BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAROLD R. HOFER,	:	
	:	File Nos. 5026597
Claimant,	:	5026598
	:	5026599
vs.	:	5026600
	:	
SNAP-ON TOOLS MANUFACTURING COMPANY,	:	A R B I T R A T I O N
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	Head Note No.: 1803

STATEMENT OF THE CASE

Darold R. Hofer, the claimant, seeks workers' compensation benefits from defendant, Snap-On Tools Manufacturing Company, a self-insured employer, as a result of stipulated work injuries on November 15, 2006; October 19, 2007; November 21, 2007 and February 28, 2008. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on May 20, 2009, but the matter was not fully submitted until the receipt of the parties' briefs and argument a week later. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits consist of two volumes of materials marked I & II. Defendant's exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit I, pages 2 through 4 will be cited as, "Exhibit I-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

File Nos. 5026597 & 5026598 (Claimant asserts both traumatic and cumulative trauma injuries to the left shoulder on November 15, 2006 & November 21, 2007):

1. On the dates asserted, claimant received traumatic injuries arising out of and in the course of employment with defendant employer. (Defendant disputes the left shoulder injury was a cumulative or gradual injury process.)

2. The injury was a cause of some degree of temporary disability during treatment.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. At the time of the November 15, 2006 injury, claimant's gross rate of weekly compensation was $774.35. Also, at that time, he was married and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $498.41 according to the workers' compensation commissioner's published rate booklet for this injury. The only rate stipulation for the November 21, 2007 injury was the same martial and exemption status.

File No. 5026599 (Claimant is asserting a biceps tear injury to the arm on October 19, 2007):

1. On the date asserted, claimant received an injury arising out of and in the course of employment with defendant employer.

2. If the injury is a cause of permanent disability, the disability is a scheduled member disability to the arm.

3. At the time of this injury, claimant's gross rate of weekly compensation was $756.31. Also, at that time, he was married and entitled to two exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $488.87 according to the workers' compensation commissioner's published rate booklet for this injury.

4. No weekly benefits were paid by defendant employer for this injury.

File No. 5026600 (Claimant asserts a low back injury on February 28, 2008):

1. On the date asserted, claimant received an injury arising out of and in the course of employment with defendant employer.

2. If the injury is a cause of permanent disability, the disability is an industrial disability to the body as a whole.

3. At the time of this injury, claimant's gross rate of weekly compensation was $760.06. Also, at that time, he was married and entitled to two exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $491.74 according to the workers' compensation commissioner's published rate booklet for this injury.

4. No weekly benefits were paid by defendant employer for this injury.

5. With reference to the claimed cost of an independent examination by Dr. Kuhnlein concerning all of these injuries, defendant agreed that the doctor would testify his fee of $4,100.00 was reasonable and defendant was not offering contrary evidence.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. Whether claimant suffered a cumulative trauma injury to the left shoulder which arose out of and in the course of his employment.

II. The extent of claimant's entitlement to temporary total disability or healing period benefits, temporary partial disability benefits and permanent disability benefits for each injury.

III. The extent of claimant's entitlement to reimbursement under Iowa Code section 85.39 for the evaluation by Dr. Kuhnlein.

IV. The gross weekly earnings at the time of the alleged November 21, 2007 injury, if necessary.

V. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Darold, and to the defendant employer as Snap-On.

From my observation of their demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Darold and his wife credible.

Darold, age 55, has worked for Snap-On or its predecessor company, at the same plant location in Algona, Iowa for over 34 years and continues to do so at the present time. This plant manufactures various types of tool storage boxes. Darold did not discuss any immediate plans for retirement at hearing. This plant is unionized where seniority operates to control job assignments and layoffs pursuant to union negotiated contracts. Darold currently has one of the highest seniority rankings in the plant. Despite his many work injuries at Snap-On, he is working without any formal restrictions imposed by treating physicians. However, Darold testified without contradiction that he continues to have pain from his injuries which adversely impacts his endurance at work. Darold customarily worked and continues to voluntary and mandatory work overtime.

Prior to Snap-On, Darold worked one and one-half years in construction erecting grain bins. Darold said this work was heavier than his work at Snap-On. He was hired by Snap-On as a spot welder on second shift. He states that this work was rather strenuous. In November 1973, he moved to days as a welder. In May, 1974, he bid to punch press where he handled parts weighing from only a few ounces to several pounds. Between March 1991 and August 2000, he was a lead person in punch press. As a lead, he was a management person who performed less manual labor work in

assisting in set ups, training and helping his supervisor. He returned to punch press line work in 2000 as a result of a re-organization. He has been a cell operator since that time in which he rotates to various machine jobs. For many years, while on his summer vacations, Darold worked for a seed corn company in detassling operations. This ended a few years ago as he now uses his vacation piecemeal to obtain some time off from work during the year.

Darold testified without contradiction that his work over the years at Snap-On involved a considerable amount of repetitive use of his hands, arms and back due to constant pulling, pushing and shoving of parts, dies and materials. At times, he said this was heavy work. Over the last few years, the work at Snap-On became heavier because Snap-On increased the size of the tool boxes they manufactured, thereby increasing the weight of parts and materials.

Darold testified that beginning in 1976, he suffered several shoulder and back work injuries which were not serious, but caused some pain. Occasionally, he would receive treatment from the company chiropractor. Snap-On plant nursing records show a long series of low back complaints from reported injuries at home and work beginning in 1976 and continuing periodically up until the work injuries in this case. Mostly, these occurred at work and he frequently received periodic care from the company chiropractor. In October 2004, he received brief treatment by a medical doctor for back pain. However, none of these prior injuries resulted in any permanent impairment or permanent activity restrictions. (Exhibit I-4:31)

Similarly, Darold reported numerous instances of left shoulder pain to plant nurses prior to the work injuries in this case after work incidents at Snap-On beginning in December 1987 frequently in conjunction with his back pain incidents. Again, he was occasionally treated for these complaints by company chiropractors. Again, the medical records fail to show that any of these prior injuries resulted in any permanent impairment or permanent activity restrictions. (Exs. I-14:31 & I-43:48).

In 1989, Darold sustained a work injury to his right index finger that resulted in a 23 percent permanent impairment to that finger according to the treating physician. (Ex. I-17). On March 21, 2006, Darold sustained a work injury to his left index finger which resulted in an amputation of the fingertip. There were various impairment ratings in the record, but claimant, in June 2007, settled the claim for this injury with Snap-On based upon a 6.4 percent permanent disability to the left upper extremity. (Ex. I-32:43, 36, 49 & Ex. K-55) He returned to regular duty after treatment for this injury in May 2006.

Left Shoulder Claim (File Nos. 5026597 & 5026598):

Darold testified that he reported to his supervisor the onset of left shoulder and low back pain on November 15, 2006 after moving a very heavy die into a machine. As he and his supervisor did not think he required medical attention, no formal report of injury was completed at that time. However, Darold states that his pain continued after his injury unlike before and later asked for care from Snap-On, but this request was

ignored and he was told to just put ice on it. A formal report of injury was not completed by Snap-On until July 2007. (Ex. I-59) Darold was receiving treatment for his ring finger injury during this time as there is no mention of left shoulder pain in those treatment records. Darold explained that Snap-On told him that the finger doctor was not to deal with any other injuries so he did not mention the left shoulder problems. In March 2007, Darold again complained to the safety manager about his shoulder and asked for assistance. At that time, a formal report of injury on March 21, 2007 was completed by this manger and Darold stated that he was going to obtain treatment from a plant physical therapist, but that he wanted a doctor if he did not improve. He added in this report that he had reported shoulder pain to his supervisor twice in the last six months. (Ex. I-44). Darold testified that this March 2007 complaint was only ongoing problems from the original injury on November 15, 2006. A note from the plant physical therapist in March 2007 indicates these ongoing problems and difficulty sleeping due to pain. (Ex. I-45). Darold also informed his family doctor of these left shoulder problems at this time. (Ex. I-45).

Darold testified that the therapist treatments in March and early July 2007 did not help. His left shoulder problems continued to worsen and he continued to ask for medical treatment. These requests continued to be ignored by Snap-On management. In July 2007, the safety manager finally filled out the injury report for the original injury date of November 15, 2007. (Ex. I-59) Darold testified that he did not seek treatment on his own during time, because he felt that Snap-On was responsible for this injury and that they should have to pay for this treatment. He was sent by Snap-On to David Berg, D.O., an occupational physician, on May 1, 2007, but only for an evaluation of the finger injury.

Finally, Snap-On referred Darold back to Dr. Berg for evaluation on August 24, 2997 of his left shoulder complaints. Such a referral is a bit odd as Dr. Berg is located in West Des Moines and more than 150 miles from either Darold's residence or the Algona plant. Upon inquiry by myself at hearing, the Snap-On human resources manager could not provide me with any reason for this long distance referral or any reason why Dr. Berg in particular was chosen over several physicians that were located in or near the Algona area. At any rate, Darold attended the evaluation.

After his examination of Darold and a review of whatever records he possessed, Dr. Berg finally issued a report on October 6, 2007. The reason for such a delay in issuing the report was not contained in this record. According to this report, Darold presented a history of a small number of left shoulder pain complaints after work activity in 1987, 1997 and May 2007. Dr. Berg then concluded that Darold's shoulder pain was not consistent with his job duties. In making this assessment, Dr. Berg utilized two DVDs of work activity by other employees at Snap-On.

Darold testified that he was not satisfied with Dr. Berg's evaluation. Apart from his conclusions, he felt that that doctor did not sufficiently examine or talk to him and had the odor of alcohol on his breath. He also was further dissatisfied after his attorney provided him with information as to this doctor's past disciplinary proceedings with the state board of medical examiners for multiple instances of substance abuse.

(Ex. I-225:305). He was initially placed on probation and later fined for violating probation. He then was suspended for a number of years.

Based upon the views of Dr. Berg, Snap-On continued to deny responsibility for the left shoulder problems. Snap-On again referred Darold back to Dr. Berg following his biceps injury in October 2007 which will be discussed further below. However, Darold this time refused to see Dr. Berg due to his previous dissatisfaction with this doctor. Darold continued treating with a chiropractor and the plant therapist for his problems.

On November 21, 2007, Darold reported another work injury to his back and a re-injury to his left shoulder and completed an injury report asking for medical treatment. (I-76:77) Snap-On, in response, continued to deny responsibility for the left shoulder complaints, but authorized in December 2007 another return to Dr. Berg. (Ex. I-78:79) Darold refused and then, on his own, sought treatment for his left shoulder from his family health provider. This provider, Sue Malloy, A.R.N.P, evaluated Darold on January 25, 2008. Malloy's assessment was overuse injury and biceps tendon injury. The doctor suspected these conditions were work related given his work activity. (Ex. I-79:80) Malloy at this time restricted Darold to a maximum 45-hour work week and referred Darold to Emil Li, M.D., an orthopedist who surgically treated the prior left index finger injury. Dr. Li examined Darold on February 6, 2008 and found an old, chronic distal biceps tendon rupture due to a work injury at Snap-On in October 2007 and possible rotator cuff tendonitis and tear in the left shoulder from a work injury in November 2006. Darold told Dr. Li, that he did not want treatment from him, only documentation that his problems were work related so that Snap-On would authorize orthopedic care. (Ex. I-81) However, Snap-On only continued to refer Darold back to Dr. Berg. Finally, on March 20, 2008, Darold submitted to examination by Dr. Berg. Dr. Berg ordered an MRI at that time. Dr. Berg has never submitted any office notes or report of this examination of Darold and did not schedule a follow-up with Darold. Snap-On's human resources manager testified at hearing that Snap-On has not received any further information from Dr. Berg. The nurse case manger met with Dr. Berg, who told her of his diagnosis of a biceps tendon injury and that the MRI may indicate the need for left shoulder surgery. The doctor also imposed activity restrictions against shoulder activity. (Ex. I-88:89)

Although the March 2008 MRI indicated a left rotator cuff tear and shoulder impingement (Ex. I-90), there was no authorization for treatment by Snap-On until May 15, 2008 when Darold was seen by John Galey, M.D., another orthopedic surgeon. Dr. Galey's diagnosis was rotator cuff tendonitis and AC joint arthritis. He then provided a cortisone injection into the shoulder. (Ex. I-91:92) Initially, the doctor removed the restrictions imposed by Malloy and Dr. Berg, but later on May 28, 2008, directed that Darold's work be limited to 40 hours. (Ex. I-95) The doctor told Darold to wait and see if he improves over the summer and if not, surgery would be considered in the fall. (Ex. I-100) Darold then did not improve, and Dr. Galey performed arthroscopic surgery on September 19, 2008 to address his diagnoses of rotator cuff tendonitis, left shoulder, acromioclavicular joint arthritis, left shoulder and a small rotator cuff tear, left shoulder.

(Ex. I-123) Following surgery, Dr. Galey returned Darold to full duty on December 18, 2008. The doctor provided a permanent impairment rating of nine percent to the upper extremity for these problems and an additional amount for the biceps injury, which will be discussed later. (Ex. I-135) This nine percent rating coverts to a five percent body as whole rating pursuant to the AMA Guides.

Two IME ratings were obtained by the parties for the left shoulder problems. Defendant's physician, Donna Bahls, M.D., opined that the left shoulder impairment is 14 percent to the left upper extremity. (Ex. I-153) This converts to a nine percent body as whole rating. John Kuhnlein, D.O., retained by claimant, opined that the left shoulder problems constitute a five percent body as a whole permanent impairment. (Ex. I-213) Based on the views of the treating doctor and Dr. Kuhnlein, I find that the left shoulder problems constitute a five percent permanent partial impairment or loss of use to the left arm. The only physician to recommend activity restrictions is Dr. Kuhnlein. As he is definitely in the minority, I am unable to find that the left shoulder injury is a cause of permanent activity restrictions. However, based upon claimant's testimony at hearing, this injury is a cause of loss of endurance and the ability to work as much overtime as is available and requires claimant to use more vacation to reduce his work load than before this injury.

The only physician to opine that the left shoulder problems are not work related is Dr. Berg. His views are not as convincing as those of the other doctors. Dr Berg simply did not have all the information necessary to render a sound opinion in October 2007. Therefore, based on the views of all of the doctors other than Dr. Berg, claimant suffered both traumatic injuries on November 15, 2006 and November 21, 2007 and a cumulative trauma injury process from his repetitive work over the years at Snap-On that manifested on November 15, 2006. Despite prior complaints of left shoulder problems, the pain which began at that time unlike before, did not improve and ultimately resulted in a request for treatment which was delayed by Snap-On for several months. Subsequent reported injuries appear to be only re-injuries or aggravations of the original injury on November 15, 2006. Most of the doctors refer to the event of November 15, 2006 as the original injury.

Therefore, the temporary and permanent disability from this injury was the result of the work injury of November 15, 2006. Darold was off work totally for treatment of this injury from September 18 through October 5, 2008. As a result of this injury, Darold suffered three periods of temporary partial disability while he was restricted in his work activity, namely from January 25, 2008 through May 15, 2008 (ARNP Malloy & Dr. Berg); from May 29, 2008 through September 17, 2008 (Dr. Galey); and from October 5, 2008 through December 18, 2008 (Dr Galey). Darold's payroll records in Exhibit M set forth his earnings during the three temporary partial disability periods and the benefits calculations are set forth in the Conclusions of Law section of this decision.

Darold disputes in the hearing report that he was paid 35 weeks of benefits for this injury. This record does not indicate why this is in dispute. Exhibit N and Exhibit II-67:79 contain evidence of checks written to claimant for these benefits and claimant did not deny that he received these checks. Consequently, I find that claimant

was paid 35 weeks of benefits at the rate of $490.01 beginning on March 25, 2009. According to defendant, these checks were continuing at the time of the hearing.

Turning to the industrial disability caused by this injury, Darold's medical condition before the manifestation of this work injury was fairly good except for his recurrent back problems, and he had only a minor functional impairment from a finger injury. He now has permanent impairment of his whole person from this injury. However, he has no formal work restrictions and can continue full duty at Snap-On without loss of earnings, which is the type of employment for which he is best suited given his age, education and work experience. However, this injury has adversely impacted his endurance and he suffers and will continue to suffer a mild loss of earnings from not working some voluntary overtime due to lingering left shoulder pain.

From examination of all of the factors of industrial disability, it is found that the work injury of November 15, 2006 is a cause of a 15 percent loss of earning capacity.

Biceps Tendon Rupture Claim (File No. 5026599):

The stipulated work injury of October 19, 2007, due to pulling on a template at Snap-On was ultimately diagnosed as a biceps tendon rupture by ARNP Malloy, Dr. Galey and Dr. Berg. No IME doctor disagrees with this diagnosis. All of these physicians agree that treatment to repair the tendon was not possible by the time it was diagnosed and there is a limited time period after such an injury where repair is possible. Darold certainly refused to see Dr. Berg after the injury and arguably is to blame for the delayed diagnosis. However, I believe that the initial referral to Dr. Berg was questionable for reasons stated above and as suggested by Dr. Kuhnlein in his last report. However, the subsequent insistence that Darold return to Dr. Berg after he reported alcohol on the doctor's breath was clearly unreasonable given this doctor's history of substance abuse. Consequently, any delay in treatment is primarily the fault of Snap-On, not Darold.

Darold is only seeking permanent disability for this injury. Dr. Galey opined that this constituted a four percent permanent partial impairment to the upper extremity. (Ex. I-135) Dr. Kuhnlein opined that this was a one percent impairment to the upper extremity. (Ex. I-213) Dr. Bahls opined that there is no ratable impairment from this injury. (Ex. I-154) Darold did not testify specifically concerning his loss of use to his arm from this injury. Based on the views of Dr. Galey, who is more familiar clinically with Darold, I find that the work injury of October 19, 2007 is a cause of a four percent loss of use to the left arm. This is in addition to the prior impairment caused by the prior ring finger injury.

Low Back Claim (File No. 5026600):

The stipulated work injury of February 28, 2008 involves the low back. Darold reported the onset of low back pain after twisting to pick up cardboard. (Ex. I-82:83) Initial care was provided again by a chiropractor who placed Darold on modified duty from February 29, 2008 through March 3, 2008, after which he returned Darold to the

same restricted duty that he was under due to the left shoulder injury. Snap-On finally authorized medical care by Mary Shook, M.D. on July 23, 2008. At that time, Dr. Shook diagnosed a lumbosacral strain with radiculopathy and imposed work activity restrictions. (Ex. I-103) The doctor treated this injury until March 4, 2009, at which time she returned Darold to regular duty. The doctor then opined that that Darold suffered a one percent permanent partial impairment to the whole person from this injury. (Ex. I-143)

While there is no specific opinion on the work relatedness of the back injury contained in Dr. Shook's records, two IME doctors have opined regarding this injury. Dr. Bahls states that given his extensive history of back problems, those occurring at work were temporary aggravations of his underlying degenerative back problem. The doctor opines that this injury is not a cause of permanent impairment. Dr. Kuhnlein opines that this is work related and constitutes a three percent body as whole impairment. Given the lack of causation views from Dr. Shook and the views of Dr. Bahls and an extensive history of back problems, I am unable to find that this specific traumatic injury constitutes anything other than a temporary aggravation work injury. Claimant has failed to show that this injury is a cause of any permanent disability.

For this injury, claimant seeks temporary disability benefits for an absence from work authorized by the chiropractor on July 23, 2008 and for temporary partial disability during restrictions by that chiropractor from February 29, 2008 through March 3, 2008.

CONCLUSIONS OF LAW

I. When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W. 2d 368 (Iowa 1985).

In the case sub judice, I found that claimant carried the burden of proof and demonstrated by the greater weight of the evidence that he suffered a gradual injury to his left shoulder with a manifestation date of November 15, 2006.

II. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

On the other hand, 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).

Left Shoulder Claim (File Nos. 5026597 & 5026598):

The parties agreed in this case that the work injury is a cause of permanent impairment to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

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

In the case sub judice, I found that claimant suffered a mild 15 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 75 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

Claimant's entitlement to permanent partial disability also entitles him to weekly benefits for healing period under Iowa Code section 85.34 for his absence from work during a recovery period until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he/she was performing at the time of injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first. In this case, I found that claimant was off work for this injury totally from September 18, 2008 through October 5, 2008. Healing period benefits will be awarded accordingly.

Claimant is also entitled to temporary partial disability benefits for any reduced earnings during when the claimant partially returns to work pursuant to Iowa Code subsections 85.33(3) & (4). This consists of 66 and 2/3 percent of the difference between claimant's actual earnings and his gross weekly earnings computed for the

purposes of computing the weekly rate pursuant to Iowa Code section 85.36. In this case, claimant was seeking such benefits for three periods. Claimant's weekly earnings are set forth in Exhibit M. The calculations are contained in the following Excel chart:

Date	Earnings	Gross Wkly Rate	TPD Benefit*
(From 1/25/08-5/15/08)			
1/25/2008	$836.95	$774.03	$0.00
2/2/2008	$704.80	$774.03	$46.16
2/15/2008	$841.07	$774.03	$0.00
2/22/2008	$836.95	$774.03	$0.00
2/29/2008	$704.80	$774.03	$46.16
3/14/2008	$704.80	$774.03	$46.16
3/21/2008	$704.80	$774.03	$46.16
3/28/2008	$563.84	$774.03	$140.13
4/4/2008	$846.32	$774.03	$0.00
4/11/2008	$836.95	$774.03	$0.00
4/18/2008	$705.36	$774.03	$45.78
4/25/2008	$707.04	$774.03	$44.66
5/2/2008	$724.44	$774.03	$33.06
5/9/2008	$724.44	$774.03	$33.06
5/16/2008	$862.13	$774.03	$0.00
(From 5/29/08-9/17/08)			
5/30/2008	$722.88	$774.03	$34.10
6/6/2008	$698.78	$774.03	$50.17
6/13/2008	$751.67	$774.03	$14.91
6/20/2008	$724.44	$774.03	$33.06
6/27/2008	$724.44	$774.03	$33.06
7/3/2008	$722.88	$774.03	$34.10
7/18/2008	$724.44	$774.03	$33.06
7/25/2008	$724.44	$774.03	$33.06
8/1/2008	$579.24	$774.03	$129.87
8/8/2008	$663.82	$774.03	$73.48
8/15/2008	$721.90	$774.03	$34.76
8/22/2008	$786.41	$774.03	$0.00
8/29/2008	$724.44	$774.03	$33.06
9/5/2008	$707.85	$774.03	$44.12
9/12/2008	$726.00	$774.03	$32.02
(From 10/06/08-12/18/08)			
10/17/2008	$722.88	$774.03	$34.10
10/24/2008	$726.01	$774.03	$32.01
10/31/2008	$719.76	$774.03	$36.18

11/1/2008	$726.01	$774.03	$32.01
11/14/2008	$724.44	$774.03	$33.06
11/21/2008	$651.04	$774.03	$82.00
11/28/2008	$732.81	$774.03	$27.48
12/5/2008	$145.20	$774.03	$419.24
12/12/2008	$688.73	$774.03	$56.87
Total			$1,847.12

*.6667 of difference between earnings and gross rate

The due date for each temporary partial disability benefit is the same as the date of the earnings received on that date from the employer.

Biceps Tendon Rupture Claim (File No. 5016599):

The parties agreed that this injury is a scheduled member disability. I found that claimant suffered a four percent permanent loss of use of his arm. Based on such a finding, claimant is entitled to 10 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m), which is 4 percent of 250 weeks, the maximum allowable weeks of disability for an injury to the arm in that subsection.

Claimant was not seeking any temporary disability benefits for this injury.

Low Back Claim (File No. 5016600):

I found in this case that claimant suffered only a temporary aggravation injury to his back from this specific trauma injury. Claimant failed to show entitlement to any permanent disability benefits.

Claimant was also seeking temporary total disability for one day off work and four days of temporary partial disability. However, according to Iowa Code section 85.32, weekly compensation benefits do not begin until after three full days of disability. As claimant was only off one day, no further compensation is owed.

III. Claimant is entitled to an independent evaluation of disability after an evaluation by the employer's physician pursuant to Iowa Code section 85.39. Claimant is seeking reimbursement for the fees and mileage incurred for an evaluation of all three injuries in this case by Dr. Kuhnlein. Defendant stipulated that Dr. Kuhnlein would testify that his $4,100.00 fee is reasonable and defendant was not offering contrary evidence. In this case, at least one employer-retained physician provided evaluations of disability for each of the claimed injuries prior to the evaluation by Dr. Kuhnlein. Consequently, claimant is entitled to this reimbursement.

IV. This issue is moot as the traumatic injury of November 21, 2007 was not found to be a cause of the disability awarded in this case and this date was not found to be the manifestation date for the cumulative injury to the left shoulder.

V. Claimant seeks additional weekly benefits under Iowa Code section 86.13, unnumbered last paragraph. That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

See also, City of Madrid v. Blasnitz, 742 N.W.2d 77 (2007).

In this case, defendant did not pay any weekly benefits to claimant until late March 2009. Claimant was entitled to weekly benefits long before that time for the left shoulder and biceps injuries in this case. Defendant solely relies on the causation views of Dr. Berg to justify this delay. As I indicated earlier in this decision, I found questionable that initial referral to Dr. Berg. However, Dr. Berg is a licensed physician and his views in October 2007, although soundly rejected as not credible, rendered the issue of the work-relatedness of the shoulder problems fairly debatable. However, also as previously indicated, I found the continued insistence that clamant return to Dr. Berg after claimant reported that he smelled alcohol on his breath at the last visit given his doctors' history of professional misconduct and the doctor's failure to submit any sort of official report of his findings and conclusions after the March 2008 evaluation rendered

continued reliance upon his views unreasonable and no longer fairly debatable. Therefore, a 50 percent penalty will be awarded in both the left shoulder and biceps claim.

ORDER

File No. 5026597:

1. Defendant shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at a rate of four hundred ninety-eight and 41/100 dollars ($498.41) per week from October 6, 2008.

2. Defendants shall pay to claimant healing period benefits from September 18, 2008 through October 5, 2008, at the rate of four hundred ninety-eight and 41/100 dollars ($498.41) per week.

3. Defendant shall pay to claimant the total sum of one thousand eight hundred forty-seven and 12/100 dollars ($1,847.12) in temporary partial disability benefits. Interest on each individual benefit is calculated from the due date for each benefit or the same day as the reduced earnings were paid pursuant to the chart in this decision.

4. Defendant shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for weekly benefits previously paid.

5. Defendant shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

6. As a penalty, defendant shall pay to claimant an additional fifty (50) percent of the permanent disability (those accrued prior to March 25, 2009), healing period and temporary partial disability benefits awarded herein.

7. Defendant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

8. Defendant shall reimburse claimant for the cost of Dr. Kuhnlein’s evaluation in this matter and the mileage for traveling to this evaluation.

9. Defendant shall file reports with this agency on the payment of this award pursuant to administrative rule 876 IAC 3.1.

File No. 5026598:

Claimant shall take nothing further from this claim except that defendant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

File No. 5026599:

1. Defendant shall pay to claimant ten (10) weeks of permanent partial disability benefits at a rate of four hundred eighty-eight and 87/100 dollars ($488.87) per week from October 20, 2007.

2. Defendant shall pay accrued weekly benefits in a lump sum.

3. Defendant shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. As a penalty, defendant shall pay to claimant an additional 50 percent of the accrued permanent disability, healing period and temporary partial disability benefits awarded herein which accrued prior to March 25, 2009.

5. Defendant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

6. Defendant shall reimburse claimant for the cost of Dr. Kuhnlein's evaluation in this matter and the mileage for traveling to this evaluation.

7. Defendant shall file reports with this agency on the payment of this award pursuant to administrative rule 876 IAC 3.1.

File No. 5026600:

1. Claimant shall take nothing further in weekly benefits.

2. Defendant shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

3. Defendant shall reimburse claimant for the cost of Dr. Kuhnlein's evaluation in this matter and the mileage for traveling to this evaluation.

Signed and filed this _____23rd_____ day of July, 2009.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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