

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASON SPENCE,

Claimant,

vs.

N & L PARKISON TRUCKING, INC.,

Employer,

and

GREAT WEST CASUALTY,

Insurance Carrier,
Defendants.
File Nos. 20700248.01
21007909.01
20700389.01

ARBITRATION DECISION

Headnotes: 1101, 1402.30

Claimant Jason Spence filed three petitions in arbitration, alleging he sustained injuries to his neck, upper back, left upper extremity, and body as a whole, on February 15, 2020, File Number 20700248.01, on February 17, 2020, File Number 21007909.01, and on February 18, 2020, File Number 20700389.01, while working for Defendant N & L Parkison Trucking ("Parkison Trucking"). Parkison Trucking and Great West Casualty Company ("Great West") filed answers to the petitions, denying Spence sustained a work injury.

An arbitration hearing was held *via* CourtCall video conference on June 24, 2021. Attorney Nicholas Platt represented Spence. Spence appeared and testified. Attorney Stephen Spencer represented Parkison Trucking and Great West. David Rosenberger, Richard Parkison and Rex Parkison appeared and testified on behalf of Parkison Trucking and Great West. Joint Exhibits ("JE") 1 through 5, Exhibits A through W, and 1 through 13 were admitted into the record. The record was held open through July 2, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

The parties submitted a Hearing Report for all three cases, listing stipulations and issues to be decided. The Hearing Report was approved at the conclusion of the hearing. Defendants waived all affirmative defenses. In his post-hearing brief Spence conceded there was no evidence supporting a February 17, 2020 injury date, File Number 21007909.01.

STIPULATIONS

1. An employer-employee relationship existed between Spence and Parkison Trucking at the time of the alleged injury.
2. At the time of the alleged injury Spence was single.
3. Costs have been paid.

ISSUES

1. Did Spence sustain an injury that arose out of and in the course of his employment with Parkison Trucking on February 15, 2020, or February 18, 2020?
2. What is the nature of the injury?
3. Is the alleged injury a cause of temporary disability during a period of recovery?
4. Is the alleged injury a cause of permanent disability?
5. If the alleged injury is a cause of permanent disability, what is the commencement date for permanency?
6. Is Spence entitled to a running award of temporary benefits from February 18, 2020?
7. What is the rate?
8. Is Spence entitled to payment of medical expenses?
9. Is Spence entitled to alternate care?
10. Is Spence entitled to recover the cost of the independent medical examination?
11. Should penalty benefits be awarded to Spence?
12. Does apportionment apply in this case?
13. Should costs be assessed against either party?

FINDINGS OF FACT

Spence lives in Perry, Iowa. (Exs. 7, p. 1; V, p. 4; Tr., p. 13) During his deposition, Spence testified he was an average student in high school, he received assistance with reading and writing in school, and he graduated from high school in 1996. (Ex. V, pp. 6-7) Spence reported he received training at Glen Oaks Community College during "my junior and senior year of high school. It was called a CT program." (Ex. V, p. 7) He further testified he received a certificate "[a]bout two months after I graduated from high school." (Ex. V, p. 8) Spence stated in 2003 he attended a two-year program at DTI in Denver, Colorado, where he studied auto and diesel and heavy

equipment mechanics. (Ex. V, pp. 8-9) Spence relayed he received a certificate from DTI in 2005 or so. (Ex. V, p. 9)

During the hearing, Spence testified he left high school after the 11th grade, later earned a GED, attended two years at a community college where he studied auto and diesel for small engines to heavy equipment, and he attended another two years of schooling at DTI in Denver where he completed a program in heavy machinery mechanics, hydraulic endorsement, and air schematics. (Tr., pp. 14-15, 61-63) He also testified at hearing he received remedial assistance in reading and writing due to having attention deficit disorder and dyslexia. (Tr., p. 15)

Spence has experience working as a ranch/farm hand, head mechanic for a lawn service, lawn mower and snow removal worker, general maintenance worker, crew manager installing solar gates, assistant manager of livestock and crops, housing construction worker, cook, concrete and yard maintenance worker, mechanic, and press machine operator. (Exs. M. pp. 58-59; 7, pp. 10-11; V., Tr., pp. 9-22, 29-34)

In July 2012, Spence sustained an injury to his left hand while working for Tyson Fresh Meats, Inc. ("Tyson"). (Ex. S, p. 93) Following a hearing and successful appeal, Spence was awarded healing period benefits from January 28, 2018 through January 30, 2018, and 22.8 weeks of permanent partial disability benefit for a 12 percent impairment to the left upper extremity. (Ex. S, pp. 93-95) Spence settled his claim against the Second Injury Fund of Iowa based on a 2009 right knee injury and his injury at Tyson for \$45,000.00. (Ex. S, pp. 88-90) Spence testified he did not have any limitations from his left hand after 2015. (Tr., p. 87)

In 2013, Spence was convicted of theft by check and he served 18 months in prison and he was then on parole for two years. (Ex. V, pp. 38-39; Tr., pp. 24-25, 64-65) Between 1996 and 1998, Spence also pleaded guilty to breaking and entering and larceny and he was incarcerated for 10 months. (Exs. M, p. 56; 7, p. 8; Tr., pp. 65, 87)

During his incarceration from the 2013 conviction, Spence worked for the City of Newton in the street department repairing roads. (Tr., p. 25) After he was released from prison, Spence continued to work for the City of Newton. (Tr., p. 25)

Due to the driving distance to Newton, Spence looked for work in Perry. (Tr., p. 26) Rosenberger, the owner of Motor Kars II, hired Spence to work as a mechanic performing oil changes, changing tires, performing brake work, repairing transmissions, and performing other light maintenance. (Ex. V, p. 40; Tr., p. 26) Rosenberger reported Spence also repossessed eight to 10 cars for Motor Kars II. (Ex. V, pp. 40-41; Tr., p. 26) Spence testified during his deposition he earned \$470.00 per week after taxes for the mechanic work and \$500.00 for every repossessed car or almost \$4,000.00 per week repossessing cars. (Ex. V, pp. 40-41) His testimony differs from Rosenberger's testimony concerning his pay and the number of cars he repossessed.

Spence testified he left Motor Kars II for personal reasons. (Tr., p. 26) Spence explained during the hearing that when he was repossessing a car he was pulled over and found out his license was suspended. (Tr., p. 27) Spence testified he did not know his license was suspended before the incident. (Tr., p. 78)

Spence next worked for Osmundson's manufacturing metal discs for farm equipment for 90 days. (Ex. V, p. 42; Tr., p. 27) While working for Osmundson's he developed a hernia and he received workers' compensation benefits. (Ex. V, pp. 44-45; Tr., p. 28) Spence also worked part-time for Van Wall Equipment while working for Osmundson's washing machines two days per week. (Tr., p. 29)

In 2019, Parkison Trucking hired Spence as part-time mechanic and eventually moved him to a full-time position. (Tr., p. 30) Parkison Trucking is a family-owned business. Richard Parkison, his wife, Nancy, their daughter, Brenda, and their son, Rex, all work for the company. (Tr., p. 154) Richard and Rex Parkison perform mechanic work and repairs on the trucks and Nancy and Brenda work in the office. (Tr., p. 154)

On December 27, 2019, Spence sought emergency medical care at the Dallas County Hospital, complaining of left side rib pain under his rib cage that developed when he was sitting at home and coughing. (JE 3, pp. 73-76) Spence reported he coughed and felt and heard a pop like a pulled muscle, and noted lifting his arm aggravated his symptoms and rest alleviated his symptoms. (JE 3, p. 76) Hospital staff excused Spence from working from December 30, 2019, through January 7, 2020, and imposed a 10-pound lifting restriction from January 8, 2020 through January 15, 2020. (JE 3, p. 80)

On January 7, 2020, Spence attended an appointment with his primary care provider, William Palmer, M.D., reporting he felt severe pain in his left lower ribs and a pop when he coughed while lifting a semi-truck tire at work. (JE 1, p. 1) Spence complained of pain with turning and with lifting heavy objects on his left side. (JE 1, p. 1) Spence testified at hearing he developed pleurisy in January 2020, about two to three weeks before the alleged injuries in this case. (Tr., p. 31) He reported the pleurisy did not affect his left shoulder or upper extremity. (Tr., p. 32)

During the arbitration hearing, Spence testified on February 15, 2020, he was realigning the rear axle of Truck 46, which is also referred to as "Frankenstein," and

I put a bar in the bracket that holds the shackle and the axle. Was using the front duals for the front axle for – to help me with leverage to push against the bar to move the axle so he could get the bolt out and shims.

He measured. He went to put the bolt and shims back on. I told him I could not hold the bar anymore. He got the bolt in. He said I could release the pressure off the bar.

When I did, we heard a pop. The bar came back into my shoulder, pushing me up against the duals. Rick turned around, took the bar off my shoulder to let me out.

I then told Rick I was hurt. And my girlfriend was there to pick me up for lunch because it was a Saturday. And he told me to go home, rest, come in on Monday and let him know how I felt.

(Tr., p. 33) Spence reported only he and Richard Parkison were working. (Tr., p. 34)

During the hearing Spence testified he returned to work on Monday morning, Richard Parkison asked him how he was doing and he said, "I'm really sore and I'm hurt," and Richard Parkison told him to do what he could do. (Tr., p. 35) Spence reported Richard and Nancy Parkison both told him that if he wanted medical help he would have to take himself. (Tr., p. 35)

Spence testified when he returned to work on February 18, 2020, a truck came in that needed a "T put on the fuel line tanks," and that he had to crawl under the cab to make the repair. (Tr., p. 36) Spence relayed,

I got in there. And I couldn't get back out because I couldn't get my left shoulder to move around to get out.

Rex did come over and help me get it out. I then told Rex, I said I want to go to the doctor for my shoulder that I hurt on the 15th and I had been requesting with Rick and Nancy.

He then told me the same thing: If I wanted medical attention, I would have to take myself. My girlfriend showed up at, I believe, 4:55. I then I told him, I'm punching out and I'm going to the doctor. I left and went to the doctor on the 18th.

(Tr., p. 37) Spence testified he believed his shoulder did not respond like it normally would because of his injury on February 15, 2020. (Tr., p. 37)

Rex Parkison testified he worked with Spence on the weekends doing mechanic work because he drives a truck during the week. (Tr., pp. 123-24) Rex Parkison reported when aligning an axle Parkison Trucking employees either use a come-along or a light bar to move a wheel back and forth when putting in or taking out shims, noting it does not take much pressure to move the wheel. (Tr., pp. 125-28) Rex Parkison testified the bolts that hold the axle go through a spring and he has never seen a bolt break on a truck. (Tr., pp. 128-29)

Rex Parkison testified he worked with Spence on February 15, 2020, a Saturday, aligning a truck to make sure the axles on the right and left side were equal to avoid excess tire wear. (Tr., p. 124) Rex Parkison admitted he could not provide an accurate date, but he recalled the incident because the axle problem on Truck 46 or Frankenstein, was ongoing and that Spence did not appear to be injured or say anything about being injured on that date. (Tr., pp. 130, 134, 140) Rex Parkison testified his father, Richard Parkison and Spence had been working on the truck axle the day before. (Tr., p. 134) Rex Parkison reported they did not use a pry bar to hold the tire, and that Spence used a come-along to adjust the axle. (Tr., p. 135) Rex Parkison testified he never helped Spence get out from under a truck at work. (Tr., pp. 135-36)

During the hearing the parties submitted competing stories about whether Rex or Richard Parkison was working on February 15, 2020. Richard and Rex Parkison do not clock in and out at Parkison Trucking and there are no documents showing they were

working on February 15, 2020. (Tr., pp. 146, 169) At hearing Spence averred Rex Parkison could not be working because he was delivering chicken manure, which Rex Parkison disputed.

Richard Parkison testified Spence did not tell him he was injured at work. (Tr., pp. 161-62) He also testified he has never seen a bolt break on a truck axle, even in an accident. (Tr., p. 161) Richard Parkison believes he worked with Spence on Truck 46 or Frankenstein on a Friday, but he could not recall if he went into work at all on Saturday, February 15, 2020. (Tr., pp. 166, 175)

Rex Parkison denied Spence ever reported he was hurt at work, but rather reported "his arms are all goofed up . . . from repeat firing guns in the military." (Tr., pp. 130-31) He also reported Spence would also leave work regularly at 3:00 p.m. because he said he needed to go to the VA while the VA was open. (Tr., p. 131) Rex Parkison denied ever seeing Spence wear a sling at work. (Tr., p. 131)

On February 18, 2020, Spence sought emergency medical treatment at the Dallas County Hospital, complaining of left shoulder/arm pain, where he was examined by Eric Ash, M.D. (JE 1, p. 3; Tr., pp. 37-38) The medical records from his treatment document Spence reported he sustained an injury two weeks before from a direct blow when a tire exploded on him at work and pushed him backward on his left arm that was outstretched trying to hold the tire and spun him. (JE 1, p. 3) Spence relayed his pain had progressively worsened, it hurt to move his shoulder, and at times he was experiencing a tingling sensation in his elbow, arm, and fingers with certain positions. (JE 1, p. 4) The medical records note Spence's left shoulder had limited range of motion and was tender to palpation over the anterior aspect, with increasing discomfort with internal and external rotation and that he could not abduct the left shoulder beyond approximately 25 degrees. (JE 1, pp. 4-5) Dr. Ash ordered x-rays, listed an impression of a sprain of the left rotator cuff capsule, prescribed baclofen and diclofenac, a Medrol Dosepak, and directed Spence to follow up with his primary care provider. (JE 1, pp. 6-7, 10-11)

Spence testified he did not tell Dr. Ash that he had been injured by a tire that exploded or that something had happened two weeks before he went to the emergency room. (Tr., p. 38)

On October 6, 2020, Dr. Ash sent a letter stating,

I reviewed this patient's deposition about his shoulder injury. I agree with the description the patient gave in the deposition about his injury. I feel that I had a misunderstanding of exactly what he was doing at work. Due to my lack of knowledge, my abbreviated statement of his complaint when he was in the emergency department, is not an exact description like he described in his deposition. My apologies for any confusion that this may have caused.

(Ex. 4, p. 1)

On May 20, 2021, Dr. Ash responded to an inquiry from the attorney for Parkison Trucking and Great West, as follows:

[y]our first question was about the patient's deposition and that I signed a letter from October 6, 2020 that was prepared by the patient's attorney that I confirmed that his deposition history was different than the history I had in my physician chart from February 18 of 2020. That is in fact the case. It is difficult for me to recall the exact visit in the emergency department and exactly what the patient said to me and how I interpreted this. I therefore signed the letter stating that his recollection of the history is different than what I had in the emergency department note. At this time I can say that I do not have any discrete memory or recollection of this patient's history given to me in the emergency department on February 18, 2020. I do try to take a good history in the emergency department with sometimes in the case of injuries especially in a work environment I may not understand exactly the process that is being explained to me and therefore may misinterpret slightly. The other history that is in the chart especially related to the injury stating that he has negative for any neck pain or chest wall pain or elbow pain and there was no radiation to the neck and that his pain was primarily anterior on the shoulder I feel is accurate. My examination in detail of the examination and this portion of the history I am confident of. With shoulder pain it is important to note if there is [sic] any symptoms above or below such as in the elbow or the neck. When I saw the patient in the emergency department he did not have any complaints involving his neck at that visit. Again I would like to restate that the initial history may be the place of confusion. What I can say for certainty is that his pain was on the anterior aspect of his shoulder and that the initial injury took place 2 weeks prior and he was having worsening discomfort and that he occasionally or sometimes felt tingling sensation in his elbow and arm and fingers with certain positions.

(Ex. B, p. 7)

Spence attended an appointment with Dr. Palmer on February 21, 2020, and Dr. Palmer documented Spence reported he had sought emergency medical treatment after an injury occurring at work the afternoon of February 18, 2020 when "he was fixing a tire and it blew and the air pressure caused him to be pushed across the room and he subsequently injured his left shoulder." (JE 1, p. 12) Spence reported he could only partially lift his arm and could not lift much weight on his left side, and complained of some numbness and tingling shooting down his arm with certain position changes and trouble sleeping due to the pain. (JE 1, p. 12) Spence denied pain at rest. (JE 1, p. 12) Dr. Palmer examined Spence, noted he had limited range of motion in his left shoulder due to pain, he could abduct 45 degrees, he had a positive empty can test, and he had moderate tenderness to palpation over the anterior and lateral shoulder. (JE 1, p. 13) Dr. Palmer referred Spence to an orthopedic surgeon, discontinued the Medrol

Dosepak, continued his muscle relaxers and naproxen, and prescribed Tylenol 3, and recommended icing and continued use of a sling. (JE 1, p. 14)

On February 28, 2020, Spence returned to Dr. Palmer, reporting he could not lift very high and if lifting above 45 degrees his left upper extremity feels like "jelly," and denied a previous injury to his left shoulder (JE 1, p. 18) Spence denied having numbness and tingling, and Dr. Palmer observed he had good grip strength. (JE 1, p. 18) Dr. Palmer assessed Spence with a left rotator cuff injury, recommended a referral to orthopedics, and continued his medication. (JE 1, p. 19)

On October 23, 2020, Dr. Palmer signed a letter written by Spence's attorney, agreeing with the following statements without providing any handwritten comments:

1. The description in the deposition of Mr. Spence's injury is consistent with what he told you about how his injury occurred. You believe it is likely that the description in the record of 2/21/20 was carried over from the initial ER record.
2. It is your opinion that the description in the deposition transcript of the injury is consistent with the mechanism of the left shoulder injury that you evaluated and treated.
3. Mr. Spence complained of neck pain related to the injury as well and you prescribed an MRI for his neck, but to your knowledge, this has not been completed.
4. You have not treated Mr. Spence for any neck or left shoulder issues prior to 2/21/20.
5. From the information you have and based on your evaluation and treatment, it is your opinion that Mr. Spence's reported left shoulder and neck issues are related to his work injury described in the deposition transcript to a reasonable degree of medical certainty.

(Ex. 2, p. 25)

On May 23, 2021, Dr. Palmer responded to a letter from the attorney for Parkison Trucking and Great West, as follows:

[r]egarding your question about the history that was recorded in the office visit notes from clinic visits on February 21 and February 28, what is recorded in my history of present illness (HPI) was my understanding of the mechanism of injury, although I cannot completely attest to any potential technicalities that may not have been accounted for or specifically commented on in my HPI. I am confident the dates of injury were correct as I clearly specified the time of injury at 4:45 PM.

In regards to Mr. Spence's complaints of neck symptoms, he did comment on "numbness and tingling that shoots down the arm with certain position changes". That would be consistent with potential cervical spine complaints, although I do not see any clear complaint of neck pain

specifically. I would however have the impression that there could potentially be a neck injury assuming there are some symptoms consistent with radiculopathy or myelopathy.

(Ex. C, p. 24)

On February 24, 2020, Spence's attorney sent a letter to Parkison Trucking stating he represented Spence regarding an injury to his left arm/shoulder/neck area that occurred at work on or about February 15, 2020, and was exacerbated by his work duties on or about February 18, 2020. (Ex. F, p. 45) Spence's attorney wrote Spence had reported his injuries and requested medical treatment from Parkison Trucking, which was denied, he had received restrictions that will keep him off work, and he had been referred to a surgeon. (Ex. F, p. 45) Spence's attorney documented it was his understanding that Parkison Trucking was denying his claim and he requested Parkison Trucking forward his letter to the company's workers' compensation carrier because Spence wanted medical treatment as soon as possible. (Ex. F, p. 45)

Spence returned to Dr. Palmer on March 6, 2020, complaining of pain following his left shoulder injury with a burning sensation, and not being able to lift over 5 pounds. (JE 1, p. 22) Dr. Palmer continued his Tylenol 3, prescribed cyclobenzaprine and naproxen, recommended a referral to an orthopedic surgeon, and released him to return to work with restrictions of no use of the left upper extremity, lifting up to 20 pounds with the right upper extremity, and sitting and standing for eight hours. (JE 1, pp. 23-24)

On March 10, 2020, Jake Flater signed a statement, which is not notarized stating, "around February 21, 2020 when seeing Jason Spence at Parkison's shop that he wasn't going to be here because he had to have surgery [*sic*] on his shoulder due to a prior injury and lots of scar tissue from shooting large guns in the service. I went on with my business after that." (Ex. J, p. 53)

Nancy Parkison completed a statement on March 15, 2020, which is not notarized, as follows:

[o]n February 19, 2020 Jason Spence came into work that morning he brought a slip in stating that he had an injury from previously that happen in the service. It was a rotor cuff injury from shooting a gun to many times. (this was his words not mine). Jason had also stated that he had a lot of scar tissue and that if anyone called about an injury to tell them it was an old one and that we were not responsible and to refuse to pay per Jason Spence. He also stated that he had seen a specialist in the Dallas County Hospital ER on the night of the 18th.

Jason then handed me a excuse from the doctor stating he could come back to work on 2/21/20 after being cleared by an orthopedist dr.

On Friday Feb 21, 2020 Jason came in to pick up his check. He had a sling on and informed me he would have to have surgery on his rotary cuff and lots of scar tissue. I would like to point out that Jason had showed up at various times while employed with us wearing a sling just like this one

and would take it off and work with no complaints. He had stated that it was just from an old injury.

I have no paperwork that he was working on a tire at all that day or any day even close to that, and if a tire exploded I or Brenda would of heard it in the office. Nothing was reported on Feb 18, 2020 before or at anytime until we received the letter from the lawyer with all his claims. As to our surprise of this happening at all.

(Ex. K, p. 54) Spence testified he did not have any interaction with Nancy Parkison on February 19, 2020. (Tr., p. 90) When asked whether he had ever wore a sling on his arms prior to February 15, 2020, Spence replied "[n]ot that I can recall or remember." (Ex. V, p. 73)

On March 18, 2020, Gary Heathcote signed a statement, which is not notarized, as follows:

I Gary Heathcote called Jason Spence on 2/19/20 & asked where he went cause he wasn't at the shop when I got back to the shop. Jason told me: (I have to have surgery on my shoulder due to hurting it in the military. I asked how long before he was back & Jason said (6 to 8 weeks & it wasn't anything he had done at the shop.

I also worked with him in the shop a lot. I was working with him on 2/18/20. There was no tire that exploded on Jason or anything thing like that happened at all.

(Ex. H, p. 51) Spence testified he did not have any interaction with Heathcote on February 19, 2020. (Tr., p. 90)

During the hearing Spence denied telling anyone he was in the military, he was a veteran, he was injured in the military, he had a service dog, he received a disability rating for his left arm, or that he treated with the VA. (Tr., p. 76)

Rosenberger is the owner of Motor Kars. (Tr., p. 96) Rosenberger testified Spence worked for him as a mechanic and he did some repossessions of vehicles. (Tr., pp. 96-97) When asked, Rosenberger testified Spence did not earn \$500.00 per week as a mechanic or earn \$4,000.00 gross income performing repossessions. (Tr., p. 97) Rosenberger also testified Spence told him he had been in the military and that he had been shot in the military. (Tr., pp. 99, 117-18)

On March 23, 2020, Spence attended a follow-up appointment with Dr. Palmer, complaining of left shoulder pain, decreased range of motion, and the inability to lift over five pounds. (JE 1, p. 25) Dr. Palmer noted Spence had not been seen by an orthopedic surgeon, recommended he see an orthopedic surgeon, continued his medication, and ordered physical therapy. (JE 1, p. 26)

Spence attended an appointment with Dr. Palmer on April 6, 2020, reporting he had been working with physical therapy and he had noticed some decrease in the swelling and tightness in his left shoulder, but he continued to have pain with range of

motion and weakness with weightbearing. (JE 1, p. 35) Dr. Palmer listed an impression of a left rotator cuff injury with possible injury to the cervical spine, continued his medication, and noted Spence was waiting for his claim to be approved or denied by Great West. (JE 1, p. 36) Spence attended 12 sessions of physical therapy between March 25, 2020, and May 29, 2020. (JE 1, pp. 27-34)

In March 2020, Spence applied for unemployment insurance benefits. (Ex. 10) In April 2020, a representative of Iowa Workforce Development found Spence was not able and available for work and denied his claim. (Ex. 10) Spence appealed the decision, and a hearing was held before an administrative law judge on May 14, 2020. (Ex. 10) Spence appeared with his attorney and Rex Parkison appeared on behalf of Parkison Trucking. (Ex. 10) Following testimony, the administrative law judge reversed the decision, finding Spence was injured at work and when he was released back to work with lifting restrictions on March 6, 2020, Parkison Trucking did not have any work for him, and that Spence had been seeking work and was able to perform light duty work since that time. (Ex. 10)

On June 30, 2020, Spence attended an appointment with Todd Peterson, D.O., an orthopedic surgeon, complaining of left shoulder pain that started in February following a work injury. (JE 2, p. 17) Dr. Peterson documented “[p]atient states that his left shoulder was hit back by a large wrench after a bolt broke,” and he complained most of the pain was on the anterior aspect of his shoulder, some shoulder popping, constant pain in the shoulder, pain with elevating and lifting the arm, and some neck pain. (JE 2, p. 17) Spence denied having a prior injury to his left shoulder and that physical therapy had provided him with minimal relief. (JE 2, p. 17) Dr. Peterson assessed Spence with left shoulder pain, noted his symptomatology was concerning of a labral or rotator cuff tear, and recommended magnetic resonance imaging. (JE 2, p. 18)

Spence underwent left shoulder magnetic resonance imaging on July 7, 2020. (JE 2, p. 15) The reviewing radiologist listed an impression of “[m]inimal feathery edema within the teres minor. This aligns along the myotendinous junction. In a posttraumatic setting this most likely represents a minimal or resolving muscle strain. There is no rotator cuff tear or atrophy of the cuff musculature.” (JE 2, p. 15)

On July 10, 2020, Spence returned to Dr. Peterson following magnetic resonance imaging. (JE 2, pp. 9-10) Dr. Peterson reviewed the imaging, assessed Spence with a left glenoid labrum tear and left shoulder pain, partial thickness rotator cuff tear, and discussed surgery. (JE 2, pp. 11-12)

The Dallas County Sheriff investigated an incident that occurred on July 10, 2020, where nails had been thrown on Parkison Trucking’s property, causing damage to trucks that ran over the nails. (Exs. R; W) The Deputy Sheriff documented on July 15, 2020, he spoke with Spence at his residence, Spence initially denied knowing anything about nails being placed at Parkison Trucking, but after telling him he had video of him buying the nails and putting them on Parkison Trucking’s property, Spence apologized for his actions. (Exs. R, p. 72; W) The Deputy Sheriff indicated he was charging Spence with criminal mischief third, trespass, and driving while barred. (Ex. R, p. 72; Tr., pp. 65-67) Spence admitted at hearing that he threw nails on the driveways of the

Parkison terminal and the Parkisons' individual homes that caused damage to at least one tire. (Tr., pp. 65, 68) Spence testified he pleaded guilty to the charges. (Tr., p. 57) The court issued a no contact order ordering Spence to have no contact with Rex Parkison and his wife, sentenced him to 75 days in jail, and ordered him to pay restitution. (Tr., pp. 57, 68; 138)

On August 6, 2020, Dr. Peterson performed a left shoulder arthroscopy with arthroscopic repair of the superior labrum, anterior-posterior lesion with subacromial decompression, and distal clavicle excision on Spence. (JE 1, p. 39) Dr. Peterson listed a postoperative diagnosis of large SLAP tear from the 10 o'clock position to the 1 o'clock position of the biceps labral complex with impingement syndrome with anterior subacromial spur and AC arthrosis. (JE 1, p. 39) Dr. Peterson ordered physical therapy following surgery. (JE 2, p. 6)

On October 15, 2020, Spence attended a follow-up appointment with Dr. Peterson, complaining of intermittent pain on the anterior aspect of his shoulder. (JE 2, p. 2) Dr. Peterson noted his strength was 5-/5 with resisted external rotation, 5/5 with resisted internal rotation, 4+/5 with resisted abduction, and for passive range of motion he had 140 degrees of flexion, 120 degrees of abduction, and internal rotation to the sacrum. (JE 2, p. 3) Dr. Peterson recommended continued physical therapy to work on motion and strength, and advised Spence to increase his activities, as tolerated. (JE 2, p. 3)

In November 2020, Spence commenced employment as a cashier with Casey's. (Exs. M., p. 59; 7, p. 11) Spence reported his employment ended in January 2021 when he was terminated for failing to provide Casey's with his restrictions. (Exs. M, p. 59; 7, p. 11; Tr., p. 54)

Since his termination from Casey's, Spence has not worked, and reported he has applied for jobs, but he has not received any job offers. (Tr., p. 54) In his Answer to Interrogatory Number 11, Spence reported since the work injury he had applied for work with Freightliner, Van Wall, Oshland's, Ace Hardware, McDonalds, Burger King, Casey's, and he submitted online applications through Iowa Workforce Development, but he had not received any employment offers. (Ex. M, p. 61) Spence reported he has also applied through Indeed, "but he has not been hired due to his restrictions." (Exs. M, p. 61; 7, p. 13)

On November 5, 2020, Dr. Peterson signed a letter written by Spence's attorney, agreeing with the following statements without providing any handwritten comments:

1. From the information you have and based on your evaluation and treatment, it is your opinion that Mr. Spence's reported left shoulder area issues are related to his February 2020 work injury he described to you, to a reasonable degree of medical certainty.
2. The treatment that you provided Mr. Spence, including surgery and physical therapy are related to his work injury in February 2020.

3. Mr. Spence would have needed to be on some form of work restriction from the time of the injury until you released him after surgery.
4. Mr. Spence has not yet reached MMI for his work related left shoulder area injury.
5. You are unable to determine permanent impairment until he reaches MMI, but would anticipate some degree of permanent impairment.

(Ex. 3, p. 1)

John Kuhnlein, D.O., an occupational medicine physician, conducted an independent medical examination for Spence on January 12, 2021, and issued his report on February 3, 2021. (Ex. 1) Dr. Kuhnlein reviewed Spence's medical records and examined him. (Ex. 1) Spence told Dr. Kuhnlein he was injured on February 15, 2020, while aligning an axle with the owner of Parkison Trucking and when he was holding a pry bar something broke and the bar shot forcefully back at him, pushing him into the front back axle tires, causing him to experience severe pain in the anterior, superior, and axillary left shoulder area radiating proximally through the trapezius area to his neck, noting the owner pulled the bar off of him. (Ex. 1, p. 2) Spence reported it was around lunchtime and the owner sent him home for the rest of the day. (Ex. 1, p. 2) The time card for February 15, 2020, shows Spence worked from 9:03 a.m. through 2:33 p.m. (Ex. G)

Dr. Kuhnlein diagnosed Spence with chronic musculoskeletal neck pain after trapezius strain and left SLAP tear and impingement syndrome with August 6, 2020, arthroscopic labral repair, subacromial decompression, and distal clavicle excision. (Ex. 1, p. 8) Dr. Kuhnlein found Spence sustained a trapezius strain with chronic neck and trapezius pain and a labral tear due to the February 15, 2020 work-related incident. (Ex. 1, p. 9) Dr. Kuhnlein recommended a second surgical opinion and found Spence had not reached maximum medical improvement. (Ex. 1, p. 18) If Spence did not pursue additional treatment, using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Kuhnlein assigned Spence a 5 percent whole person impairment to his cervical spine and a 12 percent left upper extremity impairment, which he converted to a 7 percent whole person impairment, for a total 12 percent whole person impairment. (Ex. 1, pp. 18-19) Dr. Kuhnlein also recommended restrictions. (Ex. 1, p. 19)

On May 13, 2021, Spence attended an independent medical examination with Jason Sullivan, M.D., an orthopedic surgeon. (Ex. A, p. 1) Dr. Sullivan examined Spence and reviewed his imaging. (Ex. A, p. 3) Dr. Sullivan assessed Spence with persistent left shoulder pain and dysfunction status-post left shoulder arthroscopic SLAP repair, subacromial decompression, and distal clavicle excision. (Ex. A, p. 3) Dr. Sullivan opined the mechanism of injury was consistent with Spence's left shoulder injury, he has an impairment to the left shoulder given he only has 110 degrees of forward flexion and limited abduction to 110 degrees, he does not believe he has a neck

injury related to the incident, and he recommended limitations with overhead lifting and activities. (Ex. A, pp. 3-4)

Lutterman, the treating physical therapist, signed a letter from Spence's attorney on May 19, 2021, agreeing, without providing any written comments, that he treated Spence for symptoms in his left shoulder and neck throughout his treatment, Spence had not fully recovered, and that he had been compliant with treatment recommendations. (Ex. 5, p. 2)

On May 22, 2021, Daryl Short, DPT, with WorkWell, conducted a functional capacity evaluation for Spence, which he found was valid. (Ex. 6) Short opined Spence's capabilities are in the mid-medium category of physical demand, and recommended that due to his decreased strength and endurance of his left shoulder/neck, Spence should limit elevated work and/or reaching at shoulder height and higher with material and non-material handling activities to an occasional basis. (Ex. 6, pp. 2-3)

On May 25, 2021, Dr. Peterson responded to a letter from the attorney for Parkison Trucking and Great West, opining Spence reached maximum medical improvement on October 15, 2020, and that he could benefit from additional physical therapy. (Ex. D, p. 43)

Spence testified he had neck pain initially when he saw Dr. Peterson and testified Dr. Peterson "thought it was something that could be corrected once I had my surgery and my shoulder was fixed." (Tr., p. 49) On June 17, 2021, Dr. Peterson signed another letter sent by Spence's attorney, agreeing without providing any written comments that "[d]uring the course of treating Mr. Spence you only treated him for an injury to his left shoulder and did not treat him for a neck injury," and "[f]or that reason, you do not have an opinion on whether his neck symptoms are related to his work injury." (Ex. 3, p. 3)

Parkison Trucking has a video camera system outside and inside the shop for security. (Tr., pp. 169-70) The video camera footage is preserved for approximately 15 days, until new footage records over the old footage. (Tr., pp. 133, 169) Parkison Trucking did not make any effort to preserve the video footage from February 15, 2020. (Tr., p. 175) There was no evidence presented at hearing Spence requested Parkison Trucking preserve the footage within the 15-day period, or that Parkison Trucking knew the specific allegations of Spence's complaint within the 15-day period.

CONCLUSIONS OF LAW

I. Applicable Law

This case involves the issues of whether Spence sustained an injury arising out of and in the course of his employment, entitlement to temporary benefits, extent of disability, recovery of medical bills, entitlement to alternate care, penalty benefits and costs. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70,

85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving extent of disability and temporary benefits under Iowa Code sections 85.33 and 85.34 apply to this case.

The calculation of interest is governed by Deciga-Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Arising Out of and in the Course of Employment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony,

even if uncontroverted, in whole or in part. . Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

This is a denied claim. Parkison Trucking and Great West aver Spence did not sustain an injury arising out of and in the course of his employment, averring he is not a credible witness as supported by the inconsistencies in his medical records, inconsistencies between his testimony and witness testimony and witness statements, and given his past criminal conduct.

When evaluating credibility, it is necessary to consider whether the witness has made inconsistent statements, the witness's "appearance, conduct, memory and knowledge of the facts," and the witness's interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Spence has an obvious interest in the outcome of this case. Rex and Richard Parkison also have an interest in this case given they own Parkison Trucking.

I had the opportunity to observe Spence, Rex Parkison, and Richard Parkison testify under oath. I found both Rex and Richard Parkison to be evasive when answering questions and I did not find them to be credible. I do not believe they recall who was working with Spence on February 15, 2020. I also do not find Spence to be a credible witness based on the inconsistencies between his medical records, testimony, witness testimony when considered in light of his past crimes of dishonesty. While I do not find Spence, Rex Parkison, or Richard Parkison to be credible witnesses, it is Spence who bears the burden of proof in this case. I do not find he has met his burden.

Unlike the majority of cases involving credibility issues, Spence has a history of engaging in crimes of dishonesty, with a recent theft conviction in 2013. Spence's history of engaging in crimes of dishonesty is troubling.

And while the incident with the nails did not involve a crime of dishonesty, such conduct, if it resulted in a termination, could be deemed to be a refusal of suitable work. However, the record establishes Spence's employment ended in March 2020, when he sought unemployment benefits, which he was awarded before the July 2020 nail incident.

Rex and Richard Parkison and Rosenberger testified Spence had reported he had been injured while serving in the military. Spence denied ever stating he was in the military or that he had been injured in the military at hearing. While I do not find Rex and Richard Parkison to be credible witnesses, I do find Spence has made such statements, which are untrue, to others, based on Rosenberger's testimony at hearing. Rosenberger does not work for the Parkisons and he is not related to the Parkisons. While he has known the Parkisons for 30 years, he testified he does not do any business with the Parkisons and he is not social friends with the Parkisons. (Tr., p. 112) The fact that Richard Parkison worked for Rosenberger 30 years ago when Rosenberg owned a trucking company does not support he is a biased witness. (Tr., p. 112)

I also find Spence occasionally wore a sling at work supporting an alleged prior injury, as documented by Nancy Parkison's statement. While the statement is not notarized and Nancy Parkison did not testify at hearing, I found Spence's response, when questioned about wearing a sling troubling. When asked whether he had ever wore a sling on his arms prior to February 15, 2020, Spence replied, "[n]ot that I can recall or remember." (Ex. V, p. 73) I find this testimony troubling. Certainly Spence should be able to recall whether he wore a sling when he worked for Parkison Trucking.

What I find very disturbing is the discrepancy between Spence's testimony regarding his schooling during his deposition and the hearing. During the hearing Spence explained the discrepancy, stating, "I don't know if I didn't understand it or if I just got confused with the question, but I did not graduate from high school. I got a GED." (Tr., p. 62)

During his deposition, Spence testified he was an average student in high school and that he graduated from high school in 1996. (Ex. V, pp. 6-7) Spence reported he received training at Glen Oaks Community College during "my junior and senior year of high school. It was called a CT program." (Ex. V, p. 7) He further testified he received a certificate "[a]bout two months after I graduated from high school." (Ex. V, p. 8) Spence reported in 2003 he attended a two-year program at DTI in Denver, Colorado, where he studied auto and diesel and heavy equipment mechanics. (Ex. V, pp. 8-9) Spence relayed he received a certificate from DTI in 2005 or so. (Ex. V, p. 9)

During the hearing, Spence testified he left high school after the 11th grade, later earned a GED, attended two years at a community college where he studied auto and diesel for small engines to heavy equipment, and he attended another two years of schooling at DTI in Denver where he completed a program in heavy machinery mechanics, hydraulic endorsement, and air schematics. (Tr., pp. 14-15, 61-63) Spence

reported again he attended remedial classes for reading and writing, but reported he attended the classes because he had been diagnosed with attention deficit disorder and dyslexia. (Tr., p. 15) I do not believe Spence was confused during his deposition regarding his schooling. He was asked specific questions about high school and he testified, himself, that he attended a program during his “junior and senior year of high school.” If he dropped out in the eleventh grade, he would not have attended his senior year of high school.

Spence alleges the witnesses in this case are lying and that Dr. Ash and Dr. Palmer recorded his history incorrectly. I do not find his testimony persuasive, given the above inconsistencies and considering his medical records.

Spence testified he was working with Richard Parkison on February 15, 2020. Rex Parkison and Richard Parkison do not fill out timecards and while they believe Richard Parkison was working on February 15, 2020, neither one could recall that actual date at hearing. While I do not know who was working with Spence on February 15, 2020, I do not find Spence sustained a work injury that date.

When Spence sought medical treatment on February 18, 2020, the hospital staff documented, “[h]e states about 2 weeks ago he had a tire exploded on him and it pushed backwards on his left arm that was outstretched trying to hold the tire and spun him around. He states that over the next 2 weeks he had slow but progressive worsening pain in that left shoulder,” which he reported to work. (JE 1, pp. 3-4)

Dr. Ash was working in the emergency room, a busy place. When he responded to an inquiry from Parkison Trucking and Great West’s attorney in May 2021, he could not recall the specific incident involving Spence. Dr. Ash wrote he tries to take a good history especially in the case of injuries occurring in the work environment, but he may not exactly understand the process being explained to him and may misinterpret it slightly. (Ex. B, p. 7) Dr. Ash wrote he was certain Spence’s “pain was on the anterior aspect of his shoulder and that the initial injury took place 2 weeks prior and he was having worsening discomfort” and tingling in his elbow, arm, and fingers with certain positions. (Ex. B, p. 7) I believe Spence told Dr. Ash he had been injured two weeks before the February 18, 2020 visit, and not on February 15, 2020.

I do not find Spence to be a credible witness. I do not find he has met his burden he sustained an injury arising out of and in the course of his employment with Parkison Trucking. Given this finding, the remaining issues, other than costs are moot.

III. Costs

Spence seeks to recover \$300.00 for a phone conference with Dr. Peterson on November 3, 2020, \$550.00 for Short’s functional capacity evaluation, \$350.00 for Short’s report, and the \$103.00 filing fee. (Ex. 13) Iowa Code section 86.40, provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers’ compensation commissioner for: (1) the

attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes. Given my finding Spence failed to meet his burden of proof that he sustained an injury arising out of and in the course of his employment, I decline to award Spence costs in this case.

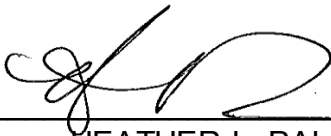
ORDER

IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing.

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

Signed and filed this 11th day of October, 2021.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Nick Platt (via WCES)

Stephen Spencer (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.