BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHARD TREVILLYAN, Claimant, vs. MARSDEN HOLDING, LLC; MARSDEN BUILDING MAINTENANCE, LLC; AMERICAN SECURITY, LLC, Employer, and XL SPECIALTY INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 5059535, 5059536 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1108, 1803

STATEMENT OF THE CASE

Richard Trevillyan, II, filed a petition for arbitration seeking workers' compensation benefits from the employer, Marsden Holding LLC, and XL Specialty Insurance Company, the insurance carrier.

The matter came on for hearing on September 27, 2018, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The parties did an excellent job of developing the record efficiently. The record in the case consists of Joint Exhibits 1 through 6; Claimant's Exhibits 7 through 11; and Defense Exhibits A through C; as well the sworn testimony of claimant. Suzanne Sogard served as the court reporter. The parties argued this case and the matter was fully submitted on September 27, 2018.

ISSUES AND STIPULATIONS

The parties have stipulated as to an employer-employee relationship at the time of the alleged injury. It is stipulated the claimant suffered two injuries to his left shoulder which arose out of and in the course of his employment. The first occurred on November 15, 2015. The second occurred on January 25, 2016. Defendants have admitted the January 25, 2016 injury is a temporary and permanent disability. Defendants deny that the November 15, 2015, injury is a cause of any disability. The defendants accepted the January 25, 2016, claim and paid 4.9785 weeks of industrial

disability. Defendants deny claimant is entitled to any disability benefits for the November 15, 2015, claim. Claimant is seeking industrial disability benefits for both claims. The parties dispute the commencement date for both injuries. For both claims the elements comprising the rate of compensation is stipulated and affirmative defenses are waived. Medical expenses are not disputed.

FINDINGS OF FACT

Richard "Rick" Trevillyan, II, was 32 years old as of the date of hearing. Mr. Trevillyan testified live and under oath at hearing. I find his testimony to be generally credible. His testimony is generally consistent with the other records in evidence. There was nothing about his demeanor which caused the undersigned any concern for his truthfulness.

Mr. Trevillyan graduated from Walnut Creek High School in 2004 and attended Southwest Iowa Community College, but did not receive a degree. In October 2014, he began working for Marsden Holding, which is also known as American Security. He worked full-time as a security officer. The work assignments varied; however, generally it was not considered heavy labor.

On November 15, 2015, Mr. Trevillyan suffered the first of his two work-related accidents. On that date, he was in an auto accident in a company vehicle. He struck a deer, totaling the car he was driving. He reported the accident and sought care at Mercy Medical Center. He was treated at Mercy for left shoulder and back pain and instructed to follow up with his primary care physician. (Joint Exhibit 1, pages 2-3) He followed up with Thomas Luft, D.O., on December 8, 2015. Dr. Luft recorded the following history.

> the patient presents after an accident approximately a month ago in which he was the driver of his work vehicle and hit a deer on the passenger side he was going approximately 55 miles an hour he had his left hand on the steering wheel and the car did come to a sudden stop with hitting a deer he noted that his shoulder and neck hurt as well as upper and mid back it continued to hurt he [*sic*] seen in urgent care and was not given much information on weight direction of this. It is bothersome for him daily and doesn't [*sic*] are clear with activities of daily living as well as he plays the bass guitar he hasn't been able to play if secondary to weakness pain and some numbness.

(Jt. Ex. 2, p. 7) Dr. Luft was concerned about a possible rotator cuff tear and referred Mr. Trevillyan for an MRI. (Jt. Ex. 2, p. 8)

Before the MRI was scheduled, Mr. Trevillyan suffered a second stipulated injury. On January 25, 2016, he was performing his security duties at a business location when he slipped on some ice and fell on the concrete. He testified that when he went to get up he felt severe pain in his left shoulder and back. He again was directed to Mercy Medical Center.

Mercy placed Mr. Trevillyan in a sling for his left arm and shoulder and instructed him to follow up with an MRI. "Please follow up with PCP or orthopedic surgeon to schedule MRI of L shoulder to evaluate for rotator cuff injury and need for surgical repair of scapular fracture." (Jt. Ex. 1, p. 6) He again returned to Dr. Luft, who again referred him for an MRI and to follow up with an orthopedist. (Jt. Ex. 2, p. 15)

Scott Meyer, M.D., evaluated Mr. Trevillyan on February 5, 2016. (Jt. Ex. 3, p. 37) Dr. Meyer diagnosed closed nondisplaced fracture of body of left scapula. He recommended a CT scan, physical therapy and provided work restrictions. (Jt. Ex. 3, p. 39) Mr. Trevillyan followed through with his treatment. By April 2016, however, Dr. Meyer diagnosed adhesive capsulitis and recommended surgery consisting of manipulation under anesthesia with diagnostic scope and possible debridement. (Jt. Ex. 3, p. 48) In July 2016, Dr. Meyer authored a medical causation report connecting his condition to the January 25, 2016 work injury. (Jt. Ex. 3, pp. 53-55) Unfortunately, some of the physical therapy was not authorized by defendants. (Jt. Ex. 3, p. 56) The surgery occurred on August 16, 2016. (Jt. Ex. 3, p. 60) Following surgery, Dr. Meyer ordered more physical therapy and some steroid injections. (Jt. Ex. 3, p. 64)

Follow up records document that Mr. Trevillyan continued to experience symptoms of sharp, radiating pain and some numbness. (Jt. Ex. 3, p. 63) In December 2016, Dr. Meyer recommended a second surgery which he described as left shoulder arthroscopic acromioplasty and bursectomy, and manipulation under anesthesia. This surgery occurred on January 10, 2017. (Jt. Ex. 5, p. 86)

On January 23, 2017, Dr. Meyer released Mr. Trevillyan to light-duty work with the employer. He ordered more physical therapy. (Jt. Ex. 3, p. 69) He continued a normal course of follow up treatment for this type of injury. In April 2017, he was assaulted at work. A May 2017 office note documented that he had been doing well in his recovery prior to the assault. (Jt. Ex. 3, p. 76) Dr. Meyer provided an injection for the pain, ordered additional physical therapy and continued work restrictions. (Jt. Ex. 3, p. 77) In June 2017, Dr. Meyer evaluated him again.

> Patient notes the cortisone injection he received on 5/8/17 helped for a couple weeks but has since worn off. He has not been to physical therapy again because worker's [*sic*] compensation will not approve it. He notes his LEFT shoulder is a little better than his last visit but he does get some stiffness and his shoulder will become painful if he does too much. Reaching behind his back causes LEFT shoulder pain. He has been doing physical therapy exercises at home. The pain is in the posterior LEFT shoulder and it occasionally burns.

(Jt. Ex. 3, p. 79) Nevertheless, at that visit, Mr. Trevillyan informed Dr. Meyer he felt he could return to work without restrictions. Dr. Meyer released him and placed him at maximum medical improvement (MMI). (Jt. Ex. 3, p. 80) On June 22, 2017, Dr. Meyer opined that Mr. Trevillyan had suffered a 2 percent left upper extremity (or 1 percent whole body) impairment rating. (Jt. Ex. 3, p. 83) The defendants paid this rating.

Mr. Trevillyan testified that after he returned to work without restrictions, he was

assaulted a second time. He testified he was knocked unconscious and suffered a facial fracture. After the assault, Mr. Trevillyan decided to quit. He testified that he feared reinjuring his shoulder.

After leaving work for the employer, he briefly secured part-time employment as a line cook before moving to Oklahoma to be with his family after his mother was diagnosed with cancer. In Oklahoma, Mr. Trevillyan worked as a line cook at a Dave & Buster's franchise and helped care for his mother. After his mother passed away, Mr. Trevillyan moved to Arizona. He transferred to the Dave & Buster's in Tucson. He recently quit that job and began working part-time as a line cook for a Village Inn restaurant.

In March 2018, Mark Taylor, M.D., evaluated Mr. Trevillyan for purposes of an independent medical evaluation (IME) under section 85.39. Dr. Taylor performed a thorough and accurate review of the medical file and interviewed Mr. Trevillyan. (Cl. Ex. 7, pp. 128-132) He examined Mr. Trevillyan as well. (Cl. Ex. 7, pp. 132-133) Dr. Taylor documented Mr. Trevillyan's ongoing symptoms, including constant aching and soreness of the anterior left shoulder, as well as sharper pain with increased use and certain movements. (Cl. Ex. 7, p. 131) He concurred with the diagnoses of Dr. Meyer. (Cl. Ex. 7, p. 133) He assigned a 10 percent left upper extremity (or 6 percent whole body) impairment rating and recommended restrictions. (Cl. Ex. 7, p. 134) It does not appear that Mr. Trevillyan uses these restrictions at work. Dr. Taylor did note, however, that working with his hands and arms away from his body will be more difficult in light of his impairment. (Cl. Ex. 7, p. 134)

Mr. Trevillyan has not sought additional medical care for his left shoulder since moving to Oklahoma and then Arizona. He continues to be gainfully employed.

CONCLUSIONS OF LAW

The first question is whether the claimant has proven by a preponderance of evidence that the November 15, 2015, work injury is a cause of any temporary or permanent disability.

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).

Dr. Meyer opined that the claimant's disability is related to the January 25, 2016, work injury. Dr. Taylor opined that both injuries were causally connected. I find that the greater weight of evidence supports a finding that the January 25, 2016, work injury is a cause of claimant's disability. It is possible that the claimant damaged his left shoulder in the November 2015 auto accident; however, it is impossible to ascertain whether that injury independently caused an ascertainable portion of his condition. As such, I find that the claimant has failed to meet his burden of proof that the November 15, 2015, work injury is a cause of any permanent disability in his left shoulder. As such, claimant shall take nothing further from this claim.

The next issue is the extent of industrial disability resulting from claimant's January 25, 2016, left shoulder injury.

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.

Examining the entirety of this case, I find that the claimant is entitled to more than the mere impairment rating. The defendants have paid roughly five weeks of benefits, pointing out that claimant merely has a 1 percent impairment rating and no restrictions. He is young and has secured work easily since quitting his job. He has not sought treatment. All of these facts are true. Nevertheless, the fact remains that claimant's

injury resulted in two surgeries and a lengthy period of recuperation. While his functional impairment rating is not high, he undoubtedly has ongoing symptoms which impair his ability to earn wages in the competitive job market, at least to some extent. These symptoms are well-documented in the treating records, as well as Dr. Taylor's IME.

While I do not accept Dr. Taylor's recommended restrictions as the applicable restrictions for claimant's conditions, I am convinced that a number of the limitations set forth in those restrictions are real. For example, Dr. Taylor recommended "approximately 10 to 15 pounds or less, depending on how far he has to reach." (Cl. Ex. 7, p. 134) In other words, while I do not believe Mr. Trevillyan needs formal permanent restrictions as assigned by Dr. Taylor, I do agree that he has well-documented functional limitations caused by his injury which undoubtedly interfere with his ability to obtain and keep work in the competitive job market. Claimant testified credibly regarding some of the difficulties he has in performing work as a line cook as a result of his left shoulder condition.

Considering all of the relevant factors of industrial disability, I find that the claimant has suffered a fifteen (15) percent loss of earning capacity.

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 evidence in the record suggests claimant returned to work on or about January 23, 2017. This is the commencement date for permanency benefits.

ORDER

THEREFORE, IT IS ORDERED:

For File No. 5059535:

Claimant shall take nothing further.

For File No. 5059536:

Defendants shall pay the claimant seventy-five (75) weeks of benefits at the rate of three hundred nine and 73/100 dollars ($309.73) per week commencing on January 23, 2017.

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).

Defendants shall receive a credit for benefits paid as stipulated in the hearing report.

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

Costs are taxed to defendants.

Signed and filed this 6th day of January, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Erik Bair (via WCES)

Abigail A. Wenninghoff (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be 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.