BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSEPH MAYES,

Claimant,

vs.

JHCI HOLDINGS, INC., a/k/a JACOBSON COMPANIES, a/k/a JACOBSON WAREHOUSE CO. INC. a/k/a NORBERT DENTRESSANGLE,

Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052416

ARBITRATION DECISION

Head Note Nos.: 1801, 1803, 3001, 4000.2, 4100

STATEMENT OF THE CASE

Joseph Mayes, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendants, JHCI Holdings, Inc., the employer, and Zurich American Insurance Co., the insurance carrier. The arbitration hearing was held on September 16, 2016, in Des Moines, Iowa, and the case was fully submitted on November 4, 2016.

At hearing, Joint Exhibits 1 through 46, and Defendants' Exhibits A through L, were received and admitted into evidence without objection. Claimant and Shawna Burkett, were called by claimant to provide testimony at the hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Counsel for the parties submitted post-hearing briefs on November 4, 2016.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant is entitled to temporary benefits for the period of October 15, 2014 through July 18, 2016, except for a period of 74.75 hours worked between February 21, 2015 and March 21, 2015.

2. Whether the odd-lot doctrine applies.

3. The extent of permanent partial disability.

4. A determination of the commencement date for permanent partial disability benefits.

5. A determination of claimant's gross weekly earnings and the applicable rate.

6. Whether defendants should be obligated to pay medical expenses contained in Joint Exhibits 43 and 44.

7. Whether claimant is entitled to alternate medical care consisting of the recommended treatment of Todd Nielsen, D.D.S.

8. Whether defendants should be obligated to pay penalty benefits related to delay or denial of permanency benefits, healing period benefits and delay of medical treatment.

9. Taxation of costs.

FINDINGS OF FACT

At the time of the hearing, claimant, Joseph Mayes was 63 years old. (Transcript page 13) He finished the 11th grade and did not receive a G.E.D., but did obtain a welding certificate. (Tr. p. 14)

Prior to working for the defendants, claimant worked in manual labor type positions. He worked in the laundry facility at Oak Forest Hospital in Chicago, Illinois. He later worked at Economy Forms, as a set-up man, positioning metal pieces for a welder to weld them together, and at AMF-Western International assembling lawn mowers. (Tr. pp. 16-19) From 1977 until 1994, claimant worked at Chicago Northwestern Railroad as a laborer, machine operator and welder. (Tr. p. 20) He had a low back injury on or about June 29, 1994. (Exhibit J, p. 1) He testified that he had a positive urinalysis and did not want to comply with required drug treatment. (Tr. p. 26) Therefore, he left the railroad and worked as a welder for a few months at Vermeer manufacturing in Pella, Iowa, and then for a short time he worked again at Economy Forms. (Tr. pp. 23-25) Claimant returned to work at the railroad in July, 1996. At that

time, he resolved his pending low back injury claim with the railroad, along with other employment matters via a written settlement and resignation of employment. (Tr. pp. 21-23; Ex. J, pp. 1-4) The medical treatment for this injury did not include any surgery or injections. (Tr. p. 22)

Claimant worked short term job assignments through a temporary staffing company and then began working for Action Warehouse in 1996. (Tr. pp. 26-27) Action Warehouse changed names several times and later became known as Jacobson Staffing, then Jacobson Warehouse Company, and eventually JHCI Holdings, Inc., the named defendant employer herein. (Tr. pp. 28, 123) Throughout claimant's employment with defendant employer, he was placed at a Titan Tire facility and worked in the same warehouse, doing the same job from the time he was hired, until October 15, 2014, the date of injury in the case at bar. (Tr. pp. 28-29)

While working for Jacobson Staffing, claimant developed a left inguinal hernia on or about December 1, 2010. (Ex. A, p. 6) He underwent a hernia repair surgery with Willie McClairen, M.D. (Ex. A, p. 5; Tr. p. 35) He was released to return to full-duty work with no restrictions about six weeks following the surgery. (Ex. A, p. 6; Tr. p. 35) On February 24, 2012, claimant was seen by Sunil Bansal, M.D., for an independent medical evaluation (IME). (Ex. A, p. 1) Dr. Bansil found that claimant had sustained a 3 percent permanent impairment to the body as a whole and assigned lifting restrictions of 40 pounds frequently and 50 pounds occasionally. (Ex. A, pp. 8-9) Claimant testified that none of the treating physicians adopted Dr. Bansal's restrictions. (Tr. p. 35) He testified that he would not have been able to return to work for the defendants with any restrictions. (Tr. pp. 35-36) He needed a full-duty work release. Claimant's job primarily involved palletizing and transporting tires. The tires weighed "anywhere from 5 pounds to 70 to 90 pounds in general." (Tr. p. 30; Ex. 34, p. 2) He loaded and unloaded tires and manually stacked tires on pallets to shoulder height or above. He also drove a forklift for about two thirds of his shift. (Tr. p. 91) This included operating a forklift in and out of an elevator to access other levels of the warehouse. (Tr. p. 54)

Claimant testified that he was able to return to his job with the defendants following the hernia surgery by "being careful." (Tr. pp. 36) He also stated that upon his return to work, he did lift more than 40 to 50 pounds, contrary to Dr. Bansal's recommendation. (Tr. pp. 94-95) He continued to work in his regular job following the hernia incident, including working up to 20 to 30 hours of overtime per week. (Tr. p. 37) Claimant pursued a workers' compensation claim concerning the hernia injury, which was resolved via settlement. (Tr. p. 93)

On December 31, 2012, claimant was seen by Ian Lin, M.D. at Des Moines Orthopaedic Surgeons, P.C. for complaints concerning his left shoulder, which began a few days after receiving a flu shot, but had been ongoing for about three months at that time. (Ex. 5, p. 84) He underwent an arthrogram on January 14, 2013, which showed "no evidence for rotator cuff tear." (Ex. 5, p. 83)

On April 15, 2013, following injections into his left shoulder, claimant was noted to be "doing much better," with full active and passive range of motion and his "strength is back to normal." (Ex. 5, p. 78) No surgery was recommended for his left shoulder and he was assigned no restrictions. (Tr. p. 50) Claimant was told by Dr. Lin to follow-up as needed and to continue with home exercises. (Ex. 5, p. 78) Claimant continued working for the defendant employer at his regular job, without restrictions.

Claimant testified that he could do all of the physical requirements of his job prior to October 15, 2014. (Tr. pp. 37-38)

On October 15, 2014, claimant was operating a forklift for the defendants, and testified that he misjudged the distance to the elevator and hit the elevator gate with the forklift, which apparently dislodged the gate. The forks of his forklift entered the elevator shaft and struck an interior wall. One wheel of the forklift was suspended in the air inside the elevator shaft. Claimant does not have a clear recollection of the events immediately prior to colliding with the elevator gate and being thrown into the bottom of the elevator shaft, about 6 to 7 feet below. (Tr. pp. 54-57, 109-110) Claimant believes that he lost consciousness for a time. (Tr. p. 57) He recalls being at the bottom of the elevator shaft, with the elevator gate lying on top of him. (Tr. p . 56) He was assisted out of the elevator shaft and an ambulance was called. (Id.)

Claimant was transported to Unity Point Health/Iowa Methodist Hospital, where he was found to have nondisplaced pelvic "fractures of the right superior and inferior pubic rami and [s]ubtle asymmetric widening of the right sacroiliac joint," and a laceration to his lip. (Ex. 8, pp. 4, 23) The pelvic fractures did not require surgery and his lip was sutured in the emergency room. (Ex. 8, p. 23) He also presented with moderate pain in his right elbow, right hip and left knee. (Ex. 8, p. 6) He was admitted to the hospital and remained there for two weeks, until his discharge on October 29, 2014. (Tr. p. 88)

During his two week stay in the hospital, there was no treatment provided to claimant that was related to either his right or left shoulder. (Tr. p. 61) However, claimant testified that on October 22, 2014, while he was in the hospital, he asked Shawna Burkett to write out for him all of the areas of his body that were hurting, which included both shoulders. (Tr. p. 62; Ex. 24, p. 28) Claimant testified that this list was created to give to his medical providers. (Tr. pp. 62-63) Shawna Burkett, testified that her connection to claimant is akin to step-father/step-daughter relationship. Although her mother and claimant did not marry, they lived together for a time, separated, and then got back together. (Tr. p. 112) She stated that claimant has been a part of her life, filling the role of a step-father, since she was 12 years old. (Tr. p. 112) Ms. Burkett confirmed that she was asked by claimant to write down the parts of his body that he told her were hurting, while he was still in the hospital, which included both shoulders. (Tr. p. 118; Ex. 24, p. 28)

Following the work injury, claimant had follow-up care for pain in his lower jaw. While he was still in the hospital, claimant was seen at Methodist Plaza Dental Group on October 24, 2014, complaining of pain in his lower jaw when eating. An oral surgeon was recommended. (Ex. 2, p. 1) On December 4, 2014, claimant was seen by Donald Copely, D.D.S , who also recommended a referral to an oral surgeon for evaluation. (Ex. 3, p. 1) On December 23, 2014, claimant was seen by Todd Nielsen, D.D.S., of Iowa Oral & Maxillofacial Surgeons. (Ex. 4, p. 12) Dr. Nielsen recommended addressing claimant's ongoing pain by extracting tooth number 24, and if that failed to resolve the issue, consider extracting tooth number 25 as well. (Ex. 4, p. 7) This recommendation was confirmed in a response to a letter dated July 12, 2016, from claimant's counsel, (Ex. 4, pp. 3-6) Dr. Nielsen also indicated by marking "yes" that claimant has chronic pain to the anterior portion of his mandible, which was caused from the October 15, 2014, work incident. (Ex. 4, p. 4) The treatment offered by Dr. Nielsen is consistent with claimant's testimony concerning his understanding of the current recommendation for treatment. (Tr. p. 78) Claimant testified that he desires to proceed with this recommended treatment. (Tr. p. 102) On October 27, 2015, Anthony Sciascia, D.D.S., of Nadent, from Ft. Collins, Colorado, provided an opinion following a records review, without seeing the claimant. (Ex. D, p. 1) Dr. Sciascia opined that "it is apparent that the claimant injured his mouth in the work accident," and that there "obviously was damage to the claimant's lower jaw as a result of the work incident." (Ex. D, pp. 1-2) He further stated that "[i]t is more than likely that the claimant's discomfort is related to the accident, however, until a specific diagnosis can be made, it is indeterminable which teeth or area is involved," and he recommended waiting to hopefully localize the area more significantly to assist with a diagnosis. (Ex. D, p. 3) However, Dr. Sciascia admits that he is unaware "to what degree the area is bothering him now or how much longer it can be tolerated." (Id.) The general opinion that the extraction of tooth number 24 and potentially number 25, may not relieve claimant's symptoms was offered by Dr. Sciascia and echoed in a follow-up record review opinion dated April 6, 2016. (Ex. D, pp. 5-7)

Defendants agree that Dr. Copely and Dr. Nielsen have been authorized dentists in this case. (Defendants' Post-Hearing Brief, p. 5)

I find, based on the opinions of Dr. Nielsen and Dr. Sciascia, that claimant's ongoing discomfort involving his lower jaw, is causally related to the October 15, 2014 work injury, and that additional medical care as recommended by the authorized provider, Dr. Nielsen, is reasonable. I further find that continued delay of treatment is unreasonable.

Claimant had follow-up care for his pelvis fracture with Wesley Smidt, M.D. of Des Moines Orthopaedic Surgeons, P.C., who noted on November 6, 2014, that claimant was using a walker with only "touch down weightbearing," [*sic*] at that time. (Ex. 5, p. 67) Claimant testified that he used a walker for several months after the injury. (Tr. pp. 105-106)

Dr. Smidt also noted on November 25, 2014, that claimant had in addition to the pelvis fracture, right elbow bursitis and right shoulder impingement. (Ex. 5, p. 56)

On December 11, 2014, claimant had a follow-up appointment and it is noted that his elbow had no erythema and had full range of motion. Claimant did not want additional medical treatment for the elbow. (Ex. 5, p. 59)

On December 16, 2014, an MRI of the right shoulder was obtained which indicated a "partial-thickness articular surface tear of the supraspinatus tendon," with "suggestion of a superimposed pinpoint full-thickness tear." (Ex. 5, p. 62)

On December 22, 2014, claimant reported slow improvement, although Dr. Smidt stated that the shoulder was continuing to cause problems. At that time he provided a cortisone injection. Dr. Smidt advised that if claimant's shoulder did not improve, surgery would be recommended. (Ex. 5, p. 55)

On January 19, 2015, Dr. Smidt recommended surgery for claimant's right shoulder, based on the MRI results and the persistent symptoms. (Ex. 5, pp. 53-54) In the same note, Dr. Smidt stated that claimant reported pain in his left shoulder, "for about a month," and also that the pain has been present "since the time of his injury." (Ex. 5, p. 53) This is the first mention in the medical records of claimant's left shoulder symptoms after the work injury. Dr. Smidt stated that due to his significant other injuries, claimant "could have had injury to the shoulder at the same time, which was not a prominent complaint given the severity of the other injuries." (Ex. 5, p. 54)

On January 28, 2015, claimant underwent surgery by Dr. Smidt on his right shoulder. (Ex. 5, p. 51) The surgery performed was an arthroscopic subacromial decompression, a distal clavicle excision, and a rotator cuff repair with 2 corkscrew anchors. (Id.)

On February 16, 2015, claimant was released to return to work, but restricted to sedentary duty. (Ex. 33, p. 55)

The parties have stipulated that claimant returned to light duty work for a total of 74.75 hours from February 21, 2105 through March 21, 2015. (Hearing Report, p. 1)

On March 5, 2015, claimant again related to Dr. Smidt that he had pain in his left shoulder, in addition to his right shoulder as well as pain in his hip and pelvis along with headaches. (Ex. 5, p. 44) Claimant was instructed to continue "sedentary work to start building up conditioning." (Id.)

On April 9, 2015, claimant reported pain in both of his shoulders, his pelvis, abdomen and occasional headaches. It is noted that "[h]e does not feel like he is making progress and improving with his right shoulder and pelvis." (Ex. 5, p. 40) Dr. Smidt noted that he can raise his arm up overhead and has "positive impingement testing and breakthrough weakness on the left." (Id.) Claimant was continued on

physical therapy for both shoulders. (Id.) Claimant's restrictions were modified from sedentary to: no lifting over ten pounds, no prolonged walking or standing, no repetitive forceful use of the bilateral arms, and no use of the bilateral arms above chest height. (Ex. 5, p. 42) Claimant was referred for pain management. (Ex. 5, p. 40)

On May 6, 2015, claimant was seen by Christian Ledet, M.D., of Central States Medicine, PLLC, "for evaluation of generalized pain." (Ex. 10, p. 17) At that time he complained of general pain in his "entire back," along with other parts of his body. (Id.)

On May 7, 2015, Dr. Smidt notes that claimant continued to complain of pain in both shoulders and his abdomen, in the area of his previous hernia. A new case manager was present at the appointment and advised Dr. Smidt that they were waiting for authorization for a referral to a general surgeon to "rule out recurrent hernia" and to determine if the workers' compensation insurance carrier would authorize care for the left shoulder. (Ex. 5, p. 37)

On June 4, 2015, claimant advised Dr. Smidt that he felt he had decreasing pain and increasing strength in his right shoulder and that his left shoulder pain was "severe." (Ex. 5, p. 34) Dr. Smidt indicated that concerning claimant's left shoulder, he probably had a rotator cuff tear, but that treatment for the left shoulder had not yet been authorized. (Id.)

On June 9, 2015, claimant was seen by Dr. Ledet and advised that his primary complaint was left shoulder pain, not his low back. (Ex. 10, p. 6)

On July 5, 2015, Dr. Ledet authored a letter stating that claimant's reduced lumbar spine range of motion was "without anatomic explanation." (Ex. 10, p. 1) He further noted that claimant had signs of "cogwheeling," concerning breakaway weakness of "many muscle groups that cannot be explained neuroanatomically," which is indicative of symptom magnification. (Id.) He also noted that claimant's responses were positive for "overreaction" and he displayed "disproportionate verbalization, facial expression." (Id.) Dr. Ledet's overall impression was that the claimant "continues to complain of pain that is diffuse and non-anatomic." (Id.) Dr. Ledet stated that claimant was to be weaned off of opioid medication, and that claimant was at MMI from a pain management perspective and no follow-up was scheduled. (Ex. 10, p. 2) He also indicated that he would defer to the orthopedic surgeon (Dr. Smidt) for assessment of permanent impairment and restrictions. (Id.)

On July 16, 2015, claimant had a follow-up appointment for his right shoulder, right elbow and pelvis injuries. (Ex. 5, p. 30) He advised that the "right shoulder continued to get better." (Id.) However, claimant also complained of pain "every where, [*sic*]" including his neck, his arms, his leg and back, in addition to the left shoulder pain that claimant noted previously. (Id.) At that visit, Dr. Smidt noted that the nurse case manager advised that the insurance carrier was not authorizing any medical care for the left shoulder. Dr. Smidt did not recommend any particular treatment for any of the

additional body parts claimant complained about, nor did he refer claimant to any other physician for those complaints. (Id.) He did however, recommend a functional capacity evaluation (FCE). (Id.) This record is understood by the undersigned to be the first documented complaint of back pain to Dr. Smidt.

Defendants' denial of medical care for the left shoulder, was confirmed by letter dated August 21, 2015, in which defendants' reason for the denial was explained as being rooted in the fact that claimant had left shoulder treatment prior to the present work injury. (Ex. 33, p. 50) However, as noted above, 18 months before the work injury on April 15, 2013, Dr. Lin stated that claimant was "doing much better," with full range of motion and normal strength. (Ex. 5, p. 78) However, on February 13, 2016, defendants explained the basis for the denial of the left shoulder, but relied on different factors than previous, stating that the denial of medical care for the left shoulder was based on the approximate three months between the date of the injury and the first medical record referencing claimant's left shoulder pain. (Ex. 33, p. 29) However, as noted above, the first report of pain in the left shoulder includes the statement that claimant had pain "since the time of his injury," and the doctor's conclusion that due to his significant other injuries, claimant "could have had injury to the shoulder at the same time, which was not a prominent complaint given the severity of the other injuries." (Ex. 5, pp. 53-54)

On August 4, 2015, a functional capacity evaluation (FCE) was conducted. (Ex. E, p. 1) The FCE stated that claimant displayed inconsistent performance and had unacceptable effort, such that "[t]he overall results of this FCE do NOT represent a true and accurate representation of the client's functional performance." (Ex. E, pp. 1-2) Nevertheless, the evaluator found claimant able to function at least at the medium physical demand level. (Ex. p. 1)

On August 10, 2015, Dr. Smidt determined that claimant had reached maximum medical improvement (MMI) concerning his right shoulder. (Ex. 5, p. 27) Claimant continued to complain of pain in his low back, neck, arms, legs, and abdomen. An examination revealed "normal 5/5 strength of the lower extremities" and "[n]o pain with passive range of motion of the hips." (Id.) Claimant had some reported pain and guarding with the elevation of either arm. (Id.) He also had guarding at end of range of motion of left arm, some crepitation in the shoulder, and guarding with cervical spine range of motion. No additional medical care was anticipated for the right shoulder, pelvis or right elbow at that time. (Id.)

On August 10, 2015, Dr. Smidt authored a letter to Stacy Darr of Gallagher Bassett advising that he reviewed the FCE, and from his experience with claimant, that claimant has "persistently stated a higher degree of pain than would be expected given his objective findings." (Ex. 5, p. 26)

Also on August 10, 2015, Dr. Smidt opined that concerning the right elbow, no restrictions were needed and concerning the right shoulder, he recommended that claimant avoid repetitive overhead work and lift no more than 30 pounds. Regarding

the pelvis injury, Dr. Smidt states that he should be restricted from repetitive very heavy work, and no lift more than 30 pounds. (Id.)

On September 22, 2015, Dr. Smidt opined, based on the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) that claimant sustained a two (2) percent whole person impairment for the right shoulder, based on Tables 16-27, 16-18 and 16-3. He also assigned a two (2) percent whole person impairment for the sacroiliac joint fracture based on Table 17-33. He combined the impairments to arrive at a final rating of four (4) percent to the whole person.

On September 24, 2015, after the defendants had denied authorization for medical treatment of the left shoulder, claimant sought additional care on his own for his left shoulder from Dr. Smidt. (Ex. 5, p. 22)

On October 2, 2015, an MRI of the left shoulder showed a full thickness tear in the supraspinatus. (Ex. 5, p. 21) Surgery was recommended. (Ex. 5, p. 20)

On December 8, 2015, Dr. Smidt responded to a letter prepared by claimant's counsel, wherein he marked "yes," indicating his opinion that: the October 15, 2014 work injury was a substantial factor in the aggravation of his underlying left shoulder condition, which required medical treatment, and that the treatment he received for his left shoulder was reasonable and necessary to treat the condition. (Ex. 5, pp. 16-17)

On December 9, 2015, claimant was seen by Margaret Fehrle, M.D. "for a railroad disability exam with right and left shoulder pain and weakness, low back pain and neck pain. He has burning in both of his feet. He has history of sleep apnea[,] asthma, COPD and emphysema and hypertension and BPH." (Ex. 21, p. 2) Dr. Fehrle placed restrictions of: occasionally lift 10 pounds with either arm; stand or walk less than 2 hours in an 8 hour day; and sitting 20 to 30 minutes at a time. It was also noted that he would have trouble with walking on uneven ground, would need to alternate between sitting and standing, would have limits regarding pushing and pulling, he would not be able to climb ladders, occasionally climb stairs, he would have trouble with balancing, stooping, climbing, kneeling, crawling or crouching, occasionally reach in all directions and overhead, he would have trouble with frequent fine manipulation, he would have trouble with fumes, odors, dust or gasses, wetness and humidity, and trouble with vibrations. (Id.) Dr. Fehrle offered no opinion concerning causation. The above restrictions are stated generally and not linked to specific parts of the body.

On February 15, 2016, Dr. Smidt confirmed that he did not record any left shoulder pain reported by claimant until January 19, 2015. However, he again stated that claimant had complained about the pain for about a month and that the pain had been present since the time of the injury. Dr. Smidt also noted that claimant "denies any shoulder complaints or problems prior to his injury." (Ex. 5, p. 14) This is incorrect as claimant had received treatment from Dr. Lin as described above, although, he had

not had any treatment for about 18 months before to the work injury occurred and he had been working without restrictions or accommodations prior to the work injury.

On March 2, 2016, Claimant underwent left shoulder surgery with Dr. Smidt, which consisted of arthroscopic subacromial decompression, distal clavicle excision and an open rotator cuff repair with 2 corkscrew anchors. (Ex. 5, p. 12)

On March 31, 2016, Jacqueline Stoken, D.O., issued a report following an independent medical evaluation (IME) that was performed on November 16, 2015. (Ex. 17, p. 22) The report indicates that she reviewed additional medical records after the examination, concerning claimant's left shoulder surgery with Dr. Smidt on March 2, 2016. (Ex. 17, p. 22) Following an examination of claimant, she opined that claimant sustained injuries to his pelvis, lip, right shoulder, and left shoulder from the October 15, 2014 work injury. (Ex. 17, pp. 38-39) She also, without significant discussion or explanation, causally related to the work injury the following conditions: "[c]hronic low back, right pelvis, bilateral hip, bilateral upper extremity (including shoulders, elbows and wrists), groin/abdominal and left knee pain." (Id.) Dr. Stoken then assigned an impairment rating, relying upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. In doing so, she assigned whole person ratings of: 5 percent for the cervical spine; 5 percent for the low back; 10 percent for the sacral fracture; 0 percent for the pelvic fracture; 15 percent for the right shoulder; 1 percent for the left elbow; 8 percent for the left knee; and, 8 percent for the right knee. (Ex. 17, pp. 39-40) Dr. Stoken opined that claimant was not yet at maximum medical improvement (MMI) for the left shoulder. (Ex. 17, pp. 39-40) She combined the impairment ratings and concluded that claimant sustained a 38 percent whole person impairment, not including the left shoulder. (Ex. 17. p. 40) Dr. Stoken also assigned permanent restrictions of: avoid lifting more than 10 pounds occasionally with the right arm (left arm to be assessed post-MMI); avoid prolonged standing or walking on uneven ground, bending, lifting and twisting; avoid ladders or working at heights that will require balance; and, alternate sitting and standing. (Ex. 17, p. 41)

On April 1, 2016, claimant was seen by Clay Ransdell, D.O. of Metro Anesthesia and Pain Management. (Ex. 18, p. 11) Claimant presented with a primary complaint of lumbar pain. (Id.) There is no reference to the work injury. Dr. Ransdell administered an injection at L5-S1. (Ex. 18, p. 14) On June 15, 2016, claimant was seen again by Dr. Ransdell and at that time reported a 50 percent reduction in pain for about one month following the previous injection. (Ex. 18, p. 6) Claimant received a second injection in his lumbar spine. (Ex. 18, p. 9) This second injection provided relief for a couple of weeks. (Ex. 18, p. 2) On July 8, 2016 Dr. Ransdell recommended a surgical consult and physical therapy. The claimant did not want to pursue physical therapy at that time. (Ex. 18, p. 5) Dr. Ransdell's records do not appear to include any reference to the October 15, 2014 work injury and he offers no causation opinion.

On July 6, 2016, two days before his last visit with Dr. Ransdell, and nearly 21 months after the work injury, claimant presented to his regular family doctor,

Brandon Madson, M.D. at Unity Point, with complaints of ongoing back pain. Claimant advised that the symptoms had been present since his fall on October 15, 2014. (Ex. 1, p. 4) An MRI showed: bilateral L5-S1 neural foraminal stenosis, worse right than left, with compression of exiting right L5 nerve root; L3-4 mild circumferential disc bulge with moderate central protrusion resulting in mild spinal canal stenosis; and, small left subarticular L4-5 protrusion with annular tear. (Ex. 1, p. 7) Claimant did not want to consider surgery. Dr. Madson recommended physical therapy and claimant intended to seek the opinion of another physician for other treatment options. (Ex. 1, p. 8)

On July 12, 2016, Dr. Smidt stated in a letter to claimant's counsel, concerning claimant's left shoulder, that the medical care, including the costs of surgery were reasonable and necessary to treat the "left shoulder injury that was sustained on October 15, 2014." (Ex. 5, p. 8) Dr. Smidt, again related the left shoulder injury and treatment, including surgery, to the date of the injury as he did on December 8, 2015. (Ex. 5, pp. 16-17)

On July 13, 2016, claimant underwent an independent medical examination (IME) with Scott Neff, D.O. (Ex. G, p. 3) Claimant stated he was having "trouble with his right elbow, right hip, and left knee, and also both shoulders." (Ex. G, p. 4) Dr. Neff reviewed claimant's medical history and conducted a physical examination of claimant, recording his left shoulder range of motion and finding negative test results for abdominal lift-off, O'Brien's and impingement signs. Claimant demonstrated the ability to get his index finger to his hairline, "but not much above the height of his head actively." (Ex. G, p. 7) Claimant reported that "his left arm remains weak." (Id.) Dr. Neff concluded that "it is not possible to categorically state that his left shoulder was not injured in the fall. He very likely had pre-existent degenerative changes in the left shoulder, which in my opinion, would have eventually become symptomatic with simply the passage of time." (Ex. G, p. 7) He further notes that "[i]t is unusual for a possible injury not to become symptomatic for several months, subsequent to the date of injury." (Id.) However, he also states that claimant advised that following the work injury, his pain was much more severe in his pelvis and in other areas, such that he did not appreciate the left shoulder pain as much as other pain he was having. (Id.) Dr. Neff did not provide any opinion concerning impairment or restrictions. Although Dr. Neff opined that claimant's underlying left shoulder condition would have become symptomatic with time, he does not provide a clear opinion whether or not the work injury sped up the need for medical treatment and surgery, or otherwise lighted up the underlying left shoulder condition. (Id.)

On July 18, 2016, Dr. Smidt noted that claimant finished physical therapy and was "overall doing pretty well," and "is going to continue with a home exercise program," and opined that he had reached MMI regarding the left shoulder. (Ex. 5, p. 6) Dr. Smidt also records that claimant "still has some discomfort in the shoulder with some activities," but that "[h]e does not have pain." (Id.) His evaluation of claimant revealed that claimant "is fully able to elevate his arm up overhead as well as full abduction. He has around 60 degrees of external rotation, full internal rotation." (Id.)

On July 25, 2016, claimant returned for a second IME with Dr. Stoken. (Ex. 17, p. 7) At that time, Dr. Stoken reviewed additional records from Des Moines Orthopaedic Surgeons and Unity Point Health Iowa Lutheran, and again examined claimant, noting that he complained of pain in his left shoulder following surgery on March 2, 2016. (Ex. 17, pp. 7-8) After Dr. Stoken's evaluation, she found claimant had reached MMI on his left shoulder and she assigned a 12 percent whole person impairment, based on Figure 16-1b and Tables 16-3 and 16-27. (Ex. 17, p. 11) She also assigned permanent work restrictions of no work at or above shoulder height and no lifting more than 10 pounds on an occasional basis with the upper extremities. (Id.) Dr. Stoken does not provide a combined rating concerning the 38 percent she previously assigned, and the 12 percent for the left shoulder. I note from the combined values chart at page 604 of the AMA Guides, Fifth Edition, that the combined value of 38 percent and 12 percent is 45 percent.

On July 29, 2016, claimant attended a Workwell Functional Capacity Evaluation with physical therapist, Todd Schemper. (Ex. 15, p. 6) It is noted that claimant was cooperative and "demonstrated a consistent performance indicated by reproducible activities throughout the testing procedure." (Id.) It is also noted that "[c]lient gave maximal effort on all test items . . . ." (Id.) The testing indicated that, claimant's capabilities place him within the sedentary category. (Ex. 15, pp. 6-7) It was determined that claimant's lifting was limited to 15 pounds rarely from waist to floor and 10 pounds rarely from waist to crown. He was also limited to rarely carrying 10 pounds. Additional limitations include occasional standing, sitting and walking; and, rare crouching and kneeling. (Ex. 15, p. 9) The conclusions of the FCE were based on the physical exam, which included an assessment of claimant's range of motion of his left shoulder. (Ex. 15, p. 11) Claimant's left shoulder range of motion documented during this FCE is noted by the undersigned to be significantly less than what was observed by Dr. Smidt just 11 days earlier when claimant was able to fully elevate his arm overhead. (Ex. 5, p. 6) The FCE indicates that claimant's forward flexion, abduction and rotation were significantly limited, contrary to Dr. Smidt's findings. (Ex. 15, p. 11; Ex. 5, p. 6)

On July 29, 2016, Dr. Smidt drafted a letter to claimant's counsel and opined that claimant sustained a two percent impairment to the whole person concerning his left shoulder, based on the AMA Guides, Fifth Edition, and recommended a permanent work restriction of no repetitive overhead work with the left arm. (Ex. 5, p. 5) I note that the four percent previously assigned by Dr. Smidt and the two percent for the left arm, combine to produce six percent permanent impairment to the whole person, based on the combined values chart at page 604 of the AMA Guides.

On August 3, 2016, Dr. Madson, claimant's family doctor, responded to a letter prepared by claimant's counsel following a review of claimant's medical records from his clinic going back to 2009, and claimant's job description with the defendant employer. (Ex. 1, p. 2) Dr. Madson responded by marking "yes" and signing the letter drafted by claimant's counsel agreeing that claimant did not have any medical condition that impacted his ability to perform his job prior to the October 15, 2014 work injury; and,

that since the work injury, claimant would be unable to perform his job or any similar employment. (Ex. 1, pp. 2-3)

On August 11, 2016, Richard Ostrander, of MVR Consulting Services, Inc., issued a vocational evaluation at the request of claimant's counsel, following an interview of claimant and review of some of the medical records and other documents. (Ex. 32, p. 5) Mr. Ostrander reviewed the medical records of : (1) Des Moines Orthopedic Surgeons, P.C. (Dr. Smidt); (2) the railroad disability examination; and, (3) the two part IME's of Dr. Stoken. (Ex. 32, pp. 5-6) He did not review the additional extensive medical records in this case, including but not limited to, the IME reports of Dr. Neff, records of Dr. Ledet, or the two functional capacity evaluations claimant had undergone at that point (a third FCE occurred after this report). Although his report contains references to two FCE's this information is apparently gleaned from other sources, as they are not mentioned in the list of medical records reviewed. (Ex. 32, pp. 5-6, 7, 9) Therefore, I find that the report is lacking the foundation of a full relevant medical history. Mr. Ostrander opined that, relying on the restrictions assigned by Dr. Smidt on July 29, 2016, of no repetitive overhead work with the left arm, claimant sustained a "reduction of employability of approximately 85% and a reduction in labor market access based on actual positions of approximately 92%." (Ex. 32, p. 13) If Mr. Ostrander applies the additional restrictions assigned by Dr. Smidt on August 10, 2015, which apply to claimant's right shoulder and pelvis, he opined that claimant sustained a 100 percent loss of employability and labor market access. (Id.) He further opines that claimant also has a 100 percent loss of employability and labor market access if the restrictions from December 9, 2015, assigned by the railroad disability examiner, Dr. Fehrle are used, or if he relies on the restrictions assigned by the FCE of July 29, 2016, or the restrictions identified by Dr. Stoken. (Id.)

On August 22, 2016, claimant underwent another FCE, at the request of defendants. (Ex. 25, p. 1) The examiner determined that the results were invalid, due to claimant's inconsistent performance, and lack of maximal effort. (Id.) Claimant is noted to have failed multiple validity criteria. (Ex. 25, p. 5) "Therefore, it is undeterminable at this time safe, maximum lifting capabilities and/or other functional capabilities." (Ex. 25, pp. 1, 5)

On August 31, 2016, James Carrol, of Ohara, LLC prepared a vocational assessment at defendants' request, following a review of substantial medical records and other documents. (Ex. I, p. 1) Mr. Carrol opined that if the restrictions assigned by the orthopedic surgeon, Dr. Smidt, were relied upon, claimant sustained a 24 percent loss of access to employment. (Ex. I, p. 16) If he used the restrictions assigned by Dr. Stoken, claimant sustained a 73 percent loss of access to employment. If he relies upon the restrictions of the July 29, 2016 FCE, claimant sustained a 99 percent loss of access to employment. (Ex. I, p. 16)

On balance, although I find Mr. Ohara's vocational report to have a more thorough foundation in the relevant medical history that Mr. Ostrander's report, I find the

conclusion that claimant has lost only 24 percent of his access to employment difficult to conceive in view of not only his age, limited education, including a lack of a high school diploma or G.E.D., but also the restrictions of Dr. Smidt which effectively place claimant in the light work category, which is inconsistent with his relevant work history. Although I do not believe that claimant has lost 100 percent of his access to the labor market, it is reasonably understood to be more than 24 percent.

In short, neither vocational report is terribly persuasive.

On September 6, 2016, claimant was seen by Lynn Nelson, M.D. of Des Moines Orthopaedic Surgeons concerning low back pain with lesser bilateral leg paresthesias and right lower extremity pain and weakness. This appointment resulted from Dr. Ransdell's July 8, 2016 recommendation for a surgical consultation. (Ex. 5, p. 1) Claimant reported the onset of the symptoms occurred at the time of the work injury, and rated his pain at 3 to 4 out of 10. (Ex. 5, p. 1) Dr. Nelson discussed with claimant the possibility of a lumbar decompression and fusion, and claimant stated that he was "not at all interested in pursuing a fusion at this time," and no return appointment was made. (Ex. 5, p. 3) Dr. Nelson did not provide an opinion regarding causation concerning the back condition.

CAUSATION

Defendants accepted the claim related to claimant's right shoulder, right elbow, pelvis and jaw.

On September 9, 2016, Dr. Stoken responded to a letter from claimant's counsel confirming her opinion that the work injury of October 15, 2014, "resulted in a substantial and material aggravation" of his left shoulder condition, which resulted in "a permanent worsening of this conditions [*sic*] by causing the left shoulder rotator cuff tear." (Ex. 17, p. 1) She supported this conclusion noting that from a review of the records, there was no rotator cuff tear identified prior to the work injury. (Ex. 17, p. 5)

Dr. Smidt on December 18, 2014, stated that the work injury of October 15, 2014, was a substantial factor in the causation of a material aggravation of claimant's underlying left shoulder condition, which made the treatment, including surgery necessary. (Ex. 5, pp. 16-19)

Dr. Neff could not say that the left shoulder injury did not occur at the time of the work injury and does not provide a clear opinion whether or not the work injury sped up the need for medical treatment for the left shoulder. (Ex. G, p. 7)

Dr. Smidt had the opportunity to interact with and evaluate claimant on multiple occasions. He performed both shoulder surgeries and was in the best position to render opinions on claimant's injuries. Although Dr. Smidt initially related the left shoulder to claimant's work injury under the assumption that claimant had no prior left

shoulder issues, it appears clear to the undersigned that this was later corrected, based on his opinion that the work injury was a substantial factor in the aggravation of an underlying condition of the left shoulder.

I rely upon the opinion of Dr. Smidt and his assessment of causation of the left shoulder concerning the October 15, 2014 work injury.

I find that the work injury of October 15, 2014, caused the pelvic fractures, the right shoulder injury, the right elbow injury, the injury to claimant's jaw, and that it was a substantial factor in causing a material aggravation to the underlying condition of claimant's left shoulder condition. I further find that based on a review of the medical records and the expert opinions provided that claimant has failed to establish a causal connection for the remaining claimed injuries. Although Dr. Stoken states that causation exists for a number of other body parts and assigns impairment ratings thereto, I find that she provides little or no basis for her conclusions and that the same are not supported by a reasonable review of the entirety of the medical records. Those opinions are therefore rejected.

Although he eventually obtained a surgical opinion for his lumbar spine, it is troubling to the undersigned that aside from the expected long list of pains he was suffering within days after the fall as recorded by Shawna Burkett, claimant's back complaints were not noted by his primary treating doctor, Dr. Smidt, until about nine months after the injury, and then, only described generally. He did describe general pain in his entire back to Dr. Ledet on May 6, 2015, about seven months after the injury. (Ex. 10, p. 17) However, Dr. Ledet indicated on July 5, 2015, that claimant's reduced lumbar spine range of motion was "without anatomic explanation." (Ex. 10, p. 1) It is not until April 1, 2016, about 18 months after the date of the injury, that claimant received the first of two injections in his lumbar spine provided by Dr. Ransdell. (Ex. 18, p. 11) However, Dr. Ransdell, does not provide an opinion concerning causation regarding the low back and his records do not discuss the work injury. Although claimant reported to Dr. Nelson nearly 23 months after the date of injury that his low back pain began on October 15, 2014, a review of the entirety of the records do not support that connection and Dr. Nelson does not provide a causation opinion.

Concerning functional impairment, I accept Dr. Smidt's assessment of permanent functional impairment based on his multiple treatments and evaluations of claimant. Dr. Smidt had an opportunity to observe claimant's healing over a period of several visits and was in the best position to evaluate claimant's credibility over multiple visits. I therefore accept his opinion of a combined six percent impairment to the whole person for the bilateral shoulders and pelvis injuries. I also find, based on Dr. Smidt's opinion that claimant has no permanent impairment for the elbow injury and there is no opinion offered regarding any functional impairment for the jaw injury. Therefore, I find that claimant has sustained a six percent whole person functional impairment from the October 15, 2014 work injury.

TEMPORARY BENEFITS

Concerning temporary benefits for the period of October 15, 2014 through July 18, 2016 (excluding 74.75 hours worked between February 21, 2015 and March 21, 2015) the undersigned notes that the parties stipulated in the hearing report that claimant was off work during that period of time (Hearing Report, p. 1) October 15, 2014, is stipulated by the parties as the date of injury. (Id.) I find that July 18, 2016, is the date upon which claimant was placed at MMI for his left shoulder by Dr. Smidt. (Ex. 5, p. 6)

Claimant testified that his return to work between February 21, 2015 and March 21, 2015, involved light duty, sedentary work, assisting the office staff with filing, which is understood to be part-time. (Tr. p. 71) He further testified that this job ended when the work was completed and there was no more work to do. (Id.) Claimant was then off work again under restrictions, which included no lifting over 10 pounds, which precluded him from returning to his prior job that involved lifting up to 70 to 90 pounds. (Ex. 5, p. 42; Ex. 34, p. 2; Tr. p. 30)

CONVERSION DATE

Based on the above described stipulation that claimant returned to work for a period of time between February 21, 2015 and March 21, 2015, I find that claimant did, in fact, return to work on February 21, 2015, albeit on a part-time, light duty basis.

INDUSTRIAL DISABILITY

I have accepted Dr. Smidt's assessment of claimant's permanent impairment rating of six percent of the whole person, for the reasons stated above.

Considering claimant's work restrictions, as stated above, on August 4, 2015, claimant underwent his first FCE, which indicated that claimant gave a less than acceptable effort and the results were deemed unreliable, but the evaluator concluded that claimant was at least able to function in the medium physical demand level, following claimant's demonstrated ability to occasionally lift 30 pounds and frequently lift 20 pounds. (Ex. E, p. 1)

On August 10, 2015, Dr. Smidt, after reviewing the FCE and the determination that the same was invalid, stated that in his experience with claimant, he "persistently stated a higher degree of pain than would be expected given his objective findings," thereby calling into question claimant's credibility. (Ex. 5, p. 26)

On July 29, 2016, claimant completed an FCE arranged by claimant's counsel. (Ex. 15, p. 5) The evaluator, Todd Schemper indicated that claimant "gave maximal effort on all test items." (Ex. 15, p. 6) Mr. Schemper assigned restrictions of: rarely lift 15 pounds from waist to floor; rarely lift 10 pounds from waist to crown; rarely carry 10 pounds; rarely crouch and kneel; and, occasionally stand, sit and walk. (Ex. 15, p. 9)

However, the undersigned noted above a rather sudden and unexplained decrease in claimant's left shoulder range of motion, compared to an evaluation by Dr. Smidt, just 11 days earlier on July 18, 2016. At that time, Dr. Smidt found claimant "is fully able to elevate his arm up overhead as well as full abduction. He has around 60 degrees of external rotation, full internal rotation." (Ex. 5, p. 6) He further found that claimant was "overall doing pretty well," and that although claimant "still has discomfort in the shoulder with some activities . . . [h]e does not have pain." (Id.)

On August 22, 2016, claimant attended an FCE arranged by defense counsel, which was determined to be invalid based upon claimant's inconsistent performance. (Ex. 25, p. 1) The examiner concluded that claimant "failed to give maximal effort." (Id.) No permanent restrictions were proposed.

On August 10, 2015, Dr. Smidt, the treating physician who performed both shoulder surgeries and had the opportunity to observe and examine claimant on multiple occasions, assigned restrictions of: avoid repetitive overhead work and no lifting more than 30 pounds for the right shoulder and the pelvis injuries. (Ex. 5, p. 26) On July 29, 2016, when he determined that claimant was at MMI for the left shoulder, Dr. Smidt assigned the additional restriction for the left shoulder of no repetitive overhead work. (Ex. 5, p. 5) These restrictions were adopted by the undersigned, as stated above.

Based on the entirety of the record, the restrictions assigned by Dr. Smidt, and in consideration of the two invalid FCE results and the questionable sudden decrease in claimant's left shoulder range of motion at the July 29, 2016, FCE, I find that the restrictions assigned by Dr. Smidt, the treating surgeon are most reliable as an assessment of claimant's capabilities.

Claimant was found to be eligible for railroad disability, which claimant testified was involved with Social Security Disability. (Tr. p. 74) His evaluation by Dr. Fehrle was based on not only his bilateral shoulders, but also his neck and back pain, his bilateral feet, hypertension, emphysema, COPD, and BPH. (Ex. 21, p. 1)

Claimant has not sought any employment since the injury, other than complying with the short-term light duty work with the defendants from February 21, 2015 through March 21, 2015. Claimant has made no independent effort to seek employment. (Tr. p. 99) I find that claimant is not motivated to return to work.

Having found the permanent restrictions assigned by Dr. Smidt to be the most reliable and accurate statement of claimant's physical ability related to the work injury, and in consideration of all other appropriate factors, including claimant's prior work history and lack of motivation to return to work, I find that claimant has failed to establish that he is an odd-lot worker.

Based upon a review of claimant's age, work history, limited education, lack of motivation to return to work, his physical restrictions and impairment rating, along with all other appropriate factors for consideration of industrial disability, I find that claimant has sustained 50 percent industrial disability.

CLAIMANT'S RATE

Considering the applicable rate in this case, the hearing report indicates that the parties are in agreement that claimant was single and entitled to one exemption at the time of the work injury. (Hearing Report, p. 1) The parties disagree as to claimant's average weekly wage. Defendants assert claimant's gross earnings per week $963.00 and a rate of $570.80. Claimant asserts that his gross earnings per week are either $1,122.66 or $1,131.12, with a rate of either $649.40 or $653.34. (Id.) The different conclusions proposed by claimant are based on two different methods of calculating the average weekly wage, explained below. Claimant was earning $18.00 per hour at the time of his injury. (Ex. 31, pp. 5, 9)

Exhibit 40, pages 7 and 8 set forth claimant's wage information. I find from this wage information that claimant's average weekly wage is $1,122.66, as proposed by claimant. This figure is calculated from multiplying claimant's straight hourly rate by the numbers of hours worked during each pay period representing the 13 weeks prior to the date of the injury, adding those amounts and dividing the sum by 13. I therefore accept the rate of $649.40 as proposed by claimant.

MEDICAL EXPENSES

Claimant asserts a claim for payment of medical expenses contained in Exhibit 43 and 44. (Tr. p. 6)

Exhibit 43 contains expenses for: (1) the FCE performed at the request of claimant's counsel by Todd Schemper at Kinetic Edge on July 29, 2016; (2) the vocational assessment obtained by claimant with Richard Ostrander of MVR Consulting Services; (3) claimant's IME with Dr. Stoken and the report that followed on March 31, 2016 (the exam occurred on November 16, 2015); and (4) the follow-up opinion of Dr. Stoken provided on September 9, 2016. These expenses do not represent medical treatment that provided a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Exhibit 44 contains medical bills from: (1) Coventry, for dates from August 27, 2015 through November 13, 2015, related to treatment of claimant's left shoulder, low back, bilateral knees; (2) Unity Point Health, for dates from March 17, 2016 through July 14, 2016; (3) Des Moines Orthopaedic Surgeons, P.C., for dates from October 15 2014 through July 22, 2016; (4) Copley Family Dentistry for date of service of January 21, 2015; (5) Orthopaedic Outpatient Surgery Center for dates of January 28,

2015 through April 14, 2016; and, (6) Associated Anesthesiologists, P.C. for dates January 28, 2015 through April 14, 2016.

Having found above that claimant sustained injuries as a result of the work injury involving the pelvic fractures, the right shoulder, the right elbow, his jaw, and his left shoulder, I find that defendants should be liable for payment of medical treatment claimant received for these injuries, including the pre-operative, operative, and post-operative treatment for the left shoulder. I further find that the said medical treatment was reasonable, helpful and beneficial for the care and treatment of claimant. Defendants are therefore responsible for payment of the medical bills described in Exhibit 44, that relate to the care and treatment of those injuries described above that have been found to be causally related to the work injury.

PENALTY

The parties stipulated in the hearing report that claimant has been paid weekly benefits from the date of the injury through the date of the hearing. (Hearing Report, p. 2) This is supported by Exhibit L, the indemnity payment log. However Exhibit L shows that payments were made at the rate of $570.80 per week. I have found above that the correct weekly rate based on claimant's wage history is $649.40. Therefore, claimant was underpaid $78.60 per week. The number of weeks from the date of injury to the date of the hearing is 100 weeks and 1 day. No calculation was provided assessing payments first to interest and second to principal on the delayed benefits. Without said calculations, I find from the evidence provided that the underpayment is $7,871.23.

I find that claimant has shown a delay or denial of weekly benefits has occurred in the form of underpayment of the weekly rate. There is no evidence presented concerning an investigation or simultaneous disclosure to claimant of the reason for the underpayment. It appears that about a month prior to the hearing in this matter, claimant's counsel was still trying to obtain defendants' rate calculation. (Ex. 40, p. 10) Therefore, I find that defendants have failed to show a reasonable or probable cause for the delay/denial and penalty should be assessed. I determine that the same should be in the range of 50 percent of the underpayment. I determine that defendants should pay a penalty for underpayment of $3,900.00.

CONCLUSIONS OF LAW

TEMPORARY BENEFITS/CONVERSION DATE

Iowa Code 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, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The Iowa Supreme Court has stated that the date of claimant's initial return to work establishes the end of healing period and the commencement of permanent partial disability (PPD) as a matter of law, when it is the earliest of the three triggering events described in section 85.34(1). This establishment of the commencement date of PPD based on claimant's first date that he/she returns to work is not precluded by the fact that claimant may be entitled to TPD benefits during subsequent weeks when he/she is unable, due to medical restrictions, to work his/her normal hours. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, at 372 (2016). The Court reasoned that because the nature of temporary benefits is to compensate for actual wage loss caused by the injury and permanency benefits are to compensate an employee for the permanent partial loss of function or loss of earning capacity, the two are not mutually exclusive and may be paid for the same injury during the same week. Evenson v. Winnebago Industries, Inc., 881 N.W.2d at 373-374 (2016).

Turning first to the issue of the commencement of PPD benefits, the parties stipulated that claimant was off work for the period of October 15, 2014 through July 18, 2016, excluding 74.75 hours worked between February 21, 2015 and March 21, 2015. Therefore the parties agree that claimant returned to work on February 21, 2015, albeit on light duty. I therefore conclude based on the above case law that February 21, 2015 is the correct commencement date for PPD benefits.

Having found above that the left shoulder is related to the work injury of October 15, 2014, and accepting the parties' stipulation that claimant was off work during that period of time as described above, I find that claimant is entitled to healing period benefits from the date of injury, October 15, 2014 through February 20, 2015. Claimant is entitled to temporary partial disability benefits from February 21, 2015 through March 21, 2015. After the light duty job was completed, claimant was again off work again and is entitled to healing period benefits from March 22, 2015 through July 18, 2016, the date of MMI of the left shoulder. When the temporary light duty work was completed on March 22, 2015, the employer no longer had light duty work available and claimant was off work with restrictions that would prevent him from returning to substantially similar employment that he was engaged in at the time of his injury, and he did not attain MMI until July 18, 2016.

INDUSTRIAL DISABILITY

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment

in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

I found above that claimant is not an odd-lot worker, on the basis there stated.

The parties have stipulated in the Hearing Report that claimant's injuries involve an industrial disability. (Hearing Report, p. 1)

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).

I have accepted Dr. Smidt's assessment of claimant's permanent impairment rating of six percent of the whole person, as stated above.

Claimant underwent three FCE's. Two were determined to be invalid. During the valid FCE, claimant demonstrated substantially reduced range of motion of the left shoulder compared to an evaluation with Dr. Smidt just 11 days earlier when he had good range of motion and some discomfort, but no pain. No explanation for the sudden loss of range of motion was given.

Dr. Smidt stated that in his experience with claimant, he "persistently stated a higher degree of pain than would be expected given his objective findings." (Ex. 5, p. 26)

Dr. Ledet found that claimant had overreaction of verbalization and facial expressions disproportionate to his condition, displayed cogwheeling and complained of diffuse pain that was non-anatomic. (Ex. 10, p. 1)

I accepted the opinions of the treating orthopedic surgeon concerning impairment and restrictions. Dr. Smit opined that claimant sustained a 6 percent whole person impairment related to the work injury, and that he should be restricted from repetitive overhead work and no lifting more than 30 pounds.

I have found claimant sustained a 50 percent industrial disability for the reasons stated above.

CLAIMANT'S RATE

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6).

The dispute concerning claimant's rate relates to calculating the average weekly wage. Claimant asserts that the correct average weekly wage is either $1,122.66 or $1,131.12. The claimant's alternative positions are based on the change in claimant's pay periods during the 13 weeks prior to the date of injury. Claimant had been paid on a weekly basis through August 9, 2014 and then began receiving his wages bi-weekly thereafter and continuing bi-weekly through the date of the work injury on October 15, 2014. The last pay period, not involving the date of injury is for the period ending October 4, 2014.

Claimant calculated the average weekly wage first by using the biweekly wage information for the period of August 10, 2014 through October 4, 2014 (8 weeks) and adding to that sum the preceding 7 weeks to reach a total of 13 weeks, and dividing by 13 to arrive at the average weekly wage of $1,122.66. The alternative calculation utilized by claimant includes a fourteenth week added to the above total, then divided by 14 to arrive at an average weekly wage of $1,131.12. However, because the information available allows the calculation to end at 13 weeks there is no need to include the fourteenth week in the calculation. I conclude that it is unnecessary and inaccurate to use the 14 week calculation method.

I conclude that $1,122.66 is the correct average weekly wage and that $649.40 is therefore the correct weekly rate applicable in this case.

It is not clear from the evidence presented what calculation method was used by defendants to arrive at their proposed amount for the average weekly wage.

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).

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the costs of medical care not authorized by section 85.27. A claimant can seek payment of unauthorized medical care by a preponderance of the evidence that care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. at 206. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206.

I have found above that the expenses contained in Exhibit 43 are not related to medical treatment. I further conclude that they are not recoverable under the above Iowa Code section 85.27 or pursuant to the above case law.

As stated above, I conclude that defendants are liable for the medical expenses contained in Exhibit 44 for the pelvic fractures, right and left shoulders, right elbow, and jaw and that the same were reasonable, helpful and beneficial for the care and treatment of claimant.

I note that claimant did not assert a claim under 85.39 and therefore is not entitled to reimbursement of the IME expense incurred with Dr. Stoken, under that code section. (Hearing Report, p. 2)

ALTERNATE CARE

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision June 17, 1986).

Claimant seeks additional dental care in the form of treatment as recommended by the authorized treating provider, Dr. Nielson of Iowa Oral & Maxillofacial Surgeons. (Ex. 4, p. 12) Dr. Nielsen recommended addressing claimant's ongoing pain by extracting tooth number 24, and if that fails to resolve the issue, consider extracting tooth number 25 as well. (Ex. 4, p. 7)

Defendants agree that Dr. Nielsen is an authorized provider. (Defendants' Post-Hearing Brief, p. 5)

Although Dr. Sciascia stated that "until a specific diagnosis can be made, it is indeterminable which teeth or area is involved," he agreed that the discomfort claimant was having was due to the work injury, and that he has no idea "how much longer it can be tolerated." (Ex. D. p. 3) Essentially, defendants recognize that claimant has ongoing pain in his jaw and are providing no treatment at this time. I have found the failure to provide care unreasonable and the care recommended by the authorized treating physician, Dr. Nielsen to be reasonable as stated above.

Defendants are obligated to provide the care recommended by their authorized provider, Dr. Nielsen.

PENALTY

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

As found above, the parties stipulated that claimant was paid weekly benefits from the date of the injury through the date of the hearing. (Hearing Report, p. 2) I

have found that the applicable rate in this case is $649.40 and Exhibit L confirms the benefits were underpaid at the rate of $570.80 per week.

I have found above that claimant established a delay/denial of benefits based on this underpayment. I have also found that defendants have failed to prove a reasonable or probable cause or excuse for the delay/denial and defendants should be obligated to pay penalty in the amount of $3,900.00, regarding the underpayment.

Claimant also seeks penalty benefits for not paying temporary and permanency benefits, however as stated above, the parties stipulated that claimant was paid weekly benefits since the date of the injury and I therefore find that there is no additional delay/denial of temporary or permanency benefits that was not addressed in the above underpayment analysis.

Claimant does not argue under the Evenson case that defendants' failure to pay PPD and TPD from February 21, 2015 to March 21, 2015, or defendants' failure to pay PPD and HP for the period of March 22, 2015 through July 16, 2016, is a separate basis for penalty, however if such an argument were presented, I would reject the same in view of the fact that the Evenson opinion was not filed by the Supreme Court until July 13, 2016, and defendants could not be held to know and follow a standard that did not yet exist.

Claimant also seeks penalty for failure to authorize medical care. However, a claimant is not entitled to a penalty under section 86.13 for late payment of medical benefits. Klein v. Furnas Elec. Co., 384 N.W.2d 370 (Iowa 1986). This claim is denied.

COSTS

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I further concluded that claimant was successful in this claim and therefore I exercise my discretion and assess costs against the defendants in this matter. Although the parties asked for a specific taxation of costs, no itemized list or proof of payment was attached to the hearing report. Therefore I conclude that the costs shall include those allowable under 876 IAC 4.33.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits for the periods of October 15, 2014 through February 20, 2015; and, from March 22, 2015 through July 18, 2016.

Defendants shall pay temporary partial disability for the period of February 21, 2015 through March 21, 2015.

Defendants shall pay two hundred fifty (250) weeks of permanent partial disability commencing on February 21, 2015 until paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date, pursuant to the stipulation contained in the hearing report.

All weekly benefits shall be paid at the rate of six hundred forty-nine and 40/100 dollars ($649.40) per week.

Defendants shall pay penalty benefits of three thousand nine hundred and 00/100 dollars ($3,900.00).

Defendants shall pay medical expenses set forth in Exhibit 44 as directed in this decision.

Defendants shall promptly authorize medical care as recommended by Dr. Nielsen.

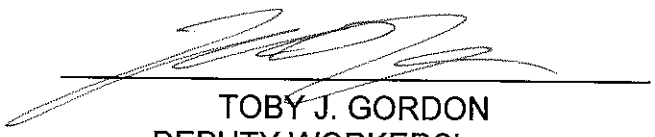
All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30.

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

Defendants shall pay the costs of this matter as allowed under 876 IAC 4.33.

Signed and filed this 3 day of April, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Larry D. Krpan
Attorney at Law
2700 Westown Pkwy., Ste. 300
West Des Moines, IA 50266-1411
larry@krpanlawoffice.com

Timothy W. Wegman
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266-2504
tim.wegman@peddicord-law.com

TJG/srs

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.