BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL BIGLEY,

Claimant,

vs.

DONALDSON COMPANY, INC.,

Employer,

and

STANDARD FIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5061014

ARBITRATION

DECISION

Head Note No. 1803

STATEMENT OF THE CASE

The claimant, Michael Bigley, filed a petition for arbitration and seeks workers' compensation benefits from Donaldson Company, Inc., employer, and Standard Fire Insurance Company, insurance carrier. The claimant was represented by Charles Showalter. The defendants were represented by Tim Wegman.

The matter came on for hearing on February 8, 2018, before deputy workers' compensation commissioner Joe Walsh in Waterloo, Iowa. The record in the case consists of joint exhibits 1 through 9, claimant's exhibits 1 through 17 and defense exhibits A through F. The claimant testified under oath at hearing. Dwight Van Wyngarden was appointed the official reporter. The matter was fully submitted on March 9, 2018, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. While the parties stipulated that the claimant sustained an injury which arose out of and in the course of his employment on November 13, 2013, the defendants dispute that the claimant injured his right shoulder in this accident. This issue is whether the claimant's right shoulder condition is causally connected to his admitted November 13, 2013, work incident.

2. Whether claimant is entitled to healing period benefits between June 27, 2017 and January 19, 2018.

3. The nature and extent of claimant's permanent disability.

4. The appropriate commencement date for permanent partial disability benefits.

5. Whether claimant is entitled to a penalty.

6. Whether claimant is entitled to medical expenses set forth in Claimant's Exhibits 14 and 16.

7. Whether claimant is entitled to the IME expenses set forth in Claimant's Exhibit 15.

8. Whether claimant is entitled to costs as set forth in Claimant's Exhibit 15.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on November 13, 2013.

3. The weekly rate of compensation is $491.19.

4. Defendants have paid and are entitled to a credit of 10 weeks of compensation (permanent partial disability).

5. Affirmative defenses have been waived.

FINDINGS OF FACT

Claimant, Michael Bigley, was 66 years old as of the date of hearing. Mr. Bigley testified live and under oath at hearing. I find his testimony highly credible. His testimony corresponds and is bolstered by the medical records and other exhibits in the record. There is nothing whatsoever about his demeanor which causes the undersigned any concern regarding his truthfulness.

Mr. Bigley graduated from high school and served in the United States Navy as an electrician mate until 1972. He has no other formal education. He has some experience helping his father on the family farm and he worked as a lathe operator for about 7 years. He then farmed for another five years before starting at Donaldson Company, Inc. (hereafter Donaldson) in 1985. He has held numerous jobs at

Donaldson, however, for approximately the past 20 years, he has worked as a press operator. Mr. Bigley testified that he has no prior workers' compensation claims, nor has he ever been restricted in his physical activities.

On November 13, 2013, Mr. Bigley suffered a significant incident of injury. He testified that the press he was operating malfunctioned. A steel recoiler arm unexpectedly spun and threw him in the air. He was thrown across the room several feet, into a guard rail, knocking him unconscious. When he regained consciousness, he had significant pain all over, including his arms, wrists, shoulder, back and neck. His employer transported him to the emergency room at Regional Health Services of Howard County. A report documents the visit.

> The patient presents following work-related injury. The onset was just prior to arrival (about 0640). The occurrence was single episode. The location where the incident occurred was work (Donaldson's). Location: Bilateral posterior lateral inferior wrists, right much moreso than left. Right ribs. Abrasions [sic] to right ear, right face, right shoulder, right elbow, right hip without significant pain. The character of symptoms is pain, swelling and bleeding. The degree at present is moderate, 10/10. There are exacerbating factors including changing position and movement. The relieving factor is immobilization.

(Joint Exhibit 1, page 1) After a full diagnostic work-up, including radiographs, the diagnosis was closed fracture of the left radius and ulna. (Jt. Ex. 1, p. 4) He was provided restrictions of no use of the right or left hands/wrists.

Follow-up care was directed by Jon Kammerer, M.D. (Jt. Ex. 2) Mr. Bigley was prescribed medications, including narcotics, provided a 5-pound lifting restriction and both wrists were casted. He was kept off work initially. On December 13, 2013, Dr. Kammerer diagnosed bilateral wrist fracture, contusion of right elbow and right shoulder pain (suspect tendinitis). (Jt. Ex. 2, p. 4) He referred Mr. Bigley to physical therapy. Between December 2013, and March 2014, Mr. Bigley attended over 50 physical therapy sessions which focused on his upper extremities, including his right shoulder. (Jt. Ex. 3, pp. 1-5; Jt. Ex. 4, pp. 1-8) Mr. Bigley reported that his right shoulder pain had progressively worsened to the point where he had a "catching" sensation. (Jt. Ex. 4, p. 6)

Mr. Bigley initially returned to work on January 15, 2014, to half days. He started back on January 19, 2014. The 5-pound lift restriction was in place. Mr. Bigley performed various light-duty tasks around the plant, such as operating a floor scrubber and performing paperwork. (Tr., pp. 22-23) He could not perform light assembly work at that time. On February 26, 2014, Dr. Kammerer released him to perform his regular job for four hours per day with a 10-pound restriction. (Jt. Ex. 2, p. 6) Thereafter, Mr. Bigley continued to complain of right shoulder weakness. (Jt. Ex. 4, p. 5) He was released from physical therapy in March 2014. On May 2, 2014, Dr. Kammerer placed

Mr. Bigley at maximum medical improvement but kept him on reasonable lifting and no overtime restrictions. (Jt. Ex. 2, p. 7) In August 2014, he recommended no lifting more than 40 pounds total, 20 pounds with the right wrist and no overtime. (Jt. Ex. 2, p. 8) He stated at that time that he had some permanent impairment and recommended referral for evaluation.

In September 2014, Daniel C. Miller, D.O., an occupational medicine specialist, evaluated Mr. Bigley's bilateral hands to provide an impairment rating. He reviewed the records and examined Mr. Bigley at that time. (Def. Ex. A, pp. 1-2) "It is my understanding that I am only to provide impairment rating for the wrist fractures." (Def. Ex. A, p. 3) There is no explanation for this statement in the record. I interpret this to mean that defendants instructed Dr. Miller not to evaluate the claimant's right shoulder condition. He provided a 4 percent rating to the right upper extremity based upon the right wrist fracture. (Def. Ex. A, p. 3) There is no evidence in this record that the employer or its agents performed any type of contemporaneous investigation regarding the compensability of the right shoulder condition.

Mr. Bigley testified that when he returned to work, he experienced pain and weakness. He testified specifically he performed his work slower and more cautiously than he had in the past. He provided numerous specific examples of this. Thus, while he was successful in returning to this position, it is doubtful that he could be hired in the competitive labor market for such a position as of the time of hearing. In any event, Mr. Bigley testified credibly that Donaldson's press operation was moved out of state in approximately December 2014. At that time, he was required to bid on other production jobs. He was awarded a fork truck driver position which he believed was the easiest job he could locate. It turned out to be difficult for him. Again, he credibly testified regarding specific physical activities in this position which caused difficulty for his hands, wrists and shoulders, such as reaching, steering and manipulating the controls. Mr. Bigley chose to retire in April 2015. He testified he was just having too much pain with the fork truck job. Mr. Bigley testified that he had planned to work until 2019 based upon his family's insurance needs.

Mr. Bigley received no active treatment on his bilateral hands, wrists or shoulder from approximately January 2015 through December 2016. He testified credibly that after he retired, his pain and weakness persisted.

Mr. Bigley was evaluated in August 2015, by Arnold Delbridge, M.D. The report is dated January 4, 2016. (Cl. Ex. 1) Dr. Delbridge performed a thorough review of the records and evaluated Mr. Bigley. (Cl. Ex. 1, pp. 1-4) He rated claimant's bilateral arms and he further opined there were deficits in claimant's right shoulder.

> On his right upper extremity, it was noted that he is able to flex his shoulder to 170 degrees but he flinches on the way down. When he abducts his shoulder he can go to 170 degrees but that hurts too. He has definite weakness in flexion of his shoulder, a little less weakness in abduction but still not close to the left. He is definitely weak in abduction,

> flexion and external rotation of his right shoulder. When his shoulder is examined, he has some crepitation palpable in his shoulder. On further examination of his right shoulder, it is noted that he has normal external rotation.

(Cl. Ex. 1, p. 4) He went on to rate the various functional deficits in claimant's right shoulder, concluding that if there is no further treatment, Mr. Bigley has an 11 percent right upper extremity impairment related to the right shoulder. (Cl. Ex. 1, p. 5) He noted irregularities in an earlier MRI of the right shoulder. He also rated the wrist fracture at 6 percent of the right upper extremity. (Cl. Ex. 1, p. 4) Dr. Delbridge combined the ratings to a 10 percent body as a whole rating. He recommended various lifting restrictions: 15 pounds with right upper extremity; no lifting above shoulder level on right; max lift of 40 pounds to chest level with both hands, no repetitive gripping on right. (Cl. Ex. 1, p. 6) Importantly, he causally connected all of these conditions to the work injury. He also stated "Mr. Bigley may want to pursue possible intervention in his right shoulder. It is uncertain what that outcome would be, but he might want to do that." (Cl. Ex. 1, p. 6)

Claimant's counsel provided Dr. Delbridge's IME to the defendants on January 18, 2016, seeking medical evaluation and care for his right shoulder. (Cl. Ex. 7) There is no evidence in the file that defendants responded to this request until Mr. Bigley filed an alternate medical care petition in May 2016.

It is noted that surveillance was performed on Mr. Bigley in February or March 2016. (Def. Ex. D) This surveillance did not produce anything of significant probative value for this case.

In May 2016, Mr. Bigley filed an alternate medical care petition seeking treatment on his right shoulder. He listed the reason for dissatisfaction with care as follows: "Defendants will not authorize evaluation and treatment for continued right shoulder pain." (Alt Care Petition, May 9, 2016) The defendants filed an answer contesting liability for the claim. (Alt Care Answer, May 11, 2016) On May 18, 2016, the agency entered an Order dismissing claimant's petition for alternate care and instructing defendants to comply with Rule 3.1(2) to provide a letter to the claimant with the reason or reasons liability was contested. On June 23, 2016, Dr. Miller prepared a supplemental report for defense counsel wherein he stated that because there was no mention of shoulder pain "until two weeks after the alleged work injury he is unable to causally relate subsequent right shoulder complaints to the work-related injury . . ." (Def. Ex. A, p. 4) It is not entirely clear in this record when this report was provided to the claimant, however, it appears it was provided sometime before July 14, 2016. (Cl. Ex. 9)

An MRI was performed on Mr. Bigley's right shoulder in January 2017. (Jt. Ex. 6) Eventually, treatment began at the Mayo Clinic with Bassem Elhassan, M.D., in approximately April 2017. (Jt. Ex. 8, p. 1) Dr. Elhassan's treatment records reflect that the referral was made by Dr. Kammerer. (Jt. Ex. 8, p. 1)

> Mr. Bigley is a 66-year-old, left-hand dominant retired machinist who presents today for evaluation of continued right shoulder pain. Back in November of 2013 patient was unfortunately what sounds like picked by a machine and dropped approximately 4 feet onto the floor directly onto his right shoulder. At that point in time, he also broke his right forearm as well as left wrist. Both of these were treated nonoperatively, Patient [sic] since then has had constant pain in his right shoulder. He has difficulty with ADLs, especially with any sort of abduction activity. He reports pain of 7/10. At this point in time, he does not trust his right upper extremity secondary to weakness of the muscles. For example, he was trying to carry his grandchild and had to put her down because of pain and weakness in his right shoulder.

(Jt. Ex. 8, p. 1) Dr. Elhassan concluded that Mr. Bigley "likely has a suprascapular nerve issue." (Jt. Ex. 8, p. 2) He recommended a diagnostic ultrasound-guided injection of the suprascapular nerve as well as a subacromial injection. These were intended to be both diagnostic and therapeutic. (Jt. Ex. 2, p. 8)

On July 13, 2017, Dr. Elhassan opined that Mr. Bigley's right shoulder problems were most likely related to his work accident. (Jt. Ex. 8, p. 6) Claimant's counsel forwarded this note to defendants on July 28, 2017, requesting defendants to accept responsibility for the right shoulder and pay benefits.

After the injections were performed, Dr. Elhassan documented a 50 percent reduction in pain. (Jt. Ex. 8, p. 3) "He is scheduled for a suprascapular nerve release with debridement and possible biceps tenodesis on June 19." (Jt. Ex. 8, p. 3) The surgical intervention was subsequently performed and Mr. Bigley received minimal follow up care from the Mayo Clinic through January 19, 2018, including physical therapy. (Jt. Ex. 8, pp. 4-9; Jt. Ex. 9) Based upon the treatment notes, it appears the surgery was successful. (Jt. Ex. 8, p. 9) In spite of the improvement in his pain levels and his range of motion, Mr. Bigley testified that he still has weakness in the shoulder which causes him difficulty in his activities of daily living.

In January 2018, defendants had Mr. Bigley evaluated by Scott Neff, D.O., an orthopedic surgeon. (Def. Ex. B) Dr. Neff thoroughly reviewed records and examined Mr. Bigley. His causation opinion is rather lengthy, but he ultimately concluded that he could not "to a reasonable degree of medical certainty, attribute or associate the progressive arthritic disease in this patient's right AC joint, and the biceps rupture, and the fraying of the rotator cuff specifically with his work-related injury." (Def. Ex. B, p. 9)

At his attorney's request, Mr. Bigley was evaluated by David Segal, M.D., a neurosurgeon, on February 6, 2018. Dr. Segal also thoroughly reviewed the records and evaluated the claimant. (Cl. Ex. 2) Dr. Segal wrote a voluminous report which commented on the opinions of all of the prior evaluating physicians. He ultimately diagnosed several conditions in claimant's right shoulder summarized as follows:

1. Right shoulder traumatic arthropathy.

2. Right rotator cuff and biceps tendonitis with complete rupture of biceps tendon.

3. Full-thickness tear upper part of subscapularis.

4. Evidence of thick subacromial bursa.

(Cl. Ex. 2, p. 22) He related all these conditions to the November 13, 2013, work injury noting that the symptoms associated with these conditions came on after the work injury and he had none of these problems before the injury. (Cl. Ex. 2, pp. 16, 22) He provided an 18 percent whole person impairment rating (16 percent from right shoulder, 2 percent from right wrist) and assigned very limiting permanent restrictions. (Cl. Ex. 2, p. 23) He also opined that the treatment provided at the Mayo Clinic was causally connected to the work injury and would have necessitated a healing period. (Cl. Ex. 2, p. 24)

Having reviewed all of the evidence in the file, I conclude that the claimant suffered a significant injury which arose out of and in the course of his employment on November 13, 2013. I find that this injury caused permanent functional disability in both the claimant's right wrist/forearm, as well as his right shoulder. The greater weight of evidence supports a finding that the damage to his right shoulder led, in part to his restrictions and eventually to his early retirement from Donaldson's.

CONCLUSIONS OF LAW

The primary question presented is the nature of the claimant's injury. The defendants concede that claimant suffered an injury on November 13, 2013, which arose out of and in the course of his employment; however, defendants contend that this injury only impacted his bilateral wrists and arms. They assert all benefits were timely paid for these conditions. The claimant contends he suffered damage to his right shoulder in this accident. The issue which must be decided is an issue of causal connection.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is

also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

I have found that the evidence supports a finding that claimant injured his right shoulder in his work accident on November 13, 2013. Mr. Bigley suffered a rather severe incident of injury. A recoiler malfunctioned essentially throwing him several feet, knocking him unconscious and causing fractures in his wrist/forearm area on both arms. Prior to this incident, Mr. Bigley's right shoulder was functioning normally. I base this upon Mr. Bigley's credible testimony, as well as the history he provided in his medical examinations. The emergency room records even document abrasions on his right shoulder, where Mr. Bigley believes he landed. Within just a few medical visits, Mr. Bigley was documenting right shoulder complaints.

Of course, medical causation must ordinarily be proven through expert medical opinions. The claimant presented medical opinions from Dr. Elhassan, Dr. Delbridge and Dr. Segal. I find these reports to be the most compelling medical evidence in the file in that they are consistent with the claimant's highly credible testimony, as well as the physical therapy notes and the general treatment records of the authorized treating physician, Dr. Kammerer.

I find the opinions of Dr. Miller and Dr. Neff less convincing. Dr. Miller was initially instructed not to even evaluate the claimant's right shoulder. Much later, at the request of defense counsel, he opined that because of a two week gap in registering shoulder complaints, he could not find medical causation. Dr. Neff performed a more thorough analysis some four years after the injury. He documented that claimant had symptoms in his right shoulder prior to the injury. He also documented that claimant injured his right shoulder in a motorcycle accident in the distant past. He seemed to believe that Mr. Bigley's condition was purely degenerative. I do not find this opinion compelling at all. Dr. Neff was relying upon facts, which is not supported by the evidence before the agency.

The next issue is the claimant's entitlement to healing period benefits.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli,

312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

It has long been held that a healing period may be intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Healing period may terminate and then begin again. Willis v. Lehigh Portland Cement Co., I-2 Iowa Ind. Comm'r Decisions 485 (Review-Reopening 1984); Clemens v. Iowa Veterans Home, I-1 Iowa Industrial Comm'r Decisions 35 (Review-Reopening 1984); Riesselman v. Carroll Health Center, III Iowa Ind. Comm'r Report 209 (App. 1982); Junge v. Century Engineering Corp., II Iowa Industrial Comm'r Report 219 (App. 1981). See also, 15 Lawyer and Higgs, Iowa Workers' Compensation Law and Practice, Section 13-3 (2007-2008).

The claimant contends he is entitled to healing period benefits from June 27, 2017, through January 19, 2018. Defendants agree claimant was not working during this period, however, dispute causal connection.

Having found that the claimant's right shoulder condition is causally connected to his work injury, I find the claimant is entitled to this intermittent healing period while he was recovering from shoulder surgery. (*See* Cl. Ex. 2, p. 24)

The next issue is the extent of disability.

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 Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

I find that the claimant has suffered an injury to his body as a whole. Therefore claimant's loss of earning capacity must be assessed.

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

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

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

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Considering all of the relevant factors of industrial disability, I find the claimant has suffered a 45 percent loss of earning capacity. Mr. Bigley was 66 years old at the time of injury. He is a high school graduate with honorable military service. He is obviously industrious and has useful skills in the competitive job market. Nevertheless, he has worked at Donaldson's for nearly 30 years, mostly as a press operator. The press operator position has been eliminated. While there were other jobs at the plant claimant could have performed with a healthy shoulder, his options are much more limited in light of his conditions.

Mr. Bigley's functional disability is located in his right shoulder and arm. He has the following conditions in his arm:

1. Right shoulder traumatic arthropathy.

2. Right rotator cuff and biceps tendonitis with complete rupture of biceps tendon.

3. Full-thickness tear upper part of subscapularis.

4. Evidence of thick subacromial bursa.

These conditions cause weakness in his right shoulder and arm which continue to cause him difficulty in his activities of daily living, such as picking up or carrying a grandchild. The surgery he had significantly reduced his pain. I find that the restrictions recommended by Dr. Segal are likely too restrictive given the good result he had from surgery, however, he obviously needs some common sense limitations on his work above shoulder level, particularly with his right upper extremity. The restrictions initially imposed by Dr. Kammerer are reasonable restrictions to prevent further injury. In addition, claimant has weakness and difficulty grasping with his right hand, resulting from the wrist fracture and resulting impairment. The evidence reflects there is no permanent impairment in the left upper extremity.

It is somewhat difficult to assess his precise loss of earning capacity because the claimant chose to retire. He has not attempted to work since retiring. I find that the claimant chose to retire when he did, at least in part, due to his work injury. He was

eligible to retire and he deemed it was simply not worth the pain and discomfort of dealing with his shoulder on a daily basis. This decision was perfectly rational under the circumstances. The evidence shows that claimant probably could work in some position if he chose to, but I find it is unlikely he could return to press operator or fork truck work given the condition of his right shoulder and right upper extremity. For this reason, the claimant's loss of earning capacity is not insignificant.

I cannot, however, find that the claimant is permanently and totally disabled. It is likely that, had Mr. Bigley performed a work search, he could have found gainful employment in some area utilizing his background and experience in agriculture or lighter manufacturing. The fact that he chose to retire and not seek further employment opportunities, while perfectly reasonable, weighs against a finding of an extremely high industrial disability. Stated another way, it is the claimant's burden to prove the extent of his disability. By not seeking work in the competitive job market it is somewhat more ambiguous as to what he can and cannot do. Since it is his burden, this weighs against him to some degree.

Having found that the claimant has suffered a 45 percent loss of earning capacity, I conclude he is entitled to 225 weeks of benefits.

The parties dispute the proper commencement date for permanent partial disability benefits. Permanent partial disability benefits commence upon the termination of the healing period. Iowa Code section 85.34(1). As the Iowa Supreme Court explained, the healing period terminates and permanent partial disability benefits commence at the earliest of claimant's return to work, medical ability to return to substantially similar employment, or the point at which the claimant achieves maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374 (Iowa 2016).

The claimant first returned to work on January 19, 2014. Defendants argue that his permanency benefits should not begin until January 20, 2018, when he reached maximum medical improvement following shoulder surgery. Under Evenson, there is no basis for this. Permanency benefits are owed when the claimant returns to work. The appropriate commencement date is January 19, 2014.

The next issue is medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Claimant has submitted medical bills set in Claimant's Exhibit 14, for his surgery at Mayo Clinic, as well as reasonable follow-up physical therapy care at Regional Health Services. The defendants' only remaining legal defense is medical causation. For the reasons set forth above, I have found in favor of the claimant. (*See also* Cl. Ex. 2, p. 23) The defendants also listed authorization as a defense, however, that defense was waived when liability on the claim was denied in the alternate medical care proceeding.

An employer may not simultaneously deny liability and direct medical care. Consequently, defendants are responsible for the medical expenses set forth in Claimant's Exhibit 14, as well as the medical mileage set forth in Claimant's Exhibit 16.

The next issue is penalty.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits

> to the employee at the time of the denial, delay, or termination of benefits.

Claimant advances a number of penalty theories. He claims there were several weeks which were simply paid a little late. The defendants' payment log demonstrates that about three and a half weeks were paid between a few days and up to a week late. (Def. Ex. C) Claimant further alleges the rate was initially underpaid without reasonable excuse (amounting to almost $30 per week underpayment for several weeks). (Cl. Exs. 5-6; *see also* Def. Ex. C, pp. 1 and 6) Claimant also alleges that there was an unreasonable delay in the permanency payments. He was released by Dr. Kammerer in May 2014, yet payment was not made until November 2014. Finally, defendants simply refused to pay any benefits as it related to the claimant's right shoulder, even before the defendants had procured any evidence to deny the shoulder claim.

I find that there is some merit to all of claimant's theories. The defendants have not presented evidence to provide a reasonable excuse or prove an ongoing investigation on any of these theories.

Unfortunately, the claimant does not provide much detail on the amount of each of the late payments, leaving it for the agency to calculate. Each theory shall be addressed below.

1. Failure to Timely Investigate or Pay Permanent Partial Disability (PPD) on Right Arm.

Mr. Bigley was released by Dr. Kammerer on May 2, 2014. At the time he was released, Dr. Kammerer diagnosed claimant suffered from right wrist fracture. He opined that Mr. Bigley was at maximum medical improvement (MMI) "with Grade I, mild, residual impairment." (Jt. Ex. 2, p. 7) This report was copied to "Worker's Comp Company." (Jt. Ex. 2, p. 7) Dr. Kammerer saw him back on August 4, 2014, and reiterated that Mr. Bigley was at MMI with residual impairment. He documented his ongoing functional limitations and kept him on restrictions at that time (probably for the arm/wrist and shoulder). (Jt. Ex. 2, p. 8) On August 11, 2014, a third-party administrator requested a rating on behalf of the defendants. Dr. Kammerer deferred, indicating he did not have the resources to calculate it. (Jt. Ex. 2, p. 9) Thereafter, the defendants arranged an appointment for Mr. Bigley to see Dr. Miller on September 23, 2014. Dr. Miller issued a report finding Mr. Bigley suffered a loss of function to his right arm of four percent October 31, 2014. (Def. Ex. A, p. 1) Defendants then paid 10 weeks of PPD benefits ($4,933.86) on November 4, 2014. (Def. Ex. C)

I find that the delay from May 2, 2014, through November 4, 2014 was unreasonable and penalty is mandatory. In particular, there is no excuse articulated at all for the delay from the date Dr. Kammerer informed the defendants claimant was at maximum medical improvement (May 2, 2014) through the date the defendants first requested a rating (August 4, 2014).

2. Failure to Contemporaneously Investigate Right Shoulder Condition.

At the time claimant was released by Dr. Kammerer, he had been receiving active treatment on his right shoulder, as well as his right wrist/arm. When the defendants arranged the appointment with Dr. Miller, defendants apparently instructed him not to evaluate Mr. Bigley's right shoulder. "It is my understanding that I am only to provide impairment rating for the wrist fractures." (Def. Ex. A, p. 3) The defendants provided no explanation for this, although, with the benefit of hindsight, it appears they did not deem the right shoulder to be connected to the work injury.

Mr. Bigley obtained a medical opinion that he had functional impairment in his right shoulder on January 4, 2016 from Dr. Delbridge. His report was credible and was forwarded to defendants shortly after it was issued. It became the basis for an alternate medical care claim in approximately May 2016, as Mr. Bigley sought further treatment for his ongoing right shoulder complaints.

Based upon the record before me, the defendants did not receive a causal connection opinion on the shoulder condition until June 23, 2016, two years after the initial impairment rating was requested. This investigation was not timely. I also find that the investigation was not credible. Dr. Miller's explanation for his rejection of causal connection was that Mr. Bigley did not mention to his medical providers any shoulder complaints until two weeks after the initial injury. (Def. Ex. A, p. 4) I am not certain this opinion, even if it were contemporaneous, would amount to a reasonable excuse. It appears Dr. Miller was simply searching for some reason to provide a basis for denial. The defendants had already denied liability on Mr. Bigley's May 2016 alternate medical care claim and the medical report appears to be an after-the-fact justification for the actions already taken. I decline to specifically address this issue because it does not matter. The investigation was not contemporaneous and penalty is mandatory. The employer's only chance to avoid penalty after not properly investigating the claim would have been to win on causation.

The defendants should have had Mr. Bigley's shoulder evaluated and rated in May 2014, and paid benefits timely. They did not. Dr. Delbridge provided a rating of 11 percent of the right upper extremity, which I find to be the best evidence of his functional disability at that time (pre-surgery). (Cl. Ex. 1, p. 5) This rating would convert to 7 percent of the whole body, or 35 weeks of benefits. This is the minimum defendants should have paid if they had properly adjusted the claim. Thus, the total value of the benefits unreasonably delayed is $17,191.65. I find a penalty on this amount is mandatory.

3. Miscellaneous Late Payments and Underpayment of Rate.

The claimant has demonstrated entitlement to additional penalties for a couple of minimally late payments and an underpayment of the rate. While no excuse was articulated for these late payments, they are minimal and they are subsumed into the overall penalty award as set forth below.

In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d at 238 (Iowa 1996). I am not at all convinced that the foregoing list is an exhaustive list of factors to be considered in assessment of the amount of a penalty. Rather, they are examples. The purpose is to set an amount of penalty to deter the defendants from engaging in such claim handling practices in the future.

Considering all of the appropriate factors in assessing the amount I award a penalty in the amount of $7,500.00 to deter such conduct in the future.

The final issue is whether the claimant is entitled to the IME expenses set forth in Claimant's Exhibit 15.

An employee is required to submit to an independent medical examination under section 85.39. The section provides that a refusal to submit to that examination may result in suspension of the employee's benefits for the period of the refusal. The reasonableness of claimant's refusal presents an issue of fact. Rule 873 IAC 4.1(12).

At the outset of hearing, defendants agreed to pay these IME expenses. (Tr., pp. 5-6) This agreement was accepted. The IME expenses set forth in Claimant's Exhibit 15 shall be reimbursed as agreed.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay healing period benefits from June 27, 2017, through January 19, 2018 at the stipulated rate of four hundred and ninety-one and 19/100 dollars ($491.19).

Defendants shall pay the claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the stipulated rate of four hundred and ninety-one and 19/100 dollars ($491.19) per week from January 19, 2014.

Defendants shall pay the medical expenses as set forth in Claimant's Exhibits 14 and 16.

Defendants shall reimburse IME expenses as set forth in Claimant's Exhibit 15.

Defendants shall pay a penalty in the amount of seven thousand, five hundred and no/100 dollars ($7,500.00).

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the ten (10) weeks previously paid.

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

Costs in the amount of one hundred and no/100 dollars ($100.00) are taxed to defendants.

Signed and filed this 15th day of January, 2019.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Charles W. Showalter
Robert C. Andres
Attorneys at Law
PO Box 2634
Waterloo, IA 50704
cshowalter@fmalaw.net
randres@fmalaw.net

Timothy W. Wegman
Attorney at Law
6800 Lake Drive, Suite 125
West Des Moines, IA 50266
tim@peddicord.law

JLW/kjw

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