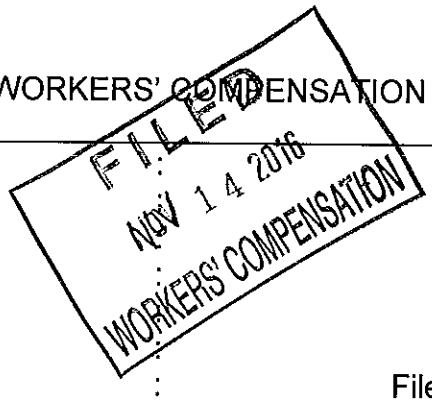
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JEFFREY SELCK,

Claimant,

vs.

NATIONWIDE OFFICE CLEANERS, LLC,

Employer,

and

ACCIDENT FUND NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5049938

A R B I T R A T I O N

D E C I S I O N

Head Note Nos.: 1100, 1108, 1400, 1803

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Jeffrey Selck, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on March 10, 2015. Claimant alleged he sustained a work-related injury on August 19, 2013. (Original notice and petition)

Nationwide Office Cleaners, LLC, is located in Clive, Iowa. For purposes of workers' compensation, the employer is insured by Accident Fund National Insurance Company. Defendants filed their answer on April 1, 2015. They denied the occurrence of the work injury. A first report of injury was filed on August 29, 2013.

The hearing administrator scheduled the case for hearing on May 10, 2016 at 8:00 a.m. The hearing took place in Cedar Rapids, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Roxann Zuniga as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants called Mr. David Miller, Operations Manager at Nationwide Office Cleaners, LLC.

The parties offered exhibits. Claimant offered exhibits marked 1 through 15 and 17 through 21, and 23. Defendants offered exhibits marked A through H.

Post-hearing briefs were filed on June 7, 2016. The case was deemed fully submitted on that date.

STIPULATIONS

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

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on August 19, 2013 which arose out of and in the course of his employment;
3. Claimant was off work from August 29, 2013 through February 16, 2015;
4. The alleged injury is a cause of permanent disability;
5. Claimant's permanent disability is an industrial disability;
6. The commencement date for any permanent partial disability benefits is February 17, 2015;
7. At the time of the work injury, claimant was married and entitled to two exemptions; and
8. The parties agree certain costs that are detailed were paid by claimant and are not in dispute.

ISSUES

The issues presented are:

1. Whether claimant is entitled to temporary or healing period benefits;
2. Did defendants offer suitable work to claimant? If so, did claimant decline the suitable work?
3. To what extent, is claimant entitled to permanency benefits?
4. To what credit are defendants entitled?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant and Mr. David Miller at hearing, after judging the credibility of the two individuals, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

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

Claimant is 38 years old and right hand dominant. He is very slight in stature. At the time of his work injury, claimant was married to Alexia F. Downing Selck. (Exhibit G, page 1) They divorced on December 26, 2014. Claimant now lives with his father, his sister and her two minor children. They all reside in Lone Tree, Iowa. The town is very small. It has approximately 1,150 residents. Lone Tree is located south of Iowa City in Johnston County. Most residents commute to larger towns for employment opportunities. Claimant's testimony established he moved 7 times since the date of his work injury. Several of the relocations involved moves to Sacramento, California and to Florence, Oregon. Claimant was not employed in either California or in Oregon.

Claimant left high school in the tenth grade. However, he obtained his General Educational Development (GED) certificate in 1996 from Marshalltown Community College. Claimant does not have any other formalized training. For 5 years he held a license as a private investigator. He owned and operated Hawkeye Investigations in Deep River, Iowa from January of 2009 through December 2010. He also worked as a private investigator in Florence, Oregon from April 2011 through 2013 and in Farmington Hills, MI from October 2007 through March 2008.

Claimant has held a number of other positions throughout his working career. He worked at Hy-Vee and Menards; he was a supervisor at a recycling center. He was a welder at Williamsburg Manufacturing; he has worked in construction; he stripped car parts from vehicles, and he has worked as a production worker in a manufacturing plant. Claimant has many transferable skills from the variety of positions he has held.

Claimant sustained an injury to his right shoulder at work on August 19, 2013 while in the course of his employment. At the time of the work injury, claimant grossed $352.23 per week. He was required to operate a backpack vacuum to clean Regina High School in Iowa City. Claimant used his right arm in back and forth motions for the duration of his 8 hour shift. On August 21, 2013, the condition became significantly worse. Claimant slipped on a wet floor. He caught himself by grabbing a handrail with his right arm. The incident placed greater stress on claimant's right arm and shoulder.

Claimant reported the injury to Tim Reyes, his on-site supervisor. Claimant also requested permission to see a physician for his right upper extremity and shoulder. Mr. Reyes indicated he would have to seek permission from his supervisor, Mr. Dave Miller at the Clive, Iowa office. Claimant and Mr. Miller communicated by both phone and by text messaging. Claimant continually requested permission to see a medical practitioner.

On August 29, 2013, claimant was advised to see Patrick G. Hartley, M.B., M.P.H., at University of Iowa Health Care. (Ex. 1, p. 1) Dr. Hartley diagnosed claimant as having:

Assessment: mild right trapezius strain and mild right volar wrist sprain (FCU tendinopathy). Patient was reassured regarding his clinical assessment and acknowledged understanding of the explanations given.

(Ex. 1, p. 2)

Dr. Hartley devised a treatment plan for claimant. It consisted of six parts.

Plan:

1. Advised patient to take Ibuprofen 600 mg TID with food, and discussed potential adverse effects.

2. Patient was provided with a wrist cockup splint at clinic to limit wrist motion, and provide support.

3. He was instructed in a home exercise program including passive extension exercise for his upper back.

4. Patient was advised to apply an icepack to the area of injury/pain every one to two hours as needed for 15 min. Icepack to be wrapped in a towel and not applied directly to the skin. An icepack was dispensed at clinic.

5. Work status: no lift above shoulder-height with right arm. No repetitive left [lift] with right arm outstretched. No forceful twisting or torquing with right hand. Use splint PRN.

6. Follow-up evaluation in 5 to 7 days. Will consider physical therapy referral if he remains symptomatic.

(Ex. 1, p. 2)

By September 9, 2013, claimant's right wrist sprain and the numbness and tingling in his right arm had nearly resolved. (Ex. 1, p. 3) Claimant's right shoulder continued to be problematic. (Ex. 1, p. 4) Dr. Hartley ordered x-rays of the right shoulder. There were no obvious fractures or dislocations. (Ex. 1, p. 4) Dr. Hartley diagnosed claimant with "Right posterior shoulder pain." (Ex. 1, p. 4) Physical therapy was ordered, and the same work restrictions were kept in place. (Ex. 1, p. 4) MRI testing was recommended. (Ex. 1, p. 9)

On October 25, 2013, claimant underwent the MRI. The results showed:

IMPRESSION:

1. HAGL lesion of the anterior band of the inferior glenohumeral ligament.

2. Supraspinatus tendinopathy.

3. Tendinopathy of the long head of biceps just superior to the bicipital groove.

(Ex. 3, p. 3)

Claimant was referred to James V. Nepola, M.D., an orthopedic surgeon, who specializes in the treatment of the shoulder. Dr. Nepola diagnosed claimant with a rotator cuff strain and a mild subacromial impingement. (Ex. 3, p. 7) Dr. Nepola provided claimant with a subacromial injection. (Ex. 3, p. 7) Eventually, Dr. Nepola recommended surgical intervention. (Ex. 3, p. 13)

On April 10, 2014, Dr. Nepola performed:

1. Diagnostic right shoulder arthroscopy.

2. Right anterior stabilization procedure (capsulorrhapy). (The technical term for the surgery is BANKART SLAP)

(Ex. 3, p. 18)

Dr. Nepola opined claimant reached maximum medical improvement effective February 17, 2015. (Ex. 7, p. 1) The orthopedic surgeon ordered a functional capacity evaluation (FCE) for claimant. The FCE occurred on June 29, 2015. Per the FCE, Dr. Nepola imposed the following restrictions for the right shoulder:

Floor to crown lift 35 pounds using both hands occasionally.

He can carry 49 pounds using both hands occasionally.

He can push/pull horizontally 25 pounds occasionally.

Overhead reaching and forward reaching occasionally.

Occasionally – 1-33% of the time (less than 1/3 of time)

(Ex. 3, p. 58) The restrictions placed claimant in the medium category of work as defined by the U.S. Department of Labor Dictionary of Occupational Titles. (Ex. 4, p. 1)

On August 19, 2015, Dr. Nepola opined claimant had a permanent impairment as a result of his work injury. The surgeon calculated the impairment rating as follows:

To the nearest degree of medical certainty he has a permanent partial impairment rating of 7% of the upper extremity which is equivalent to 4% of the whole person according to the Guides to the Evaluation of Permanent Impairment of the AMA, 5th Edition. This rating is the result of loss of active forward flexion (1% upper extremity) and extension (1%

> upper extremity) per figure 16-40 on page 476, pulse of active abduction (4% upper extremity) per figure 16-43 on page 477, and loss of active external rotation (1% upper extremity) per figure 16-46 on page 479 of the Guides. This is intended to be an assessment of his overall level of impairment on February 17, 2015 due to right upper extremity complaints as a result of the August 19, 2013 work incident, and not intended to be combined with any previously assigned right upper extremity impairment rating attributed to that work incident.

(Ex. 7, p. 1)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. On September 9, 2015, Richard L. Kreiter, M.D., examined claimant. Then Dr. Kreiter authored a report expressing his opinions relative to claimant's condition following his work injury on August 19, 2013. (Ex. 9) Dr. Kreiter opined claimant had a permanent impairment of 8 percent to the body as a whole, based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Ed. (Ex. 9, p. 1)

Dr. Kreiter imposed the following permanent work restrictions:

> Permanent restrictions are needed. Jeffrey may lift up to 20 pound [sic] with the right elbow to his side from floor to bench occasionally. He can lift 30 to 35 pounds, both arms, with elbows to the side occasionally from floor to bench. No repetitive reaching away or above shoulder height on the right side.

(Ex. 9, pp. 1-2)

Claimant requested another medical opinion because he could not comprehend why he had pain in his right shoulder. Claimant presented to David S. Tearse, M.D., an orthopedist in Cedar Rapids. Dr. Tearse ordered the standard MR/arthrogram. (Ex. 15, p. 3) The results were essentially normal. (Ex. 15, p. 3) Claimant was upset since the MRI did not show an objective cause for claimant's pain. (Ex. 15, p. 3) Dr. Tearse did not recommend any additional surgery or new restrictions. (Ex. 15, p. 3) Dr. Tearse made a referral to Sunny R. Kim, M.D., a physiatrist. Dr. Kim was asked to address claimant's issues with chronic pain.

Claimant's first appointment with Dr. Kim occurred on May 3, 2016. (Ex. 16, p. 1) Dr. Kim prescribed Embeda for claimant. (Ex. 16, p. 3) The physiatrist diagnosed claimant with:

1. I believe what he is experiencing is primarily soft tissue and capsular pain.

2. advise LiteCure modality for pain relief and pro-healing

3. f/u after his 6th treatment to reassess. May need to give consideration to cervical spine workup if shoulder does not get better.

4. For chronic pain advise abuse deterrent embeda 20 mg BID x 30 days as he has not been responding well to ibuprofen/tyleno [sic].

(Ex. 20, p. 2)

Since claimant reached maximum medical improvement, he has held two jobs. He was employed briefly in each one. Claimant worked for Foresight Security Solutions, Inc. in March 2016. He worked only 28 hours at $10.00 per hour. Claimant voluntarily terminated his employment when he was unable to secure "employment and tax documentation." (Ex. C, p. 4) The gross wages were more than claimant was earning at Nationwide Office Cleaners.

Claimant also worked for the Pearson Company in Iowa City, Iowa. He held the position for 1 month and he was compensated at $12.00 per hour. Claimant terminated his position because he did not believe he had the technical expertise to handle the job. The gross wages were more than claimant earned at Nationwide Office Cleaners.

RATIONALE AND CONCLUSIONS OF LAW

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

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

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

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

The parties agree claimant sustained an industrial disability. The salient issue is the extent of the industrial disability. There are two functional impairment ratings.

Dr. Nepola rated claimant as having a rating of 4 percent impairment to the body as a whole. Dr. Kreiter rated claimant as having a rating of 8 percent impairment to the body as a whole. There is a disagreement as to the restrictions that should be imposed.

Dr. Nepola's restrictions place claimant in the medium category of work. The restrictions appear to be reasonable, given the degree of injury claimant sustained to his right shoulder. Dr. Tearse appears to concur with the restrictions imposed by Dr. Nepola. On the other hand, Dr. Kreiter's restrictions appear more onerous. He places a 20 pound lifting restriction on claimant's use of the right arm from floor to bench.

The undersigned accepts the restrictions imposed by Dr. Nepola as being more realistic. The restrictions were given after claimant performed consistently in a FCE. (Ex. 4). Dr. Tearse is in agreement with Dr. Nepola's restrictions.

Claimant is a relatively young man. He is capable of retraining. He has a valid license to drive motor vehicles in Iowa. The 2012 tax record he produced showed he and his then spouse had an adjusted gross income of $20,214.00. The adjusted gross income was at the low end of the wage spectrum. Claimant was a very low wage earner when he was injured. Even if he is restricted to the medium level of work, he should be able to earn at or above the wage level he was earning at Nationwide Office Cleaners.

The employer terminated claimant. That is some indicia of claimant's employability. It is true he will not be able to engage in construction work, in many welding jobs, he will not be able to strip auto parts from wrecked vehicles and he may be precluded from some production work. However, there are still jobs available to claimant, such as working as a cashier or in the security field. There are always positions open in the retail field.

Therefore, after considering all of the factors affecting industrial disability, it is the determination of the undersigned; claimant has an industrial disability in the amount of thirty (30) percent. Defendants shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the stipulated weekly benefits rate of $250.05 and said benefits shall commence from February 17, 2015, the date claimant reached maximum medical improvement. Defendants shall take credit for all permanency benefits previously paid.

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

The next issue is whether claimant is entitled to healing period benefits for the period from August 29, 2013 through February 16, 2015. The parties admit claimant was off work during this time period. Defendants maintain claimant refused to accept

suitable work during this time frame. Claimant testified he was terminated by Ms. Brenda Mataya, Human Rights Manager. Ms. Mataya no longer works for Nationwide Office Cleaners. She did not testify. Claimant's direct supervisor, Tim Reyes, no longer works for the company. He did not testify. Mr. David Miller, Operations Manager in Clive, Iowa, testified for the company.

Claimant produced Exhibit 19 to establish he was in contact with his superiors after he was injured. Exhibit 19 consists of numerous text messages claimant had with Mr. Miller. Claimant notified the company he could not come to work due to his shoulder pain. He also requested permission to complete an injury report and most importantly, claimant continually requested medical treatment. There are 21 pages substantiating claimant's attempts to contact his supervisors and to request medical care subsequent to his work injury. In addition, claimant submitted Exhibit 23. It is a two page calendar for August 2013 and September 2013. Claimant made detailed notes about who he contacted at work about his injury. The records were very credible. Claimant also testified no one offered him suitable work once he was injured. The undersigned found claimant to be credible with respect to this fact.

Mr. Miller testified he understood that Ms. Mataya terminated claimant for "no call and no show" (NCNS) for work. Mr. Miller testified he did not offer suitable work to claimant, once he had sustained his work injury.

It is the determination of the undersigned; claimant was terminated from his employment shortly after his work injury. His employer failed to offer suitable work to claimant. Therefore, claimant is entitled to healing period benefit for the period from August 29, 2013 through February 16, 2015 and said benefits shall be paid at the rate of $250.05 per week.

The final issue is the matter of costs. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party

> utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Defendants shall pay:

Filing Fee	$100.00
Deposition	$119.75

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits commencing from February 17, 2015 and payable at the stipulated weekly benefit rate of two hundred fifty and 05/100 dollars ($250.05) per week.

Defendants shall also pay unto claimant healing period benefits for the period from August 29, 2013 through February 16, 2015, and said benefits shall be paid at the stipulated weekly benefit rate of two hundred fifty and 05/100 dollars ($250.05) per week.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Defendants shall take credit for all benefits previously paid to date.

Defendants shall pay costs as described in the body of this decision.

Defendants shall file all requisite reports in a timely manner.

Signed and filed this 14th day of November, 2016.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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