BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOUGLAS WEATHERMAN,

Claimant,

vs.

LENNOX INDUSTRIES,

Employer,

and

INDEMNITY INS. CO. OF N. AMERICA,

Insurance Carrier,
Defendants.

File No. 5053707

ARBITRATION

DECISION

Head Note Nos.: 1402.40, 1803
2502, 2701, 2907, 4000.2

STATEMENT OF THE CASE

Douglas Weatherman, claimant, filed a petition for arbitration against defendants, Lennox Industries, as the employer, and Indemnity Insurance Company of North America, as the insurance carrier. An in-person hearing occurred on November 28, 2016.

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.

The evidentiary record includes claimant's exhibits 1 through 14 and defendants' exhibits A through E. Claimant testified on his own behalf and called a vocational expert, Jeff Johnson, to testify. Defendants also called a vocational expert, Amy Botkin, to testify. All exhibits were received at the time of the evidentiary hearing, though the physical copy of Ms. Botkin's deposition (Exhibit 14) was provided to the undersigned subsequent to the arbitration hearing. Nevertheless, the evidentiary record was completed at the conclusion of the November 28, 2015 arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. The parties were given until December 22, 2016 to file their post-hearing briefs, at which time the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits, including a claim for odd-lot status.

2. The applicable weekly worker's compensation rate at which weekly benefits should be paid.

3. Whether claimant is entitled to reimbursement of the fees for his independent medical evaluation.

4. Whether claimant is entitled to alternate medical care, including a request for a repeat left shoulder MRI.

5. Whether defendants should be ordered to pay penalty benefits for an alleged unreasonable delay in payment of weekly benefits.

6. Whether costs should be assessed against either party.

FINDINGS OF FACTS

The undersigned, having considered all of the evidence and testimony in the record, finds:

Douglas Weatherman is a 65 year old man, who lives in Marshalltown, Iowa. Mr. Weatherman worked for the employer, Lennox Industries, for 46 years. Other than high school jobs, claimant worked exclusively for Lennox since graduating from high school in 1969. He attended one semester of community college while working full-time at Lennox, but dropped out of college to pursue his career with Lennox. (Claimant's testimony) Mr. Weatherman worked at Lennox until June 8, 2015 when he voluntarily retired. (Claimant's testimony; Ex. C2, p. 65; Ex. C3)

During his employment with Lennox, Mr. Weatherman held numerous positions. He was able to learn each of these positions without difficulties and had the highest seniority within the plant when he retired. (Transcript, p. 64) Mr. Weatherman was able to bid to essentially any job he desired within the Lennox facility by the time he retired.

This case arises out of a work injury that occurred on August 20, 2013. (Hearing Report) On that date, Mr. Weatherman tripped on a floor mat, caught himself on a machine with his left arm outstretched. He experienced immediate symptoms in his left shoulder and reported his injury. (Claimant's testimony)

Lennox set up medical care for claimant through Charles D. Mooney, M.D. Dr. Mooney initially evaluated Mr. Weatherman on August 26, 2013. He noted claimant had essentially normal range of motion in claimant's left shoulder but ordered four weeks of physical therapy. (Ex. 1, p.1)

At his return visit on September 26, 2013, Dr. Mooney again noted almost full range of motion and normal strength in claimant's left arm and shoulder. (Ex. 1, p. 2) However, as a result of the ongoing reports of symptoms, Dr. Mooney referred claimant to an orthopaedic surgeon, David K. Sneller, M.D. Dr. Sneller evaluated claimant on October 9, 2013. He noted some reduction in claimant's left shoulder range of motion but recommended only conservative care. (Ex. 2)

Claimant returned for follow-up with Dr. Mooney on December 2, 2013. Dr. Mooney again documented full range of motion and no weakness in claimant's left shoulder. He declared Mr. Weatherman to have achieved maximum medical improvement and assigned no permanent restrictions for claimant's injury. (Ex. 1, p. 3)

Unfortunately, despite the release from care and the declaration of maximum medical improvement, Mr. Weatherman continued to experience symptoms in his left shoulder. He requested additional medical care and was referred for a second orthopaedic evaluation performed by Timothy R. Vinyard, M.D., on March 27, 2014. Dr. Vinyard recommended an MRI be performed on claimant's left shoulder. (Ex. 3, p. 8)

After submitting to an MRI, claimant presented for further evaluation by Dr. Vinyard. Dr. Vinyard read the left shoulder MRI to demonstrate a full-thickness tear of the supraspinatus tendon and a labral injury in the left shoulder. Dr. Vinyard recommended surgical intervention for these injuries. (Ex. 3, p. 12) On May 14, 2014, Dr. Vinyard took claimant to surgery and performed a left arthroscopic rotator cuff repair, a biceps tenodesis, a subacromial decompression and a distal clavicle excision. (Ex. 4)

By July 31, 2014, Dr. Vinyard's notes indicate claimant was "doing fantastic" and noted claimant reported symptoms as 0 out of 10 on the pain scale, reflecting essentially no pain being reported. (Ex. 3, p. 18) Dr. Vinyard reiterates this report noting that claimant was doing very well in August 2014 and that he reported minimal symptoms in October 2014. (Ex. 3, pp. 21, 24) Dr. Vinyard released claimant to return to work without restrictions effective October 6, 2014. (Ex. 3, p. 24) He declared Mr. Weatherman to have achieved maximum medical improvement at that time and opined that claimant sustained a one percent permanent impairment of the whole person as a result of the injury. (Ex. 3, pp. 25, 29) Mr. Weatherman sought no additional medical treatment for his left shoulder after being released by Dr. Vinyard in October 2014.

Mr. Weatherman testified in his deposition and again at trial that he did not tell Dr. Vinyard he was symptom-free or doing great during his follow-up appointments. (Ex. B, p. 56) However, I do not find claimant's testimony in this respect to be credible.

Dr. Vinyard's records were prepared contemporaneous in time to his evaluations of claimant. Claimant has demonstrated no reason why Dr. Vinyard would inaccurately record these comments in multiple medical records. Moreover, Dr. Vinyard's records and comments are corroborated by concurrent physical therapy records.

For instance, on August 28, 2014, claimant presented to Dr. Vinyard, who reported that claimant "continues to do very well" and noted that claimant's "strength, range of motion, and pain continue to improve." (Ex. A11) On that same date, Mr. Weatherman presented to a physical therapy visit in which the therapist recorded, "[c]ontinued progression of strengthening exercises with minimal complaints of pain." (Ex. A12) On September 2, 2014, the physical therapist noted that claimant "was able to play golf this weekend and his shoulder felt good. He continues to have soreness with increased activity, although improving." (Ex. A13, p.31) On September 18, 2014, the therapist noted claimant reported, "[l]ittle pain with activity." (Ex. 14, p. 34) Ultimately, I find that Mr. Weatherman had a good recovery from his left rotator cuff surgery and most of his symptoms resolved by September 2014, consistent with the records detailing this recovery prepared by Dr. Vinyard.

Nevertheless, it is also obvious from this record that claimant sustained permanent disability as a result of the August 20, 2013 left shoulder injury. Mr. Weatherman sustained a prior right shoulder injury while working for Lennox. While the right shoulder was being treated, claimant also had physicians evaluate his left shoulder. As part of an independent medical evaluation performed January 25, 2012, Robert C. Jones, M.D., evaluated claimant's left shoulder and found that it had full range of motion and no loss of strength. (Ex. 6) That evaluation and the reported left shoulder findings in Dr. Jones' IME report are accepted as accurate and demonstrate a permanent change in claimant's left shoulder after the August 20, 2013 work injury.

The question to be decided is the extent of the permanent disability claimant sustained as a result of the August 20, 2013 left shoulder injury. Dr. Vinyard opined that Mr. Weatherman sustained only a one percent permanent impairment due to some restriction in his flexion of the left shoulder. Claimant sought an independent medical evaluation with Margaret Fehrle, M.D., who is an orthopaedic surgeon that previously treated claimant's right shoulder injury. (Ex. 5)

Dr. Fehrle evaluated claimant on March 17, 2016. She noted that claimant was frustrated because his shoulder was not close to being back to its pre-injury condition. (Ex. 5, p. 45) Dr. Fehrle documented weakness in claimant's left shoulder, continued pain in the left shoulder, and decreased range of motion in multiple planes within the left shoulder during her evaluation. (Ex. 5, p. 46) As a result of her examination findings, Dr. Fehrle recommended a repeat MRI of the left shoulder, noted that claimant may have a recurrent rotator cuff tear, and recommended claimant refrain from any overhead activities, that he lift only 20 pounds from floor to waist, and that he perform no repetitive pushing or pulling activities. (Ex. 5, p. 46)

Mr. Weatherman's examination and presentation to Dr. Fehrle in March 2016 was significantly different than his presentation to Dr. Vinyard or the physical therapist in September and October 2014. Dr. Fehrle was specifically asked about this change in condition during her deposition. Dr. Fehrle explained, "I do not know why he's doing so much worse now than he was doing then." (Ex. 5, Deposition Transcript page, 16) Dr. Fehrle opined that claimant's rotator cuff was susceptible to further injury after the surgical repair and that benign, everyday activities can cause further injury. (Ex. 5, Dep. Tr., p. 17) However, Dr. Fehrle was not able to causally connect her examination findings definitely to the August 20, 2013 work injury.

No other physician has causally connected the findings reported by Dr. Fehrle to the August 20, 2013 work injury or explained why there was a deterioration of claimant's condition between 2014, when released by Dr. Vinyard, and 2016, when evaluated by Dr. Fehrle. Perhaps it should also be mentioned that claimant's reported symptoms and demonstrated abilities during the 2016 evaluation by Dr. Fehrle are not consistent with claimant's actual abilities.

Dr. Fehrle testified that she could only identify 80 degrees of active abduction by claimant in his left shoulder during her evaluation. (Ex. 5, Dep. Tr., p. 8) However, defendants introduced surveillance video that demonstrated claimant clearly abducting his shoulder higher than 90 degrees at several points in the video. (Ex. 5, Dep. Tr., pp. 22, 28) Dr. Fehrle testified that the surveillance video depictions of claimant's shoulder abduction abilities contradict her examination findings. (Ex. 5, Dep. Tr., p. 22)

My review of the surveillance video clearly demonstrates claimant actively abducting his shoulder greater than 90 degrees at several points on the video. (Ex. C1) The surveillance video includes three video sessions on July 1, 2016, July 2, 2016, and July 8, 2016. On July 1, 2016 at 10:23 a.m., claimant is depicted reaching above his shoulder height with both shoulders and with a golf club in his hand. Again at 11:48 on that date, claimant reached above shoulder height with his left arm and shoulder. At 1:35 p.m., on July 1, 2016, claimant is depicted in the video raising his left arm above his head, resting his arm on a golf cart and leaves his arm in that raised position approximately 40 seconds without any obvious difficulties or discomfort. (Ex. C1)

On July 2, 2016 at 12:53 p.m., the surveillance video depicts Mr. Weatherman actively lift his left shoulder over shoulder height as he removed a golf club from the bag. At 12:55 p.m., on July 2, 2016, the surveillance video demonstrates claimant holding the pin on the green at an angle with his left shoulder abducted greater than 90 degrees. On July 8, 2016, Mr. Weatherman is depicted lifting and holding a shop vacuum away from his body with only his left arm at approximately 11:52 and 11:53 a.m. At 12:24 p.m., on that same date, Mr. Weatherman is seen with his left arm stretched forward to dust or clean his dash at an angle that is approximately 90 degrees, though not in specifically an abduction maneuver. (Ex. C1) The surveillance videos introduced at defendants' Exhibit C1 are contradictory to the physical examination findings by Dr. Fehrle.

Ultimately, I find that Mr. Weatherman had a reasonably good recovery after the surgery performed by Dr. Vinyard. I find that he had nearly full range of motion and good strength, as detailed by Dr. Vinyard. I find that claimant was capable of working without restrictions in his pre-injury job, as released by Dr. Vinyard. In fact, Mr. Weatherman returned to his pre-injury job and continued to perform that job after surgery until his voluntary retirement.

Claimant ultimately took a severance offer from Lennox that paid him for an early retirement because the plant was moving some jobs out of the country. Mr. Weatherman foresaw detrimental changes to the retirement plan coming if he stayed beyond the end of the union contract. Therefore, he did the prudent financial thing and took the buy-out offered by Lennox and the financial incentives therein. However, I find that Mr. Weatherman was physically capable of continuing to work in his pre-injury job, if he had chosen to do so and did not have other financial incentives to retire.

The parties and the physicians involved in this case disagree about the proper impairment rating that should be assigned to Mr. Weatherman's left shoulder injury. Claimant relies upon the opinions of Dr. Fehrle and contends that Dr. Vinyard did not properly identify and assign a six percent impairment of the whole person as a result of claimant's distal clavicle resection performed as part of his surgery. Dr. Vinyard opines that he does not believe the additional impairment is warranted.

Review of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 16-27 on page 506 indicates that a distal clavicle resection arthroplasty is assigned a 10 percent permanent impairment of the upper extremity. According to Table 16-3 on page 439, a 10 percent permanent impairment of the upper extremity converts to a six percent permanent impairment of the whole person. Although Dr. Vinyard does not believe this impairment should be awarded under these circumstances, I find that the AMA Guides instruct that the additional six percent impairment of the whole person would be attributable to claimant's distal clavicle excision. In this respect, I accept Dr. Fehrle's opinions.

However, I do not accept Dr. Fehrle's range of motion measurements because they are significantly reduced from those identified by Dr. Vinyard and are contradicted by the surveillance video. Therefore, I accept Dr. Vinyard's opinion that claimant has one percent permanent impairment as a result of restricted range of motion. Combined with the six percent for the distal clavicle excision, I find that claimant sustained a seven percent permanent impairment of the whole person as a result of his August 20, 2013 left shoulder work injury.

Both parties introduced vocational reports. Claimant's vocational expert opines that claimant has a 100 percent loss of access to all jobs for which he has transferable skills. Claimant's vocational experts relies upon the restrictions offered by Dr. Fehrle and opines that there are not any available jobs for claimant within a 30-mile radius of his home. Interestingly, it does not appear that the claimant's vocational expert was provided or considered the opinions of the treating orthopaedic surgeon, Dr. Vinyard.

Having found Dr. Vinyard's full duty release and range of motion measurements to be most convincing on this record, I find it damaging to the opinions of claimant's vocational expert that he did not have or did not mention Dr. Vinyard's opinions.

Defendants introduced a competing vocational expert, who identified potential positions claimant could perform within a 50-mile radius of his home. Interestingly, the defense vocational expert also utilized the restrictions offered by Dr. Fehrle and made no analysis of claimant's abilities or vocational options when Dr. Vinyard's opinions were considered and utilized. Given that I found Dr. Vinyard's opinions pertaining to claimant's physical abilities to be most convincing, I found neither vocational expert's opinions terribly enlightening or helpful in this case. I do not rely upon either experts' report or opinions.

Considering claimant's age, educational background, work history, lack of motivation to continue working at Lennox, the situs and severity of his injury, his permanent impairment rating as discussed above, his lack of formal medical restrictions per Dr. Vinyard, his ability to return to his pre-injury job for several months after his injury, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Weatherman proved he sustained a 10 percent loss of future earning capacity as a result of the August 20, 2013 left shoulder work injury.

Mr. Weatherman specifically alleged he should qualify for odd-lot status. In this respect, I find that Mr. Weatherman met his prima facie burden to shift the burden of production to defendants. Specifically, Mr. Weatherman produced a vocational report that he has lost 100 percent access to all jobs available to him within 30 miles of his residence. This report was sufficient to establish a prima facie case as an odd-lot employee.

However, defendants also carried their burden of production by introducing a vocational report, as well as establishing through Dr. Vinyard's release without restrictions and claimant actual return to work that claimant was not an odd-lot or permanently totally disabled. Defendants' production returned the burden of persuasion to claimant to establish his claim as an odd-lot employee. For the reasons outlined above and specifically given the lack of restrictions from Dr. Vinyard and claimant's actual return to work in his pre-injury job, I find that claimant failed to establish by a preponderance of the evidence that he is permanently and totally disabled or an odd-lot employee.

Mr. Weatherman asserts a claim for penalty benefits, urging that the defendants unreasonably delayed or denied him benefits. Claimant concedes that the defendants paid him 25 weeks of permanent partial disability benefits. He also concedes that Dr. Vinyard released him to return to work without restrictions and that he actually returned to work for Lennox after the date of injury.

However, Mr. Weatherman contends that Lennox unreasonably ignored the permanent impairment rating offered by Dr. Fehrle for the distal clavicle excision

performed by Dr. Vinyard. Claimant also contends that the defendants failed to re-examine their position and offer additional permanent disability benefits after Dr. Fehrle imposed permanent activity restrictions, offered additional permanent impairment, and recommended an additional MRI in March 2016. In essence, claimant contends that he sustained a significant industrial disability well in excess of the five percent industrial disability paid by defendants.

In reality, I found that claimant proved only a minimal loss of earning capacity. Although I ultimately found Dr. Fehrle's impairment rating related to the distal clavicle excision to be most appropriate, defendants did have one percent impairment rating from Dr. Vinyard and sought further clarification from Dr. Vinyard about the challenge to his permanent impairment rating, including the potential rating for the distal clavicle excision. Even Dr. Fehrle acknowledged that the distal clavicle excision impairment rating was debatable among physicians. I find that defendants had evidence that supported reasonable disputes about the extent of claimant's permanent impairment rating.

I also find that defendants had reasonable disputes pertaining to claimant's activity restrictions, ability to return to work without restrictions, and other factors that impact his future earning capacity. In this case, I found that claimant proved only a 10 percent loss of future earning capacity. This is not significantly more than voluntarily paid by defendants.

Moreover, I find that it was reasonable for defendants to rely upon the full duty work release from Dr. Vinyard and claimant's actual return to work as a basis to challenge any higher industrial disability claim. Similarly, I find that it was reasonable for defendants to rely upon claimant's voluntary resignation and acceptance of a monetary buy-out program as a basis to challenge his motivation to continue working and his actual loss of future earning capacity.

Given that I found flaws in Dr. Fehrle's medical opinions and flaws in the vocational experts introduced by claimant, I find that defendants had reasonable evidentiary bases to challenge those opinions as well. Ultimately, I find that defendants had reasonable bases to challenge claimant's entitlement to any industrial disability, or permanent partial disability benefits, above and beyond those voluntarily paid by defendants.

The parties also disputed claimant's gross average weekly wages prior to the injury date. (Hearing Report) Claimant asserts that his applicable average weekly wage was $908.23, while defendants contend that the applicable average weekly wage was $880.00.

The parties appear to agree that nine weeks immediately preceding the date of injury are representative, as all parties included nine of the same weeks. The real dispute between the parties is whether the weeks of August 12, 2013, July 8, 2013, June 3, 2013, and May 13, 2013 should be considered representative. Claimant

asserts each of these weeks is representative, while defendants contend these weeks are not representative and that additional weeks should be substituted for these weeks. (Ex. 12, p. 114; Ex E)

The week of August 12, 2013 includes 32 hours of regular hours worked, plus an additional 8 hours of vacation time. All parties concede that a similar week of July 22, 2013 should be included. During the week of July 22, 2013, claimant actually worked more hours and had the same amount of vacation time. Therefore, I find the week of August 12, 2013 is representative of claimant's customary earnings prior to the date of injury.

The week of July 8, 2013 includes pay for 40 hours of vacation. None of the other weeks considered include only vacation hours. I do not find the vacation hours to be representative of claimants' customary earnings. I find that the week of July 8, 2013 should not be included in the calculation of claimant's gross weekly earnings.

The weeks of June 3, 2013 includes 27 hours of regular hours as well as 16 hours of vacation pay. None of the other weeks including more than 8 hours of vacation pay are included in the calculations. I find that the week of June 3, 2013 is not consistent with or considered claimant's customary earnings for the period prior to August 20, 2013. I find that the week of June 3, 2013 should not be included in the calculation of claimant's gross weekly earnings.

The fourth contested week is the week of May 13, 2013. The week of May 13, 2013 includes 31.4 hours of regular hours, 5 overtime hours, and 8 hours of vacation pay. This week is very similar to the weeks of July 22, June 24, June 10, May 27, and May 36 as far as hours worked and vacation pay. I find that the earnings for the week of May 13, 2013 are representative of claimant's customary earnings prior to the date of injury and should be included in the calculation of the gross average weekly wages.

Having found that two weeks should be excluded, as noted above, I find that the weeks of April 29, 2013 is almost identical to other weeks that were included by the parties. I find that the earnings for the week of April 29, 2013 are representative of claimant's customary earnings before this work injury.

Similarly, I find the week of April 22, 2013 to be representative of claimant's customary earnings. This week contains 40 hours of regular work and 10 hours of overtime work. This is specifically found to be representative of claimant's customary earnings before the date of injury.

Claimant contends that he regularly took vacation and the parties essentially agree that some weeks that claimant took vacation are representative of his customary earnings. Defendants contend that the weeks claimant took vacation result in higher weekly earnings and exclude the vacation hours from their calculation of the weekly earnings. I find that it was customary for claimant to take vacation and supplement his income in this manner.

Claimant utilized vacation time in 9 of the first 15 weeks under consideration by the parties. In 3 of the other weeks, claimant used a floating holiday or received holiday pay. Therefore, in 12 of the first 15 weeks under consideration and immediately preceding the work injury, claimant used vacation pay, a floating holiday or received holiday pay. I find that the holiday and vacation pay were customary and are representative of claimant's earnings. In this sense, I find claimant's exhibit 12, page 114 accurate as to the proper calculations, though I substitute weeks as noted above to reach my final calculations.

Having found that two weeks should be excluded and two additional weeks substituted into the calculation of claimant's gross average weekly earnings and having found that vacation hours and earnings are representative and should be included in the calculation of claimant's gross average weekly earnings, I find that the following earnings are representative of claimant's customary earnings prior to the date of injury:

Week of	Gross Earnings
8/12/13	$769.59
8/5/13	$913.25
7/29/13	$974.56
7/22/13	$1,261.76
6/24/13	$874.75
6/17/13	$976.88
6/10/13	$858.28
5/27/13	$833.57
5/20/13	$926.33
5/13/13	$962.19
5/6/16	$1,078.22
4/29/13	$848.53
4/22/13	$1,069.46
TOTAL	$12,347.37

Dividing $12,347.37 by 13 weeks, I specifically find that claimant's gross average weekly wage prior to the work injury were $949.80. Claimant was married and entitled to three exemptions on the date of injury. (Hearing Report)

CONCLUSIONS OF LAW

The parties have stipulated that claimant sustained a work related injury, that the injury resulted in permanent disability, and that the injury should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). (Hearing Report)

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.

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).

Mr. Weatherman also asserts that he is an odd-lot employee. 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.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

In this case, claimant produced a vocational report, which opines that he has been rendered unable to effectively compete for a full-time job in the competitive labor market. Claimant has met his prima facie case and the burden of production shifts to defendants to identify suitable work opportunities for claimant.

Defendants came forward with a competing vocational expert opinion, which identifies potential jobs available to claimant. Dr. Vinyard also released claimant to return to work without restrictions and defendants established that claimant actually returned to work for several months without medical restrictions in his pre-injury job. Therefore, I conclude that defendants produced sufficient evidence to refute the prima facie case presented by claimant. When this occurs, the ultimate burden of persuasion remains with claimant to establish that the only services he can perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

In this case, I found that claimant did not carry his burden of persuasion to establish an odd-lot or a permanent total disability claim. Rather, I found that claimant proved only a minimal loss of future earning capacity as a result of the August 20, 2013 work injury. Specifically, having considered all of the relevant factors of industrial disability, I found that claimant proved a 10 percent loss of future earning capacity as a result of the work injury on August 20, 2013.

A 10 percent loss of future earning capacity entitles claimant to a 10 percent industrial disability award. Iowa Code section 85.35(2)(u). Since this involves an unscheduled injury, claimant's benefit entitlement is calculated using a 500 week schedule. Iowa Code section 85.35(2)(u). Claimant has established entitlement to 50 weeks of permanent partial disability for his 10 percent industrial disability resulting from the August 20, 2013 work injury.

The parties dispute the proper weekly rate at which benefits should be awarded. The only dispute in this regard is the claimant's average gross weekly earnings prior to the date of injury and the corresponding weekly worker's compensation rate. (Hearing Report)

The weekly benefit amount payable to an injured employee is based upon 80 percent of the employee's weekly spendable earnings. Iowa Code section 85.37. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing 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 from the calculation, however. Iowa Code section 85.36(6); Jacobson Transp. Co. v. Harris. 778 N.W.2d 192 (Iowa 2010); Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003). Computation of the applicable wage rate is calculated "not mechanically nor technically, but flexibly, with a view always to achieving the ultimate objective of reflecting fairly the claimant's probably future earning loss." Hanigan v. Hedstrom Concrete Products, Inc., 524 N.W.2d 158, 160 (Iowa 1994).

However, "any week of 40 hours or more" is a "representative week, regardless of how little or how much overtime is worked during that week, and regardless of how many other weeks are worked with overtime." Ratliff v. Quaker Oats, File No. 5046704 (Appeal January 2017). Similarly, weeks that include vacation, holiday pay or wellness pay are excluded. Id.

In this case, the parties disputed the inclusion of four weeks of benefits. I found that two of the disputed weeks were representative of claimant's customary earnings and that two were not representative. I substituted two weeks that represented customary earnings in compliance with Iowa Code section 85.36(6). I found that Mr. Weatherman's average gross weekly earnings prior to the August 20, 2013 injury date were $949.80.

The parties stipulated that claimant was married and entitled to three exemptions at the time of the August 20, 2013 work injury. (Hearing Report) The applicable weekly rate for a married person with three exemptions and an average weekly wage of $949.80 is $613.07. Iowa Workers' Compensation Manual (effective dates July 1, 2013 through June 30, 2014). Therefore, defendant shall pay all permanent partial disability benefits at the rate of $613.07 per week. Iowa Code section 85.34(3)(a).

Claimant also seeks an award of penalty benefits, alleging defendants unreasonably denied industrial disability benefits in excess of the five percent, or 25 weeks of benefits, voluntarily paid to claimant.

Penalty benefits are appropriate if an employer denies, delays, or terminates workers' compensation benefits "without reasonable or probable cause or excuse." Iowa Code § 86.13(4)(a). Under that provision, the commissioner has leeway to award up to 50 percent of the amount of denied or delayed benefits. Id. The commissioner shall award penalty benefits if (1) "[t]he employee has demonstrated a denial, delay in payment, or termination of benefits" and (2) "[t]he employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Id. § 86.13(4)(b); see also City of Madrid v. Blasnitz, 742 N.W.2d 77, 81 (Iowa 2007) (holding after claimant shows delay, burden shifts to employer to prove a reasonable cause or excuse).

The employer's excuse must satisfy three criteria: (1) it must be "preceded by a reasonable investigation and evaluation by the employer . . . into whether benefits were owed to the employee"; (2) the results of that investigation and evaluation must form the actual basis for the denial, delay, or termination of benefits; and (3) the employer must contemporaneously convey the basis for the denial, delay, or termination to the employee. Iowa Code § 86.13(4)(c). The employer's delay, denial, or termination is subject to the "fairly debatable" standard, that is, if reasonable minds may differ on the employee's entitlement to benefits, the employer's delay or denial will be deemed reasonable and penalty benefits should not be awarded. Blasnitz, 742 N.W.2d at 84.

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.

In this case, I found that the defendants' denial of additional industrial disability benefits was reasonable under the facts as presented. Ultimately, I found that claimant proved a slightly greater industrial disability than was voluntarily paid by defendants. However, defendants had reasonable bases, supported by specific evidence in this record, to challenge additional entitlement.

For instance, defendants had a one percent permanent impairment rating from Dr. Vinyard, as well as a full duty work release from Dr. Vinyard to support their contention. Defendants were able to establish that claimant actually returned to his pre-injury job and worked in that position without medical restrictions for several months before he voluntarily retired from Lennox. Arguably, claimant could have continued to work at Lennox with no actual loss of future earnings.

Although claimant presented competing evidence, including presentation of a prima facie case as an odd-lot employee, defendants successfully met their burden of production to refute that claim. Claimant failed to prove entitlement to any significant industrial disability benefits. Having found that defendants' investigation provided reasonable bases upon which they actually challenged claimant's entitlement to industrial disability benefits above their voluntary payment, I conclude that no penalty benefits should be awarded in this case. Iowa Code section 86.13.

Mr. Weatherman also seeks an order for alternate medical care pursuant to Iowa Code section 85.27(4). Specifically, claimant seeks an order compelling defendants to authorize and pay for a repeat MRI of his left shoulder.

Defendants are obligated to provide reasonable and necessary medical care that is causally related to the work injury. Iowa Code section 85.27. However, in this instance, I did not find that the current symptoms and limitations identified by Dr. Fehrle were causally related to the August 20, 2013 work injury. Dr. Fehrle recommended a left shoulder repeat MRI to determine if claimant has a new tear in his left rotator cuff.

No medical opinion concludes that a re-tear of the rotator cuff is causally related to the work injury on August 20, 2013. Moreover, I found the medical opinions of Dr. Vinyard to be convincing in this case. Ultimately, claimant failed to prove that his current condition, symptoms, and need for a new MRI of the left shoulder are causally related to the August 20, 2013 work injury. Therefore, claimant has not established entitlement to the requested alternate medical care. Iowa Code section 85.27.

Claimant also seeks an award for reimbursement of his independent medical evaluation charges. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

"Iowa Code section 85.39 does not expose the employer to liability for reimbursement of the cost of a medical evaluation unless the employer has obtained a rating in the same proceeding with which the claimant disagrees." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 394 (Iowa 2010). The employer "is not obligated to pay for an evaluation obtained by an employee outside the statutory process." Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

In this case, Dr. Vinyard was the authorized surgeon offered by defendants. Dr. Vinyard declared maximum medical improvement and offered a permanent impairment rating on October 23, 2014. (Ex. 3, p. 29) Claimant was dissatisfied with that impairment rating and sought an independent medical evaluation with Dr. Fehrle on March 17, 2016. Claimant clearly operated within the statutory framework of Iowa Code section 85.39 and obtained an evaluation of his permanent impairment only after defendants had initially secured an impairment rating he believed was too low. Therefore, I conclude that claimant has established entitlement to reimbursement of Dr. Fehrle's independent medical evaluation fee totaling $1,400.00.

Finally, claimant seeks an assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has prevailed on his request for additional permanent disability benefits, I conclude that it is appropriate to assess some of claimant's costs against defendants.

Claimant's filing fee of $100.00 shall be assessed pursuant to 876 IAC 4.33(7). Claimant seeks assessment for the cost of several medical reports, including a report from Dr. Vinyard, two reports from Dr. Fehrle and a vocational report from his vocational expert. Claimant also seeks assessment of the deposition fee and transcription fee for both vocational experts. Claimant also seeks additional vocational expert fees totaling $1,000.00, as well as IME fees for Dr. Fehrle and the FCE fee charged by her chosen physical therapist. Agency rule 876 IAC 4.33(6) permits the assessment of the reasonable cost of obtaining "no more than two doctors' or practitioners' reports."

Claimant clearly cannot obtain assessment of all of the requested costs pursuant to Rule 4.33(6). I did not rely upon either vocational expert's opinions. Similarly, I did not rely upon the FCE as a basis for my award. I did utilize the medical reports pertaining to the assessment of an impairment rating for the distal clavicle excision. Therefore, I conclude it would be most appropriate to assess the costs for the reports that I relied upon. Specifically, I assess $375.00 for Dr. Vinyard's report, as well as $375.00 for the cost of one of Dr. Fehle's reports. I do not find any of the other claimed costs to be reasonable or appropriate to be assessed.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing on October 6, 2014 at the weekly rate of six hundred thirteen and 07/100 dollars ($613.07).

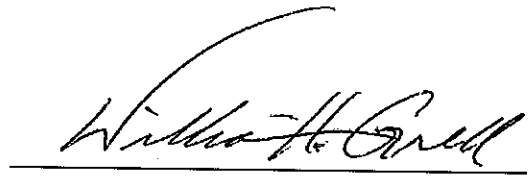
Defendants shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant's independent medical evaluation fee totaling one thousand four hundred and 00/100 dollars ($1,400.00) pursuant to Iowa Code section 85.39.

Defendants shall reimburse claimant's costs totaling eight hundred fifty and 00/100 dollars ($850.00).

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.

Signed and filed this 6th day of April, 2017.



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