

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT OSTWINKLE,

Claimant,

vs.

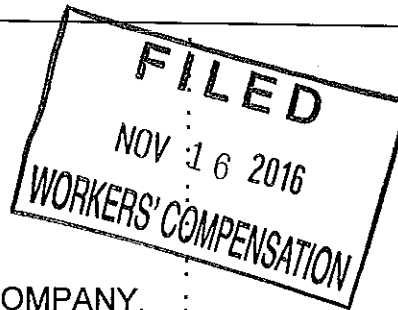
MATHY CONSTRUCTION COMPANY,

Employer,

and

ZURICH AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File Nos. 5052718
5052719

ARBITRATION
DECISION

Head Note Nos.: 1801; 1801.1; 1803

STATEMENT OF THE CASE

Claimant, Robert Ostwinkle, filed petitions in arbitration seeking workers' compensation benefits from Mathy Construction Company, employer, and Zurich American Insurance Company, insurance carrier, both as defendants, as a result of stipulated injuries sustained on July 6, 2012 and July 23, 2013. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on June 7, 2016, in Cedar Rapids, Iowa. The record in this case consists of claimant's exhibits 1 through 21, defendants' exhibits A through C, and the testimony of the claimant and Scott Kueter. The parties submitted post-hearing briefs, the matter being fully submitted on July 15, 2016.

ISSUES

In File No. 5052718 (Date of Injury: July 6, 2012; Right Shoulder):

The parties submitted the following issue for determination:

1. The extent of claimant's industrial disability.

In File No. 5052719 (Date of Injury: July 23, 2013; Low Back):

The parties submitted the following issue for determination:

1. Whether claimant is entitled to temporary disability benefits during the periods of December 5, 2013 through May 4, 2014; November 14, 2014 through May 10, 2015; and/or November 10, 2015 through May 18, 2016.

STIPULATIONS

In File No. 5052718 (Date of Injury: July 6, 2012; Right Shoulder):

The stipulations of the parties in the hearing report are incorporated by reference in this decision and are restated as follows:

1. The existence of an employer-employee relationship at the time of the alleged work injury.
2. Claimant sustained an injury on July 6, 2012 which arose out of and in the course of employment.
3. The alleged injury is a cause of temporary disability.
4. The alleged injury is a cause of permanent disability.
5. The permanent disability is an industrial disability.
6. The commencement date for permanent partial disability benefits, if any are awarded, is March 19, 2013.
7. At the time of the alleged injury, claimant's gross earnings were \$1,936.76 per week, claimant was married, and claimant was entitled to three exemptions.
8. Affirmative defenses were waived.
9. Prior to hearing, claimant was paid 30 weeks of permanent partial disability benefits at the rate of \$1,292.42 per week.

In File No. 5052719 (Date of Injury: July 23, 2013; Low Back):

The stipulations of the parties in the hearing report are incorporated by reference in this decision and are restated as follows:

1. The existence of an employer-employee relationship at the time of the alleged work injury.

2. Claimant sustained an injury on July 23, 2013 which arose out of and in the course of employment.
3. The alleged injury is a cause of temporary disability.
4. The issue of permanency is not ripe for determination.
5. At the time of the alleged injury, claimant's gross earnings were \$2,193.40 per week, claimant was married, and claimant was entitled to three exemptions.
6. Affirmative defenses were waived.
7. Since October 21, 2015, defendants have been paying claimant weekly benefits at the rate of \$1,264.65.

FINDINGS OF FACT

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

Claimant's testimony was clear, knowledgeable and consistent as compared to the evidentiary record. He was personable and his demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 60 years of age at the time of hearing. He graduated high school in 1973 and resides in Cascade, Iowa. Claimant is right hand dominant. Claimant's work history includes as a laborer on family-owned crop and livestock farms, lumber yard attendant and delivery, and in asphalt paving. (Claimant's testimony)

In 1976, claimant began as a laborer on an asphalt paving crew, he subsequently became a driver and later, a foreman. He performed such work until 1999, when he was hired by defendant-employer. Since that time, claimant has worked as a foreman for defendant-employer, running an asphalt paving crew. He runs one of three such crews for defendant-employer. His duties require claimant to manage operations of his crew and locations, check conditions, set up traffic control, and schedule workers and truck deliveries. In addition to his supervisory tasks, claimant also performed physical labor on the crew. (Claimant's testimony)

Defendant-employer's job description for the position of foreman – hot mix asphalt paving crew notes physical demands including the ability to frequently stand, walk, climb, bend, rake, shovel, and lift 21 to 50 pounds, and occasionally sit, crawl, kneel, run, reach above shoulder level, and lift 51 to 100 pounds. Seasonal work hours were noted as up to 14 hours per day, 6 days per week. (Ex. 10, pp. 187-188)

On July 6, 2012, claimant suffered a stipulated work-related injury to his right shoulder. Claimant testified on this date, he began to suffer with right shoulder pain while lifting road signs out of a ditch. Claimant testified he completed an injury report, but continued working. When his symptoms did not abate, claimant requested medical treatment. (Claimant's testimony)

Defendants arranged for claimant to receive medical care through Medical Associates. Michael Stenberg, M.D., evaluated claimant on August 7, 2012 and initiated a course of conservative treatment, including work restrictions, physical therapy, and use of over-the-counter medications. (Ex. A, p. 1) Erin Kennedy, M.D., assumed claimant's care and provided treatment from August 15, 2012 through October 22, 2012. During this timeframe, Dr. Kennedy performed a subacromial injection, imposed work restrictions, ordered continued physical therapy, and prescribed naproxen. (Ex. A, pp. 2-7) Dr. Kennedy also ordered an MRI of claimant's right shoulder which took place on September 18, 2012. (Ex. A, pp. 7-8) Following the MRI, Dr. Kennedy reviewed the results and opined the MRI revealed a partial tear of the supraspinatus tendon. She maintained work restrictions and referred claimant for orthopedic evaluation. (Ex. A, p. 9)

Per Dr. Kennedy's referral, claimant presented to Scott Schemmel, M.D., for orthopedic evaluation on November 2, 2012. Dr. Schemmel assessed findings consistent with subacromial impingement syndrome and partial thickness rotator cuff tearing. He recommended arthroscopic intervention. (Ex. A, pp. 10-11)

On November 9, 2012, defendant-employer placed claimant on seasonal layoff. (Ex. B, p. 2) Claimant testified he received weekly workers' compensation benefits during the time he was laid off. (Claimant's testimony)

Claimant underwent surgery performed by Dr. Schemmel on November 26, 2012. The procedure consisted of arthroscopic debridement of an articular side rotator cuff tear, partial thickness; biceps tenotomy; labral debridement; and chondroplasty of the glenoid. Dr. Schemmel issued a post-operative diagnosis of partial thickness undersurface articular side rotator cuff tear of the supraspinatus tendon; partial tear of the biceps tendon with superior labral tearing; and grade 3 or grade 4 articular surface change on the anterior aspect of the glenoid. (Ex. 4, pp. 18-20)

On March 19, 2013, claimant returned to Dr. Schemmel in surgical follow up. Dr. Schemmel opined claimant had done very well post-surgery, with some residual soreness, as well as some pain and weakness with range of motion. Dr. Schemmel opined claimant should be capable of returning to work at his preinjury level and thus, released claimant without restrictions. He noted Dr. Kennedy would perform a rating of claimant's permanent impairment. (Ex. A, p. 12)

On May 9, 2013, Dr. Kennedy performed a records review and determined claimant achieved maximum medical improvement (MMI) from his right shoulder surgery on March 19, 2013, the date of his last evaluation with Dr. Schemmel. (Ex. 5, p. 24)

Subsequently, on May 22, 2013, claimant presented to Dr. Kennedy for in-person evaluation. Claimant described his current complaints as aching and burning of the right shoulder and deltoid muscle; he rated the pain as a level 2 to level 6 on a 10-point scale. Claimant reported suffering with no pain if his right arm was at rest, but pain with use of the arm and particularly, with use when the arm was outstretched to the front or side of his body. He relayed an ability to perform any such task for a short period; however the arm became fatigued and achy with performance of certain job tasks for longer periods. Claimant reported experiencing difficulty with use of a trailer jack, hammering, loading binders, swinging a sledgehammer, and operating stick controls of a skid loader. Dr. Kennedy noted each of these tasks required the right arm to be outstretched away from claimant's body. Claimant also reported increased discomfort with use of vibratory tools such as a jackhammer; while he could previously perform this task for the majority of a work day, he was now unable to tolerate the duty for longer than 15 minutes. He noted his employer accommodated his limitations by allowing more frequent breaks and greater variability in job tasks. As a result, claimant's exposure to certain duties was limited in duration. Given these accommodations, Dr. Kennedy opined claimant was working full duty without difficulty. (Ex. 6, p. 27)

Dr. Kennedy performed a physical examination of claimant. (Ex. 6, pp. 27-28) Dr. Kennedy opined claimant did well post-operatively. She noted claimant regained strength, but reported decreased conditioning of the right shoulder. Based upon decrements in range of motion of the right shoulder, Dr. Kennedy opined claimant suffered a 6 percent whole person impairment. She noted claimant had resumed work full duty, without restrictions. (Ex. 6, p. 28)

Claimant testified he and Dr. Kennedy discussed claimant's need for permanent restrictions. He testified Dr. Kennedy informed him she could impose permanent restrictions, but doing so might result in termination of his employment. As a result, claimant testified Dr. Kennedy advised him to discuss his limitations with a supervisor and determine if claimant could receive informal accommodation. Claimant testified he spoke with his supervisor and the supervisor expressed acceptance of claimant returning to work in his existing physical condition. (Claimant's testimony)

On July 23, 2013, claimant suffered a stipulated work-related injury to his low back. Claimant testified on this date, he was wrapping heavy electrical cords and felt a sharp pain from his stomach and into his low back. (Claimant's testimony) Claimant was transported to the emergency room, where he received treatment. Claimant was administered Toradol and provided prescriptions for Lortab and ibuprofen 800 mg. He was removed from work for one day and allowed to return to work thereafter under work restrictions. (Ex. 7, p. 30-31)

Claimant then began a course of treatment of his back injury with Medical Associates. On July 30, 2013, Thomas Miner, D.O., evaluated claimant and recommended conservative care, including physical therapy. He noted as a foreman, claimant possessed the opportunity to restrict his duties. He imposed work restrictions of a 10-pound maximum lift and avoidance of repetitive bending, lifting, and twisting. (Ex. 8, pp. 32, 34)

Thereafter, from August 15 through October 16, 2013, claimant's back care at Medical Associates was handled by Kelly Lindblom, ARNP. Claimant continued to follow a conservative treatment plan and Ms. Lindblom imposed gradually lessening activity restrictions. (Ex. 8, pp. 44, 49, 51, 53) On October 16, 2013, claimant returned to Ms. Lindblom and reported difficulties with certain duties and continued back symptomatology. Ms. Lindblom imposed restrictions of standing, walking, and sitting as limited by comfort; no repetitive bending, lifting or twisting of the back; no lifting over 30 pounds; and no shoveling or raking. (Ex. 8, pp. 58, 60)

On December 5, 2013, defendant-employer placed claimant on seasonal layoff. (Ex. 17, p. 234; Ex. B, p. 3) Claimant testified he did not apply for unemployment benefits, as he was under work restrictions. (Claimant's testimony)

On March 11, 2014, claimant presented to Dr. Kennedy for evaluation of his back complaints. Dr. Kennedy recommended conservative care and maintained the restrictions imposed by Ms. Lindblom on October 16, 2013. (Ex. 8, p. 63) Claimant continued to follow up with Dr. Kennedy, who recommended continuation of claimant's work restrictions and referred claimant for pain management with Peggy Mulderig, M.D. (Ex. 8, pp. 69, 71-72)

Claimant remained on seasonal layoff from December 5, 2013 through May 4, 2014, as the records reveal claimant resumed full work hours on May 5, 2014. (Ex. 18, p. 235; Ex. C, p. 1) However, while the seasonal layoff was still in effect, claimant worked limited hours during the weeks ending March 8, 2014 and April 5, 2014. Specifically, in each of these weeks, claimant worked 7.5 hours and earned \$199.13. (Ex. C, p. 1)

On June 20, 2014, claimant presented to Medical Associates and was evaluated by Joseph Garrity, M.D. Dr. Garrity noted claimant had suffered a work-related injury of being burned by hot antifreeze. He opined claimant would soon achieve MMI and required no restrictions. (Ex. 9, pp. 114-116)

On November 14, 2014, defendant-employer placed claimant on seasonal layoff. (Ex. 19, p. 236; Ex. B, p. 4) Claimant did not apply for unemployment benefits, as he remained under work restrictions. (Claimant's testimony)

Claimant returned to Dr. Garrity on November 24, 2014 for evaluation of back complaints. Dr. Garrity recommended claimant continue his existing course of care with Dr. Kennedy. Dr. Garrity commemorated restrictions of standing, walking, and sitting as

limited by comfort; no bending, lifting, or twisting of his back; and no lifting over 30 pounds. (Ex. 8, pp. 74-75) Claimant returned to Dr. Kennedy on December 5, 2014; she maintained the restrictions imposed by Dr. Garrity. (Ex. 8, p. 78) Claimant was referred back to Dr. Mulderig for further care, which continued from January 15 through April 7, 2015. (Ex. 8, pp. 80-83, 85)

On May 7, 2015, claimant presented to Michael Chapman, M.D., for evaluation of his back complaints. Following evaluation, Dr. Chapman recommended surgical fusion. He also imposed restrictions of lifting up to 35 pounds; limiting bending, lifting, or twisting of the back; no shoveling; and no work beyond claimant's physical comfort level. (Ex. 8, p. 89)

Claimant remained on seasonal layoff from November 14, 2014 through May 10, 2015. The records reveal claimant resumed full time work for defendant-employer on May 11, 2015, during the week ending May 16, 2015. (Ex. 20, p. 276; Ex. C, p. 2) Although claimant remained on seasonal layoff into May 2015, claimant performed some limited work for defendant-employer in prior weeks. (Ex. 20, pp. 237-238, 241, 243-245, 248-250, 256-259) Claimant earned \$172.58 during the week ending March 14, 2015, \$232.31 in the week ending March 28, 2015, \$1,782.18 in the week ending April 11, 2015, \$836.33 in the week ending April 18, 2015, and \$1,795.46 in the week ending April 25, 2015. (Ex. C, p. 2)

Claimant's counsel authored a letter to claims specialist, Michael Sechrest, of defendant-insurance carrier dated July 6, 2015. Counsel requested authorization of the back surgery recommended by Dr. Chapman. He also requested defendants remit payment for healing period benefits for the back claim during periods claimant was placed on seasonal layoff. (Ex. 9, pp. 90-91) Upon learning of defendants' representation by counsel, claimant's counsel forwarded his letter of July 6, 2015 to defendants' counsel and requested assistance with the listed issues. (Ex. 9, p. 92)

On August 24, 2015, claimant's counsel authored a letter to defendants' counsel citing medical records from Medical Associates which claimant believed established he was under restrictions at the time of his seasonal layoffs. Claimant's counsel, accordingly, requested payment of healing period benefits. (Ex. 9, pp. 94-136)

At defendants' referral, on September 23, 2015, claimant presented to Chad Abernathey, M.D., for evaluation of back complaints. Dr. Abernathey recommended surgical intervention. (Ex. 13, p. 225)

At the arranging of claimant's counsel, on October 14, 2015, claimant presented for independent medical evaluation (IME) with board certified occupational and environmental medicine physician, Robin Sassman, M.D., for consideration of his right shoulder condition. Dr. Sassman issued a report containing her findings and opinions on November 10, 2015.

In drafting her report, Dr. Sassman analyzed claimant's work duties and the physical demands of these duties, reviewed claimant's medical records, and performed a physical examination. (Ex. 2, pp. 5-7, 9-10) Dr. Sassman assessed a right shoulder rotator cuff tear, post arthroscopy. She opined claimant achieved MMI on November 26, 2013, one year following surgery. In terms of further care, Dr. Sassman recommended claimant perform daily range of motion exercises. (Ex. 2, p. 10) Dr. Sassman opined claimant sustained permanent impairment of 7 percent whole person due to decreased range of motion of the shoulder. She also recommended the following permanent restrictions with respect to claimant's right shoulder: using both hands, limit lifting, pushing, pulling and carrying to 30 pounds occasionally from floor-to-waist or waist-to-shoulder and to 20 pounds rarely above shoulder height; with only the right hand, limit lifting, pushing, pulling and carrying to 10 pounds rarely; no use of ladders due to an inability to maintain a three-point safety stance; no use of vibratory or power tools; and limit gripping and grasping to below shoulder height on an occasional basis with the right hand. (Ex. 2, p. 11)

On October 14, 2015, Dr. Kennedy performed a records review with respect to claimant's back condition. She indicated as claimant had not solicited additional treatment despite Dr. Chapman's surgical recommendation five months' prior, it was her opinion claimant had achieved MMI as of October 14, 2015. (Ex. 9, p. 158)

Following receipt of Dr. Kennedy's opinion claimant had achieved MMI, defendant-insurance carrier began issuing weekly benefit checks in the amount of \$1,264.65, designated as permanent partial disability benefits. (Ex. 12, p. 199-216)

On October 27, 2015, claimant's counsel directed a letter to defendants' counsel regarding Dr. Kennedy's placement of claimant at MMI with respect to his back condition. Claimant's counsel expressed belief this opinion was in error, as it appeared predicated upon claimant's failure to pursue surgical care, when claimant had, in fact, sought authorization for surgery from defendants. (Ex. 9, pp. 137-138)

Defendants' counsel authored a responsive letter to claimant's counsel that same date, expressing disagreement with the contention that Dr. Kennedy's opinion was incorrect. Counsel noted claimant might be eligible for intermittent healing period benefits at a later date, should he undergo surgery. Regardless of Dr. Kennedy's position on MMI, defendants' counsel indicated defendants declined to pay healing period benefits during seasonal layoffs. He reasoned claimant's healing period ended when claimant was medically capable of returning to substantially similar employment and claimant had returned to work in his pre-injury position. (Ex. 9, p. 160)

On November 10, 2015, defendant-employer placed claimant on seasonal layoff. (Ex. 21, p. 277) Claimant did not apply for unemployment benefits, as he remained under work restrictions. (Claimant's testimony)

On February 6, 2016, claimant underwent a lumbar laminectomy surgery performed by Dr. Abernathey. (Ex. 13, p. 226) On April 13, 2016, Dr. Abernathey opined he viewed no contraindication to full duty work duties from a neurosurgical standpoint. (Ex. 13, p. 227)

Following surgery, defendant-insurance carrier issued weekly benefit checks in the amount of \$1,264.65 through April 13, 2016, designated as temporary total disability benefits. (Ex. 12, pp. 217-224)

On April 20, 2016, claimant's counsel directed a letter to defendants' counsel. Claimant's counsel expressed concern defendants would rely upon Dr. Abernathey's letter of April 13, 2016 and attempt to return claimant to full duty work. (Ex. 9, pp. 169-170)

Defendants' counsel issued a responsive letter dated April 28, 2016, clarifying defendant-employer intended claimant to return to work as a foreman. Counsel indicated defendant-employer would continue to provide claimant the "discretion" to use his best judgment as to the job functions he was capable of performing. Counsel indicated if a task was "too physically demanding," defendant-employer did not want claimant to perform that task. (Ex. 9, p. 174)

On May 10, 2016, claimant's personal physician, Guy McCaw, M.D., authored a statement regarding claimant's ability to return to work. Dr. McCaw opined claimant may perform full time work hours, but should work "as tolerated within the limits of his back and right leg pain." (Ex. 9, p. 186)

On May 18, 2016, defendants' counsel provided claimant's counsel with a modified duty work assignment form with respect to claimant's back and right leg difficulties. Counsel noted defendant-employer agreed claimant "should not engage in any work activities that aggravate those conditions or which he believes he should not do." Counsel indicated defendant-employer's position was consistent with the work release authored by Dr. McCaw. (Ex. 9, p. 181) The enclosed work assignment form adopts the restrictions of Drs. Abernathey and McCaw and indicates claimant is not to perform duties he feels are "too physically demanding" given his back and right leg conditions. (Ex. 9, p. 183)

Claimant testified he continues to suffer with limitations of his right shoulder. He testified his strength is "not very good" and he has "very little" endurance, as he is required to take frequent breaks from use of the right arm. Claimant testified he is also limited in the manner in which he uses his right arm extended from his body. (Claimant's testimony)

Claimant testified following the low back injury, his ability to work changed beyond the limitations required of his right shoulder. He explained walking then resulted in numbness of the right leg, tingling of the right foot, and pain of his low back and right

side. Claimant denied difficulty walking with his paving crew prior to the July 23, 2013 injury, but following the injury, he experienced leg symptoms after walking 500 feet. As a result, he ceased performing walking duties as frequently. He also experiences weakness in his legs with prolonged standing. As a result of these problems, claimant testified he will sit in his work pickup to get relief; however, sitting can also cause difficulties. Accordingly, claimant alternates between sitting and standing. Claimant testified he also can experience pain with bending to lift; on some occasions, he can work through the pain and on others, he is forced to rest. Claimant testified he has never returned to the level of functioning he could manage prior to his low back injury. (Claimant's testimony)

At the time of evidentiary hearing, claimant remained employed by defendant-employer as a foreman. He earns a higher hourly wage than he had prior to either stipulated work injury; his rate of pay is set in accordance with a union contract governing work for laborers. Claimant testified he enjoys his work, but he is unable to perform as much physical work as he had prior to his shoulder injury. Claimant testified he now performs only a fraction of the physical work he performed prior to his shoulder injury in July 2012. Claimant testified his supervisor, Scott Kueter, has been good to work with and has essentially allowed claimant to control what tasks he performs. In the event claimant finds a task too demanding, he speaks to Mr. Kueter, and the two determine a plan to accomplish what needs to be done. (Claimant's testimony)

Claimant testified he experiences difficulty with gripping and grasping tasks. He now drives almost exclusively with his left arm, while leaving his right arm sitting on the console. Claimant also experiences difficulty operating equipment and sometimes has difficulty completing tasks requiring forceful use of hand tools. Claimant testified he is limited in his ability to lift with his right arm; he is able to lift greater weights with his arm at his side than with his arm bent. Claimant testified he also fatigues with heavier-natured lifting and experiences difficulties working above shoulder height. He exercises care with use of steps or ladders. Claimant also limits the duration or avoids use of vibratory tools such as a jackhammer, asphalt compactor, or chop saw. (Claimant's testimony)

Scott Kueter, superintendent for defendant-employer, testified at evidentiary hearing. Mr. Kueter testified he oversees existing and upcoming projects; in this role, he supervises claimant. He described their relationship as involving reporting to one another, as he values claimant's extensive hands-on experience and allows claimant to handle on-site activities. Mr. Kueter testified there are two other paving crews in addition to claimant's, each of which have foreman. These foreman have the same responsibilities as claimant, albeit in different working environments. (Mr. Kueter's testimony)

Mr. Kueter testified claimant is a good worker. He indicated claimant performs the same activities as he had prior to either work injury, yet acknowledged claimant likely performed a significant amount less shoveling and physical labor. Mr. Kueter testified claimant performed less of such labor following the right shoulder injury and

acknowledged claimant performed less, to some degree, following the back injury. Mr. Kueter testified he has informed claimant if he is unable to handle a duty, that there are other members of the crew who can perform the task. He explained there is a certain amount of physical work which needs to be done by the crew, but claimant's contribution to that physical work has lessened. Mr. Kueter testified he has explained to claimant that Mr. Kueter values claimant's ability to manage the paving crew and does not need claimant to perform physical labor. (Mr. Kueter's testimony)

Mr. Kueter's testimony was clear, professional, and consistent with the evidentiary record. His demeanor was excellent and gave the undersigned no reason to doubt his veracity. Mr. Kueter is found credible.

CONCLUSIONS OF LAW

In File No. 5052718 (Date of Injury: July 6, 2012; Right Shoulder):

The sole issue for determination is the extent of claimant's industrial disability.

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 R. App. P. 6.14(6).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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

Claimant was 60 years of age on the date of evidentiary hearing. He is a high school graduate, with the vast majority of his work history involving manual labor. In addition to ongoing family farm involvement, since 1976, claimant has remained employed in the asphalt paving industry. He initially began as a laborer, then became a driver, and ultimately, a foreman. Since 1999, claimant has worked as a foreman for defendant-employer. Claimant has spent the last 40 years performing asphalt paving work and during the last 17 years, for defendant-employer. This is clearly a field in which he possesses significant skill and knowledge, as testified to by claimant's supervisor. Asphalt paving is an industry which clearly suits claimant's interests and aptitudes and thus, any negative impact upon claimant's ability to participate in this labor field detrimentally impacts his earning capacity.

As a result of the stipulated right shoulder injury of July 6, 2012, claimant underwent a course of conservative care and ultimately, underwent arthroscopic surgery. The procedure, performed by Dr. Schemmel, consisted of arthroscopic debridement of a partial rotator cuff tear, biceps tenotomy, labral debridement, and chondroplasty of the glenoid. Following surgery, Dr. Schemmel opined claimant should be capable of functioning at his preinjury level and thus, released claimant without restrictions. He delegated the authority to rate claimant's permanent impairment to Dr. Kennedy.

When claimant presented to Dr. Kennedy, claimant described ongoing complaints and limitations of his right shoulder. Claimant reported difficulty with duration of certain work tasks, operation of certain equipment, and use of specific tools. Dr. Kennedy noted each of the activities described required extension of claimant's right arm away from his body. Claimant noted his employer was accommodating his limitations. As a result, Dr. Kennedy noted claimant had resumed full duty without permanent restrictions; she did not impose any permanent restrictions. Based upon range of motion decrements, Dr. Kennedy opined claimant sustained a 6 percent whole person impairment.

Claimant credibly testified he discussed his need for permanent restrictions with Dr. Kennedy and she advised him to speak to his employer about continued informal accommodations, as opposed to her imposing formal restrictions which could jeopardize his employment. Claimant testified he spoke with his supervisor and was advised defendant-employer accepted claimant to return to work in his existing physical condition. Claimant resumed work in his foreman position.

Claimant subsequently underwent an IME with Dr. Sassman on October 14, 2015. Dr. Sassman reviewed claimant's work duties and the physical demands of each duty. Following a physical examination, Dr. Sassman opined claimant sustained a 7 percent whole person impairment based on decrements in range of motion. She also recommended permanent work restrictions of: using both hands, limit lifting, pushing, pulling and carrying to 30 pounds occasionally from floor-to-waist or waist-to-shoulder and to 20 pounds rarely above shoulder height; with only the right hand, limit lifting, pushing, pulling and carrying to 10 pounds rarely; no use of ladders due to an inability to

maintain a three-point safety stance; no use of vibratory or power tools; and limit gripping and grasping to below shoulder height on an occasional basis with the right hand.

Dr. Kennedy and Dr. Sassman utilized the same rating methodology to determine the extent of claimant's permanent impairment as a result of the July 6, 2012 shoulder injury. In doing so, they arrived at consistent impairment ratings of 6 and 7 percent whole person, respectively. Due to the consistency in the methodology and ultimate ratings, the undersigned adopts both opinions in consideration of the extent of claimant's industrial disability.

With respect to determination of claimant's loss of earning capacity, a primary factor in claimant's claim is his need for permanent work restrictions. Dr. Schemmel opined claimant could resume work without restrictions; however, he deferred to Dr. Kennedy on the extent of claimant's permanent impairment. During her evaluation, claimant reported notable ongoing limitations resulting from the right shoulder condition. Dr. Kennedy commented the offending activities generally required claimant to use his right arm in an extended fashion. Notably, Dr. Kennedy's report does not specifically opine claimant should not follow permanent work restrictions, she simply comments claimant had resumed full duty without restrictions.

Claimant credibly testified Dr. Kennedy advised him to discuss informal accommodations with defendant-employer. Claimant testified he did so and was accepted to return to work given his physical limitations. His supervisor, Mr. Kueter, testified claimant performed less physical labor following the right shoulder injury than he had performed prior to the injury. While claimant was not, and is not, required to perform a certain quota of manual labor, Mr. Kueter testified claimant's contribution to the paving crew's performance of such labor diminished following the right shoulder injury. Given these facts, it is determined claimant did sustain permanent limitation in his functioning following the stipulated work injury of July 6, 2012.

Dr. Sassman's report contains the only attempt to quantify claimant's ongoing limitations in terms of permanent restrictions. While claimant has clearly been accepted to return to work for defendant-employer, these restrictions are relevant to determining claimant's loss of access to the labor market generally. The job description for claimant's foreman position requires an ability to lift up to 100 pounds occasionally, lift up to 50 pounds frequently, and rake and shovel frequently. Dr. Sassman's restrictions limit claimant to lifting 30 pounds occasionally and 20 pounds rarely, no use of vibratory or power tools, and only occasional grasping with the right arm. These restrictions are contradictory to claimant's stated job description and job duties. If claimant were not already employed by defendant-employer and did not possess his significant knowledge of the asphalt paving industry, I find it unlikely claimant would be hired for his foreman position.

However, to defendant-employer's credit, it has provided claimant with informal accommodations which have allowed claimant to continue working in his preinjury foreman position. The injury occurred approximately four years prior to evidentiary hearing and claimant has remained capable of performing his duties with these informal restrictions. Claimant's successful return to work in his preinjury position undoubtedly is attributable in a large degree to his excellent working relationship with Mr. Kueter, who values claimant's expertise and ability to run a crew. For Mr. Kueter, it is clear he does not require claimant to perform physical labor to a significant degree and he sees tremendous value in claimant's ability to manage a crew. While this attitude has facilitated claimant's ability to return to work in his preinjury position, I am doubtful the same concession would be made for claimant in the industry as a whole. However, as of the date of hearing, claimant has remained employed in his preinjury position, works commensurate hours, and earns a higher rate of pay than he had at the time of the right shoulder injury.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 40 percent industrial disability as a result of the stipulated work-related injury of July 6, 2012. Such an award entitles claimant to 200 weeks of permanent partial disability benefits (40 percent x 500 weeks = 200 weeks), commencing on the stipulated date of March 19, 2013. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were \$1,936.76, and claimant was married and entitled to 3 exemptions. The proper rate of compensation is therefore, \$1,181.11.

In File No. 5052719 (Date of Injury: July 23, 2013; Low Back):

The sole issue for determination is whether claimant is entitled to temporary disability benefits during the periods of December 5, 2013 through May 4, 2014; November 14, 2014 through May 10, 2015; and/or November 10, 2015 through May 18, 2016.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical

recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Claimant suffered a stipulated work-related injury to his low back on July 23, 2013. Claimant argues he is entitled to temporary disability benefits during three seasonal layoffs following his low back injury on July 23, 2013. Defendants argue claimant is not entitled to temporary disability benefits during these periods because prior to each period, claimant had returned to his preinjury position and claimant performed substantially similar work to that he performed at the time of the July 23, 2013 accident.

Review of the medical records in evidence reveals at the time of the first seasonal layoff on December 5, 2013, claimant remained under the care of Medical Associates and work restrictions imposed by Ms. Lindblom. These restrictions included standing, walking, and sitting as limited by comfort; no repetitive bending, lifting or twisting of the back; no lifting over 30 pounds; and no shoveling or raking. At the time of the layoff, claimant had returned to work in his preinjury foreman position; however, both claimant and Mr. Kueter credibly testified claimant performed less physical labor following his back injury than he had simply following the right shoulder injury. Claimant specifically and credibly testified to limitations in his abilities to stand, walk, sit, and bend following the low back injury. These limitations are attributable to the low back injury, not the right shoulder injury. This conclusion is supported by Dr. Sassman's lack of similar permanent restrictions on these tasks relative to claimant's right shoulder claim. It is determined that as of the date of the December 2013 seasonal layoff, claimant had not previously returned to substantially similar work.

As claimant has proven he remained under work restrictions which limited his activity further than he had been limited at the time of the July 23, 2013 work injury, claimant is entitled to temporary disability benefits during the seasonal layoff in the winter of 2013-2014. Claimant claims that seasonal layoff stretched from December 5, 2013 through May 4, 2014; this claim is supported by the evidence in the record. Accordingly, claimant is entitled to temporary total disability or healing period benefits,

whichever should prove applicable, during those weeks he did not work for defendant-employer.

However, the record establishes claimant worked limited hours for defendant-employer in the two weeks ending March 8, 2014 and April 5, 2014. During each of those weeks, claimant earned \$199.13. The parties stipulated claimant's gross earnings at the time of the July 23, 2013 work injury were \$2,193.40. As claimant has earned less in these two weeks than his stipulated gross earnings at the time of the work injury, claimant is entitled to temporary partial disability benefits during the weeks in question. Specifically, claimant is entitled to \$1,329.58 ($66 \frac{2}{3}$ percent x (\$2,193.40 - \$199.13) = \$1,329.58) in each of these two weeks.

Claimant is entitled to temporary total disability benefits from December 5, 2013 through May 4, 2014, but interrupted by those two weeks in which defendant-employer offered claimant limited work. The period of December 5, 2013 through May 4, 2014 is 21.571 weeks; when one deducts the two weeks of limited work, claimant is entitled to temporary total disability benefits for 19.571 weeks. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were \$2,193.40 and claimant was married and entitled to 3 exemptions. The proper rate of compensation for temporary total disability benefits is therefore, \$1,278.92.

During the first seasonal layoff period, defendants are responsible for payment of 19.571 weeks of temporary total disability benefits during the period of December 5, 2013 through May 4, 2014 at the rate of \$1,278.92. During the two weeks of seasonal layoff in which claimant worked reduced hours, defendants are responsible for payment of temporary partial disability benefits. Claimant is entitled to \$1,329.58 in temporary partial disability benefits during the weeks of March 8, 2014 and April 5, 2014, for a total temporary partial disability award of \$2,659.16 during the first seasonal layoff.

The second seasonal layoff occurred on November 14, 2014. At the time of this layoff, claimant again remained under the care of Medical Associates and under restrictions imposed by Dr. Kennedy relative to claimant's back injury. At the time of the layoff, Dr. Kennedy had imposed the same restrictions imposed by Ms. Lindblom at the time of the first seasonal layoff. On November 24, 2014, Dr. Garrity commemorated claimant's back restrictions as standing, walking, and sitting as limited by comfort; no bending, lifting, or twisting of the back; and no lifting over 30 pounds. Dr. Kennedy reaffirmed these restrictions on December 5, 2014.

Therefore, at the time of the second seasonal layoff, claimant remained under medical treatment and under work restrictions. As with the restrictions imposed at the time of the first seasonal layoff, these restrictions limited claimant's physical activities beyond the limitations attributable to the right shoulder injury. Accordingly, it is determined claimant had not returned to substantially similar work prior to his second seasonal layoff beginning November 14, 2014. Claimant argues the second seasonal layoff stretched from November 14, 2014 through May 10, 2015; this position is supported by the evidentiary record. Therefore, claimant is entitled to temporary total

disability benefits from November 14, 2014 through May 10, 2015, during those weeks he did not work for defendant-employer.

However, the record shows claimant worked limited hours in five weeks of the seasonal layoff period. Claimant earned \$172.58 during the week ending March 14, 2015, \$232.31 in the week ending March 28, 2015, \$1,782.18 in the week ending April 11, 2015, \$836.33 in the week ending April 18, 2015, and \$1,795.46 in the week ending April 25, 2015. The parties stipulated claimant's gross weekly earnings were \$2,193.40. As claimant earned less during these five weeks than his stipulated gross weekly earnings, claimant is entitled to temporary partial disability benefits during these weeks.

During the week ending March 14, 2015, claimant is entitled to \$1,347.28 in temporary partial disability benefits ($66 \frac{2}{3}$ percent \times (\$2,193.40 - \$172.58) = \$1,347.28). During the week ending March 28, 2015, claimant is entitled to \$1,307.46 in temporary partial disability benefits ($66 \frac{2}{3}$ percent \times (\$2,193.40 - \$232.31) = \$1,307.46). During the week ending April 11, 2015, claimant is entitled to \$274.16 in temporary partial disability benefits ($66 \frac{2}{3}$ percent \times (\$2,193.40 - \$1,782.18) = \$274.16). During the week ending April 18, 2015, claimant is entitled to \$904.76 in temporary partial disability benefits ($66 \frac{2}{3}$ percent \times (\$2,193.40 - \$836.33) = \$904.76). During the week ending April 25, 2015, claimant is entitled to \$271.97 in temporary partial disability benefits ($66 \frac{2}{3}$ percent \times (\$2,193.40 - \$1,795.46) = \$271.97). For these five weeks, claimant is entitled to a total of \$4,105.63 in temporary partial disability benefits.

Claimant is entitled to temporary total disability benefits from November 14, 2014 through May 10, 2015, but interrupted by those five weeks in which defendant-employer offered claimant limited work. The period of November 14, 2014 through May 10, 2015 is 25.429 weeks; when one deducts the five weeks of limited work, claimant is entitled to temporary total disability benefits for 20.429 weeks. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were \$2,193.40 and claimant was married and entitled to 3 exemptions. The proper rate of compensation for temporary total disability benefits is therefore, \$1,278.92.

During the second seasonal layoff period, defendants are responsible for payment of 20.429 weeks of temporary total disability benefits during the period of November 14, 2014 through May 10, 2015 at the rate of \$1,278.92. During the five weeks of seasonal layoff which claimant worked reduced hours, defendants are responsible for payment of temporary partial disability benefits. Claimant is entitled to a total of \$4,105.63 in temporary partial disability benefits during the second seasonal layoff.

The third seasonal layoff began on November 10, 2015. The parties stipulated claimant has received weekly indemnity benefits during the entirety of the seasonal layoff; however, the parties dispute whether these benefits reflect temporary or permanent disability benefits. I therefore, must determine if claimant is entitled to

temporary disability benefits during the entirety, or any portion, of the third seasonal layoff.

At the time of the third seasonal layoff, the last physician to specifically address claimant's need for restrictions was Dr. Chapman. On May 7, 2015, Dr. Chapman recommended fusion surgery and imposed work restrictions of lifting up to 35 pounds; limiting bending, lifting, or twisting of the back; no shoveling; and no work beyond claimant's physical comfort level. It was under these restrictions that claimant resumed his duties as foreman. However, as was the case with the first and second seasonal layoffs, claimant's duties as a foreman were restricted beyond the limitations resulting from the right shoulder injury. Accordingly, I find claimant had not resumed substantially similar employment.

It is relevant that on October 14, 2015, Dr. Kennedy placed claimant at MMI relative to his back condition. However, she did so based upon claimant's failure to follow through with Dr. Chapman's fusion recommendation. The undersigned finds this opinion unconvincing as to claimant's achievement of MMI, as it is clear Dr. Kennedy was unaware of claimant's requests for defendants to authorize surgery with Dr. Chapman. It was defendants who refused to authorize the care recommended by Dr. Chapman as opposed to claimant who failed to pursue the treatment. It would be inappropriate to penalize claimant with respect to entitlement to temporary disability benefits when the MMI opinion was based upon a failure to pursue care which defendants denied.

Furthermore, at the time of claimant's third seasonal layoff, Dr. Abernathey had recommended a lumbar laminectomy. During the layoff period, claimant underwent surgery by Dr. Abernathey. Dr. Abernathey released claimant without restrictions from a neurosurgical standpoint. However, defendant-employer acknowledged claimant would be allowed to utilize his own discretion in performance of his job duties upon return to work. Claimant's personal physician, Dr. McCaw, imposed restrictions of working as tolerated within the limits of claimant's back and right leg pain. Defendant-employer acknowledged and adopted this restriction in its offer for claimant to return to work.

During the period of the third seasonal layoff, claimant remained in a period of active treatment of his back injury and had not returned to his preinjury level of functioning. The work which claimant performed prior to the layoff period was not substantially similar to that which he performed on the date of the back injury, July 23, 2013. Therefore, it is determined claimant is entitled to temporary total disability benefits during the third seasonal layoff period. Claimant argues the period extended from November 10, 2015 through May 18, 2016; this period is supported by the evidentiary record. At the time of the work injury, the parties stipulated claimant's gross weekly earnings were \$2,193.40 and claimant was married and entitled to 3 exemptions. The proper rate of compensation for temporary total disability benefits is therefore, \$1,278.92. Claimant is entitled to temporary total disability benefits from November 10, 2015 through May 18, 2016 at the weekly rate of \$1,278.92.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5052718 (Date of Injury: July 6, 2012; Right Shoulder):

Defendants shall pay unto claimant two hundred (200) weeks of permanent partial disability benefits commencing March 19, 2013 at the weekly rate of one thousand one hundred eighty-one and 11/100 dollars (\$1,181.11).

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 receive credit for benefits paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33.

In File No. 5052719 (Date of Injury: July 23, 2013; Low Back):

Defendants shall pay unto claimant temporary total disability benefits at the weekly rate of one thousand two hundred seventy-eight and 92/100 dollars (\$1,278.92) for the periods of December 5, 2013 through May 4, 2014; November 14, 2014 through May 10, 2015; and November 10, 2015 through May 18, 2016, except as interrupted by weeks in which claimant is entitled to temporary partial disability benefits, as set forth in the decision.

Defendants shall pay unto claimant temporary partial disability benefits in the total amount of six thousand seven hundred sixty-four and 79/100 dollars (\$6,764.79) for the weeks of March 8, 2014, April 5, 2014, March 14, 2015, March 28, 2015, April 11, 2015, April 18, 2015, and April 25, 2015, as set forth in the decision.

Defendants shall pay accrued weekly benefits in a lump sum.

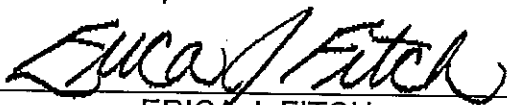
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall receive credit for benefits paid.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33.

Signed and filed this 16th day of November, 2016.


ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/kjw

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