BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT SHRUM, Claimant, vs. BOLDT GROUP, INC., Employer, and TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, Insurance Carrier, Defendants.	:	File No. 5067317 ARBITRATION DECISION Head Note Nos.: 1108, 1700, 1800, 1800.3, 2500, 2700

STATEMENT OF THE CASE

Robert Shrum, claimant, filed a petition in arbitration seeking workers' compensation benefits against Boldt Group, Inc., employer, and Travelers Indemnity Company of Connecticut, insurer, for an accepted work injury date of September 16, 2015.

The case was heard on February 25, 2020, in Des Moines Iowa, and was considered fully submitted on April 22, 2020, upon the simultaneous filing of briefs. The record consists of Joint Exhibits 1-8, Claimant's Exhibits 1-2, and Defendants' Exhibits A-K along with the testimony of the claimant.

ISSUES

Whether claimant has sustained an industrial disability arising out of work injuries to his neck, shoulder and back in addition to his right upper extremity;

The extent of claimant's disability;

Whether claimant is entitled to alternate medical care under Iowa code section 85.27;

Whether defendants are entitled to a credit for indemnity against overpayment;

Claimant seeks ongoing and future medical care; and

Claimant wishes for the taxation of costs.

STIPULATIONS

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

The parties agree the claimant has sustained a work-related injury on September 16, 2015 and that injury was the cause of some temporary disability during a period of recovery entitlement to which is no longer in dispute.

While the parties disagree as to the extent of the claimant's permanent disability, they concede that the commencement date for permanent partial disability benefits, if any are awarded, is July 28, 2016.

At the time of the injury, claimant's gross earnings were $1,569.99 per week. The claimant was single entitled to one exemption. Based on the foregoing the weekly benefit rate is $869.08.

The defendants waive all affirmative defenses.

The defendants are not seeking a credit under Iowa code section 85.38(2).

FINDINGS OF FACT

Claimant, Robert Shrum, was a 47-year-old male at the time of the hearing. His educational background includes graduation from high school and vocational school. He served in the Army National Guard from 1991 to 1997 as a combat engineer building bridges, engaging in landmine warfare, and driving trucks. He was honorably discharged. While he served, he sustained a right knee injury. Because the National Guard service was primarily on the weekends, claimant simultaneously had various full-time jobs including maintenance of a golf course and work at a manufacturing plant building brake cables for cars and trucks.

During his early to mid-20s, claimant found his way to welding school. It was a two-year program and through it he was able to achieve a welding certificate. After obtaining his certificate, claimant embarked on a career of welding for various companies building air tanks and utility haulers. His job duties were essentially the same in that they required twisting, reaching, equipping of the welding equipment, and reaching overhead. At one time, claimant ran his own utility trailer manufacturing business. Due to the condition of his right arm and shoulder, claimant believes that he would not be able to return to those welding positions.

After several years of applying and being turned down to the Boilermakers Union, claimant eventually began his apprenticeship in 2005. He eventually achieved

journeyman status and it was his plan to retire from the boilermakers. However, he does not believe he will be able to do that now due to the injuries to his shoulder, arm, and upper back.

His past medical history is significant for a motor vehicle collision with a deer in December 2007. (Joint Exhibit 2:13) In his visit with Rodney Yager, D.O. on December 21, 2007, claimant complained of upper back, neck and head pain. (JE 2:13) He was diagnosed with a cervical spine strain and a thoracic spine strain and given Vicodin and Flexeril. (JE 2:14) Claimant returned to Dr. Yager's office on September 5, 2008 with complaints of neck and upper back pain. (JE 2:15) Claimant was given a Toradol injection and released. (JE 2:16) A year later, claimant returned with complaints of chronic neck and shoulder pain that worsened after lifting heavy objects. The pain was primarily focused in the right upper back. (JE 2:17)

On October 12, 2010, claimant was seen by Jonathan D. Colen, D.O. for memory loss and concentration difficulty issues. (JE 2:19) Claimant had a multifactorial diagnosis including anxiety disorder, history of a learning disorder, and chronic neck pain. (JE 2:21 – 22)

Claimant had upper right back and neck pain treatment by a chiropractor approximately once a month from August 2012 through December 2012. (JE 1:9) Claimant returned to the chiropractor on October 22, 2013 with complaints of neck, shoulder, lower back and hip pain. (JE 1:9) On May 16, 2014, claimant sought out treatment for his neck, left shoulder and upper back, and left hip. (JE 1:11)

Claimant was seen again by Dr. Yager on December 16, 2014 for neck and back pain with some numbness and tingling in the left arm while driving. (JE 2:26) He was diagnosed with a left sacroiliac dysfunction and cervical radiculopathy. For treatment claimant was prescribed a Medrol Dosepak, Neurontin and Vicodin. (JE 2:26)

On April 29, 2015, claimant was seen by James R. Robertson, D.C. at the Back2Health chiropractic clinic for low back pain and neck pain. (JE 3:56) Claimant attributed the pain to riding an all-terrain vehicle on rough terrain. (JE 3:56) Dr. Robertson diagnosed claimant with low back pain, cervicalgia, thoracic subluxation, and spasm of muscle. (JE 3:57) Claimant's condition improved after treatment and Dr. Robertson believed that the claimant's prognosis would be excellent. (JE 3:57)

Dr. Yager saw claimant again on June 17, 2015 for neck and left shoulder pain with numbness radiating down the left arm. (JE 2:28) Claimant believed that he had overworked his left arm while doing yard work. (JE 2:29) Claimant was prescribed a Medrol Dosepak, Vicodin, and Neurontin. (JE 2:29)

On September 16, 2015, claimant was in a man basket approximately 20 feet in the air. He was holding onto a clamp with his right hand, lost his grip, and was nearly pulled out of the basket. Claimant testified that he reported the injury the day of the incident before he left. His primary pain was in his elbow. He testified that they gave him ibuprofen or an ice pack in the safety office.

He returned the following day but was unable to complete his work duties. Due to the ibuprofen and ice pack not alleviating his pain, Blankenheim Services was engaged to provide claimant with onsite physical therapy. (JE 5) Throughout his treatment, claimant reported neck, shoulder and arm pain but the primary diagnosis and focus of treatment was on his right upper extremity. (See generally, JE 5) Physical therapy did not alleviate claimant's pain. Eventually he was referred to the McFarland Clinic.

On September 28, 2015, claimant reported his right arm pain to Dr. Yager. (JE 2:31) Claimant believed that it was due to an overextension of his right elbow and wrist when he picked up a heavy object while at work. (JE 2:32) Claimant was diagnosed with right forearm strain despite a negative x-ray. He was instructed to take appropriate over-the-counter medications. (JE 2:32) At that time, claimant had a prescription for hydrocodone to be taken four times a day for ten days. (JE 2:31)

On October 5, 2015, claimant filled out a self-assessment occupational health history form for McFarland Clinic. (JE 4:62) He wrote that 40 to 70 pounds slipped while he was holding onto it, straightening out his right arm. (JE 4:62) His symptoms were around the elbow, forearm, wrist and hand with shooting pain and tightness of hand and loss of grip. (JE 4:62)

Claimant was seen by Charles D. Mooney, M.D. on October 7, 2015, for the complaints of pain in the right arm, radiating into the hand. (JE 4:6) He denied numbness, tingling or specific weakness. (JE 4:60) The examination revealed mild but obvious swelling into the dorsal aspect of the forearm just distal to the elbow. He had good grip strength and normal sensation but pain with provocative testing with extension against resistance. (JE 4:60) He had no specific medial epicondylar tenderness but was markedly tender just distal to the epicondyle laterally. (JE 4:60) Dr. Mooney suspected claimant had a right forearm sprain that may involve a partial tear of the brachioradialis and extensor musculature. (JE 4:60) Because claimant had already undergone about three weeks of conservative treatment, Dr. Mooney ordered x-rays and MRI. (JE 4:60) Claimant was to continue to be on light duty status with a maximum lift of five pounds on the right upper extremity. (JE 4:61)

The MRI revealed a partial-thickness tear involving the distal biceps tendon with tenosynovitis. (JE 4:65) claimant was then referred to Bryan Warme, M.D. for consultation who claimant saw for the first time on December 1, 2015. (JE 4:66, 6:82) Dr. Warme noted claimant presented with right elbow pain radiating into the hand. (JE 6:82) Dr. Warme incorrectly wrote that claimant had not done physical therapy and suggested claimant try a few months of therapy. (JE 6:82) If, after the months of therapy, claimant continued to have symptoms consistent with partial-thickness distal biceps injury, Dr. Warme would consider surgery. (JE 6:82)

During his December 2, 2015 visit, claimant presented with a rounded shoulder but the range of motion in the shoulder was within normal limits. (JE 5:77) on February 10, 2016, claimant mentioned to his physical therapist that his shoulder had been bothering him. (JE 5:74) Claimant's right shoulder complaints continued in the February 25, 2016 visit. (JE 5:75)

On February 23, 2016, Dr. Warme offered surgery with the caveat that it would not resolve claimant's forearm pain. (JE 6:85) Claimant wanted to try to increase his work restrictions and forego surgery at that point. (JE 6:86) Later that day, claimant changed his mind and opted for surgery which was scheduled for March 28, 2016. (JE 6:86)

On March 8, 2016, claimant had been off of work due to an emergency appendectomy on March 1, 2016. His pain rating into the biceps area was two out of ten on a ten-scale. (JE 5:76) Together he and the physical therapist worked on the wrist, elbow and shoulder. (JE 5:76) Claimant went through a pre-physical but on March 23, 2016, the surgery was canceled as the defendant employer demanded a second opinion be performed. (JE 6:90)

On March 24, 2016, claimant was experiencing an increase of pain, particularly in the shoulder and bicipital insertion points. (JE 5:77)

On April 1, 2016, a second opinion was obtained from orthopedist Benjamin S. Paulson, M.D. who agreed that claimant should undergo surgical repair to his biceps tendon tear. (Defendants' Exhibit I:23) There was no examination of claimant's right shoulder by Dr. Paulson. On April 12, 2016, claimant mentioned that his shoulder had been bothering him, running up from his wrist into his shoulder. (JE 5:79)

On April 11, 2016, claimant called Dr. Warme's office with concern over the upcoming surgery and claimant's increasing right shoulder pain. (JE 6:93)

On April 18, 2016, Andy Burt, the physical therapist, wrote to Dr. Warme that claimant had initially responded well to physical therapy but had plateaued with mild discomfort with weakness in the right upper extremity. (JE 5:80) Due to the upcoming surgery, physical therapy was discontinued. (JE 5:80) No further appointments were scheduled after his discharge. (JE 5:81)

The surgery took place on April 26, 2016. (JE 7:106) Claimant was laid off this day. He returned to work for the boilermakers after four months but immediately had problems. Shortly after a return to work, claimant took a four-day medical layoff. He had two to three more union jobs but because of his right upper extremity problems, he was unable to continue and transitioned into driving a truck. (Def. Exhibit G:17-18)

Claimant began physical therapy for pain in the right shoulder with advanced physical therapy and sports medicine on May 2, 2016. (JE 8:109) He presented with complaints of right shoulder, elbow, and wrist pain. (JE 8:109) He treated with physical therapy throughout the month of May. During that time, he was unable to perform home maintenance and unable to lift with his right upper extremity. His pain varied from six on a ten scale to a nine on a ten scale. (See generally, JE 8) By the end of May claimant had improved to the point where he was able to do home maintenance with minimal assistance in lifting of no more than five pounds. (Def. Exhibit A:116) This condition continued until about mid-July. (JE 8:130) On July 11, 2016, claimant was able to dress, drive and travel, and engage in home maintenance independently without difficulty. (JE

8:130) Lifting was increased to no more than 35 pounds and the claimant reported having no pain or discomfort with activity. (JE 8:130) His grip and pinch were symmetrical bilaterally and he exhibited only slightly reduced flexion. (JE 8:130) He was discharged from physical therapy on October 3, 2016, having returned to pre-injury levels for all but lifting which was limited to 40 pounds from floor to waist. (JE 8:132)

On June 7, 2016, claimant returned to Dr. Warme for post-surgical follow-up. (JE 6:99) He was six weeks out from the right distal biceps repair and overall he had done well. (JE 6:99) At this appointment he asked Dr. Warme to examine the shoulder. (JE 6:99) Dr. Warme was concerned that claimant had either impingement or cuff injury. (JE 6:99) X-rays were ordered which were essentially normal. (JE 6:100) Claimant developed an infection at the biceps incision point. (JE 6:103)

Claimant returned to Dr. Yager's office on June 16, 2016 in follow-up for an infection in the arm after the biceps surgery performed on May 25, 2016 by Dr. Warme. (JE 2:35) The claimant had previously been prescribed Bactrim for ten days. He was at day seven at the time of the visit. (JE 2:36) Dr. Yager directed the claimant to return should the infection not resolve after the ten-day period. (JE 2:36)

On July 20, 2016, Dr. Warme released claimant to full activity. (JE 6:104) On examination, claimant had full strength and range of motion. (JE 6:104) Claimant reported no pain in grip strength. (JE 6:104)

In the meantime, claimant treated with Dr. Robertson on August 3, 2016 for his low back and neck pain. (JE 3:58) During this visit claimant attributed his pain to helping a friend turn over an all-terrain vehicle. (JE 3:58) Dr. Robertson diagnosed claimant with cervicalgia, low back pain, segmental, somatic dysfunction of lumbar region and sacral region. (JE 3:58) Claimant responded to treatment and Dr. Robertson believed that claimant would be good. (JE 3:58)

On August 31, 2016, claimant returned to Dr. Yager to report center and lower left back pain. (JE 2:39) During this visit, the claimant denied any injury. He stated that pain had been ongoing on the left side for about four weeks and that it started after he had pulled out the interior of a car. He treated with a chiropractor but it did not help. On examination he was positive over the left tenth rib circumferentially with positive exhalation dysfunction. (JE 2:41) Dr. Yager diagnosed claimant with a left rib strain. (JE 2:41) Claimant was prescribed baclofen, a Medrol Dosepak and Vicodin. (JE 2:41)

A month later on September 21, 2016, claimant returned with reports of back pain. (JE 4:42) Again, the claimant related that back to when he was working on the car. (JE 2:43) On examination he had positive tenderness over the right lower lumbar spine. The lumbar spine x-ray was negative. (JE 2:43) Dr. Yager prescribed baclofen, Vicodin and physical therapy. (JE 2:44) Claimant was taken off work for the day. (JE 2:45)

On February 13, 2017, claimant returned to Dr. Yager with complaints of lower back, neck and shoulder pain. (JE 2:46) He reported that his shoulder and arm hurt when he drove and tended to go numb. (JE 2:47) during the examination, claimant was

positive for tenderness in the right trapezius muscle, right paraspinal region, and had decreased range of motion to the left in the cervical spine. (JE 2:47) Dr. Yager diagnosed claimant with right lumbar and cervical spine pain. He was given a prescription for baclofen and Vicodin. (JE 2:47) Dr. Yager also wrote out work restrictions for February 11, 2017 through February 13, 2017. (JE 2:48)

Claimant returned to Dr. Yager March 13, 2017 with repeated complaints of neck and shoulder pain. (JE 2:50) Claimant had been taking baclofen three times a day and hydrocodone four times a day and that while the medication did not cause him to be tired, claimant still had pain that worsened when he welded. (JE 2:50) Claimant informed Dr. Yager that he would be switching his occupation from welding to truck driving. (JE 2:50) Dr. Yager refilled claimant's prescription for baclofen and Vicodin. (JE 2.51)

On March 24, 2017, counsel for the defendants wrote counsel for the claimant informing the claimant that the gross wages for claimant was $14,129.94. Dividing the nine weeks being utilized results in an average weekly wage of $1,569.99 with an applicable rate of $869.08. Prior to that claimant was paid a slightly higher rate and therefore the defendants assert an overpayment. (Def. Exhibit F:14)

October 13, 2017, claimant returned to Dr. Yager for arthritis and joint pain. This time his primary complaint was in his right arm. "He was doing yard work and states it has progressively gotten worse. He has had weakness which is actually worse than the pain with flexion at the elbow. The patient states that if he lifts anything 5 lbs. or over, he has increased pain. He states he tried to lift a gallon of milk and almost dropped it due to his weakness and severity of pain." (JE 2:54) Dr. Yager was concerned the claimant had a possible rupture in his biceps and ordered an MRI. (JE 2:54)

On July 21, 2017, counsel for the defendant informed the claimant that the September 16, 2015 injury resulted in only a distal tear of the biceps tendon and not the back, neck or right shoulder. (Def. Ex. F: 15)

On August 30, 2019 claimant underwent an independent medical evaluation with Charles Taylon, M.D., a neurosurgeon. (Claimant's Exhibit 1) Dr. Taylon issued a report on September 1, 2019. Claimant reported an improvement in strength after his surgery but stated that he still had shooting pain in his forearm and pain at the base of his neck which radiates to his right shoulder and scapula. These problems increase with activity. (Cl. Ex. 1:1)

During the examination, he exhibited a mild decrease in range of motion of the neck and mild weakness in the right biceps muscle to confrontation testing. (Cl. Ex. 1:1) Dr. Taylon noted several complaints of right shoulder pain beginning with claimant's initial treatment with Blankenheim rehabilitation facility and continuing through 2017 during claimant's visits with Dr. Yager. Based on the medical records and claimant's history along with his own experience and expertise, Dr. Taylon included the claimant has sustained a partial tear of his right biceps as a result of the work injury dated September 16, 2015. Claimant also aggravated a mechanical musculoligamentous

injury involving his neck and shoulder. (Cl. Ex. 1:2) Combined, these injuries give rise to a 5 percent impairment of the whole body with recommended restrictions of no lifting greater than 50 to 75 pounds. (Cl. Ex. 1:2) Dr. Taylon charged $2,000 for the examination and $500 for the report. (Cl. Ex. 2:13)

On September 25, 2019, Dr. Warme opined via a checkmark on a letter authored by defendants' counsel that claimant had been released with a zero percent permanent partial disability rating and that the shoulder pain was not related to the work injury. (Def. Ex. J:25)

Since leaving the Boilermaker's union, claimant works as an independent contractor, delivering campers. It does require some physical work in that he has to lower the hitch, drop a tailgate, and use a crank. He makes the same amount of money but works year-round as opposed to when he was with the union, he would work approximately six months out of the year. He testified that while the revenue is the same or greater, his expenses such as fuel and maintenance for the truck are higher. Additionally, he does not have the same retirement or health benefits. Claimant does not believe he can lift more than ten pounds with his right arm and has refrained from certain hobbies with his children and the use of an off-road utility vehicle. At hearing, claimant said that he had obtained health insurance approximately three to six months prior to the hearing. During his deposition in July 2019, he testified that he obtained health insurance through his wife's employer's health plan. It is found that claimant has had access to health care since July 2019.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

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).

Defendants' arguments are twofold. First, they maintain that the claimant has a credibility issue and second, that Dr. Taylon's opinions are invalid because they do not address the prior treatment and complaints of the claimant before claimant's work injury of September 16, 2015.

Claimant had been treating with a chiropractor in April 2015 for back and neck pain after claimant had been riding an all-terrain vehicle. Claimant treated with Dr. Yager in June 2015 for neck and left shoulder pain with numbness radiating down the left arm which claimant attributed to overuse as a result of yard work. Both of these instances were single visits with no follow-up.

On September 16, 2015, claimant's medical condition changed. After the work injury, claimant needed regular therapy and ultimately had surgery to address weakness in the right upper extremity. As for his shoulder, claimant made complaints regarding shoulder and neck pain to the onsite physical therapist but his right upper extremity was the primary focus of therapy and then became the primary focus of treatment by Dr. Warme. Dr. Warme's records were not without errors, which led to a delay of treatment for claimant. During the first visit, Dr. Warme concluded claimant had not done physical therapy when claimant had onsite physical therapy arranged by the defendant employer. Dr. Mooney had noted in October that claimant already had undergone three weeks of conservative treatment with no improvement and ordered the x-rays and MRIs which revealed the biceps tear. Dr. Warme also believed that the tear was only approximately 50percent thickness but the surgery revealed only 20 percent attachment. (See JE 6:82 and 7:1) When Dr. Warme issued his opinion, it was based on a checklist authored by the counsel for the defendants and did not include the initial and consistent complaints of right shoulder pain that claimant made to the therapist at Blankenheim Services.

While defendants are correct that the shoulder and neck complaints were sporadic and not presented to all the health care providers, there were regular references to shoulder pain throughout 2016 and into 2017. On December 2, 2015, claimant presented to Blankenheim with a rounded shoulder and in February 10, 2016, claimant reported to the therapist that his shoulder had been bothering him. He repeated the shoulder complaint at the February 25, 2016, visit. On March 8, 2016, claimant and the physical therapist worked on the wrist, elbow and shoulder region. On April 11, 2016, claimant called Dr. Warme's office with concern over the upcoming surgery and his increasing right shoulder pain. On April 12, 2016, claimant mentioned again that his right shoulder had been bothering him with pain running from the wrist up to the shoulder. On May 2, 2016, he began physical therapy with Advanced Physical Therapy and Sports Medicine specifically for his shoulder. On June 7, 2016, he asked Dr. Warme to examine his right shoulder and Dr. Warme was concerned that claimant had either impingement or cuff injury. Besides x-rays, little has been done to investigate claimant's complaints of shoulder pain.

Dr. Taylon is not a treating doctor or an orthopaedic specialist but rather a neurologist. He did review the records and noted that the claimant had a pre-existing condition in his neck and shoulders that was exacerbated by the September 16, 2015, work injury. Defendants argue in their brief that Dr. Taylon was asked about the claimant's neck when the neck was not an issue in the case, however, during the prehearing discussion, the claimant asserted that he was seeking a causation finding as to current complaints in the neck, back, and shoulder. (See Transcript page 5) There was no objection to this by the defendants. Dr. Taylon's medical opinion is given greater weight as it considered claimant's pre-existing condition of occasional pain and discomfort and the impact of the work injury on the pre-existing condition. Dr. Taylon's opinion more accurately represents the whole picture of claimant's complaints of pain in the shoulder.

The greater weight of the evidence supports a finding that claimant's right shoulder pain which extends into the neck and down the arm is related to the work injury.

There is no expert opinion tying the back pain to the work injury and thus the claimant did not carry his burden of proof in respect to any claim pertaining to his back. Dr. Taylon's causation finding was confined to the neck, shoulder and right upper extremity.

Therefore, claimant is entitled to an industrial disability award based on the neck, shoulder and right upper extremity injuries rather than a functional disability award.

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 terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Dr. Taylon's opinion was that claimant sustained a 5 percent impairment of the whole body and recommended restrictions of no lifting greater than 50 to 75 pounds. Claimant has testified that he does not feel that he can lift more than 10 pounds but his physical therapy records, independent medical examination, and his post-work behavior does not support a work restriction that low. Claimant has returned to work and while it is not similar work and expenses are higher, it is a similar wage. Relying on Dr. Taylon's opinion as well as claimant's post-injury work history, his education, his experience, and his background, it is determined that claimant has sustained a 5 percent impairment of the whole body.

Claimant is also entitled to ongoing medical care for his neck, shoulder and right upper extremity given the above finding of causation.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Claimant requests alternatively that he be entitled to alternate medical care under Iowa Code section 85.27. Defendants argue that claimant has not pursued or obtained any treatment under his personal health insurance which he has had since at least July 2019. Defendants also point out that there is no evidence that medical treatment has been recommended for either the upper back or right shoulder. Dr. Yager recommended a follow up MRI for claimant's right arm weakness. Dr. Warme was concerned that claimant was suffering from impingement or a cuff injury but this has not been followed up on. Dr. Taylon has recommended an MRI of the neck and shoulder. Thus, defendants' assertions that no treatment has been recommended for the shoulder is inaccurate.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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

Currently there is no care being provided for claimant's condition and, in denying a claim, defendants do not have the right to choose the provider of care. Claimant continues to have symptoms in his neck, shoulder and right arm. Defendants have offered no care. They have denied the claim for benefits in regards to the shoulder and neck and have not offered any follow up care for the right upper extremity.

Based on the foregoing, it is determined that claimant is entitled to alternate care. Dr. Yager has recommended claimant undergo further testing. Claimant is entitled to return to Dr. Yager for follow-up regarding the right shoulder, neck and right upper extremity and claimant is entitled to treatment recommended by Dr. Yager including, but not limited to, referrals to specialists as needed.

In this case, defendants inadvertently paid temporary total disability benefits through August 31, 2016 (Def. Ex. E:2), which was past the maximum medical improvement date. Iowa section 85.34(4) applies to overpayment of temporary or healing period benefits. It states:

> 4. *Credits for excess payments*. If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of

> that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

Iowa Code section 85.34(4) (2013) (emphasis added). In this case, there is no assertion that the defendants failed to act in good faith and therefore, Iowa Code section 85.34(4) governs defendants' credit for the overpayment of healing period benefits. Bailey v. Mid Plains Insulation Co., Inc., File No. 5054523 (App. February 21, 2020). Because of this, defendants are entitled to a credit against the permanent partial disability that has been awarded to the claimant under this decision.

Claimant wishes for the taxation of costs. The cost itemization includes the expense of a witness who did not testify and therefore it is excluded. Defendants make the professional statement in the brief that Dr. Taylon's independent medical evaluation has been paid. The remaining costs are awarded to the claimant pursuant to 875 IAC 4.33.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of eight hundred sixty-nine and 08/100 dollars ($869.08) per week from July 28, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants are to be given credit for benefits previously paid from July 28, 2016, to August 31, 2016.

That claimant is entitled to alternate care and is entitled to return to Dr. Yager and receive treatment recommended by Dr. Yager including but not limited to referrals to specialists as needed.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 excluding Dr. Taylon's fees as defendants have made a professional statement that those costs have previously been paid.

Signed and filed this 13th day of May, 2020.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Laura L. Pattermann (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.