BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NICOLAS LNENICKA, Claimant, vs. B.G. BRECKE, INC., Employer, and SENTINEL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 20009047.01 ARBITRATION DECISION Head Note Nos.: 1402.20, 1402.40, 1803, 2907

STATEMENT OF THE CASE

Claimant, Nicolas Lnenicka, filed a petition in arbitration for workers' compensation benefits against B.G. Brecke, Inc., as employer, and Sentinel Insurance Company, as insurer, both as defendants. The hearing occurred before the undersigned on January 25, 2022, via CourtCall.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 14, Claimant's Exhibits 1 through 3, and Defendants' Exhibits A through N. Claimant testified on his own behalf. Christian Schwartzhoff testified on behalf of the defendants. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed their post-hearing briefs on or before March 3, 2022, at which time the case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a left shoulder injury arising out of and in the course of employment on July 15, 2020;

2. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits;

3. Claimant's gross weekly earnings and the applicable weekly worker's compensation rate at which benefits should be paid;

4. Whether defendants are entitled to a credit for overpayment of benefits pursuant to Iowa Code section 85.34(4) and (5); and

5. Costs.

FINDINGS OF FACT

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

Nicolas Lnenicka, claimant, filed an Original Notice and Petition on February 15, 2021, for injuries he allegedly sustained to his neck and left shoulder on July 15, 2020. An evidentiary hearing occurred before the undersigned on January 25, 2022.

Mr. Lnenicka was 43 years old at the time of the evidentiary hearing. (Hearing Transcript, page 9) He was raised in Olin, Iowa and graduated from Olin High School in 1996. He did not pursue any post-secondary education; rather, he immediately entered the workforce as a general laborer. (Hr. Tr., pp. 9-11) Since 2007, Mr. Lnenicka's primary source of employment has been boilermaker and millwright assignments through Boilermakers Local Union 83. (See Hr. Tr., p. 15)

Due to a lack of consistent assignments through the union, Mr. Lnenicka sought and obtained employment as a millwright with the defendant employer on May 5, 2020. (Hr. Tr., p. 21; Exhibit C, page 5) His job duties largely consisted of welding and other general labor activities. (See Hr. Tr., pp. 21-23) Mr. Lnenicka considered his millwright duties to be less physically demanding than the work he performed as a boilermaker. (Hr. Tr., p. 23)

On the date of injury, Mr. Lnenicka and his crew were assigned to work at International Paper in Cedar Rapids, Iowa. (Hr. Tr., pp. 24-25) The crew was tasked with replacing or positioning a new bearing on an industrial paper dryer. In order to position the bearing, the crew first had to lift the bearing onto a scaffold. From there, the crew used a hoist to pull the bearing up to its proper elevation. Mr. Lnenicka estimated that the bearing weighed between 350 to 400 pounds. (Hr. Tr., p. 25) Unfortunately, the bearing was approximately a quarter-inch short of where it needed to be after using the hoist. Instead of lowering the bearing and reconfiguring the hoist, the crew attempted to push/pull the bearing on their own. Mr. Lnenicka positioned himself under the bearing so he could push while another crew member pulled from above. Mr.

Lnenicka did not recall whether he felt any immediate sensations in his neck or left shoulder area while pushing the bearing into place; however, he did recall that his neck and left shoulder area became sore and stiff at some point during his shift. Mr. Lnenicka testified he did not think anything of it at the time and decided to keep working. He completed his approximately 15-hour shift and returned home. (Hr. Tr., pp. 25-26)

The next morning, Mr. Lnenicka reported to work for an assignment in Amana, Iowa. Mr. Lnenicka asserts he was "sore as could be" but still reported for work as he had a lot of welding to take care of in Amana. (Hr. Tr., p. 27) After his shift, Mr. Lnenicka presented to his personal chiropractor for an adjustment. (Joint Exhibit 2, page 3)

Despite his pain, Mr. Lnenicka continued to work, presenting for an assignment in Dubuque, Iowa on July 17, 2020. (Hr. Tr., p. 28)

On Saturday, July 18, 2020, Mr. Lnenicka presented to the emergency room at Mercy Medical Center in Cedar Rapids, Iowa. (JE12, p. 125) He reported left shoulder pain after pushing an object at work three days prior. (Id.) When x-rays of the left shoulder returned no acute bony findings, Mr. Lnenicka was provided a sling and told he may require an MRI if his symptoms continued or worsened. (JE12, p. 128)

The next day, Mr. Lnenicka called the defendant employer and reported his alleged work injury. (Hr. Tr., p. 29) After reporting his injury, Mr. Lnenicka consented to a drug test and defendants directed Mr. Lnenicka's care to Nicholas Bingham, M.D. (JE13, p. 143)

Mr. Lnenicka first presented to Dr. Bingham on July 20, 2020. (Id.) Mr. Lnenicka described the work injury to Dr. Bingham, noting he used his left shoulder to push the bearing into place. (Id.) On examination, Mr. Lnenicka demonstrated decreased range of motion, tenderness, and pain in the left shoulder and neck. (See JE13, p. 144) Dr. Bingham diagnosed a sprain of the left shoulder girdle and prescribed physical therapy. (JE13, p. 145)

At his July 29, 2020, follow-up appointment with Dr. Bingham, Mr. Lnenicka reported radiating pain in his upper arm and numbness of the left thumb. (JE13, p. 147) Mr. Lnenicka requested an MRI, noting "something is not right." (Id.) Dr. Bingham assured claimant that he would order the proper diagnostic imaging if conservative treatment failed. (JE13, p. 148)

When physical therapy failed to alleviate claimant's complaints, Dr. Bingham ordered MRIs of the cervical spine and left shoulder. (JE13, p. 150)

The imaging of the cervical spine, dated August 28, 2020, revealed a disc protrusion with possible crowding of the C6-C7 nerve roots and central right foraminal stenosis at C6-C7. (See JE13, p. 152)

The left shoulder MRI revealed mild rotator cuff tendinopathy, AC joint degeneration, and evidence of Parsonage-Turner syndrome, a rare disorder that can be consistent with trauma to the brachial plexus. (See JE13, p. 152) Dr. Bingham opined that treatment for Parsonage Turner syndrome is nonsurgical with physical therapy and time, with most cases resolving within one (1) year. (JE13, p. 152) To further evaluate the potential for Parsonage-Turner syndrome, Dr. Bingham ordered an EMG and recommended Mr. Lnenicka present for an additional stint of physical therapy. (JE13, p. 152)

The EMG, dated October 1, 2020, returned findings consistent with carpal tunnel syndrome, as well as moderate C-6 radiculopathy on the left. (JE7, p. 20; see JE13, p. 154)

Mr. Lnenicka returned to Dr. Bingham's office to discuss the EMG results on October 6, 2020. (JE13, p. 153) Mr. Lnenicka complained of pain from the neck extending down into the upper border of the trapezius, as well as numbness in his left thumb. He did not complain of shoulder joint pain at this appointment. (JE13, p. 154) Dr. Bingham relayed that the EMG revealed findings consistent with carpal tunnel syndrome and C6 radiculopathy. (Id.) He opined the carpal tunnel syndrome was probably not related to the acute injury on July 15, 2020. (Id.) He further opined that the EMG results did not resemble Parsonage-Turner syndrome as initially suggested by the left shoulder MRI. (Id.) In light of these findings, Dr. Bingham referred Mr. Lnenicka for an orthopedic evaluation, noting the orthopedic surgeon could "consider/sort out" causation with respect to carpal tunnel syndrome, Parsonage Turner syndrome, and the C6 radiculopathy. (Id.)

Mr. Lnenicka presented to Cassim Igram, M.D. on October 14, 2020. (JE8, p. 21) Mr. Lnenicka reported that the pain in his neck and left shoulder waxed and waned, and he experienced occasional paresthesias of the left upper extremity. (Id.) He also reported daily headaches that started in the midday and worsened throughout the evening. (Id.) On the date of examination, claimant reported no radiating pain up his neck or down into his hand. (Id.) Based on Mr. Lnenicka's improvement to date, and his findings on examination, Dr. Igram opined it was unlikely that claimant would need surgery to repair his cervical spine. (JE8, p. 23) However, given claimant's ongoing complaints of left shoulder pain and his limited range of motion, Dr. Igram recommended a referral to an orthopedic shoulder specialist. (JE8, pp. 23-24)

Pursuant to Dr. Igram's recommendation, defendants referred claimant to Matthew Bollier, M.D. (See JE8, p. 25) Dr. Bollier documented good range of motion and strength in claimant's left shoulder, but pain in the neck with range of motion testing. (JE8, p. 29) Contrary to Dr. Igram's findings, Dr. Bollier opined that claimant had full and normal range of motion of the left shoulder, normal sensation, no neurologic dysfunction, and no instability. (Id.) He also opined the mechanism of injury described does not correlate with shoulder pathology and placed claimant at maximum medical improvement for the left shoulder as of November 9, 2020. (Id.) He opined claimant

could return to work without restrictions and assessed zero percent left upper extremity impairment. (Id.)

Following his orthopedic evaluations, Mr. Lnenicka returned to Dr. Bingham on November 17, 2020. (JE13, p. 155) Mr. Lnenicka reported improvement in his pain symptoms; however, he continued to complain of numbness in the left thumb and index finger. (Id.) On examination, Mr. Lnenicka continued to demonstrate decreased range of motion, tenderness, and pain in the cervical spine. (JE13, p. 156) Dr. Bingham summarized claimant's recent treatment, noting:

> To recap, patient's EMG/NCV showed both evidence of a C6 radiculopathy which would explain thumb numbness as well as left carpal tunnel syndrome which would better explain the thumb and index finger combined. I would like to maximize the function of the neck and shoulder girdle, to see if it has any effect on the numbness. Think C6 radiculopathy could be related to this incident. If it proves to be more likely carpal tunnel syndrome, I do not think it relates to the incident described as the original injury.

(Id.) Dr. Bingham subsequently referred claimant for work hardening. (Id.)

Mr. Lnenicka began his work hardening program on December 1, 2020. (JE9, p. 79) The notes from his initial appointment provide that Mr. Lnenicka was back to working full-time. (JE9, p. 80) Indeed, personnel records provide that Mr. Lnenicka began working for Jamar in December 2020. (Ex. M, p. 33)

On December 16, 2020, Mr. Lnenicka presented to the emergency room with complaints of headaches and left arm weakness. He reported his belief that he had overdone it at work, presumably for Jamar. (JE12, p. 130; Hr. Tr., p. 55) At hearing, claimant confirmed that it was a work assignment through Jamar that caused him to present to the emergency room. (Hr. Tr., p. 55) Despite this flare-up in symptoms, medical notes from a December 23, 2020, work hardening session provide that claimant demonstrated the ability to perform 79 percent of the physical demands of a millwright and boilermaker. (JE9, p. 100)

Given the opinions of Drs. Igram and Bollier that claimant was not a surgical candidate, Dr. Bingham opined "The single treatment option left" for claimant was a consultation with a pain management specialist. He then referred Mr. Lnenicka to Tork Harman, M.D. (See JE13, p. 158; JE11, p. 116)

Mr. Lnenicka first presented to Dr. Harman on January 4, 2021, with complaints of pain in the left side of his neck, radiating up to his head and down towards his left shoulder. (JE11, p. 116) Dr. Harman recommended and administered the first of two cervical epidural steroid injections on January 4, 2021. (JE11, pp. 117-118) Dr. Harman administered the second cervical ESI on February 15, 2021. (JE11, p. 122) Despite the ESI, claimant continued to complain of numbness in the left thumb and index finger. (JE13, p. 160)

Claimant underwent a functional capacity evaluation (FCE) with Mark Smalling, P.T. on January 25, 2021. (JE10, p. 114) According to the report, Mr. Lnenicka demonstrated the capabilities and tolerances to function in the heavy physical demand level, which included the ability to lift up to 100 pounds. (Id.)

Based on the results of the FCE, Dr. Bingham released claimant to full-duty work without restrictions on January 26, 2021. (JE13, pp. 161, 163) Shortly after releasing claimant back to work, Dr. Bingham left Mercy Occupational Health. Mr. Lnenicka's care was subsequently transferred to Jeffrey Westpheling, M.D. (See JE13, p. 164)

Despite Dr. Bingham's departure, Mr. Lnenicka continued to present to Mercy Occupational Health. He presented to Dr. Westpheling for the first and last time on March 5, 2021. (JE13, p. 164) Mr. Lnenicka reported improvement following the second cervical ESI; however, he continued to report some neck discomfort with radiating pain into the left upper extremity. (Id.) Dr. Westpheling assessed claimant with cervical radiculitis and recommended no further treatment. He placed claimant at MMI and released him to return to work without restrictions. (JE13, p. 165)

Outside of independent medical examinations, Mr. Lnenicka has not sought out or requested any additional medical treatment since March 5, 2021. (Hr. Tr., p. 49)

On March 15, 2021, Dr. Westpheling addressed claimant's permanent impairment. Dr. Westpheling placed claimant's cervical spine condition in DRE Category II and assigned 5 percent whole person impairment. (JE13, p. 167)

In response, claimant sought an independent medical evaluation (IME) with Mark Taylor, M.D. (Ex. 1) The evaluation occurred on July 21, 2021. (Ex. 1, p. 1) Following an examination of claimant and a review of the medical records, Dr. Taylor opined that claimant's cervical spine condition fell between DRE Category II (5-8 percent impairment) and III (15-18 percent impairment) and assigned 11 percent whole person impairment. (Ex. 1, p. 9) He explained that his rating, when compared to the rating assigned by Dr. Westpheling, is justifiable due to claimant's ongoing symptoms, objective test results, persistent weakness associated with grip strength, the decreased size of his forearm, and decreased range of motion in the left shoulder. (Id.) Notably, Dr. Taylor did not assign a separate impairment rating for the left shoulder. (Id.)

With respect to additional treatment, Dr. Taylor recommended Mr. Lnenicka undergo additional evaluation with Dr. Sunny Kim for the size disparity between claimant's forearms, as well as the decreased grip strength on the left, and persistent paresthesias. (Ex. 1, p. 8) Dr. Taylor opined claimant's symptoms could possibly be explained by his carpal tunnel syndrome, which would not be directly related to the July 15, 2020, work injury. (Ex. 1, pp. 8-9)

In a letter, dated December 14, 2021, Dr. Westpheling offered a critique of Dr. Taylor's impairment rating, noting examiners are only allowed to award up to 3 percent additional impairment if the corresponding DRE Category does not adequately

encompass the claimant's amount of impairment. (Ex. J, p. 22) He further provided alternative explanations as to why claimant's forearms might not be equal in size. (Id.) The remainder of the December 14, 2021, letter addresses Dr. Taylor's recommendations regarding permanent restrictions and additional treatment. (Ex. J, pp. 22-23)

Mr. Lnenicka was laid off by the defendant employer on July 20, 2020, five days after the alleged date of injury. He has not worked for the defendant employer since. (Ex. H, p. 17) Mr. Lnenicka first returned to work as a boilermaker for Jamar Company in approximately December 2020. Although he was physically able to perform the job duties required of him, he eventually experienced an increase in neck and left shoulder pain and sought additional treatment. (JE12, p. 130; see Hr. Tr., p. 34)

Mr. Lnenicka believes he next worked for Austin Industrial in a non-union millwright position in May of 2021. (Hr. Tr., pp. 35-36) Prior to working for Austin Industrial, Dr. Westpheling reviewed the job duties of the non-union millwright position and determined claimant could perform the essential job functions without accommodation. (JE13, p. 169) While working for Austin Industrial, Mr. Lnenicka developed low back pain and eventually underwent surgery to address the same in October 2021. (See JE14, p. 188)

The first issue to be addressed in this decision is whether claimant sustained an injury to his left shoulder as part of the July 15, 2020, work injury. Defendants stipulate that claimant sustained an injury to his neck; however, they dispute whether claimant sustained a separate injury to the left shoulder. (Hearing Report).

The only physician to specifically address causation with respect to the alleged left shoulder injury is Dr. Bollier. He opined, "The mechanism of injury to include lifting a heavy weight while resting on the shoulder along with his location of pain over the left trapezius muscle belly and cervical spine does not correlate with shoulder pathology" and "review of MRI shows no labral or rotator cuff tear." (JE8, p. 29) I find Dr. Bollier's causation opinion credible and convincing. Claimant's expert, Dr. Taylor, did not address causation, but similarly opined there is no permanent impairment attributable to the left shoulder.

Given these opinions, I find claimant failed to prove he sustained a permanent left shoulder injury as a result of the July 15, 2020, work incident.

Defendants further assert that claimant's current complaints are not causally related to the stipulated neck injury. More specifically, defendants assert the pain, weakness, and atrophy in claimant's left upper extremity, as well as the numbness in his left hand, stem from personal conditions not related to the July 15, 2020, work injury.

Throughout the course of claimant's medical treatment, the authorized physicians have largely linked the above complaints to diagnoses of carpal tunnel syndrome, Parsonage-Turner syndrome, or C6 radiculopathy.

As a preliminary matter, I note that all physicians seemingly agree that claimant's left carpal tunnel diagnosis is not directly related to the July 2020 work injury. (See JE13, p. 154; Ex. J, p. 22; Ex. 1, pp. 8-9) As such, I find that claimant failed to prove his carpal tunnel syndrome is causally related to the July 15, 2020, work incident. However, such a finding does not preclude a determination that claimant's current complaints, including numbness in the thumb and index finger, are causally related to the original work injury.

In reviewing the medical records in evidence, I note that the October 1, 2020, EMG revealed C6 radiculopathy on the left. (JE7, p. 20; see JE8, p. 24) Dr. Bingham opined that the EMG showed evidence of C6 radiculopathy "which would explain thumb numbness." (JE13, p. 156) Dr. Bingham also opined that claimant's carpal tunnel syndrome could explain the numbness in claimant's thumb and index finger. (Id.) In other words, Dr. Bingham felt that both diagnoses could be contributing to the numbness in the left thumb, while the numbness in claimant's index finger would only be explained by the carpal tunnel syndrome.

In comparison, Dr. Taylor opined that the disc protrusion at C5-C6, with crowding of the C6 and C7 nerve roots, is consistent with claimant's complaint of paresthesias impacting both the left thumb and index finger. (Ex. 1, p. 8) Dr. Taylor acknowledged that carpal tunnel syndrome could be contributing to the same. (Id.) However, Dr. Taylor ultimately diagnosed claimant with intermittent cervicalgia and secondary headaches with abnormal MRI and radiculopathy, and persistent paresthesias impacting the left thumb and index finger. He causally related the cervical spine injuries and associated symptoms to the July 15, 2020, work incident. (Ex. 1, p. 8)

Dr. Westpheling opined that carpal tunnel syndrome was a likely cause of claimant's ongoing paresthesias in the left thumb and index finger. (Ex. J, p. 22) He did not specifically rule out the possibility of the paresthesias being related to C6 radiculopathy. He also did not comment on Dr. Bingham's recommendation with respect to maximizing the function of the neck and shoulder girdle to see if it had any effect on the numbness. (JE13, p. 156) Given his lack of analysis, and his limited interactions with claimant, it is difficult to accept the causation opinions of Dr. Westpheling as convincing in this matter. Instead, I accept the causation opinion of Dr. Taylor and find claimant's numbness in the left thumb and index finger are to some extent attributable to the July 15, 2020, work injury. I further accept the opinions of Dr. Bingham to the extent they support the conclusions of Dr. Taylor.

Defendants also attribute claimant's current pain, weakness, and atrophy to Parsonage-Turner syndrome. (Defendants' Post-Hearing Brief, pages 11-12) In doing so, they prematurely dismiss such a diagnosis as a wholly personal condition, unrelated to the July 15, 2020, work injury. As explained by Dr. Bingham, Parsonage-Turner syndrome can be caused by a traumatic injury to the brachial plexus. (See JE13, p. 152) That being said, it is unclear from the evidentiary record whether any physician attributes claimant's ongoing complaints to Parsonage-Turner syndrome.

After initially suspecting Parsonage-Turner syndrome, Dr. Bingham ordered an EMG and later opined that the results did not resemble Parsonage-Turner syndrome as initially suggested by the left shoulder MRI. (JE13, p. 154) However, Dr. Bingham also provided that, "I think [it] is something for the surgeon to consider/rule out." (Id.) Unfortunately, neither Dr. Igram nor Dr. Bollier addressed the Parsonage-Turner syndrome in their reports. It is possible their silence on the issue is an indication that they did not reach the same diagnosis as Dr. Bingham.

Dr. Westpheling similarly noted that claimant's MRI of the left shoulder revealed findings consistent with Parsonage-Turner syndrome which can cause weakness and atrophy in an upper extremity and not necessarily defined on EMG/nerve conduction studies unless specifically looking for the same. (Ex. J, p. 22)

Like Dr. Bingham and Dr. Westpheling, Dr. Taylor diagnosed Mr. Lnenicka with an abnormal shoulder MRI with concern for acute Parsonage-Turner syndrome, but with negative EMG with regard to the brachial plexus. (Ex. 1, p. 8) He did not specifically diagnose claimant with Parsonage-Turner syndrome. He did, however, note that the diagnostic imaging in this case has provided mixed results, and, as such, he recommended further evaluation of radiculopathy versus a brachial plexus injury. (Id.)

Dr. Taylor broadly opined that given claimant's history and the currently available medical records, the left-sided cervical spine and trapezius and parascapular injury is directly and causally related to the July 15, 2020, incident at work. (Ex. 1, p. 8) I find this broad opinion would necessarily include the potential diagnosis of Parsonage-Turner syndrome.

Given the above opinions, it appears claimant's ongoing complaints could be causally related to the original date of injury regardless of whether they stem from Parsonage-Turner syndrome or C6 radiculopathy. That being said, Dr. Taylor's impairment assessment is based on the "paresthesias consistent with the MRI findings and consistent with the EMG study." The only diagnosis consistent with both studies is the radiculopathy impacting C6, not the Parsonage-Turner syndrome. Ultimately, I accept the causation opinion of Dr. Taylor and find claimant's ongoing complaints are attributable to the July 15, 2020, work injury.

The next issue to be addressed is the extent of claimant's entitlement to permanent partial disability benefits for the stipulated neck injury.

In total, two physicians have assessed claimant's permanent impairment with respect to the neck. Both physicians utilized the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

Dr. Westpheling, an occupational medicine specialist who briefly served as claimant's authorized treating physician following Dr. Bingham's departure from Mercy Occupational Health, placed claimant's cervical spine condition in DRE Category II and assigned 5 percent whole person impairment. (JE13, p. 167)

Dr. Taylor, a certified independent medical examiner and board certified occupational and environmental medicine physician, placed claimant's cervical spine condition between DRE Category II and III and assigned 11 percent whole person impairment. (Ex. 1, p. 9) Dr. Taylor's impairment rating is based on the "paresthesias consistent with the MRI findings and consistent with the EMG study." The only diagnosis consistent with both studies is the radiculopathy impacting C6. He explained that his higher rating, when compared to the rating assigned by Dr. Westpheling, is justifiable because of claimant symptoms, objective test results, persistent weakness associated with claimant's grip strength, the decreased size of claimant's forearm, and the slightly decreased range of motion in the left shoulder. (Id.)

In a letter, dated December 14, 2021, Dr. Westpheling offered a critique of Dr. Taylor's impairment rating, noting examiners are only allowed to award up to 3 percent additional impairment if the DRE Category does not adequately encompass the claimant's amount of impairment. (Ex. J, p. 22)

I do not find Dr. Westpheling's critique to be particularly convincing. In fact, his opinion only reinforces the applicability of Dr. Taylor's impairment rating. Dr. Westpheling explained that an examiner is allowed to award up to 3 percent additional impairment if a category does not adequately encompass the amount of an individual's impairment. Dr. Taylor assigned 11 percent impairment. According to Page 392 of the AMA Guides, DRE Category II ranges from 5 percent to 8 percent whole person impairment. Given Dr. Westpheling's explanation, Dr. Taylor was justified in awarding 11 percent whole person impairment, which is 3 percentage points greater than the maximum rating provided in DRE Category II.

As I weigh the competing medical evidence and consider the evidentiary record as a whole, I find the medical opinions of Dr. Taylor to be the most convincing. Dr. Taylor's report provides a comprehensive analysis of claimant's condition and provides opinions that are easy to follow and consistent with the evidentiary record. More importantly, Dr. Taylor is the only physician to consider claimant's persistent paresthesias when assessing claimant's permanent impairment. As such, I accept Dr. Taylor's 11 percent whole person impairment rating and find the same resulted from the July 15, 2020, work injury.

With respect to permanent restrictions, I accept the recommendations outlined in claimant's January 2021 FCE report. The undersigned is cognizant of the fact Dr. Bingham released claimant to return to work without restrictions after analyzing the January 2021 FCE report. However, this is not conclusive evidence that claimant returned to a baseline with respect to his functional abilities or that he does not require some form of permanent restrictions. Rather, as noted in Dr. Bingham's January 26, 2021, addendum, claimant was returned to full duty work without restrictions because his job as a millwright was classified as a heavy demand position and the January 2021 FCE found claimant was capable of operating at the heavy level of function.

Despite claimant's arguments to the contrary, these permanent restrictions will not substantially interfere with his ability to obtain employment in the future. Indeed, claimant passed a pre-employment physical prior to accepting a full-time millwright position with Austin Industrial in May, 2021. (See Ex. L, p. 28) Claimant is no longer employed with Austin Industrial due to an unrelated low back injury.

Defendants challenge Mr. Lnenicka's credibility in this case. Indeed, I note several instances in which claimant provided inconsistent or contradicting testimony. For instance, claimant testified that he only worked two days for Jamar in December 2020 due to an increase in his neck pain. While the contemporaneous medical records support an increase in claimant's neck pain following his work for Jamar, claimant testified at the evidentiary hearing that he only worked two days for Jamar because the job assignment ended and he was subsequently laid off, not because of an increase in his neck pain. (Hr. Tr., pp. 34-35)

Claimant also made a number of claims that are unsubstantiated by the evidentiary record. For instance, claimant asserted for the first time at hearing that he failed three welding tests following the July 15, 2020, work injury. While claimant referenced failing a welding test at his deposition, he did not mention why he failed the test, or whether he failed the welding test before or after the date of injury. Moreover, when asked about failing the welding test at his deposition, claimant seemingly shrugged it off by providing, "it happens." (Ex. N, Depo. p. 13) At hearing, claimant testified that he failed these three welding tests because he was uncomfortable and sore, attributing the same to the effects of the July 15, 2020, work injury. Claimant did not provide the dates of the failed tests or who he was working for when he failed the tests. Further, these tests are not documented in personnel or medical records. Presumably, claimant would have failed the tests while working for either Jamar or Austin Industrial. That being said, claimant testified that he only worked two days for Jamar, and approximately 45 days for Austin Industrial before he suffered an unrelated injury to his low back. Moreover, claimant testified that he was hired by Austin Industrial to "basically run around with a grease gun greasing zerks." (Hr. Tr., p. 17; see Ex. N, Depo. p. 44) While possible, it seems unlikely claimant failed three welding tests while working brief stints for Jamar and/or Austin Industrial.

While I have my concerns regarding claimant's credibility, his concerns do not detract from his consistent reporting of the July 15, 2020, work injury or his ongoing complaints documented in the contemporaneous medical records.

Considering claimant's age, educational and employment histories, his subsequent employment, his ability to return to past employment opportunities, the situs and severity of his injuries, his permanent work restrictions, permanent impairment, motivation to continue working, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find claimant proved a 15 percent loss of future earning capacity as a result of the July 15, 2020 work injury.

The parties dispute Mr. Lnenicka's gross weekly earnings. More specifically, the parties dispute whether his per diem pay should be included in his rate calculation. Mr. Lnenicka received per diem pay when he worked out-of-town jobs. According to payroll records, Mr. Lnenicka received $950.00 of per diem between May 5, 2020, and July 20, 2020. (Exhibit D, page 6) He did not receive per diem when working within the Cedar Rapids area. (Hr. Tr., p. 68-69) Mr. Lnenicka testified that when he was working out of town, he generally stayed in his fifth wheel and brought his own meals from home. (Hr. Tr., p. 42) Initially, Mr. Lnenicka testified that he never spent any of his per diem pay on lodging or food. (Hr. Tr., p. 65) However, he later recalled defendant employer paying for a motel room. (Hr. Tr., pp. 41, 62) When asked if he always stayed at a motel or out of town lodging, Mr. Lnenicka responded, "Not always[,]" implying that he, at times, stayed in motels. (Hr. Tr., p. 42) He further testified that he occasionally used per diem to buy things like soda or a piece of pizza. (Hr. Tr., p. 43)

Whether claimant was successful in asserting the per diem he received should be classified as earnings will be addressed in the conclusions of law section.

CONCLUSIONS OF LAW

The initial dispute between the parties is whether claimant proved he sustained a left shoulder condition as a result of the July 15, 2020, work injury.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of referred to the cause or source of the injury. The words "in the course of refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

In this case, I found the only physician offering a causation opinion pertaining to claimant's alleged left shoulder condition was Dr. Bollier. I found his unrebutted causation opinion credible and convincing. Therefore, I conclude that claimant failed to prove by a preponderance of the evidence that he sustained an injury to the left shoulder which arose out of and in the course of his employment on July 15, 2020.

The next disputed issue between the parties is the extent of claimant's entitlement to permanent disability benefits. The parties stipulate that Mr. Lnenicka sustained permanent disability as a result of the July 15, 2020, work injury and that the injury should be compensated with industrial disability pursuant to Iowa Code section 85.34(2)(v).

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).

Claimant did not return to work for the defendant employer following the July 15, 2020, work injury. There is no evidence that the defendant employer offered to return claimant back to work at equal or greater wages. As such, I find claimant's entitlement to permanent disability benefits is not limited to his functional impairment rating.

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. Iowa Code section 85.34.

Having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved a 15 percent loss of future earning capacity as a result of the July 15, 2020, work injury. This is equivalent to a 15 percent industrial disability and entitles claimant to an award of 75 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The parties dispute the proper workers' compensation rate. Claimant asserts gross earnings were $1,499.33 per week, resulting in a workers' compensation rate of $878.35. Defendants assert claimant's gross earnings were $1,326.30 per week, resulting in a workers' compensation rate of $789.02. The difference in the rate calculations is attributable to the inclusion of per diem pay in claimant's calculation. Defendants argue the per diem should not be included in the rate calculation, pursuant to Iowa Code section 85.61(3).

Iowa Code section 85.61(3) provides a definition of "gross earnings" and holds that "reimbursement of expenses" and "expense allowances" should be excluded from calculation of gross earnings.

In this case, claimant received $950.00 of "per diem" during the 13 weeks leading up to the date of injury. Claimant alleges these "per diem" payments should be added to his gross weekly earnings because these payments were not used as reimbursement for expenses or an expenses allowance.

Claimant's argument was previously recognized in Premium Transp. Staffing, Inc., v. Bowers, 872 N.W.2d 199 (Iowa Ct. App. 2015) (table). In Bowers, the claimant received $52.00 per diem as compensation. The claimant testified at hearing he spent only $12.00 per day for food and expenses and pocketed the remainder. The deputy commissioner concluded the claimant showed by a preponderance of the evidence only a portion of his per diem was reimbursement for expenses. The deputy commissioner found $12.00 of the per diem payment was an expense allowance under Iowa Code section 85.61(3) but included the remaining $40.00 of the per diem in calculating the weekly rate. The Iowa Court of Appeals eventually affirmed the deputy commissioner's inclusion of the $40.00 per diem in calculating the rate.

In this case, claimant testified that he consistently underspent or entirely kept his per diem amounts. However, this testimony was vague and not based on actual receipts or assignments. Claimant testified that he did, occasionally, spend his per diem allowance on food and lodging. He submitted no additional evidence to provide the specific amounts he spent or kept. Because claimant offered no evidence to substantiate his testimony, such as receipts or invoices, I did not find claimant's testimony regarding the use of his per diem allowance credible. Claimant has not met his burden to prove that the true nature of the per diem payments was to increase his

compensation, as opposed to truly being meant for expenses. I therefore conclude claimant failed to carry his burden to establish that his living expenses were lower than the "per diem" allowance. See Tammen v. Echo Powerline Leasing, LLC, File No. 5053791 (Arb. December 8, 2017)

Thus, without the per diem allowance, I adopt defendants' calculation and conclude claimant's average gross weekly wage is $1,326.30. (Ex. F, p. 11) Having accepted the parties' stipulations that claimant was single and entitled to one exemption on his date of injury, and having concluded that claimant's gross average weekly wage was $1,326.30, I conclude claimant's rate is $789.02 using the rate book with effective dates of July 1, 2020, through June 30, 2021.

Defendants assert a credit for overpayment of benefits due to overpaying the weekly rate of compensation. Iowa Code section 85.34(4) addresses credits for excess payments. For injuries occurring on or after July 1, 2017, an employer can claim a credit for excess payments of temporary total disability, healing period, or temporary partial disability benefits against any future weekly benefits due for any injury to that employee. Iowa Code section 85.34(4)

Prior to hearing, claimant was paid 31 weeks of temporary total disability benefits at the rate of $950.99 per week. (Ex. E) I found the proper rate of compensation to be $789.02 per week. This creates an overpayment of $161.97 per week.

Under the plain meaning of Iowa Code section 85.34(4), defendants are entitled to a credit for the excess $5,021.07 paid in temporary benefits based on the incorrect rate.

Prior to hearing, claimant was also paid 22 weeks of permanent partial disability benefits at the rate of $950.99 per week. (Ex. E) Defendants assert that claimant was not paid out the entire 25 weeks of PPD benefits corresponding with Dr. Westpheling's impairment rating because they discovered claimant was working in December 2020 while also collecting TTD benefits without notifying defendants of the same.

Again, defendants assert a credit for the overpayment of PPD benefits based on the incorrect rate. I found the proper rate of compensation to be $789.02 per week. This creates an overpayment of $161.97 per week. Under the plain meaning of Iowa Code section 85.34(5), defendants are entitled to a credit for the excess $3,563.34 paid in permanent partial disability benefits based on the incorrect rate.

Defendants further assert a credit for 25 weeks of PPD benefits. It is undisputed that defendants paid 22 weeks of PPD benefits prior to the evidentiary hearing. Defendants assert they are entitled to an additional three weeks of PPD benefits. More accurately, defendants are asserting a credit for an alleged overpayment of TTD benefits during the month of December, 2020. Defendants argue they are entitled to a credit for the month of December, 2020 because claimant failed to present W2s, 1099s,

or any tax records to prove how much he worked or didn't work. Defendants' argument disregards the burden of proof on this issue.

The burden of proving entitlement to a credit falls upon the employer seeking the credit. Albertsen v. Benco Manufacturing, File No. 5010764 (App. July 27, 2007). There is no evidence in the evidentiary record to support a finding that claimant worked for three weeks in December, 2020, or throughout the entire period in which he received TTD benefits in the month of December, 2020.

The evidentiary record fails to definitively establish how much work claimant performed throughout the month of December, 2020. Medical records note that claimant was back to working full-time; however, claimant testified that he only worked two days in December, 2020. Union records produced by defendants seemingly support claimant's testimony and provide that claimant worked 25 hours in December, 2020. (Ex. M, p. 33)

Given this information, I find defendants have carried their burden of proving entitlement to a credit for a one-week overpayment of TTD benefits in the month of December, 2020. Iowa Code section 85.34(4)

In summary, defendants are entitled to credit for the overpayment on the weekly rate, an overpayment of one week of temporary total disability benefits from December, 2020, and 22 weeks of permanency benefits. Iowa Code 85.34(4), (5)

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Mr. Lnenicka seeks the costs associated with his filing fee. The cost of the filing fee is appropriate and assessed pursuant to 876 IAC 4.33(7).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay seventy-five (75) weeks of permanent partial disability benefits commencing on the stipulated commencement date of March 5, 2021.

All weekly benefits shall be paid at the rate of seven hundred eighty-nine and 02/100 dollars ($789.02).

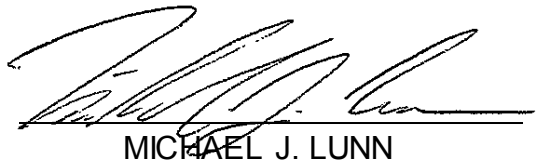
Defendants shall be entitled to credit for all weekly benefits paid to date consistent with this decision.

Defendants shall pay accrued weekly benefits, including but not limited to the underpayment of the weekly rate, in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall reimburse claimant costs totaling one hundred three and 00/100 dollars ($103.00).

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 __22nd___ day of July, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Matthew Petrzelka (via WCES)

Aaron Oliver (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.