BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROGER HERMAN,

Claimant,

vs.

JOHNSON SANITARY PRODUCTS,

Employer,

and

PARTNERS MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5042825

APPEAL

DECISION

Head Note No.: 1803

Defendants Johnson Sanitary Products, and its insurer, Partners Mutual Insurance Co., appeal from an arbitration decision filed on November 12, 2014. Claimant Roger Herman cross-appeals. The case was heard on September 15, 2014, and it was considered fully submitted on October 17, 2014, in front of the deputy workers' compensation commissioner.

The deputy commissioner awarded claimant a running award of healing period benefits, alternate medical care and Iowa Code section 86.13 penalty benefits in the amount of $500.00.

Defendants assert on appeal that the deputy commissioner erred in finding claimant is entitled to additional healing period benefits beyond January 17, 2012, allegedly because claimant was at maximum medical improvement (MMI) as of that date. Defendants also assert the deputy commissioner erred in awarding additional medical care. Defendants also assert claimant is not entitled to additional permanent partial disability (PPD) benefits or, in the alternative, claimant's entitlement to additional PPD benefits is minimal. Defendants also assert the deputy commissioner erred in awarding penalty benefits.

Claimant asserts on cross-appeal that the deputy commissioner erred in not awarding permanent total disability or, in the alternative, claimant asserts the running

award of healing period benefits should be affirmed. Claimant also asserts the deputy commissioner erred in failing to award significantly more than $500.00 in penalty benefits.

The record, including the transcript of the hearing before the deputy commissioner and all exhibits admitted into the record, and the detailed arguments of the parties, have been reviewed de novo on appeal. Those portions of the proposed agency decision pertaining to issues not raised on appeal or cross-appeal are adopted as part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the following analysis, findings, and conclusions and I modify the arbitration decision as follows:

ISSUES ON APPEAL AND CROSS-APPEAL

The issues raised on appeal and cross-appeal are:

1. The extent of claimant's entitlement to weekly healing period benefits and permanent disability benefits;

2. The extent of claimant's entitlement to alternate medical care; and,

3. 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.

STIPULATIONS AT HEARING

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

1. On July 14, 2011, claimant sustained an injury arising out of and in the course of his employment with defendant-employer Johnson Sanitary Products.

2. Claimant is seeking a running award of healing period benefits since July 15, 2011, and defendants agree he has been off work since July 15, 2011. In the event the agency finds claimant has achieved MMI from the work injury, claimant is also seeking permanent total disability benefits.

3. The stipulated work injury is a cause of some degree of permanent industrial disability if claimant is found to have achieved MMI.

4. At the time of the stipulated work injury, claimant's gross weekly earnings were $371.27. Also at that time, claimant was single and entitled to one exemption for income tax purposes. Therefore, claimant's weekly workers' compensation

benefit rate is $246.25 according to the workers' compensation commissioner's published rate booklet for this injury.

5. Medical benefits, other than claimant's request for alternate care, are not in dispute.

6. Prior to hearing, defendants voluntarily paid 56 weeks of weekly benefits, 25 weeks of which were designated as permanent disability benefits, for this work injury at the weekly rate of $229.05. On September 15, 2014, defendants paid claimant a lump sum in the amount of $1,204.85 for underpayment of the weekly rate of compensation.

7. The grounds asserted for the penalty claim are the biweekly payment of weekly benefits, underpayment of benefits, and failure to pay a running award of healing period benefits or, in the alternative, failure to adequately compensate for permanent disability.

FINDINGS OF FACT

Claimant was 65 years old at the time of hearing. He is a high school graduate. (Transcript page 8) Previous work history includes being part of a section gang for the Milwaukee Railroad, building and finishing motor homes at Lifetime Motor Homes, machine operator at Weaver Construction, assembly and machine operator at Iowa Mold & Tooling, and bagging dehydrated milk at APMI. (Tr. pp. 9-12) Claimant testified that all of these prior jobs required lifting in excess of 50 pounds. (Id.) There is nothing in the evidence to suggest otherwise.

Claimant began working for defendant-employer Johnson Sanitary Products, a distributor of cleaning supplies, on May 20, 2011, as a courier, primarily as a delivery driver, earning $9.25 per hour, 40 hours per week. (Ex. 9, pp. 90-95) This job required claimant to lift up to 75 pounds when loading and unloading his delivery van. He also needed to climb ladders while carrying products to access and restock products on shelving in the warehouse. (Tr. pp. 14-15, Ex. 9, p. 101) While claimant was off work due to the work injury in this case, and under light duty work restrictions by the authorized treating physician, claimant was told by defendant-employer light duty was not available and he would have to be 100 percent before he could return to work. (Tr. p. 26)

On August 9, 2011, claimant was terminated by defendant-employer. The termination letter stated claimant received a warning on July 5, 2011, regarding ineffective time management, accuracy of the job and taking direction, and claimant was given two weeks to improve, but no improvement was observed. Claimant was terminated because he was within the 90-day probationary period. (Ex. 9, p. 103)

Claimant testified that the only problem he had was not completing his delivery route within the time allotted and he was returning late to the employer's location. He explained he was unfamiliar with the routes as a new employee, but he stated his timeliness improved after he purchased a GPS unit. (Tr. pp. 26-27) As claimant was off work after his injury on July 14, 2011, he never completed the two-week period given to him to improve his performance. Regardless of whether claimant's termination was due to the injury, claimant is no longer physically able to return to his job at defendant-employer because his current permanent work restrictions will not allow him to lift or carry up to 75 pounds, or climb ladders, which is required in the job. (Ex. 9, p. 101)

The stipulated work injury of July 14, 2011, involves the left shoulder. The injury occurred when claimant was pulling on a heavy barrel of floor cleaner weighing between 275 and 300 pounds. (Tr. pp. 18-19, 61)

Claimant testified he had two prior work injuries while working for Iowa Mold & Tooling, an injury to his neck and a torn rotator cuff of his right shoulder. He also stated he had some prior low back problems. However, claimant stated he returned to work after all of his past injuries without permanent activity restrictions and he stated he had no permanent activity restrictions prior to the work injury of July 14, 2011. (Tr. pp. 16-18) Claimant also stated he had no left shoulder problems or any medical treatment for his left shoulder prior to the July 14, 2011, work injury. (Tr. pp. 36-38) There is nothing in the record to suggest this testimony was incorrect. The treating orthopedic surgeon opined that the MRI performed after the July 14, 2011, work injury revealed that the torn rotator cuff in the left shoulder occurred before July 14, 2011, although the surgeon also opined that it is not uncommon for such a tear to be asymptomatic until an occurrence of an aggravating event. (Ex. 3, p. 023; Ex. B, pp. 6-8)

On the day of the injury, claimant received medical treatment at a local hospital from Rajendra Singh, M.D. (Exhibit 1) Dr. Singh diagnosed shoulder and back sprain. (Ex. 1, page 2) Sam Hunt, M.D., claimant's primary care physician, opined a possible rotator cuff tear on July 18, 2011, and a probable rotator cuff tear on July 25, 2011. (Ex. 2, pp. 1 and 6) An MRI confirmed a large rotator cuff tear on July 27, 2011. (Ex. 2, p. 9)

On July 29, 2011, Eric Potthoff, D.O., the treating orthopedic surgeon, diagnosed a massive retracted rotator cuff tear. (Ex. 3, p. 13) Dr. Pothoff recommended physical therapy and then administered a cortisone injection on September 1, 2011. (Ex. 3, pp. 19-20) Dr. Potthoff opined that claimant reached MMI on January 17, 2012. (Ex. 3, p. 29) Dr. Potthoff opined that permanent work restrictions would be needed. (Ex. 3, p. 29) On February 15, 2012, Dr. Potthoff assigned a permanent impairment rating of eight percent of the left upper extremity resulting from the shoulder injury, which converts under the AMA Guides Fifth Edition to a five percent permanent partial impairment of the body as a whole. On December 3, 2013, Dr. Potthoff adopted restrictions, without providing any discussion, determined by a functional capacity

evaluation (FCE) performed on January 26, 2012. (Ex. B, p. 7) More will be discussed about the FCE below.

Dr. Potthoff opined on December 3, 2013, that a shoulder replacement is a likely treatment option for claimant in the future, but Dr. Potthoff stated such a procedure would be related only to the pre-existing rotator cuff tear, and it would not be related to the work injury. (Ex. B, pp. 7-8) In a prior office note, Dr. Potthoff stated he discussed a possible future shoulder replacement with claimant on October 13, 2011, and he told claimant such a surgery would be to address only his pain and it would not improve the motion or strength of the shoulder. (Ex. 3, p. 23)

After claimant performed unsuccessful job searches during and after receiving unemployment compensation benefits in November and December 2011, he sought social security disability benefits. (Tr. pp. 12-14, 58; Ex. 15, pp. 12-15) The social security application included not only his left shoulder problems, but back, right shoulder and neck problems as well. (Tr. pp. 46-47, Ex. E, pp. 17-19) However, claimant claims most of his current problems are caused by the left shoulder injury. (Tr. p. 47).

As a part of the social security determination process, Matthew Byrnes, D.O., issued a report on March 5, 2012, for Iowa Disability Determination Services based on a review of claimant's medical records. (Ex. 14) Despite noting that not all of claimant's statements were fully consistent with objective findings (Ex. 14, p. 163), Dr. Byrnes opined that claimant was disabled and is functionally limited to lifting 20 pounds occasionally, 10 pounds frequently; only occasional push/pull with the left arm; no overhead lifting with the left arm; no sitting, standing or walking more than six hours per day; no ladder climbing; no crawling; only occasional bending, kneeling or crouching; and, no use of vibratory tools with the left arm. (Ex. 14, pp. 163-165) The only ongoing problems reported by Dr. Byrnes involved the "massive" three muscle rotator cuff tear in claimant's left shoulder. (Ex. 14, p. 166) Dr. Byrnes stated that the prior right shoulder, neck and low back problems were not ongoing at the time of his evaluation. (Id.) Claimant's restrictions were found to prohibit a return to his past jobs because his is limited to light duty work with no overhead reaching. (Ex. 14, p. 167) Claimant was then awarded social security disability benefits with an onset date of July 14, 2011, the same day as claimant's work injury at Johnson Sanitary Products.

Sunil Bansal, M.D., performed an independent medical evaluation (IME) of claimant on June 22, 2012. While Dr. Bansal stated claimant is not at MMI because he is a candidate for shoulder replacement surgery, Dr. Bansal also indicated that without having that particular procedure, claimant is at MMI because Dr. Bansal opined claimant currently has a nine percent impairment of the whole body based on more limited range of motion measurements than what was found by Dr. Pothoff. (Ex. 6, p. 68) Dr. Bansal also recommended permanent work restrictions as follows:

> Mr. Herman did have an FCE, but reported he was quite sore afterwards, noting that the following are restrictions based on what he can realistically perform as well as taking into account the massive tearing of his shoulder that he currently has. He has (sic) at high risk of further damage if he stresses his shoulder to any degree at this point. Given the fact that he has had prior right shoulder surgery and his left shoulder is so weak, he risks further damage to the right as well given the natural propensity to compensate.
>
> Taking all of the above into account, I assign the following restrictions:
>
> I would place a restriction of no lifting greater than lifting 10 pounds with the left arm as well as no lifting overhead with the left arm.
>
> No frequent lifting, pushing, or pulling to avoid further damage to the shoulder and keep pain levels in check.
>
> No pushing, pulling greater than 20 lbs.
>
> He should avoid continual reaching as that will cause his supporting tendons to be overextended and subsequently cause pain. His body may even try to compensate by utilizing shoulder area tendons.

(Ex. 6, p. 69)

I find that the permanent restrictions recommended by Dr. Bansal are reasonable, they are the most appropriate restrictions for claimant and those restrictions permit claimant to work within the light duty category.

I disagree with the arbitration decision and I find that because claimant has not undergone the shoulder replacement surgery, he achieved maximum medical improvement as of January 17, 2012, as opined by Dr. Potthoff (Ex. 3, pp. 29, 31) and as indicated by Dr. Bansal. (Ex. 6, p. 68) Claimant has not received any treatment since his last visit with Dr. Potthoff in January 2012. As noted by both Dr. Potthoff and Dr. Bansal, a future shoulder replacement surgery could be performed to address claimant's pain, but it would not increase his functioning. Claimant admitted at hearing that until the hearing in this case, he had not sought any further treatment from Dr. Potthoff or any other provider since January 2012. (Tr. pp. 42-45) When asked about the shoulder replacement surgery, claimant stated he did not know much about it and had not really talked to anyone about it, but he stated he has heard some bad things about the surgery. (Tr, pp. 32) Consequently, it is unclear whether claimant desires such a surgery without further advice from a shoulder specialist. Therefore, I find that claimant's condition has been stable and ratable since January 17, 2012, and claimant has been at MMI since that date.

Despite reaching maximum medical improvement, claimant continues to have significant pain. He testified that his pain level is 6-7 out of a high of 10 when he is active, and 3-4 out of 10 when he is inactive. He currently uses over-the-counter medications to address his pain. His pain limits his activities of daily living.

I do not find convincing Dr. Pottoff's view that the potential shoulder replacement surgery is not related to the work injury, but only to the pre-existing condition. Both Dr. Potthoff and Dr. Bansal state that the surgery would address only claimant's pain and not the functionality of his shoulder. (Ex. 3, p. 23; Ex. 6, p. 68) I find that the record in this case supports a finding that claimant was asymptomatic until the July 14, 2011, injury and his pain has been continuous since that time. Therefore, if the work injury caused the onset of the pain, logically any surgery to address that pain is related to the injury. The injury may not be the only factor, but it remains a significant factor, in precipitating the potential need for a future total left shoulder replacement.

The significance of the July 14, 2011, work injury is clearly shown by Dr. Pottoff's views on permanent impairment and restrictions. Claimant had no permanent impairment or permanent restrictions before the work injury. Dr. Bansal believes claimant's loss of range of motion is getting worse and the record demonstrates this fact. As aptly pointed out by claimant's counsel in the cross-appeal brief, the range of motion findings for flexion, abduction, extension and external rotation in the FCE testing is less than the findings by Dr. Potthoff, and Dr. Bansal's findings are less than those in the FCE. (Ex. 3, p. 28; Ex. 5, p. 51 and Ex. 6, p. 68) Dr. Potthoff did not explain why his measurements differ from those taken at the FCE, given the evaluator's opinion that claimant was providing maximum and valid effort.

The FCE results also are troublesome. The FCE evaluator concluded that claimant is able to perform medium-to-heavy work due to his demonstrated ability to perform two-hand frequent lifting of 33 pounds from floor to waist and two-hand push/pull of 150 pounds. Defendants assert that the social security evaluator, Dr. Byrnes, did not review the FCE and, consequently, his views should be unconvincing.

Typically, FCE evaluators and vocational experts in our proceedings refer to heavy, medium and light physical demand levels when submitting expert opinions to this agency. Usually in doing so, they are referring to the physical demand levels described in Appendix C of the Dictionary of Occupational Titles (DOT) published by the United States Department of Labor. The DOT has now been replaced by an on-line resource called "O-Net." The social security administration has essentially adopted the same description of these physical demand levels in their regulations. 20 CFR 404.1567. These physical demand levels are essentially described as follows: Heavy work requires the ability to lift up to 50 pounds frequently and 100 pounds occasionally. Medium work requires the ability to lift up to 25 pounds frequently and 50 pounds occasionally. Light work requires the ability to lift up to 20 pounds occasionally and 10 pounds frequently.

In applying these physical demand level descriptions to the results of the FCE in this case, I find only in the floor to waist testing was claimant able to lift 33 pounds frequently. He was not able to do so from waist to shoulder level or overhead. He was not able to lift more than 35 pounds occasionally. Consequently, claimant is not able to perform jobs in the medium physical demand category as defined by the Dictionary of Occupational Titles or the social security regulations. What resource was used by the FCE evaluator in this case is not disclosed in the report. Consequently, the view of Dr. Byrnes, the social security evaluator, that claimant is limited to light duty work is found to be consistent with the FCE results, and it is also found to be consistent with the restrictions recommended by Dr. Bansal. There was a difference in the push-pull views of the evaluator and those of Dr. Byrnes, but the FCE results were with the use of both arms, and the push-pull restriction of Dr. Byrnes was only for the injured left arm and shoulder. In adopting the FCE results, it is unclear whether Dr. Potthoff accepted the conclusion about medium-heavy work, or just the results which again are consistent with the views of Dr. Byrnes. Considering all of the evidence in the record in this case, I find that the permanent light-duty restrictions recommended by Dr. Bansal are the correct permanent restrictions for claimant as a result of the work injury of July 14, 2011.

I find the work injury of July 14, 2011, is a cause of a significant permanent partial impairment to the body as a whole and, more importantly for the analysis of industrial loss, I find the work injury causes claimant to be restricted to light duty work with no overhead lifting as more particularly described in Dr. Bansal's IME report.

Claimant's medical condition before the work injury was good and he had no functional impairments or ascertainable disabilities. He was able to fully perform physical tasks involving heavy lifting, repetitive lifting, repetitive bending, twisting and stooping, and prolonged standing and sitting. Due to claimant's physical limitations caused by the work injury in this case, he is unable to return to the job he had at the time of his injury and he is unable to return to any of his other past employments for which he is best suited given his age, work experience, and education.

Following his termination by defendant-employer and his recovery from the injury, claimant was unsuccessful in searching for employment. He then sought and received social security disability benefits. (Tr. pp. 33-34; Ex. 15, p. 172 – depo. pp.13-15) However, the record in this case does not establish whether claimant specifically sought employment within the permanent work restrictions specifically recommended by Dr. Bansal.

Neither Dr. Potthoff nor Dr. Bansal stated claimant is incapable of working. Also there is no report in the record from a vocational expert stating claimant is unemployable. Therefore, I find the work injury of July 14, 2011, to be the cause of significant industrial disability, but I do not find the work injury to be the cause of

permanent total disability. I find claimant has established a 75 percent loss of earning capacity, which entitles him to 75 percent industrial disability.

As noted above, I find the record to be unclear regarding claimant's desire for additional treatment, including the total shoulder replacement procedure discussed by Drs. Potthoff and Bansal. I find that the need for such a surgery was precipitated by the work injury and the onset of left shoulder pain at that time. I find that if claimant so desires, he should be further evaluated, as directed by defendants, for additional treatment by another orthopedic surgeon who specializes in shoulder replacement surgery, such as James Napola, M.D., who is with the University of Iowa Hospitals and Clinics. There has been a breakdown of the physician-patient relationship between claimant and Dr. Potthoff such that claimant should not be required to return to Dr. Potthoff for further evaluation or treatment. (Ex. 15, p. 176 – depo. pp. 29-30; Tr. pp. 22-24)

The employer herein paid benefits at $229.05, an underpayment of $17.20 per week for 56 weeks of benefits. No reason or excuse was offered for using the lower weekly rate other than a statement that the gross weekly rate was miscalculated and defendants believe they acted reasonably. While this was later corrected, there clearly was a delay in paying $1,204.85 in benefits. It is unknown if this payment includes unpaid interest.

Temporary total disability (TTD) benefits were paid every two weeks rather than every week as required. Thus every other week of TTD benefits was paid late. Yet, even then, the benefits were paid with gaps of nearly a month on one occasion and nearly three weeks on another occasion. No reason or excuse was offered for the improper payments of weekly benefits.

CONCLUSIONS OF LAW

1. 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 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).

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); 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).

The parties stipulated that if claimant is found to be at MMI, 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.

In 2004, Iowa Code section 85.34(2)(u) was amended to read as follows:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

This change adopted the so-called "fresh start rule." The fresh start rule is based upon the premise that a workers' earnings in the competitive labor market at the time of a work injury are reflective of that workers' earning capacity. If that worker had any physical or mental impairment or any other socio-economic impediment limiting his or her employment prior to a work injury, the impact of that impairment or impediment upon that worker's earning capacity, absent evidence to the contrary, has already occurred and is reflected in his earnings at the time of injury.

Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work-related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earnings capacity from what existed immediately prior to the work injury. This means that a person already severely disabled before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons start with a 100 percent earning capacity, regardless of any prior health conditions.

The rationale for this approach is that in Iowa, as well as in other states, the employer's liability for workers' compensation benefits is dependent upon that person's weekly rate of compensation which is a portion of the person's weekly earnings at the time of injury. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into any award of compensation for a work injury and there is no need to further apportion out that impact from any workers' compensation award. If the injured workers wages are high, despite his prior condition, then the condition apparently has not negatively impacted his earning capacity. If they are low, it is likely they are low because of his prior condition and consequently, the employer's liability is low because of the resulting low rate of compensation.

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 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.

As stated above, I find claimant has suffered a 75 percent loss of earning capacity as a result of the work injury. Such a finding entitles claimant to 375 weeks of permanent partial disability benefits.

2. Claimant seeks alternate medical care. Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 526 2 N.W.2d 433 (Iowa 1997). Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, this 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 therefore, allow and order other care.

In this case, any pursuit of a surgery was denied by defendants because they assert that such a need for the surgery is not related to the work injury. I find otherwise and treatment is awarded if claimant wishes to pursue that option. As stated above, if claimant desires further evaluation for a possible shoulder replacement surgery, defendants shall direct claimant to another orthopedic surgeon who specializes in shoulder replacement surgery. Claimant is not required to return to Dr. Potthoff for further evaluation or treatment.

3. Claimant seeks penalty benefits under Iowa Code section 86.13 (4). That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation 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 if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or

termination of benefits. (Iowa Code section 85.13(4)(b)) A reasonable or probable cause or excuse must satisfy the following requirements:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

(3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." City of Madrid v. Blasnitz, 742 N.W.2d 77, 83 (Iowa 2007); Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996)

In this case, claimant sought penalty benefits on three grounds. First, defendants paid benefits at two-week intervals, rather than weekly as required by our statutes. Defendants provided no reason or excuse for this payment method or reason or excuse for the more than two-week delays in a couple of payments. Defendants acted unreasonably in doing so.

Second, claimant sought penalty benefits for underpayment of the weekly benefit rate until receipt of a check for back payments. No reason or excuse was offered for defendants' miscalculation of the weekly rate. Such a delay in payment was unreasonable. Just saying you acted reasonably is insufficient.

Thirdly, claimant sought penalty benefits for failing to provide a running payment of healing period benefits. In this case, as this decision demonstrates, because claimant is found to be at MMI as of January 17, 2012, this portion of claimant's penalty claim fails.

The deputy commissioner assessed the sum of $500.00 as penalty for the unreasonable delays in paying benefits. This is an appropriate amount given the very small amounts underpaid and the very short delays in payments.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of November 12, 2014, is modified as follows:

1. Defendants shall pay claimant healing period benefits from July 15, 2011, through January 17, 2012, at the stipulated weekly rate of two hundred forty-six and 25/100 dollars ($246.25).

2. Defendants shall pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing on January 18, 2012, at the stipulated weekly rate of two hundred forty-six and 25/100 dollars ($246.25).

3. Defendants shall receive a credit against this award for the prior payment of weekly benefits.

4. At the request of claimant, defendants shall provide additional treatment for the work injury of July 14, 2011, by an orthopedic surgeon other than Dr. Potthoff, who specializes in shoulder replacement surgeries, which treatment shall include left shoulder replacement surgery if recommended by that surgeon.

5. Defendants shall pay a penalty of five hundred and 00/100 dollars ($500.00) for their unreasonable delays in paying weekly benefits.

6. Defendants shall pay accrued weekly benefits in a lump sum.

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

8. Defendants shall reimburse claimant's costs as outlined in the arbitration decision and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

9. Defendants shall file subsequent reports of injury (SROI) as required by administrative rule 876 IAC 3.1(2).

Signed and filed this 3rd day of March, 2016.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
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