with occasional elbow range of motion. She also recommended no grasping or pinching with left arm and no driving or operation of heavy machinery while taking sedating medications. (Ex. 3, pp. 62, 64-65)

Claimant returned to Ms. Dunn on July 12, 2013, who indicated claimant was progressing as expected postoperatively. Claimant and Ms. Dunn discussed tapering from claimant's pain medications. Ms. Dunn recommended claimant wear his sling at all times, except for removing the sling while inside his home and settled. She also imposed restrictions of no reaching away from the body or above chest height with left arm; no lifting, pushing or pulling with the left arm; and no forceful gripping or pinching with the left hand. (Ex. 3, p. 68) Ms. Dunn ordered a course of physical therapy. (Ex. 3, p. 69)

On August 20, 2013, claimant returned to Dr. Nepola for evaluation. Dr. Nepola noted claimant demonstrated limited range of motion of the shoulder and was not making much progress with physical therapy. Dr. Nepola advised claimant to stop using the shoulder immobilizer in order to encourage range of motion. He prescribed gabapentin, refilled the Percocet on a lower dosage, and ordered additional physical therapy, focusing on daily range of motion. Dr. Nepola also imposed restrictions of no reaching away from the body or above chest height with the left arm; no pushing, pulling, or lifting with the left arm; and no forceful gripping or pinching with the left hand. (Ex. 3, pp. 71, 75-76)

On September 3, 2013, claimant returned to Dr. Nepola. At that time, Dr. Nepola noted claimant presented to evaluation wearing his shoulder immobilizer, despite being asked at the prior appointment to discontinue use of the immobilizer in order to encourage range of motion. Claimant reported he did not wear the immobilizer at home. Following examination, Dr. Nepola maintained claimant's existing activity restrictions and ordered continued physical therapy, including a trial of a TENS unit to see if the device would be beneficial. Dr. Nepola also advised claimant not to wear the sling, as tolerated. Due to motion and strength deficits in the left hand, Dr. Nepola ordered an EMG/nerve conduction study of the left upper extremity to evaluate for a possible nerve injury. (Ex. 3, pp. 77-78)

Claimant returned to Dr. Nepola on October 8, 2013. At that time, claimant presented wearing his sling and indicated he was unable to tolerate the pain caused by not wearing the sling. Claimant also stated the physical therapist advised him to use the sling. Claimant expressed complaints of twitching in the left ulnar nerve distribution of the hand and fingers, as well as pain and spasms across his left upper torso and extremity. (Ex. 3, p. 83) Dr. Nepola again recommended an EMG. Dr. Nepola recommended continued physical therapy and telephoned the therapist to advise of the importance of claimant weaning from use of the sling. To claimant, Dr. Nepola stressed the importance of discontinuing use of and dependence on the shoulder sling, including stiffness, tingling, and pain. (Ex. 3, pp. 85, 98-99)

On October 14, 2013, Jun Kimura, M.D., performed EMG testing. Dr. Kimura opined the nerve conduction studies were normal and the EMG showed a limited number of motor units in some muscles, potentially related to claimant's effort. He summarized the testing as an essentially normal study. (Ex. 3, pp. 82, 87-88)

Following EMG, claimant returned to Dr. Nepola on November 12, 2013. Dr. Nepola opined claimant's testing was unremarkable for nerve pathology. Claimant expressed continued complaints of pain and stiffness. (Ex. 3, p. 89) X-rays were taken, with Dr. Nepola describing the results as unremarkable. Dr. Nepola ordered a series of labs in an attempt to rule out the etiology of claimant's symptoms. In the interim, he recommended continued physical therapy, focusing on range of motion. (Ex. 3, pp. 90, 100-101)

On December 3, 2013, claimant returned to Dr. Nepola. Dr. Nepola opined claimant's EMG and inflammatory labs were normal, ruling out both a nerve condition and infection. Dr. Nepola opined claimant's continued stiffness was highly abnormal 6 months post rotator cuff repair. (Ex. 3, pp. 92-93, 106-107) Dr. Nepola raised the option of a diagnostic scope with manipulation in order to allow him better knowledge of claimant's shoulder condition. Dr. Nepola explained to claimant he would be stiff and sore after surgery. Claimant indicated he was not interested in undergoing additional procedures. Accordingly, Dr. Nepola ordered additional therapy. (Ex. 3, pp. 93-94, 107-108)

At follow-up with Dr. Nepola on January 14, 2014, claimant reported continued pain of the left shoulder. (Ex. 3, pp. 95, 111) Dr. Nepola again described claimant's level of stiffness as unexpected 8 months post repair. Dr. Nepola indicated he recommended surgical intervention, as he was uncomfortable with claimant's findings. Dr. Nepola informed claimant of surgical options, including diagnostic arthroscopy with manipulation under anesthesia and arthroscopic repair of the tendon tears. Claimant indicated a desire to continue physical therapy and Dr. Nepola ordered additional therapy. (Ex. 3, pp. 96, 112, 114)

On February 25, 2014, claimant presented to Dr. Nepola. Dr. Nepola noted claimant continued to complain of significant persistent pain. Claimant admitted his complaints were perhaps better than prior to surgery, but felt he was not progressing with respect to stiffness or pain. Claimant described his left arm as essentially "functionless." Dr. Nepola reviewed the physical therapy notes and indicated they detailed little progress with motion and strength; claimant agreed with that finding. (Ex. 3, p. 115) On examination of the left shoulder by Dr. Nepola, claimant demonstrated significant guarding. Dr. Nepola noted claimant suffered with "some of the most severe stiffness we have ever seen after surgery." (Ex. 3, p. 116)

Dr. Nepola opined "there is no conservative treatment out there that we think will make any sort of meaningful difference." (Ex. 3, p. 116) With respect to treatment options, Dr. Nepola indicated:

> We did offer him a manipulation under anesthesia, and arthroscopic debridement and evaluation, but he is extremely opposed to this. We offered him I nerve block, and an examination under local anesthesia, but again he is very resistant to this. He is convinced that something was wrong with his initial nerve block from the surgery performed here, and he is very hesitant to undergo that again.

(Ex. 3, p. 116)

Dr. Nepola expressed belief continued therapy would not offer claimant the increased motion desired; however, he agreed to order additional therapy. Dr. Nepola indicated he anticipated claimant would ultimately require some form of manipulation or

procedure under anesthesia. He also refilled claimant's prescription for hydrocodone. (Ex. 3, p. 117)

On March 25, 2014, claimant returned to Dr. Nepola and reported no change in his pain level or ability to move his arm. Claimant indicated he did not want surgery or pain medications. (Ex. 3, p. 122) Dr. Nepola noted:

> Discussed with patient that his prognosis of improving is not great. Discussed that an MRI would be needed to further assess the shoulder and possibly have surgery in the future. Patient is hesitant to agree to MRI due to pain while lying down, but agreed to it since it is minimally invasive.

(Ex. 3, p. 123) Accordingly, Dr. Nepola ordered an MRI of the left shoulder. (Ex. 3, p. 124)

Claimant returned to Dr. Nepola on April 29, 2014. Claimant reported no change in pain or movement, but indicated he received relief with use of a TENS unit and meloxicam. Dr. Nepola noted he had recommended an MR arthrogram at the last visit, but claimant did not want to undergo any additional invasive testing. (Ex. 3, p. 127) Dr. Nepola opined claimant's prognosis was poor. Due to claimant's refusal of an MR arthrogram to evaluate the potential causes of his symptoms, Dr. Nepola recommended a home exercise program and use of the TENS unit, as well as a two-week trial of Lyrica. (Ex. 3, p. 129)

On May 13, 2014, claimant returned to Dr. Nepola and reported continued pain, without relief from the TENS unit or Lyrica. Claimant refused any invasive procedures, including an MR arthrogram or surgical intervention. Given the refusal, Dr. Nepola opined claimant's treatment options were limited and their likelihood of improving pain and deficits in range of motion were low. Accordingly, Dr. Nepola placed claimant at maximum medical improvement (MMI) and ordered a functional capacity evaluation (FCE) for determination of permanent work restrictions. (Ex. 3, pp. 136-137)

Claimant testified he did not want to undergo additional invasive treatment and risk further worsening of his condition without a guarantee the treatment would help. (Claimant's testimony)

On June 3, 2014, Tim Vander Wilt, PT, performed a FCE. Mr. Vander Wilt found claimant gave maximum, consistent effort, and was cooperative and willing to work to his maximum abilities. He found claimant's FCE results to be valid. Mr. Vander Wilt noted during evaluation, claimant's pain limited him in front carry, left carry, overhead tasks, and floor to waist lifting. Mr. Vander Wilt indicated claimant was unable to safely perform some testing of front carry, floor to waist lift, and left carry. (Ex. 5, p. 143) He found claimant demonstrated good capabilities with his right arm, but noted the following:

Significant deficits:

1. Left arm carry.
2. Floor to waist lift.
3. Unable to perform overhead activities.
4. Hand gripping of the left upper extremity was below average.
5. Waist to crown lift.

(Ex. 5, p. 144)

Mr. Vander Wilt found the FCE results determined claimant was capable of functioning in the sedentary physical demand category. (Ex. 5, p. 144) He noted the following functional limitations: (1) inability to lift waist to crown or perform left carry; (2) maximum rare lift of 5 pounds waist to floor, 5 pounds front carry, and 40 pounds right carry; (3) no waist to floor lift or front carry on an occasional or frequent basis; (4) right carry of 30 pounds occasionally and 20 pounds frequently; and (5) inability to perform elevated work. (Ex. 5, p. 145) Mr. Vander Wilt noted claimant was able to exert left hand grip force of 21.3 pounds, with the mean for claimant's age and gender of 112.9 pounds. Claimant also demonstrated a left palmar pinch of 7.6 pounds, with the mean for his age and gender of 25.9 pounds. (Ex. 5, pp. 145-146)

On left shoulder examination, Mr. Vander Wilt found decreased range of motion, including 41 degrees of forward flexion, 15 degrees of abduction, and 0 degrees of extension, internal rotation, and external rotation. He also found muscle strength of 2/5. (Ex. 5, p. 148) Mr. Vander Wilt performed examination of the left elbow and found a slight decrease in range of motion to 139 degrees of flexion, with normal being 150 degrees. He also noted muscle strength of 3/5. (Ex. 5, p. 149) Mr. Vander Wilt noted left wrist and forearm strength of 3/5. (Ex. 5, p. 149)

Dr. Nepola authored a letter to defendant-insurance carrier dated July 28, 2014. Dr. Nepola opined claimant achieved MMI as of May 13, 2014, but future treatment may include non-steroidal anti-inflammatories, corticosteroid injections, physical therapy and possibly, further surgery. Based upon loss of range of motion, Dr. Nepola found claimant sustained a permanent impairment of 22 percent left upper extremity or 13 percent whole person. (Ex. 3, p. 140) Dr. Nepola also recommended permanent restrictions based upon the FCE results:

> [Claimant] is released to return to work with permanent restrictions of rare lift of 5 pounds from waist to floor, no lifting from waist to crown, rare left [sic] of 5 pounds front carry with the left upper extremity. [Claimant] is unable to perform repetitive reach out from his body, repetitive overhead reaching with the left arm, and is unable to climb ladders.

(Ex. 3, p. 140)

On August 27, 2014, defendants' counsel authored a letter to claimant's counsel. Counsel represented defendants would continue to issue permanent partial disability benefits until 65 weeks of such benefits had been paid, with those weeks representing the 13 percent impairment rating of Dr. Nepola. Counsel indicated such benefits would be issued weekly until August 14, 2015. (Ex. 19, p. 238)

On October 28, 2014, defendants' counsel authored a letter to claimant's counsel. By the letter, counsel indicated claimant's average weekly wage had been miscalculated, leading to a weekly benefit rate of $689.97. Counsel indicated this higher rate had resulted in an overpayment, for which defendants intended to seek credit against the permanent partial disability benefits yet to be paid. (Ex. J, p. 4)

At the referral of claimant's counsel, on November 10, 2014, claimant presented for independent medical evaluation (IME) with board certified occupational and environmental medicine physician, Robin Sassman, M.D. Dr. Sassman issued a report of her findings and opinions dated December 2, 2014. (Ex. 6, p. 151) During interview, claimant reported symptoms of pain of the left shoulder and pectoralis region, as well as in the posterior shoulder and axilla. Claimant described the pain as radiating to the left elbow, with additional sensations of burning and pins-and-needles in the left arm. He also complained of numbness of the third, fourth, and fifth digits of the left hand, and decreased grip strength. (Ex. 6, p. 156) On examination, Dr. Sassman noted left shoulder range of motion of 35 degrees of flexion, 20 degrees of extension, 40 degrees of abduction, 20 degrees of adduction, 20 degrees of internal rotation, and 20 degrees of external rotation. Left elbow range of motion was limited to 120 degrees of flexion. Dr. Sassman observed 5/5 strength of the left shoulder, elbow, and wrist. (Ex. 6, p. 157)

Following records review, interview, and examination, Dr. Sassman issued diagnoses of (1) left shoulder rotator cuff tear with continued pain and adhesive capsulitis, status post surgeries by Dr. Potthoff and Dr. Nepola; (2) left elbow pain; and (3) radicular symptoms of the left arm in the setting of a previous C5-6 fusion. (Ex. 6, pp. 151, 158) With respect to causation of claimant's complaints, Dr. Sassman opined claimant's continued pain and adhesive capsulitis symptoms were directly and causally related to the work injury of September 12, 2011. Dr. Sassman opined claimant's left elbow pain had not been evaluated completely, despite reports of pain since the injury. Based upon the information available to her, Dr. Sassman opined claimant's left elbow symptoms were directly and causally related to the work injury. Although claimant had a history of a C5-C6 fusion, Dr. Sassman indicated there was no evidence claimant sought care for left arm radicular complaints prior to the work injury, with claimant specifically denying any such complaints prior to the work injury. She noted claimant began to suffer with numbness of the left third, fourth, and fifth digits following the work injury. (Ex. 6, p. 158) With respect to causation of these complaints, Dr. Sassman wrote:

> While it is true that this could be stemming from an elbow issue as well, it is possible that he had a concomitant injury to the cervical spine that has

> not yet been addressed either. Therefore, the treatment recommendations made below are appropriate and will help further clarify these issues.

(Ex. 6, p. 158)

Accordingly, Dr. Sassman recommended additional treatment. Dr. Sassman recommended a CT or MRI of the cervical spine to evaluate for nerve root impingement. Dr. Sassman indicated the cervical spine needed to be ruled out as a potential cause of claimant's upper extremity complaints given claimant's history of cervical fusion. Dr. Sassman also recommended orthopedic evaluation of claimant's left elbow. (Ex. 6, pp. 158-159) With respect to further treatment of his left shoulder, Dr. Sassman noted claimant was uninterested in further evaluation or treatment. Given claimant's declination of Dr. Nepola's offer of a repeat arthrogram and manipulation under anesthesia, Dr. Sassman indicated she had no further treatment recommendations with respect to the shoulder. (Ex. 6, p. 159)

Dr. Sassman expressed belief claimant would not achieve MMI until after completion of the above treatment recommendations. In the event such recommendations were not followed, Dr. Sassman agreed with the MMI date imposed by Dr. Nepola, July 28, 2014. Based upon her current examination, Dr. Sassman opined claimant had sustained permanent impairments of 2 percent upper extremity for loss of range of motion of the elbow and 26 percent upper extremity for loss of range of motion of the left shoulder. She combined the ratings to a 27 percent left upper extremity or 16 percent whole person impairment. Dr. Sassman deferred on an impairment rating for the cervical spine pending further evaluation. (Ex. 6, p. 159) Dr. Sassman also recommended permanent restrictions, with the caveat the need for restrictions may change with further treatment:

> I would recommend limiting lifting, pushing, pulling and carrying to 5 pounds with the right hand only on an occasional basis from floor to waist, waist to shoulder and over the shoulder. I would not recommend lifting with the left hand at all. Gripping and grasping as well as upper extremity activities should be limited to the right hand only. I would not recommend these types of activities with the left upper extremity. I would not recommend the use of vibratory or power tools as these may exacerbate his symptoms. I would not recommend the use of ladders as he would be unable to obtain a 3-point safety stance. I would not recommend crawling due to his left upper extremity symptoms.

(Ex. 6, p. 160)

Claimant retained the services of vocational rehabilitation counselor and consultant, Lewis Vierling, to complete a vocational rehabilitation evaluation. In completion of his evaluation, Mr. Vierling reviewed 1,340 pages of records provided by claimant's counsel regarding claimant's care, treatment, and defendants' answers to

interrogatories, and met personally with claimant on September 24, 2014. (Ex. 14, p. 191) During interview, claimant reported continued symptomatology of the left shoulder, trapezius, upper arm, elbow, forearm, wrist, hand, and digits. He reported his pain ranged from a minimum level of 4 or 5 on a 10-point scale to a level 8 or 9. (Ex. 14, p. 210) Claimant also relayed tasks which he was unable to perform or which were severely limited by his conditions. (Ex. 14, pp. 211-212)

Mr. Vierling's vocational evaluation report was issued on December 22, 2014. Mr. Vierling found claimant's work at defendant-employer fell within the very heavy level of exertion. (Ex. 14, p. 193) Accordingly, he found that preinjury, claimant was capable of performing jobs from a sedentary up to the very heavy physical demand level. (Ex. 14, p. 207) Mr. Vierling found claimant demonstrated an earning capacity of approximately $17.00 to $20.00 per hour, for annual earnings of $35,360.00 to $41,600.00, prior to the work injury. (Ex. 14, p. 190) By Mr. Vierling's analysis, prior to the work injury, claimant was employable and placeable in occupations that exist in significant numbers within the competitive labor market. (Ex. 14, p. 190)

With respect to claimant's post-injury vocational profile, Mr. Vierling expressed belief claimant demonstrated well above average clerical perception, above average form perception, and average general learning ability, verbal and numerical aptitude, spatial perception, eye-hand coordination, and finger and manual dexterity. (Ex. 14, p. 203) He further identified 21 specific transferable skills claimant possessed in his preinjury occupational profile, including inspecting vehicles, sorting products and materials, receiving and storing clerk, growing and harvesting plants, raising or capturing fish or animals, loading or unloading materials, cleaning objects and buildings, driving vehicles less than three tons, operating vehicles to transport people or freight, and selling products or services. (Ex. 14, pp. 204-205)

Due to claimant's work restrictions, Mr. Vierling indicated claimant needed to explore work options in the sedentary physical demand category. (Ex. 14, p. 212) By Mr. Vierling's analysis, claimant's post-injury vocational profile included 8 of the 84 specific occupational categories available in claimant's preinjury profile. According to Mr. Vierling, the 8 categories represented approximately 35 to 40 occupations; the 84 categories represented 415 to 420 occupations. Claimant's remaining occupational categories included the categories of billing, cost and rate clerk; customer service representative; procurement clerk; and radio dispatcher. Categories excluded from claimant's post-injury profile included agricultural equipment operator, chemical equipment operator, crop farmworker/laborer, driver/sales laborer, farm and ranch animal farmworker, floor stock clerk, industrial truck/tractor operator, landscape gardener/lawn maintenance worker, personal and home care aide, and railroad yard worker. (Ex. 14, pp. 188, 208, 214, 215)

Based upon this analysis, Mr. Vierling opined claimant had lost access to 91 percent of the specific occupational categories for which he qualified and which formed a part of claimant's preinjury occupational profile. Mr. Vierling noted this figure specifically considered claimant's inability to perform the material and non-material

handling physical demands which were elements of claimant's preinjury profile. (Ex. 14, pp. 188, 216) Mr. Vierling ultimately concluded claimant sustained a "severely diminished work capacity." (Ex. 14, p. 118)

Mr. Vierling stated claimant would face "numerous" obstacles in an attempt to obtain and retain employment. (Ex. 14, p. 217) He highlighted placeability issues such as "aging with a chronic disability, labor market conditions, workforce participation date, employers' attitudes, the probable need for accommodations, and his physical and mental health status." (Ex. 14, p. 188) Mr. Vierling expressed belief claimant would "more likely than not, be unable to obtain and retain employment in the competitive labor market in his region of the State." (Ex. 14, p. 217)

Mr. Vierling testified at evidentiary hearing. At hearing, Mr. Vierling stood by his opinion claimant lost access to 91 percent of his preinjury occupational profile. Mr. Vierling opined claimant is now quite limited in his employability and is presented with a "difficult situation" in terms of his prospects to return to the competitive labor market. Of the four job titles he identified for claimant, Mr. Vierling stated jobs of these types were limited in claimant's geographical area. While Mr. Vierling admitted he did not perform a complete labor market survey, he expressed concerns with respect to claimant's prospects in gaining such positions. His concerns included whether claimant would be hired into the position, could he pass a physical, and could claimant meet the physical demands of the job. Mr. Vierling opined claimant's prospects for returning to employment presented a "bleak picture" at the time of hearing. (Mr. Vierling's testimony)

Mr. Vierling's testimony was consistent with his vocational evaluation and delivered in a professional manner. His demeanor gave the undersigned no reason to doubt his veracity. Mr. Vierling is found credible.

At defendants' arranging, claimant presented for IME with board certified occupational medicine physician, Charles Mooney, M.D., on December 23, 2014. (Ex. C, p. 3) Dr. Mooney attempted to examine claimant's left shoulder, but found doing so difficult due to guarding. Dr. Mooney noted claimant's active range of motion was less than 10 degrees of flexion and abduction. When requested, Dr. Mooney indicated claimant would only raise his left arm with the assistance of his right arm. (Ex. B, p. 8) Dr. Mooney stated:

> Subsequently, any attempts at range of motion measurements of the left shoulder are felt to be invalid as he offers less than 5 degrees of flexion, abduction, and will resist any attempt to measure internal and external rotation in the 90/90 position as recommended by the AMA guide.

(Ex. B, p. 8)

On further examination, Dr. Mooney found normal range of motion of the left elbow. Dr. Mooney noted claimant demonstrated guarding of the left biceps on active measurement of the left elbow and demonstrated only 130 degrees of flexion but full extension. Dr. Mooney noted claimant also showed guarding in pronation and supination, but claimant did not demonstrate loss of either pronation or supination when distracted. Dr. Mooney observed mild biceps asymmetry, but no demonstrable intrinsic muscular wasting. (Ex. B, p. 8)

Dr. Mooney opined claimant's strength was "poorly estimable" due to claimant's break away or withdrawal from attempts to measure strength of the biceps or triceps, and flexion or extension of the wrist. (Ex. B, p. 8) He found claimant demonstrable 5/5 strength in extension and flexion of the digits of the left hand against resistance. He also found left shoulder strength of 4/5 in external rotation and 3/5 in internal rotation. On testing, claimant expressed significant complaints of pain, with grimacing, and demonstrated break-away and withdrawal. On testing of grip strength, Dr. Mooney indicated claimant offered less than 10 pounds of force and did not grip with the fourth and fifth digits. (Ex. B, pp. 8-9)

Following examination, Dr. Mooney assessed: (1) status post left subscapularis tear with diagnostic arthroscopy and two repairs; (2) evidence of "abnormal pain behavior with non-physiologic findings;" (3) status post C5-C6 cervical fusion; and (4) prior left upper extremity injury of the elbow and forearm. Dr. Mooney opined claimant demonstrated evidence of injury to his left shoulder, consistent with the subscapularis tear noted on MRI and surgically treated. He opined there was no evidence of significant injury to claimant's left elbow, due to prior left elbow injury and "poorly supported" complaints of left elbow pain. (Ex. B, p. 9) Dr. Mooney also opined claimant's ongoing left hand complaints were not corroborated by objective findings. With respect to the question of MMI, Dr. Mooney opined Dr. Nepola's date of May 14, 2014 was not unreasonable. (Ex. B, p. 10) Despite this statement, Dr. Mooney opined:

> However, [claimant] has not recovered from the surgery as expected despite protracted physical therapy. The failure to restore functional motion and strength is not medically explainable, and he has declined evaluation that may aid in further recovery. It is my opinion that other conditions including adhesive capsulitis could be excluded by the additional imaging, and that his pain complaints are so excessive that chronic pain syndrome (a somatoform disorder) should be considered.
>
> [Claimant] has demonstrated similar behavior with other work related injuries described above and his recoveries are fraught with excessive pain complaints without objective findings. Given this pattern of behavior in the workers [sic] compensation setting secondary gain issues and psychological explanations should be considered.

> It is my opinion that [claimant's] findings of loss of use, and apparent contentment with this current physical restrictions and symptoms are incongruent with that of an otherwise young reasonably healthy individual. For that reason, a psychological condition influencing his complaints should be excluded, and an independent mental health examination should be considered.

(Ex. B, p. 10)

Dr. Mooney indicated he was unable to opine as to the extent of claimant's permanent impairment, as his attempts to examine range of motion were invalid and should not be used to provide an opinion on impairment. (Ex. B, p. 11) Dr. Mooney further opined although claimant's FCE was considered valid, claimant would "greatly benefit from repatriation into the workplace." He opined interventions such as cognitive behavioral therapy might allow claimant to better manage his chronic pain and improve his functioning from the FCE levels. Dr. Mooney opined this form of intervention should be considered prior to releasing claimant to return to work under a restriction limiting him to essentially no use of his left arm. (Ex. B, p. 11)

Dr. Mooney issued a supplemental letter dated January 8, 2015. By this document, Dr. Mooney expressed agreement with Dr. Nepola's recommendation for an MRI arthrogram of the left shoulder "in order to exclude such conditions as adhesive capsulitis." (Ex. B, p. 13) With respect to Dr. Sassman's recommendation for a cervical MRI, Dr. Mooney indicated he recommended no further imaging of the cervical spine in respect to claimant's current shoulder complaints and noted claimant's prior cervical fusion. With respect to Dr. Sassman's recommendation for orthopedic evaluation of the left elbow, Dr. Mooney opined claimant's left elbow complaints were not related to the work injury, but related to the prior crushing injury of the left arm in 2004. (Ex. B, pp. 13-14)

Claimant testified in December 2014, he did not receive his weekly indemnity checks for a few weeks. Claimant testified at the time, he had no notification the benefits would cease. (Claimant's testimony) On December 22, 2014, claimant's counsel authored an email to defendants' counsel requesting an explanation as to why his client had not received a weekly check since approximately December 1, 2014. (Ex. 19, p. 239)

Defendants' counsel authored an email response to claimant's counsel on December 28, 2014. Counsel stated defendants' position was that Dr. Nepola's impairment rating was fully paid as of December 1, 2014, when the weeks of permanent partial disability (PPD) paid were combined with the "TTD overpayment previously discussed." Despite this position, defendants agreed to make voluntary payment of an additional 5 percent industrial disability, for 25 additional weeks of permanent partial disability benefits, and a total payment of 90 weeks of permanent partial disability benefits. Accordingly, counsel indicated defendants would issue a check of benefits

accrued from December 1 to date and then commence weekly benefits until May 25, 2015. (Ex. 19, p. 239)

Claimant admits defendants issued him a check for the three weeks of benefits missed, plus interest. (Claimant's testimony)

Defendants retained independent vocational evaluator, Tom Karrow, to complete a vocational rehabilitation evaluation and assist claimant in locating employment. (Ex. D, p. 1) Mr. Karrow scheduled an in-person interview of claimant at his attorney's office on December 9, 2014, but claimant was unable to attend due to illness. In lieu of the in-person meeting, claimant participated in a telephone interview with Mr. Karrow and claimant's attorney on that date. During his interview, claimant indicated he would consider employment at a location within 10 to 15 miles of Alden, Iowa. At time of interview, Mr. Karrow noted claimant had not registered with the Iowa Workforce Center regarding employment. (Ex. D, p. 3) In addition to the interview, Mr. Karrow reviewed Mr. Vierling's vocational report, the FCE, various medical records, claimant's personnel records from defendant-employer, and claimant's interrogatory answers. (Ex. D, p. 2)

Mr. Karrow issued a written vocational rehabilitation evaluation report dated January 12, 2015. Following review of claimant's medical records, including the FCE and Dr. Nepola's restrictions, Mr. Karrow opined claimant was restricted to sedentary activities with his left upper extremity. Mr. Karrow noted claimant was right-handed and the FCE results indicated claimant could right carry 40 pounds. Mr. Karrow opined claimant was therefore capable of functioning in the medium physical demand level with respect to the right upper extremity. (Ex. D, p. 4) Mr. Karrow stated:

> The FCE results state that [claimant's] capabilities are in the sedentary category of physical demand characteristics; however, the right upper extremity has the capability of lifting 40 pounds rarely, 30 pounds occasionally, with no limitations for sit, stand or walk. This would place the right upper extremity and the rest of his capabilities for sitting, standing and walking in the medium category of work activity.
>
> Overall, it appears that [claimant] is functioning between the sedentary and medium duty level of physical activity when including all of his abilities physically, according to the valid Functional Capacity Evaluation of June 3, 2014.

(Ex. D, p. 4)

Mr. Karrow indicated claimant's work history included heavy duty jobs as farm worker and orderly; medium duty jobs as driver, home attendant, and truck driver; and light duty jobs as sales representative and supervisor. (Ex. D, p. 5) Mr. Karrow also noted claimant had worked in the following fields: brushing/spraying, animal propagating, plant cultivation, healthcare/medical, transporting, accommodating, and sales. He identified claimant's transferable skills to include abilities to supervise

coworkers, prepare and inspect farm and site materials and related construction materials, take inventory, carry out and understand regulations, move hands and eyes in coordination to complete tasks, work with all types of people, use entry-level math, operate hand tools and machinery, drive heavy equipment and trucks, drive and operate vehicles, construct and/or repair, and manage time appropriately. (Ex. D, p. 6)

In connection with his evaluation, Mr. Karrow provided claimant job leads in letters dated December 16, 2014, December 19, 2014, December 24, 2014, and January 2, 2015. (Ex. D, p. 8) Mr. Karrow also requested claimant sign a vocational consent letter which would allow Mr. Karrow to confirm that claimant had registered with the Iowa Workforce Center. As of January 12, 2015, Mr. Karrow had not received the requested consent letter. According to Mr. Karrow, the Iowa Workforce Center agreed the job leads he provided claimant would be appropriate positions and that such positions become open and available on an occasional basis in the Alden, Webster City, and Iowa Falls area. Mr. Karrow also noted the Iowa Workforce Center indicated jobs such as desk clerk, counter clerk, fast food worker, customer service representative, night auditor, cashier, and restaurant crew member carry an average hourly wage of approximately $8.00 to $8.50 per hour. (Ex. D, p. 9)

Mr. Karrow indicated he followed-up with each of the prospective employers provided to claimant. (Ex. D, p. 8) With respect to the job leads provided to claimant on December 16, 2014, Mr. Karrow noted there was no evidence claimant had attempted to contact Kmart or the McDonalds in Iowa Falls. Mr. Karrow indicated the McDonalds had two open positions over the preceding few weeks and he believed these jobs likely fell within claimant's restrictions. The Walmart representative was unable to locate an application from claimant on file and further indicated the open positions had been filled. However, Mr. Karrow noted the representative anticipated more openings in the future in the sedentary-to-light and light-to-medium duty levels. The manager at Casey's indicated she knew claimant and provided him an application, but claimant had not returned the completed application. The manager expressed belief claimant would be capable of performing cashiering duties within his limitations. Mr. Karrow noted the manager's statements contradicted claimant's written job log which indicated he submitted an application at Casey's on December 19, 2014. A representative from Goodwill confirmed an application from claimant was on file. Although no positions were currently available, Mr. Karrow was informed Goodwill would keep claimant's application on file. (Ex. D, p. 9)

With respect to the job leads provided on December 19, 2014, Mr. Karrow was informed by a Casey's representative that no application from claimant was on file and the store currently had an open position within claimant's abilities. The McDonalds in Webster City also confirmed no application was on file from claimant and open positions were available. The Hy-Vee in Iowa Falls had no application for employment from claimant. The Casey's in Webster City found no application from claimant and represented the positions had been filled, including for the position of light duty, full-time clerk. A representative from Kum & Go confirmed an application for employment was on file at one location, but not at the store Mr. Karrow referred claimant to with the open

position. A representative at Bomgaars in Webster City confirmed claimant's application was on file. Mr. Karrow discussed claimant's prospects with the Bomgaars manager. According to Mr. Karrow, the manager thought claimant would be capable of doing a sales position within his limitations; however such positions were currently filled. (Ex. D, p. 10)

With respect to the job leads provided on December 24, 2014, Mr. Karrow was unable to confirm receipt of an application at any of the three prospective employers. The Hy-Vee in Webster City indicated no application on file and that jobs were available, including customer service, counter clerk, and cashier. Mr. Karrow also noted Hy-Vee was willing to accommodate, if need be. (Ex. D, p. 10) A representative from Check Into Cash stated claimant did not have an application on file and all positions had been filled. A representative from the AmericInn Hotel stated claimant had not submitted an application and the hotel currently had an opening for a desk clerk. (Ex. D, p. 11)

With respect to the job leads provided on January 2, 2015, both the Dairy Queen and the Kum & Go in Hampton denied claimant had an application on file. Both the Kum & Go in Ackley and in Eldora indicated they would need to consult records to determine if an application was on file. (Ex. D, p. 11)

Claimant's job log also contained references to employers claimant claimed to have contacted on his own, without referral from Mr. Karrow. Mr. Karrow reviewed the search logs from December 12 through December 29, 2014 and made contact with employers to whom claimant claimed to submit applications. The City of Alden Public Libraries stated their last open position was closed over a year prior. (Ex. D, p. 11) The Iowa Falls Library representative stated no application from claimant was on file and further represented the only open position required at least a four-year degree. (Ex. D, p. 12) The Iowa State Extension Service representative stated no application was on file. The representative indicated he spoke with claimant and advised him positions with that office require at least a four-year degree. The Heritage Care Center stated claimant had no application on file. The representative also stated the only jobs which would become available at Heritage Care Center were occasional nursing or maintenance jobs, both of which are beyond claimant's abilities and transferable skills. (Ex. D, p. 11) A representative from O'Reilly Auto Parts found no application on file. On his log, claimant indicated he applied for parts stocking clerk position; the representative indicated such a position was heavy-nature work. Mr. Karrow was unable to make contact with Diana's Place to confirm if claimant applied for work. A representative at Dale Howard, Inc. confirmed an application was on file for a driver position. The representative stated the position involves driving cars to and from locations, but positions are sporadic opportunities and none were currently open. (Ex. D, p. 12)

Claimant also made contact with Iowa Select Farms. Mr. Karrow confirmed this contact and application with a representative of Iowa Select Farms. The representative also indicated claimant was interviewed on January 5, 2015. According to the

representative, the interview went very well, with claimant having a good work history and education. However, most jobs at Iowa Select Farms involved lifting of around 40 pounds. Mr. Karrow spoke with the employer regarding claimant's restrictions and the employer expressed belief claimant would be able to work as a dispatcher. This position was filled as of the time of claimant's interview. The dispatcher duties involved entering and retrieving information from a computer, answering the telephone, and other light activities. Duties were described as mainly sedentary to light, with rare lifting of around 40 pounds, but this requirement might be able to be accommodated. The dispatcher position paid $14.00 per hour, 50 hours per week. Another possible position for claimant at Iowa Select Farms was as a delivery person with maximum lifting of 40 pounds on occasion. A delivery person earned $12.00 per hour, 30 hours per week. However, no such positions were currently open. (Ex. D, pp. 11-12)

In review of claimant's job search efforts, Mr. Karrow indicated claimant had not made contact with all of the employers to which he was referred by Mr. Karrow. Mr. Karrow noted some of employers to which he previously referred claimant had job openings and were willing to accept claimant's application. Mr. Karrow expressed belief the job leads appeared to be within claimant's physical capabilities and transferable skills, in his geographical area. In regard to claimant's individual job search, Mr. Karrow indicated it appeared claimant applied for work outside his physical capabilities. Additionally, Mr. Karrow noted claimant had failed to return a job application provided by Casey's and had represented he applied to certain employers, but the employers indicated no application was submitted. (Ex. D, p. 12)

Mr. Karrow opined the most appropriate positions available to claimant would be as cashier, counter clerk, customer service, desk clerk, night auditor, or dispatcher. Mr. Karrow indicated claimant had not applied to all the employers in his geographical area who have such positions available. (Ex. D, pp. 12-13) In Mr. Karrow's belief, the fact claimant did not register with the Iowa Workforce Center until December 29, 2014 "indicates he did not conduct an adequate job search." Overall, Mr. Karrow opined claimant had not completed an "adequate" job search. (Ex. D, p. 13)

Mr. Karrow also made consideration of the wages claimant would be eligible to earn in the positions Mr. Karrow recommended. He indicated entry-level jobs carry wages of $8.00 to $8.50 per hour. At Iowa Select Farms, the dispatcher position carries an hourly wage of $14.00 and the driver position carries an hourly wage of $12.00. In comparison to his preinjury wage of approximately $17.00 to $18.00 per hour at defendant-employer, Mr. Karrow found a 53 percent wage loss (comparing an average $17.50 preinjury hourly wage with the entry-level wage of approximately $8.25 per hour). (Ex. D, p. 13) However, Mr. Karrow opined claimant might be able to return to work as a truck driver with no touch loads in the event he renewed his CDL license. Mr. Karrow indicated there would be such jobs available to claimant and these jobs typically pay $45,000.00 to $55,000.00 annually in claimant's labor market. If claimant followed this route, he would have suffered no wage loss. (Ex. D, pp. 4, 13)

In addition to performing his own vocational analysis, Mr. Karrow also critiqued Mr. Vierling's vocational report. Mr. Karrow highlighted the fact Mr. Vierling based his assessment on job opportunities within the sedentary category only, while Mr. Karrow opined claimant was essentially unrestricted with the right arm and is right-hand dominant. (Ex. D, p. 8) He noted Mr. Vierling did not include the fact claimant was able to lift a maximum of 40 pounds with the right arm and has virtually no limitations on sitting, standing, and walking. Further, Mr. Karrow indicated Mr. Vierling did not consider the fact claimant was able to perform his own cooking, cleaning, lawn mowing, and driving, which Mr. Karrow described as light duty activities. Mr. Karrow opined claimant's own description of his daily activities "exceeds sedentary physical capabilities." (Ex. D, p. 7)

While Mr. Karrow agreed with Mr. Vierling regarding claimant's aptitudes, Mr. Karrow also expressed belief Mr. Vierling improperly considered claimant's subjective perception of his abilities, instead of relying upon objective medical evidence. Mr. Karrow also noted Mr. Vierling did not complete a labor market survey where he contacted employers concerning employment opportunities for claimant. (Ex. D, p. 7) Although Mr. Vierling opined claimant's post-injury profile included 35 to 40 similar occupations, Mr. Karrow highlighted Mr. Vierling's failure to identify the similar occupations or refer claimant to available positions. (Ex. D, p. 8)

At evidentiary hearing, Mr. Vierling testified to his critique of Mr. Karrow's vocational opinions. Mr. Vierling described Mr. Karrow's report as "optimistic" and not realistic with respect to claimant's functional capacities. Mr. Vierling indicated he believed Mr. Karrow did not consider claimant's narrative on his pain levels and physical abilities. Mr. Vierling indicated Mr. Karrow listed claimant's skills and performed a labor market survey for a number of jobs; however, Mr. Vierling indicated the identified positions may or may not be available in claimant's geographical area. Mr. Vierling also highlighted Mr. Karrow's failure to analyze placement issues such as claimant's likelihood of hire. In summary, Mr. Vierling expressed belief Mr. Karrow failed to "put everything together" into a profile that identified jobs claimant was now qualified to perform. (Mr. Vierling's testimony)

Claimant testified he continues to suffer with constant left shoulder pain, located in the musculature of the front, back, and side of his shoulder, as well as in the armpit. He also reported occasional cramping of his left arm and fingers. Claimant testified he is unable to find a comfortable position, sleeps in a recliner, and is "lucky" to sleep two to four hours per night. He takes no prescription medications, but self-treats daily with use of over-the-counter medications, as well as use of a TENS unit, topical gels, heating pads, ice, and massage. He also continues to perform the home exercises he learned from Dr. Nepola or in physical therapy. His home exercise program has a duration of 1 ½ to 1 ¾ hours per day; he tries to perform the program three times daily. (Claimant's testimony)

Claimant is able to perform activities of daily living and personal care, although claimant testified he has adapted to perform most of such tasks with his right arm. Claimant testified he has changed the manner in which he washes dishes and on rare occasions, a friend or relative will assist him with cleaning dishes. He has also begun to limit his creation of dirty dishes by using disposable plates and cups. Claimant limits himself to use of only his right arm in performance of snow removal or mowing; he also receives assistance with such tasks and utilizes a sling to minimize movement of the left shoulder. Claimant also utilizes the shoulder sling when he walks prolonged distances in order to remove the deadweight from the hanging arm and reduce jerking of the left shoulder. As a result of the shoulder condition, claimant testified he is no longer able to engage in his hobbies of biking, wrestling, playing catch or football, running, or four-wheeling with his children. (Claimant's testimony)

Claimant's sole source of income is weekly permanent partial disability benefits. Claimant testified each day, he hopes he is able to locate employment. He is willing to travel 25 miles from his home for work, a distance similar to his prior commute to defendant-employer. (Claimant's testimony) Subsequent to claimant's work injury, defendant-employer went out of business. Claimant never returned to work for defendant-employer after his work injury, was never offered work, and did not receive a termination notice. (Claimant's testimony; Ex. A, Depo. Tr. p. 13)

Claimant testified he looked for work throughout the course of his treatment. While under temporary restrictions, claimant testified he asked his supervisor at defendant-employer about job opportunities, but was not offered work. (Claimant's testimony) As of deposition on November 13, 2014, claimant stated he was actively looking for work. Claimant explained he was checking in with multiple places to inquire if employment was available, including contacting his former employers and landlord regarding job opportunities. Claimant admitted he only submitted one formal job application, for a maintenance position at Cargill, and had not received a response. (Ex. A, Depo. Tr. pp. 13-15) At evidentiary hearing, claimant testified he made multiple work inquiries and submitted multiple applications. Claimant testified he has participated in job interviews at Walmart, McDonalds, Casey's, Cargill, Fastenall, Napa Auto Parts, O'Reilly, and Culligan, as well as with local farmers. He began approaching managers directly in attempts to locate work, but has been unable to locate work within his restrictions. Claimant testified he attempted to follow up with all leads provided by Mr. Karrow. He also continues to work with an individual at the Iowa Workforce Development Center in Fort Dodge. He has received no offers for full or part-time employment since being released by Dr. Nepola. (Claimant's testimony)

Claimant attempted to renew his CNA following his first shoulder surgery, but was unable to complete the physical requirements. He also attempted to renew his CDL license in 2014, but was unable to meet the physical requirements of licensing. Claimant does possess a drivers' license. (Claimant's testimony; Ex. A, Depo. Tr. pp. 15-16) Claimant does not own a computer and uses a computer at the public library in order to conduct his job search. An individual at Iowa Workforce Development assisted

claimant in creating an email account to use in connection with the job search. In his work history, claimant has seldom used a computer. He described himself as a "pecking" typist, usually using only his right hand. (Claimant's testimony)

Claimant does not believe himself capable of returning to his former work in agricultural labor due to his permanent restrictions. Claimant also does not believe himself capable of selling cars, due to the requirements to clean off vehicles and remove snow, as well as to climb into and out of vehicles. Claimant testified he contacted two dealerships regarding the job requirements for a salesperson; he testified he was unable to meet the physical requirements for the jobs, as they required scraping ice from vehicles and some light maintenance. Claimant testified he applied for work at each dealership, but was not offered a position. (Claimant's testimony; Ex. A, Depo. Tr., pp. 17-18)

Claimant currently volunteers at a Methodist church and at a nursing home facility in Iowa Falls. At church, claimant provides limited assistance with meals or greets parishioners. At the nursing home, claimant converses or play games with residents, or assists with activities. He also volunteers at isolated events such as blood drives or at the Legion. Claimant testified he has inquired of work opportunities at each of the facilities in which he volunteers, but has not successfully gained employment. (Claimant's testimony; Ex. A, Depo. Tr. 22)

The evidentiary record contains a statement created by the Social Security Administration of claimant's earnings for the years 1991 to 2013. In 1997, the year claimant obtained his associates' degree, claimant earned $24,142.00. In subsequent years, the record reveals the following earnings: $28,786.00 in 1998; $35,558.00 in 1999; $21,855.00 in 2000; $29,320.00 in 2001; $16,953.00 in 2002; $20,726.00 in 2003; $26,470.00 in 2004; $31,583.00 in 2005; $22,871.00 in 2006; $34,355.00 in 2007; $35,601.00 in 2008; $2,153.00 on 2009; $31,605.00 in 2010; $28,109.00 in 2011; and zero earnings in 2012 or 2013. (Ex. 24, p. 256)

Claimant incurred out-of-pocket prescription expenses related to the work injury. Claimant calculates the expense as $295.59, while defendants calculated the expense as $275.40. (Ex. 20, pp. 240-241; Ex. J, pp. 1-3) Claimant also incurred mileage expense incident to claimant's IME and defendants' IME. Claimant requested payment for 233 miles travelled in November and December 2014. (Ex. 20, p. 241-A)

CONCLUSIONS OF LAW

The first issue for determination is extent of claimant's industrial disability, including whether claimant is permanently and totally disabled.

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

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

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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).

Claimant was 38 years of age at the time of evidentiary hearing. He earned a high school diploma and an associate's degree in agribusiness, with records demonstrating claimant was generally an average student. Claimant is right-hand dominant. As a result of the stipulated work injury on September 12, 2011, claimant suffered a rotator cuff tear, with arthroscopic repair by Dr. Potthoff and arthroscopic revision repair with placement of hardware and biceps tenotomy by Dr. Nepola. Following revision surgery, claimant's improvement was abnormally poor, with continued stiffness and pain. Dr. Nepola offered a diagnostic scope with manipulation

under anesthesia and/or an MR arthrogram in order to further evaluate the condition, but claimant refused additional invasive intervention. Dr. Nepola ultimately opined claimant's prospects for improvement with conservative care were poor and placed claimant at MMI.

Dr. Nepola recommended a functional capacity evaluation to aid in determining claimant's permanent restrictions. Mr. Vander Wilt performed the FCE and determined the results of the examination to be valid. He noted claimant demonstrated good capabilities with his right arm, but significant deficits in left arm carry, floor to waist lift, waist to crown lift, and an inability to perform overhead activities, as well as below average gripping with the left hand. Mr. Vander Wilt noted on examination, claimant's pain limited him in front carry, left carry, overhead tasks, and floor to waist lifting. He opined claimant was unable to safely perform some testing of front carry, floor to waist lift, and left carry. In summary of the FCE results, Mr. Vander Wilt found claimant capable of functioning in the sedentary physical demand category. He noted the following functional limitations: (1) inability to lift waist to crown or perform left carry; (2) maximum rare lift of 5 pounds waist to floor, 5 pounds front carry, and 40 pounds right carry; (3) no waist to floor lift or front carry on an occasional or frequent basis; (4) right carry of 30 pounds occasionally and 20 pounds frequently; and (5) inability to perform elevated work.

Dr. Nepola reviewed claimant's FCE and imposed the following work restrictions: "rare lift of 5 pounds from waist to floor, no lifting from waist to crown, rare left [sic] of 5 pounds front carry with the left upper extremity." (Ex. 3, p. 140) Additional restrictions included no repetitive reaching out from the body, repetitive overhead reaching with the left arm, and no climbing of ladders. Dr. Sassman recommended permanent restrictions to limit lifting, pushing and carrying to 5 pounds with the right hand only on an occasional basis from floor to waist, waist to shoulder and over the shoulder; no lifting with left arm; gripping and grasping with the right hand only; no use of vibratory or power tools; no use of ladders; and no crawling due to left upper extremity symptoms. Dr. Mooney found his results of examination invalid and recommended claimant should consider cognitive behavioral therapy to manage chronic pain and improve functioning from the FCE levels.

As Dr. Nepola served as claimant's treating physician, with the opportunity to observe and interact with claimant on multiple occasions, including over an extended period of abnormally poor improvement, Dr. Nepola is in the best position to assess claimant's functional limitations. To so assess, he recommended a functional capacity evaluation which Mr. Vander Wilt found yielded valid results. The FCE found claimant capable of functioning within the sedentary physical demand category and those results were essentially adopted by Dr. Nepola. Accordingly, the undersigned adopts the restrictions ordered by Dr. Nepola and based upon the valid FCE, in consideration of claimant's industrial disability. Of note, Dr. Sassman recommends permanent restrictions more stringent than those imposed by Dr. Nepola and Dr. Mooney declined to recommend permanent restrictions, recommending claimant learn skills to manage his pain and improve function prior to receiving restrictions.

Dr. Nepola opined claimant sustained a 22 percent left upper extremity or 13 percent whole person impairment as a result of decreased range of motion of the shoulder. Dr. Sassman opined claimant sustained permanent impairments of 2 percent left upper extremity for loss of range of motion of the elbow and 26 percent left upper extremity for loss of range of motion of the shoulder, for a combined equivalent of 16 percent whole person. Dr. Mooney opined his attempts to examine claimant's range of motion were invalid and should not be used as a basis for an impairment rating; he also indicated claimant's pain complaints were excessive and claimant had a history of similar behavior in other workers' compensation claims. For the same reasons as set forth *supra*, it is determined Dr. Nepola's opinion is entitled to the greatest weight. Dr. Sassman's opinion is slightly greater, but consistent, with that of Dr. Nepola. Dr. Mooney, on the other hand, declined to opine as to permanent impairment based upon a belief claimant's presentation was invalid. No other provider opined claimant's presentation was invalid or exaggerated; accordingly, Dr. Mooney's opinion is entitled to no weight.

Following the work injury, claimant never returned to work for defendant-employer. While on temporary restrictions, defendant-employer made no offer of light duty work to claimant. Defendant-employer subsequently went out of business. Mr. Vierling opined claimant's duties for defendant-employer fell within the very heavy physical demand category. This opinion is unrebutted. As claimant is now limited to sedentary work as a result of the work injury, claimant would be foreclosed from a return to his preinjury position even if defendant-employer remained in business.

Claimant has not successfully repatriated to the workforce following the work injury. Claimant's vocational position was evaluated by both Mr. Vierling and Mr. Karrow. Mr. Vierling found preinjury claimant was capable of functioning from the sedentary up to the very heavy physical demand category with an earning capacity of approximately $17.00 to $20.00 per hour. Postinjury, Mr. Vierling found claimant was limited to positions in the sedentary physical demand category. As a result, Mr. Vierling found claimant lost access to 91 percent of the occupational categories for which he qualified preinjury. Mr. Karrow was retained to perform a vocational evaluation and assist claimant in locating employment. In performing his analysis, Mr. Karrow opined claimant was restricted to the sedentary category with the left upper extremity, but could function within the medium physical demand level with the right upper extremity. Mr. Karrow provided claimant job leads and admitted entry-level jobs carried wages of approximately $8.25. When compared to claimant's approximate wage of $17.50 per hour at the time of the work injury, Mr. Karrow stated claimant demonstrated a 53 percent wage loss. However, Mr. Karrow indicated higher wage jobs were available, including if claimant were to renew his CDL and procured a job doing no touch loads.

In evaluating the probative value to provide vocational opinions, I typically provide greater weight to the vocational opinion of a consultant who performed a labor market survey and provided an injured worker with job leads in an attempt to return the worker to employment over the vocational opinion of a counselor who simply performed

an analysis of a workers' vocational options. Herein, that would lead the undersigned to provide greater weight to the opinion of Mr. Karrow over that of Mr. Vierling.

However, in completing his labor market survey and selecting job leads, Mr. Karrow did so based upon his interpretation of claimant's FCE results. Specifically, Mr. Karrow declined to limit his analysis to the sedentary physical demand level noted in claimant's FCE and essentially adopted by Dr. Nepola. Rather, Mr. Karrow reasoned claimant was capable of functioning at a higher level with the right upper extremity, which warranted a job search extending from the sedentary to the medium physical demand category. Mr. Karrow's interpretation, however, is not supported by the medical opinions in evidence. Dr. Nepola based his permanent restrictions upon the FCE which limited claimant to the sedentary work category. Dr. Sassman's recommended permanent restrictions are even more restrictive than those imposed by Dr. Nepola. Therefore, the undersigned is unable to provide any weight to a vocational opinion which is based upon a non-medical provider's interpretation of FCE results when that opinion is contradictory to the opinions of three medical providers: Mr. Vander Wilt, Dr. Nepola, and Dr. Sassman.

Claimant's work history consists of farm labor, livestock care, trucking driving and maintenance, loading hogs, sales and route delivery driver, car sales, grain hauling, and his similar work for defendant-employer. Each of these positions require physical abilities beyond the sedentary physical demand category and claimant's permanent restrictions. Claimant credibly testified he inquired into performance of car sales, arguably the lightest-natured of the prior positions, and was unable to meet the physical requirements of either prospective employer. Claimant was also unable to meet the physical requirements to renew either his CDL or his CNA certification. The work injury has therefore likely precluded claimant from returning to any position similar to those he has held in his working life.

Although claimant has lost access to a large portion of job types available to him preinjury, positions do exist for which claimant is qualified. Mr. Vierling identified 8 specific occupational categories containing 35 to 40 occupations. As he did not perform a labor market survey, the record lacks evidence regarding the availability of such positions in claimant's geographical area. Claimant has shown he possesses skills which are transferrable to other occupations and continues to utilize his social skills in respect to his continued volunteerism.

While claimant's opportunities for work have certainly lessened following the work injury, the undersigned is unconvinced claimant has maximized his job search and shown motivation to return to the labor force. Mr. Karrow's records denote claimant failed to follow through on all job leads, albeit some of the leads were to positions which exceeded claimant's restrictions. Mr. Karrow's analysis also indicated claimant appeared to apply for positions outside his physical capabilities, failed to return a provided job application, and represented applications were submitted to employers which were unable to corroborate claimant's representation. Claimant also failed to

enlist the services of Iowa Workforce Development until December 2014, some seven months following his release from Dr. Nepola.

The undersigned also believes claimant has failed to maximize his medical treatment options. Claimant's choice not to undergo further invasive procedures or testing with an unknown prospect for relief of symptoms is understandable. Only claimant can determine whether his symptoms are significant enough to warrant undergoing additional treatment or if his symptomatology can be adequately controlled through activity limitation and conservative care. Claimant alone has the right to determine what medical treatment he is willing to subject himself to. However, claimant's unwillingness to undergo relatively low-risk diagnostic treatments such as an MR arthrogram or manipulation under anesthesia raises questions regarding his motivation to maximize his healing and potential to return to work.

Claimant is a young worker, with the intellectual capabilities to successfully earn an associate's degree in agribusiness. His work history has involved a great deal of heavy labor, tasks which claimant is now precluded from performing. However, claimant has maintained an ability to function in the sedentary physical demand category. Given his prior education, claimant likely maintains the ability to become retrained in a field which is sedentary in nature. He has not explored this option. Nor does the undersigned believe claimant has maximized his work search. Should the claimant successfully reenter the labor market, entry level positions available to him carry an average wage of $8.25 per hour, approximately one-half the hourly wage he earned at defendant-employer.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 50 percent industrial disability as a result of the stipulated work-related injury of September 12, 2011. Such an award entitles claimant to 250 weeks of permanent partial disability benefits (50 percent x 500 weeks = 250 weeks), commencing on the stipulated date of May 14, 2014. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $623.02, and claimant was single and entitled to 3 exemptions. The proper rate of compensation is therefore, $414.91.

The next issue for determination is whether claimant is entitled to payment of various 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).

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

In dispute are the out of pocket expenses incurred by claimant. Claimant calculates the total out of pocket expense as $295.59, while defendants calculated the expense as $275.40. The undersigned reviewed the receipts claimant provided to defendants, in evidence at Exhibit 20, page 241. On that document, I found receipts for the following amounts: $20.29, $22.88, $22.78, $33.54, $33.54, $24.69, $50.00, $43.39, and $24.19. These receipts total $275.30 in out of pocket expense incurred by claimant. Defendants shall reimburse claimant for out of pocket expenses in the amount of $275.30.

Claimant also requests payment for medical mileage expenses incurred in travelling to claimant's IME and defendants' IME. Claimant's exhibits represent 233 miles travelled for these examinations. The applicable mileage rate at the time claimant travelled the 233 miles was $.56. Accordingly, claimant is entitled to payment of medical mileage in the amount of $130.48 (233 miles x $.56 = $130.48).

The next issue for determination is whether defendants are entitled to a credit for overpayment of temporary disability benefits against permanent partial disability benefits due as a result of the stipulated work injury of September 12, 2011. The parties agree defendants overpaid temporary disability benefits. Defendants have computed the amount of overpayment as $13,477.94, a figure claimant does not dispute.

Claimant argues defendants are not entitled to a credit for the overpayment against permanent partial disability benefits due and owing in this file. In support of his contention, claimant cites to the Iowa Supreme Court case of Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010). In Swiss Colony, the Court ruled the plain language of Iowa Code section 85.34(5) directed that the overpayment of *any* weekly benefits is to be credited against a subsequent injury with the same employer.

However, section 85.34(5) is not the controlling statutory section with respect to the overpayment at issue in this claim. Rather, the undersigned finds section 85.34(4) contains the proper remedy for determining defendants' credit. Iowa Code section 85.34(4) states:

> 4. *Credits for excess payments.* If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the

> liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

Section 85.34(4) is directly on point to the overpayment at issue in this claim. Defendants significantly overpaid claimant's temporary total disability/healing period benefits at a rate over $275.00 higher per week than the rate stipulated to by the parties. Defendants clearly acted in good faith by overpaying at such a rate and notified claimant in writing of the discovery of the overpayment. Defendants did not attempt to collect the overpayment from claimant directly, nor improperly reduce claimant's temporary disability benefits. Rather, defendants notified claimant of their intent to seek a credit for the overpayment of temporary benefits against the weeks of permanent disability benefits that had been volunteered in connection with Dr. Nepola's rating.

As section 85.34(4) governs claimant's credit for the excess of temporary disability benefits paid, it is determined defendants are entitled to a credit in the amount of $13,477.94. This determination is consistent with the case of McBride v. Casey's Marketing Co., File No. 5037617 (Remand February 9, 2015). In McBride, the presiding deputy found defendants were only entitled to a credit for an overpayment of healing period benefits against payments made for future work injuries claimant sustained with the same employer. On appeal, the former workers' compensation commissioner applied the Swiss Colony case and denied defendants' credit argument. Defendants filed a petition for judicial review and the district court judge authored a ruling reversing the commissioner's decision with respect to this issue, concluding section 85.34(5) and the Swiss Colony case did not apply to the overpayment of temporary total disability. Rather, the judge ruled section 85.34(4) applied and remanded the case to the commissioner to apply section 85.34. On remand, the acting workers' compensation commissioner made the following determination:

> In light of the order of Judge Blaine, it is the determination of this acting workers' compensation commissioner; defendants shall take credit against any permanent partial disability benefits for all overpayments defendants made to claimant in the form of healing period benefits. Such a remedy for the credit is provided by Iowa Code section 85.34(4) which specifically addresses healing period benefits. To hold otherwise, would render Iowa Code section 85.34(4) utterly meaningless. Section 85.34(4) is a specific section. It is the section that governs in the present case.

(McBride at page 5)

The undersigned finds defendants are entitled to a credit against permanency benefits ordered in this case in the amount of $13,477.94, in accordance with section 85.34(4) and as applied in McBride. (*See also* Kreb v. Hometown Restyling, Inc., File

No. 5048685 (Arb. August 6, 2015); Rover v. Cambrex Corp., File No. 5046945 (Arb. December 18, 2015).)

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Claimant argues he is entitled to penalty benefits for defendants' delay in payment of permanent partial disability benefits from December 4 through December 26, 2014.

Dr. Nepola declared claimant at MMI on May 13, 2014. Following an FCE, Dr. Nepola authored a letter dated July 28, 2014 whereby he opined claimant required permanent restrictions and had sustained a permanent impairment of 13 percent whole person. On August 27, 2014, defendants' counsel authored a letter to claimant's counsel indicating defendants would pay permanent partial disability benefits until 65 weeks of such benefits had been paid, representing the 13 percent rating issued by Dr. Nepola. Counsel specifically indicated such benefits would be paid weekly until August 14, 2015. On October 28, 2014, defendants' counsel authored another letter to claimant's counsel indicating an intent to apply the overpayment of temporary disability benefits against the permanent partial disability benefits yet to be paid. Claimant's permanent partial disability benefits were stopped in early December 2014, as defendants' believed the paid weeks of permanent partial disability benefits combined with the overpayment of temporary disability benefits totaled the equivalent of 65 weeks of benefits. When claimant's counsel inquired as to the reason for termination of benefits on December 22, 2014, defendants agreed to pay an additional 25 weeks of permanent partial disability benefits. Defendants responded promptly on December 28, 2014 with an explanation as to the cessation of claimant's benefits, a volunteer of additional benefits, and represented the past weeks of benefits would be paid plus interest.

In order to be entitled to penalty benefits, claimant bears the burden of proving a delay in payment of benefits occurred. In the instant case, defendants initially represented claimant would receive weekly permanency benefits until August 14, 2015. However, subsequent to this letter and over one month prior to cessation of claimant's weekly benefit checks, defendants informed claimant there had been an overpayment of temporary disability benefits which they intended to apply against any further permanent disability benefits to be paid. Defendants argue when the weekly permanent partial disability checks were combined with the overpayment of temporary benefits, the equivalent of 65 weeks of benefits were paid as of December 1, 2014, triggering a stop of claimant's permanent disability checks. Claimant does not dispute defendants' computation that the combined figures totaled the equivalent of 65 weeks, representing the entirety of Dr. Nepola's rating.

The undersigned found by this decision that defendants are entitled to a credit for the overpayment of temporary disability benefits against the permanent disability benefits owed in this case. Given the undersigned agreed with defendants on this issue and defendants paid the equivalent of Dr. Nepola's rating prior to terminating claimant's benefits, I find claimant has failed to prove a delay in benefits actually occurred in December 2014. The fact defendants ultimately volunteered additional weeks of permanent partial disability benefits does not change the fact that defendants properly made payment of the permanent disability benefits which corresponded to Dr. Nepola's rating. Having found claimant failed to carry his burden of proving a delay in permanent partial disability benefits, claimant is not entitled to penalty benefits.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $3,101.00 vocational evaluation of Mr. Vierling (Ex. 16, pp. 225-226); $20.00 in copies of medical records (Ex. 21, p. 242); and $20.00 for a copy of the FCE report (Ex. 21, p. 244). Defendants do not dispute taxation of these costs. These are allowable costs and are taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing May 14, 2014 at the weekly rate of four hundred fourteen and 91/100 dollars ($414.91).

Defendants shall pay claimant's out of pocket medical expenses in the amount of two hundred seventy-five and 30/100 dollars ($275.30) and medical mileage in the amount of one hundred thirty and 48/100 dollars ($130.48).

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall receive credit for benefits paid, including a credit in the amount of thirteen thousand four hundred seventy-seven and 94/100 dollars ($13,477.94) for overpayment of temporary total disability/healing period benefits to be applied against the permanent disability benefits awarded herein.

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

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

Signed and filed this 26th day of January, 2016.

ERICA J. FITCH
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.