BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MYNOR ALEXANDER MENDOZA FERREZ a/k/a EDUARDO GARZONA, Claimant, vs. WYCKOFF HEATING & COOLING, Employer, and LEMARS INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5061081, 5061082 A P P E A L D E C I S I O N Head Note Nos: 1803

Defendants Wyckoff Heating & Cooling, employer, and its insurer, LeMars Insurance Company, appeal from an arbitration decision filed on June 28, 2018. Claimant Eduardo Garzona cross-appeals. The case was heard on August 8, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 10, 2017.

In File No. 5061081, the deputy commissioner found claimant carried his burden of proof that the May 21, 2014, work injury caused claimant to sustain permanent injuries to his right shoulder and lumbar spine. The deputy commissioner found claimant failed to meet his burden of proof that the May 21, 2014, work injury caused claimant to sustain a permanent injury to his left lower extremity. The deputy commissioner found claimant sustained permanent total disability from the work injury under the traditional industrial disability analysis. The deputy commissioner found claimant is entitled to receive reimbursement from defendants in the amount of $350.00 for the cost of the FCE report of Daryl Short, DPT, and $162.50 for the cost of the vocational report of Carma Mitchell, MS.

In File No. 5061082, the deputy commissioner found claimant failed to carry his burden of proof that the September 5, 2014, work injury, resulted in permanent disability.

Defendants assert on appeal that the deputy commissioner erred in finding claimant is permanently and totally disabled. Defendants further assert the deputy

commissioner erred in awarding the costs of the FCE report and vocational report as taxable to defendants.

On cross-appeal, claimant essentially asserts that if the undersigned does not uphold the permanent total disability finding of the deputy commissioner in regard to the May 21, 2014, date of injury, then the deputy commissioner erred in finding claimant did not sustain permanent total disability as a result of the September 5, 2014, date of injury. Claimant further asserts that in such a scenario, the undersigned would necessarily have to address defendants' credit for successive disabilities.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, those portions of the proposed arbitration decision filed on June 28, 2018, relating to issues properly raised on intra-agency appeal are affirmed in part, reversed in part, and modified in part.

In File No. 5061081, I affirm and adopt the deputy commissioner's finding that claimant sustained a permanent injury to his low back. I affirm and adopt the deputy commissioner's finding claimant did not sustain a permanent injury to the left lower extremity. However, I respectfully disagree with the deputy commissioner's finding that claimant sustained a permanent injury to his right shoulder. Lastly, I reverse the deputy commissioner's taxation in the amount of $350.00 for the cost of Mr. Short's FCE report, and $162.50 for the cost of Ms. Mitchell's vocational report.

In File No. 5061082, I affirm and adopt the deputy commissioner's finding that claimant failed to carry his burden of proof that the September 5, 2014, work injury resulted in permanent disability to any of the alleged body parts.

The deputy commissioner provided a comprehensive summary of the medical records in the arbitration decision; however, further guidance regarding the chronology of events and additional information pertaining to a subsequent, unrelated right upper extremity injury is warranted for purposes of clarity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, who was 41 years old at the time of hearing, was working for defendant-employer as a heating and cooling technician at the time of his injuries. (Hearing Transcript, page 13) As a technician, claimant was tasked with installing air conditioning systems in newly constructed buildings. (Tr., p. 15) It is undisputed that on the first date of injury, May 21, 2014, claimant tripped and fell down a flight of stairs.

Two days later, claimant presented to a physician at Mercy West Family Practice & Urgent Care with complaints of right shoulder pain, with low back pain that radiated into the right lower extremity. (Joint Exhibit, page 1) X-rays of the right shoulder and

lumbar spine revealed no acute bony abnormalities. (JE1, p. 2) The physician diagnosed claimant with strains of the right shoulder and low back.

Claimant reported improvement in his right shoulder at his June 3, 2014, follow-up appointment. Unfortunately, claimant continued to complain of left knee pain. (JE1, p. 8) Around this time period, claimant became anxious about his inability to work and the resulting financial hardship. (See JE1, pp. 11, 12) He requested to return to work on June 10, 2014, however, the physician declined to return claimant to work until he obtained an examination and release from an orthopedic physician. (JE1, p. 13)

Defendants sent claimant to Daniel Miller, M.D. of Occupational Medicine Plus for an initial evaluation on June 18, 2014. (JE2, p. 20) Claimant continued to complain of discomfort in his right shoulder and left knee. An MRI of claimant's left knee, dated June 25, 2014, was normal. (JE4, p. 93)

Following a brief stint of physical therapy, claimant returned to Dr. Miller and reported improvement in the left knee condition. With respect to the right shoulder, claimant was still experiencing occasional strong pain with reaching. (JE2, p. 26) Dr. Miller administered an epidural steroid injection to the right shoulder and returned claimant to full duty work on June 21, 2014. (Id.) After reporting significant improvement from the ESI, Dr. Miller placed claimant at maximum medical improvement (MMI) and discharged him from treatment on August 13, 2014. (JE2, p. 30)

Claimant worked in a full-duty capacity for the defendant employer between June 21, 2014, and the second date of injury, September 5, 2014. (Tr., pp. 20-21)

On September 5, 2014, claimant suffered a stipulated injury while lifting a heating unit. Claimant's description of the incident has varied. At deposition, claimant testified to a specific injurious event where he fell backwards with a 150-200 pound box and the box landed on his stomach. (See Ex. A, Depo. pp. 33-34) Medical records depict an aggravation of his low back condition as a result of his work activities. (JE2, p. 32) Defendants understood claimant's injury as pain in the right shoulder after lifting a furnace off of a truck. (Ex. 4, p. 1)

Claimant presented to Mercy West Urgent Care on September 10, 2014, with a primary complaint of low back pain. Claimant associated his low back pain with the May 2014 fall. Claimant also reported intermittent pain in his right shoulder. According to the physician's notes, claimant associated his shoulder pain with lifting activities at work. (JE1, pp15-19)

Claimant returned to his authorized treating physician, Dr. Miller, on September 11, 2014. Claimant reported experiencing an increase in low back discomfort while working Friday, September 5, 2014. According to claimant, his pain continued to increase when he returned to work Monday, September 8, 2014. (JE2, p. 32) Dr. Miller ordered an MRI of the lumbar spine on September 18, 2014. (JE2, p. 36)

As noted above, claimant's account of how the September 5, 2014, injury occurred is significantly different than what he reported to Mercy Urgent Care and Dr. Miller. Claimant testified to a specific injurious event wherein he fell backwards with a box and the box landed on his stomach. (See Ex. A, Depo. pp. 33-34) I do not find claimant's testimony that a 150-200-pound box fell on his stomach to be credible. It simply does not match the initial descriptions given to the medical providers.

Despite finding claimant's later renditions of the incident to be exaggerated, I agree with the deputy commissioner that claimant's work activities on September 5, 2014, likely caused a temporary aggravation of claimant's low back condition. As such, I affirm and adopt the deputy commissioner's finding claimant did not prove permanent injuries to his low back, right shoulder, or left knee as a result of the September 5, 2014, work injury.

The MRI of the lumbar spine, dated October 8, 2014, revealed degenerative disc changes through the middle and lower lumbar spine, prominent disc bulging at L5-S1 with high-grade central canal stenosis, and mild disc bulging at L3-L4 and L4-L5. (JE4, p. 94)

Claimant was terminated by defendant-employer on or about October 10, 2014. (Ex. 4, p. 39) Shortly thereafter, claimant applied for and secured employment with Uno Staffing as a general laborer installing insulation for Kinzler Construction in Ankeny, Iowa. (Hr. Tr., pp. 28-29) From October 2014 to February 2015, claimant installed insulation on a full-time basis. He did not present for any medical treatment related to his right shoulder, left knee, or low back during that time period. Claimant testified he did not present for medical treatment because he believed he was no longer entitled to medical treatment from defendant-employer due to his termination. (Tr., p. 24) Claimant would not seek additional treatment for his low back or right shoulder until December 2015. (Id.)

A key piece of evidence that is essentially buried in the arbitration decision is the fact claimant sustained a subsequent injury to his right upper extremity while working for Uno Staffing which required surgery.

On February 21, 2015, claimant sustained injury to his right wrist and ankle when he fell while working for Uno Staffing. (See Tr., pp. 29-30) At the time of injury, claimant was standing on a ladder, installing insulation. The ladder apparently slipped and claimant fell approximately 10 feet, landing on his outstretched right hand or wrist. (See Ex. B, p. 8) According to Dr. Bansal's IME report, claimant fell approximately 16 feet and landed on his right side. (See Exhibit B, p. 1) Claimant denied neck and back pain at his initial examination. Nevertheless, a CT scan of the cervical spine was ordered. The CT scan was negative for acute osseous injury. In addition to the CT of the cervical spine, the staff at Mary Greeley Medical Center ordered a CT of the head, as well as x-rays of the right wrist, right forearm, chest, right ankle, and foot. (See Ex. B, pp. 6-7)

In subsequent appointments, claimant complained of dense numbness in his right hand and fingers. (See Ex. B, p. 7)

Claimant underwent surgery on his right wrist in March 2015. The surgery consisted of an open reduction with plate fixation of an extra-articular fracture of the right distal radius and right carpal tunnel release. (See Ex. B, p. 7) In May 2015, Dr. Shumway assigned ten percent impairment to the right wrist as a result of the work injury. (Ex. 5, p. 44) Claimant would later return to Dr. Shumway in January 2016 to receive a series of injections for ongoing pain and discomfort. (See Ex. B, p. 9)

Sunil Bansal, M.D., conducted an independent medical examination for claimant's right wrist and ankle injuries on June 14, 2016. (See Ex. B, p. 1) Dr. Bansal recommended claimant lift no more than 20 pounds, occasionally, or 10 pounds, frequently, with the right arm. (See Ex. B, p. 3)

After receiving treatment for the unrelated right upper extremity injury, claimant requested additional treatment for his low back and right shoulder. Defendants authorized a return visit to Dr. Miller on December 2, 2015. (JE2, p. 41) A lumbar spine MRI, dated December 14, 2015, revealed a large central disk herniation at L5-S1, causing severe central and bilateral lateral recess stenosis. (JE4, p. 95) A right shoulder MRI, taken on the same date, revealed tendinopathy without discrete partial or full-thickness tear, and proximal long head biceps tendinopathy without rupture. (JE4, p. 97) After reviewing claimant's MRI reports and medical history, Dr. Miller opined claimant's complaints were causally related to the original work injury on May 21, 2014. (JE2, p. 46)

On February 18, 2016, Dr. Miller examined claimant concerning his right shoulder. Claimant stated his shoulder was 80 percent better and only caused pain when he reached for something high. Dr. Miller placed claimant at MMI and released him from treatment for the right shoulder. (JE2, p. 61) Claimant has not presented for medical treatment related to his right shoulder since the February 18, 2016, appointment with Dr. Miller. (See Tr., p. 50)

When conservative treatment failed to alleviate claimant's complaints of pain in his low back, claimant was referred to Todd Harbach, M.D. for a surgical consultation. (JE3, p. 66)

During this time period, it is believed claimant was employed for brief stints with ServiceMaster and Nationwide Office Cleaners. Claimant testified he did not make it through training at ServiceMaster because of his right hand. He similarly testified he discontinued working for Nationwide after one day because of pain he experienced in his low back. (Ex. A, Depo. pp. 19-21)

Claimant eventually underwent a right, L5-S1 microdiscectomy by Dr. Harbach on March 9, 2016. (JE3, p. 71) On April 6, 2016, claimant reported he was doing well and experiencing no pain in his back. (JE3, p. 76) On April 29, 2016, claimant again

indicated he felt fine and the pain he experienced prior to surgery was gone. (JE3, p. 80) Dr. Harbach placed claimant at MMI and released him to work without restrictions on June 24, 2016. (JE3, p. 87) Months later, claimant told his IME physician he was glad he had surgery on his low back. He relayed that his pain had improved, but was not completely gone. He estimated the surgical procedure produced a 70 percent improvement in his back condition. (Ex. 2, p. 18)

In a letter dated July 14, 2016, Dr. Harbach considered claimant's surgical procedure a success, noting claimant was asymptomatic by June 27, 2016. He reiterated that claimant had reached MMI and was returned to work without restrictions. Dr. Harbach placed claimant into DRE lumbar category III and assigned ten percent permanent partial impairment of the whole person. (JE3, p. 89)

At the request of his attorney, claimant presented to Daryl Short, DPT for a functional capacity evaluation (FCE) on October 24, 2016. (Ex. 1) The FCE report indicated claimant was cooperative and demonstrated consistent performance. Claimant reported the ability to sit for 30 to 45 minutes. He also reported the ability to stand or walk for up to two hours. (Ex. 1, p. 4) The FCE found claimant's capabilities were in the lower medium category of physical demand. The FCE noted claimant could occasionally carry 25 pounds and should limit elevated work, forward bent standing, reaching and kneeling/half-kneeling to an occasional basis. (Ex. 1, p. 3) The report provides claimant has slight or no limitations with sitting, standing work, or walking. (Ex. 1, p. 2)

In a letter addressed to claimant's attorney, dated July 20, 2017, Dr. Harbach endorsed the October 2016 FCE as a reasonable expectation for permanent functional limitations for claimant based on an 8-hour work day, 40-hour work week. (JE3, p. 90)

In the arbitration decision, the deputy commissioner adopted the restrictions outlined in the October 2016 FCE as claimant's permanent restrictions. (Arbitration Decision p. 5) I disagree with the deputy commissioner's findings in this regard. While I find the FCE accurately reflects claimant's functional abilities as of October 24, 2016, it cannot be said that the limitations outlined in the FCE are solely attributable to the May 21, 2014, work injury. To do so would ignore the unrelated, right upper extremity injury claimant sustained on February 21, 2015.

For example, the FCE provides claimant should limit his grasping tasks to an occasional basis due to the decreased strength and endurance in his right hand. (Ex. 1, p. 3) When discussing his condition with his vocational expert, claimant reported reduced strength and endurance when using his right hand. He described being unable to squeeze or grip items firmly because his hand cramps and he has to straighten his fingers with his left hand. (Ex. 3, p. 34) It cannot be said this restriction is related to the May 21, 2014, date of injury. There is no evidence claimant lacked strength and endurance in his right hand when the defendant employer took claimant "as is." Rather, claimant acquired this limitation subsequent to his work for defendant-employer. Such a

limitation significantly impacts claimant's earning capacity as highlighted in the vocational assessment of Theresa Wolford, MS:

> Given the restrictions put forth in the Functional Capacity Evaluation, Mr. Garzona would be limited to work at the light level. The combination of occasional reaching and occasional grasping would eliminate competitive level employment.

(Ex. B, p. 13)

It cannot be said claimant's right wrist injury was insignificant. The authorized treating surgeon provided an impairment rating of ten percent of the right upper extremity for the right wrist. (Ex. 5, p. 44) Moreover, claimant's IME physician recommended claimant limit his lifting to 20 pounds occasionally or 10 pounds, frequently with the right arm as a result of the February 21, 2015, non-related injury. (See Ex. B, p. 3)

The initial medical opinions of Dr. Harbach and claimant's own testimony call the validity of Mr. Short's FCE into question. Dr. Harbach released claimant without restrictions on June 24, 2016. (JE3, p. 87) Dr. Harbach's later endorsement of the FCE report as reasonable does not negate his former opinion regarding claimant's need for restrictions specific to the low back. At hearing, claimant estimated he could lift between 35 and 40 pounds. (Tr., p. 36) He further testified he lifts his 38-pound daughter once or twice per day. (Id.)

For these reasons, I cannot accept claimant's FCE as objective evidence of claimant's functional abilities attributable solely to the May 21, 2014, date of injury. For the purposes of this appeal decision, we are only concerned with permanent disability stemming from the May 21, 2014, work injury. Unfortunately, no medical record or expert report separated the injuries when reaching their opinions on permanent restrictions. I accept claimant's testimony that he is limited by his low back condition and I find he likely requires considerable restrictions specific to the low back. I accept Claimant's FCE to the extent it serves as evidence of claimant's functional abilities following all injuries.

Claimant obtained an independent medical examination (IME) with Robin Sassman, M.D., on January 3, 2017. (Ex. 2) In her report, Dr. Sassman assigned a 26 percent whole person impairment rating for claimant's low back and right shoulder conditions. (Ex. 2, p. 23) Despite knowing claimant had recently presented for an FCE, Dr. Sassman provided her own lifting restrictions for claimant. She recommended claimant limit his lifting, pushing, pulling, and carrying to 30 pounds occasionally from floor-to-waist; 20 pounds rarely from waist-to-shoulder; and 10 pounds rarely above shoulder height. Dr. Sassman also provided claimant should limit standing and walking to an occasional basis and he will need to change positions due to his low back symptoms. (Id.) It is worth noting the FCE report found claimant had slight or no limitation with respect to sitting, standing, and walking. (Ex. 1, p. 2) In this regard, I find

that the opinions of the FCE more accurately reflect claimant's walking and standing abilities.

Claimant did not present for treatment related to his low back between his release from Dr. Harbach in June 2016 and the date of hearing. Claimant has not presented for treatment related to his right shoulder since Dr. Miller released him at MMI as of February 18, 2016. At the time of hearing, claimant was only taking over-the-counter pain medication for his back pain. (See Ex. 2, p. 18)

At deposition, claimant complained of a decrease in his right shoulder range of motion but denied any ongoing pain. (Ex. A, Depo. p. 31) With respect to his low back, claimant testified the permanent pain in his back went away following surgery. (Ex. A, Depo. pp. 36-37) Claimant explained that he experienced pain 24 hours a day prior to surgery. Now he only experiences pain when he has long periods of sitting or standing. (Ex. A, Depo. p. 37) At hearing, claimant testified that the pain he experiences in his back is permanent and gets progressively worse throughout the day. (Tr., pp. 35-36)

At the time of hearing, claimant was working as a construction supervisor of sorts. (Hr. Tr., p. 32) He earns $12.00 per hour at this job. (Hr. Tr., p. 49) In this role, claimant carries a notebook from room to room and checks to make sure everything is working properly. Claimant observes the lights, air-conditioning, carpet, paint, and bathrooms. If something is not working properly, claimant makes note of the issue and sends that to the contractors or hotel owners. (Hr. Tr., p. 49) Claimant communicates with the contractors/hotel owners in English. (Id.) It appears as though the supervisor position is not a stable, full-time job. Claimant testified he "came into an arrangement for them to pay me 40 hours a week[,]" but he was not working 8-hour days. (Hr. Tr., pp. 32-33)

Both parties offered vocational opinions that relied to some degree on the limitations outlined in claimant's October 2016 FCE report. Based on the restrictions outlined in that report, and the sit/stand restrictions provided by Dr. Sassman, Ms. Mitchell determined claimant would not be able to obtain or sustain full-time, competitive employment. (Ex. 3, p. 35) Ms. Wolford provided three different loss of earning capacity analyses based upon three different sets of restrictions. Using the limitations outlined in the FCE report, Ms. Wolford opined claimant sustained a 100 percent loss of earning capacity. Ms. Wolford found claimant could work in the light category of work; however, claimant's grasping and reaching restrictions attributable to the right wrist injury would eliminate competitive level employment. (Ex. B, p. 13) Using the restrictions outlined in the reports of Dr. Bansal and Dr. Sassman, Ms. Wolford opined claimant sustained a loss of earning capacity between 30 and 60 percent. (Ex. B, p. 15)

The deputy commissioner did not expressly accept or reject either vocational report; however, because he found the FCE accurately reflected claimant's limitations and restrictions, the deputy commissioner seemingly accepted the two vocational opinions providing claimant had sustained a 100 percent loss of earning capacity. (Arb. Dec. p. 9) I respectfully disagree with this analysis. Again, to accept the limitations

outlined in the FCE report without qualification is to hold defendants responsible for the ramifications of a subsequent injury which claimant sustained while working for a different employer.

I do not find the vocational opinion of Ms. Mitchell to be persuasive or particularly helpful when assessing claimant's industrial disability. Ms. Mitchell did not conduct a labor market survey. She did not actively attempt to secure alternative employment for claimant. Ms. Mitchell's report does not appear to factor in claimant's ability to work as a supervisor as he had previously done for Iowa Meats and in the position he held at the time of hearing. Instead of addressing each report separately, Ms. Mitchell combined the limitations outlined in the FCE report with the walking restrictions recommended by Dr. Sassman to find claimant had sustained a 100 percent loss of earning capacity. For these reasons, I do not find Ms. Mitchell's report to be persuasive. (See Ex. 3)

In comparison, Ms. Wolford's report is extensive. (See Ex. B) The report summarizes claimant's medical history as it relates to the injuries claimant sustained with defendant-employer as well as with Uno Staffing. The report further summarizes claimant's employment history, transferrable skills, and vocational abilities. The report also provides a detailed assessment of each provider's restrictions and their effect on claimant's earning capacity. I cannot accept the vocational opinion tethered to Dr. Bansal's IME report as his restrictions are only attributable to the unrelated February 21, 2015, work injury. I accept Ms. Wolford's vocational opinion as it relates to the restrictions outlined by the FCE report and Dr. Sassman. The weight to be given to these vocational opinions is slightly diminished due to the fact the FCE and Dr. Sassman's report factor in limitations related to the unrelated February 21, 2015, right upper extremity injury. I find Ms. Wolford's opinion regarding claimant's loss of access to the labor market to be more consistent with claimant's restrictions and actual abilities at the time of hearing.

With this history in mind, I will first address defendants' argument on appeal that claimant sustained no permanent disability as a result of the May 21, 2014, work injury. I affirm and adopt the deputy commissioner's finding that claimant sustained a permanent injury to his back on May 21, 2014. I affirm and adopt the deputy commissioner's finding that claimant did not sustain a permanent injury to his left knee on either date of injury. However, for the following reasons, I reverse the deputy commissioner's finding that claimant sustained a permanent injury to his right shoulder on May 21, 2014.

The objective medical evidence does not support a finding claimant sustained permanent disability to the right shoulder as a result of either of the stipulated work injuries. (See JE2, p. 30; See also JE4, p. 97)

Claimant's right shoulder was initially evaluated by the urgent care staff at Mercy West Family Practice on May 23, 2014. X-rays taken of the right shoulder revealed no acute bony abnormalities and claimant was diagnosed with a strain. (JE1, p. 2) One month later, claimant complained of occasional strong pain with reaching. He received

an epidural steroid injection and was returned to full-duty work. (JE2, p. 26) After reporting significant improvement following the ESI, claimant was placed at MMI as of August 13, 2014. (JE2, p. 30) Thereafter, claimant returned to full-duty work with defendant-employer. He did not present for medical treatment related to the right shoulder again until December 2015.

When he did return for medical treatment related to the right shoulder, his complaints were minimal and his treatment plan was brief. (See JE2, pp. 45-62) An MRI of the right shoulder, dated December 14, 2015, revealed tendinopathy without discrete partial or full-thickness tear, and proximal long head biceps tendinopathy without rupture. (JE4, p. 97) On February 18, 2016, claimant reported his shoulder was 80 percent improved. (JE2, p. 61) He was subsequently placed at MMI and discharged from further treatment. (JE2, p. 62) An impairment rating was not provided. Claimant did not present for treatment related to his right shoulder between February 2016 and the date of hearing.

No physician, with the exception of claimant's IME physician retained for the purposes of litigation, opined claimant sustained permanent impairment to his right shoulder as a result of the May 21, 2014, date of injury. While Dr. Miller's September 18, 2014, report provides claimant did sustain permanent impairment as a result of the May 21, 2014, work injury, the report does not specify to which body parts claimant sustained permanent impairment. Moreover, the report provides a zero percent impairment rating without citing to a chapter, page number, or graph in the AMA Guides. It cannot be said Dr. Miller's report assigns permanent impairment to the right shoulder. (JE2, p. 35)

I do not find Dr. Sassman's opinions regarding claimant's right shoulder convincing. Dr. Sassman's opinions regarding the right shoulder appear to be based on an incomplete medical record. Dr. Sassman's medical records summary for the May 21, 2014, date of injury is limited to the medical records of Mercy West Family Practice & Urgent Care. Dr. Sassman does not discuss or summarize medical records from claimant's treating physician between June and August 2014. (Ex. 2, pp. 13-14)

Dr. Sassman diagnosed claimant with right shoulder pain with concern for a rotator cuff and/or labral tear. (Ex. 2, p. 21) In closing, Dr. Sassman recommended, "an MRI of the right shoulder be obtained to assess for this." (Id.) This diagnosis and recommendation for an MRI is troubling for two reasons. First, the "current symptoms" section of Dr. Sassman's report is void of any right shoulder pain complaints. (Ex. 2, p. 18) Second, claimant obtained an MRI of the right shoulder in December 2015. (JE4, p. 97) There is no indication Dr. Sassman reviewed the December 17, 2015, MRI report of claimant's right shoulder, which revealed no partial or full-thickness tears.

Lastly, Dr. Sassman examined claimant over two and a half years after the initial date of injury. Between the initial date of injury and her examination, claimant sustained an unrelated injury to the right upper extremity which required surgery when he fell 10-16 feet from a ladder. It does not appear as though Dr. Sassman reviewed the IME

report of Dr. Bansal, wherein Dr. Bansal recommended lifting restrictions for the right arm. Dr. Sassman's report does not address how claimant's range of motion, or his need for restrictions, would be impacted, if at all, by the unrelated, February 21, 2015, right upper extremity injury and subsequent surgical intervention. Dr. Sassman merely notes that the injury occurred and seemingly accepts claimant's opinion that the injury did not increase his right shoulder or low back symptoms. (See Ex. 2, pp. 21-23)

For those reasons, I reject Dr. Sassman's opinions as they relate to claimant's right shoulder. Given that there are no other medical opinions finding permanent impairment to the right shoulder, I reverse the deputy commissioner's holding and find claimant did not meet his burden of proof to establish he sustained permanent impairment of his right shoulder as a result of his May 21, 2014, work injury. Likewise, I find claimant did not meet his burden of proof to establish he sustained permanent impairment to the right shoulder as a result of the September 5, 2014, work injury.

Having found claimant sustained permanent disability of his low back as a result of the May 21, 2014, work injury, the next issue to address on appeal is the extent of claimant's permanent disability.

Defendants argue the deputy commissioner erred in his determination that claimant is permanently and totally disabled because the deputy commissioner relied on the vocational assessment of Ms. Mitchell, which defendants assert is flawed, without taking other relevant factors of industrial disability into consideration, such as claimant's lack of motivation or the opinions of claimant's treating physicians.

Having previously rejected the vocational opinions of Ms. Mitchell, I direct my analysis to claimant's motivation.

A discussion regarding claimant's motivation, or lack thereof, is largely absent from the arbitration decision. Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. October 14, 1997)

Claimant exhibited some motivation to return to work immediately following his termination from defendant-employer. Following his termination in October 2014, claimant applied for and secured alternative employment with Uno Staffing as a general laborer. (Tr., pp. 28-29) He held this position until February 21, 2015, when he sustained an unrelated work injury. (See Tr., pp. 29-30)

After the February 21, 2015, injury but before the March 2016 microdiscectomy, claimant only applied for two or three employment opportunities. (Ex. A, Depo. pp. 19-22) Claimant testified he was ultimately turned away from a job at ServiceMaster because of his right hand, and he quit another job because the work aggravated his low back pain. (Ex. A, Depo. pp. 20-21)

Claimant did not attempt to secure employment during the nine months between his release from Dr. Harbach in June 2016 and the date of his deposition in March 2017. However, over the next four months leading up to the evidentiary hearing, claimant actively sought employment and was able to secure two jobs relatively quickly: a cleaning position with the Cheesecake Factory and a supervisor position with a construction company. (Hr. Tr., pp. 32-33; See Ex. 3, p. 35)

Claimant testified he quit the cleaning position because the standing and walking increased his back pain. (Tr., p. 33; See Ex. 3, p. 35) I question the authenticity of claimant's reasoning. First, the FCE report provides claimant with slight to no limitation as it relates to his ability to walk and stand. (Ex. 1, p. 2) Second, Dr. Harbach was encouraging claimant to walk two miles per day for rehabilitation purposes shortly after the microdiscectomy. (JE3, p. 78) Claimant confirmed he engaged in cardiovascular activities, such as using a treadmill and elliptical, as part of his rehabilitation. (Ex. A, Depo. p. 38) It appears as though claimant continues to exercise; however, he no longer rides a bike. (Id.) When describing what activities of daily living aggravate his symptoms, claimant only provided, "sleeping and working out are difficult due to pain." (Ex. 2, p. 18) Third, it is difficult to conceptualize how claimant would not be able to handle the standing and walking at Cheesecake Factory, but is able walk room to room in his hotel supervisor position.

Claimant did not pursue any avenue for retraining or further education. His vocational expert was not retained to actively place him with potential employers. I am unconvinced claimant demonstrated motivation to seek alternative employment or participation in the labor market following his release from treatment by Dr. Harbach. The only evidence submitted by claimant to show motivation to return to work is his testimony that he applied to work for two different employers in the months leading up to his evidentiary hearing. (Tr., pp. 32-33) This suggests that when claimant applied himself, he was able to secure employment relatively quickly.

The evidentiary record contains two expert opinions with respect to permanent impairment related to claimant's low back condition. Dr. Harbach placed claimant into the DRE lumbar category III and assigned 10 percent permanent partial impairment of the whole person. (JE3, p. 89) Dr. Harbach's opinion was based, in part, on claimant being asymptomatic at the time of his release.

Using the Range of Motion method, Dr. Sassman assigned a 20 percent whole person impairment rating. (Ex. 2, pp. 22-23) Dr. Sassman used the Range of Motion method because claimant had previously sustained a surgical injury to the low back.

I find Dr. Sassman's rating to be more persuasive than Dr. Harbach's rating. Dr. Harbach's opinion that claimant is asymptomatic is not consistent with claimant's ongoing complaints detailed in his testimony and throughout the medical records. Further, the Guides do suggest using the Range of Motion method for repeat injuries within the same region. (AMA Guides to the Evaluation of Permanent Impairment, p. 380)

I am not convinced claimant's functional limitations are as significant as he describes. Prior to undergoing the March 2016 microdiscectomy, claimant was capable of installing insulation on a full-time basis. (Tr., p. 29) While less physically taxing than his position with defendant-employer, installing insulation is not a sedentary duty occupation. Claimant's medical records subsequent to the March 2016 microdiscectomy depict an individual with minimal pain. Even assuming claimant's pain increased following Dr. Harbach's release in June 2016, claimant still reported 70 percent improvement in his back pain following surgical intervention. (Ex. 2, p. 18) He did not present for any additional care for his low back condition following Dr. Harbach's release.

The evidentiary record does not support a finding that claimant is incapable of full-time employment. No physician has recommended permanent restrictions be imposed on claimant's work hours. In fact, the FCE report provides, "These projections are for an 8-hour per day and 40 hours per week at the levels indicated with the FCE Test Results and Interpretation." (Ex. 1, p. 3) When he endorsed the limitations outlined in the FCE report, Dr. Harbach specifically provided, "I would lend my endorsement to this report as a reasonable expectation for permanent functional limitations for this patient for an 8-hour work day, 40-hour work week." (JE3, p. 90) Ms. Mitchell is the only individual in the evidentiary record to opine claimant is not capable of handling full-time employment. I do not find her opinion persuasive in that regard.

Defendants argue the deputy commissioner overlooked claimant's considerable education and English skills. I do not find their arguments overly convincing. Claimant is an intelligent individual and has shown a desire to learn the English language. Aside from demonstrating claimant's willingness to retrain, I put little stock in the fact claimant received a computer programming certificate in 2011. It is likely the computer programs claimant utilized in class over 8 years ago are now obsolete. It cannot be said claimant has considerable English skills in the context of the competitive job market. Claimant required a translator at most, if not all, medical appointments and at the evidentiary hearing. While I do not find claimant is permanently and totally disabled, I agree with the deputy commissioner that claimant sustained significant permanent disability as a result of the May 21, 2014, work injury.

Claimant is an intelligent individual in the prime of his earning career. In addition to his education level, claimant possesses a number of transferrable skills he has obtained throughout his employment history, including at least two supervisory positions, that would be attractive to potential employers. (See Ex. B, p. 12) He has several connections within the construction community. (Tr., p. 48) In fact, one such connection led to his work as a hotel supervisor. (Id.) Although he is precluded from virtually all employment opportunities in the construction industry, his field of choice, he has shown the ability to handle a supervisory position. I have little doubt in his ability to retrain given his desire to improve himself. Claimant is actively learning the English language. (See Ex. A, Depo. pp. 14-16) He desires additional education and is interested in returning to school in Guatemala to obtain his law degree. (Ex. A, Depo. pp. 27-28)

Claimant is currently capable of performing light, or "lower-medium" work. Dr. Harbach released claimant without restrictions related to claimant's low back injury. (JE3, p. 87) While I do not accept Dr. Harbach's opinion as proof claimant's low back condition does not require some form of restrictions, it cannot be said the limitations outlined in the FCE are solely attributable to defendant-employer. Given claimant's age, experience, education, transferrable skills, motivation, and all other factors relevant to industrial disability, I find claimant sustained 65 percent industrial disability as a result of the May 21, 2014, work injury.

The final issue to be decided on appeal is costs. Defendants assert the deputy commissioner erred by taxing defendants the costs of Mr. Short's FCE report and Ms. Mitchell's vocational report.

In assessing whether an FCE report is taxable under rule 876 IAC 4.33, the relevant inquiry is whether the FCE was required by a medical provider as necessary for the completion of a medical report. See e.g. David Mundt v. Nash-Finch Company, File No. 5031874. (Arbitration Decision, May 10, 2012) In a more recent appeal decision, Pastor v. Farmland Foods. Inc., File No. 5050551 (Appeal Decision October 27, 2017) the undersigned reversed a deputy commissioner's finding that pursuant to rule 4.33, the claimant was entitled to receive reimbursement from the defendants for the cost of an FCE report because "no authorized medical provider requested the FCE and because [the FCE provider] was not a practitioner whose charge can be recovered as a cost pursuant to rule 876 IAC 4.33. (Id. at p. 2) In this case, the FCE performed by Mr. Short was requested by claimant's counsel, and not by any of claimant's treating or evaluating providers. Because Mr. Short's FCE was not necessary for a medical provider or medical evaluator to complete their report, no portion of Mr. Short's FCE charge is taxable as a cost under rule 876 IAC 4.33. As such, I reverse the deputy commissioner's decision to tax defendants with the cost of the FCE report.

I did not rely upon or find Ms. Mitchell's vocational report and opinions to be helpful in reaching the above findings. I conclude that this requested cost should not be taxed against defendants.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 28, 2018, is affirmed in part, reversed in part, and modified in part.

File No. 5061081 – Date of Injury: May 21, 2014

Defendants shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the stipulated weekly rate of three hundred eighty-six and 65/100 dollars ($386.65) per week, commencing on June 24, 2016.

Defendants shall receive credit for all benefits previously paid.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of one hundred twelve and 92/100 dollars ($112.92) and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

File No. 5061082 – Date of Injury: September 5, 2014

Claimant shall take nothing further from these proceedings.

Signed and filed on this 30th day of December, 2019.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James Neal Via WCES

René Charles Lapierre Via WCES
Deena A. Townley Via WCES