BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN L'ESTRANGE,

Claimant,

vs.

OLD DOMINION FREIGHTLINE, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE CO.,

Insurance Carrier,
Defendants.

File Nos. 5052159,
5060106

ARBITRATION

DECISION

Head Note Nos.: 1402.40; 1802; 1803; 2401; 2501; 2502; 2701; 2907

STATEMENT OF THE CASE

John L'Estrange, claimant, filed two petitions in arbitration and seeks workers' compensation benefits from defendants, Old Dominion Freightline, Inc., as the employer, and New Hampshire Insurance Company, as the insurance carrier. Hearing was held on October 29, 2015.

Claimant was the only witness to testify at hearing. The evidentiary record also includes claimant's exhibits 1 through 25 and defendants' exhibits A through L.

The parties also submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations.

Counsel requested the opportunity to file post-hearing briefs. The parties' briefing deadline was established as December 7, 2015. Upon the filing of post-hearing briefs, this case was deemed fully submitted to the undersigned.

After full submission of this case, the undersigned noted that there was a discrepancy between the parties' weekly rate stipulations and the Iowa Workers' Compensation Manual (rate book). Therefore, to ensure that the parties' stipulations were accurate and that the weekly rate at which any benefits are awarded was accurate, the undersigned issued an order to show cause filed on January 25, 2016. The parties responded via e-mail to the undersigned on January 26, 2016, clarifying the proper gross weekly earnings and weekly rate for these cases. Specifically, the parties clarified that there was a scriveners' error on the hearing report for File No. 5060106. The parties stipulate that the gross weekly earnings for both files are $1,414.02 and that

the applicable weekly rate for both files is $811.54. The parties' stipulations, as noted in the January 26, 2016 e-mails from counsel are accepted and all weekly benefits will be awarded at the rate of $811.54.

ISSUE

In File No. 5060106, the parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits.

2. Whether costs should be assessed against either party.

In File No. 5052159, the parties submitted the following disputed issues for resolution:

1. Whether the claimant gave timely notice of the March 18, 2013 work injury.

2. Whether the work injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability benefits, including a claim for a running healing period.

3. Whether the work injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. Whether claimant is entitled to an award of past medical expenses for treatment of the March 18, 2013 work injury.

5. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39.

6. Whether claimant is entitled to an award of alternate medical care.

7. Whether costs should be assessed against either party.

FINDINGS OF FACT

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

Claimant, John L'Estrange, is 66 years of age. He resides in and worked for the employer out of a terminal in Des Moines, Iowa. Mr. L'Estrange is a high school graduate. He completed a degree as a diesel mechanic in the mid-1970's. He attended and was certified through a truck driving school in the mid to late 1970's.

Claimant is a veteran, having served in the United States Air Force from 1968 through 1972. He was promoted to the rank of Staff Sergeant and worked in military

policy while in the Air Force. Claimant was honorably discharged from the military and sustained no combat related injuries.

Mr. L'Estrange has worked as a janitor for the State of Iowa. He loaded trucks for UPS and then became an over-the-road truck driver. Although he obtained training, he has never worked as a diesel mechanic.

Claimant worked over 17 years for USF Dugan with a dedicated route from Des Moines to Kansas City and back. This position initially required claimant to move freight by hand. However, as he obtained more seniority, his job at USF Dugan became more of a "no touch" load job. Claimant's employment ended with USF Dugan when the company went out of business.

He then obtained employment with Old Dominion in 2006 and worked as an over-the-road driver for that company from 2006 through June 2013. He drove a dedicated route that required him to drive to Osceola, exchange trailers, return to Des Moines, exchange trailers, then drive to and from Kansas City. Claimant testified his job with Old Dominion was five days per week and that the most demanding part of his job was hooking and unhooking trailers. Essentially, claimant's position with Old Dominion was a "no touch" truck driving position.

Claimant testified that he did not have any significant injuries to either shoulder prior to March 2013. Although he had a fall on ice in 2009, he testified that he did not experience any lost time as a result of that injury. His Department of Transportation physicals leading up to March 2013 do not identify any injuries or impairment of either of his arms or shoulders.

On March 1, 2013, claimant slipped on ice and fell forward onto his right arm while performing his truck driving functions for Old Dominion. As a result of that fall, Mr. L'Estrange suffered a right shoulder injury. He drove himself back to the employer's terminal. (Exhibit 3, page 27)

The employer referred claimant to its chosen medical clinic, Doctors Now. Angela Atzen, D.O., evaluated claimant on March 5, 2013. Dr. Atzen ordered right shoulder x-rays, imposed work restrictions and recommended over-the-counter medication until a return evaluation.

Mr. L'Estrange returned to light duty work after the March 1, 2013 injury and testified that he was capable of performing the offered light duty work. However, at a March 18, 2013 follow-up with Doctors Now, claimant noted he had tripped over a floor mat at work and fell onto his right arm and folded left arm in front of his body. Dr. Atzen noted pain in both biceps as well as a reinjury and pain with loss of motion in the right shoulder.

The parties dispute whether claimant sustained a left shoulder injury on March 18, 2013. Claimant testified that he fell onto the folded left arm, experienced

symptoms, and reported his injury to his supervisor on the same day as the fall. Although defendants assert that claimant did not timely report the left shoulder injury, they offered no testimony or other evidence to refute claimant's testimony that he reported the injury on March 18, 2013.

Claimant also testified that his supervisor directed him to seek treatment again after the March 18, 2013 fall. The medical records clearly demonstrate that claimant did report for medical evaluation at Doctors Now's clinic on March 18, 2013. Claimant further points out that he mentioned falling onto the folded left arm at the Doctors Now appointment. Defendants accurately urge that the March 18, 2013 records from Doctors Now do not identify symptoms or an injury to the left shoulder, nor do those records document recommendation for treatment of the left shoulder.

On March 20, 2013, claimant returned to Doctors Now. That medical record documents that claimant had an obvious left biceps deformity. It also noted "Breakaway of left shoulder, likely due to pain." (Ex. 2, p. 18) Upon referral to an orthopaedic surgeon, claimant prepared written documentation which noted he had fallen twice and gave dates of injury of March 2, 2013 and March 19, 2013. (Ex. 6, p. 52) Although not the exact dates of the falls, claimant's estimates were close and certainly correspond with his reports of injury to the employer after the March 18, 2013 fall. On the other hand, the treating surgeon, Mark Fish, D.O., makes no notations about complaints of the left shoulder in his office notes and renders no treatment to the left shoulder.

Claimant was ultimately referred to another orthopaedic surgeon, Teri Formanek, M.D. for his left elbow. In Dr. Formanek's initial history, claimant relayed that he had fallen on different occasions at work. However, Dr. Formanek records no complaints of left shoulder pain or symptoms. Claimant's left shoulder was not ultimately evaluated by an orthopaedic surgeon until September 2015 by Kary R. Schulte, M.D.

Ultimately, Dr. Fish opines that the alleged left shoulder mechanism of injury is consistent with the asserted left shoulder injury. Dr. Schulte opines that the left shoulder injury is related to the fall at work in his history. Sunil Bansal, M.D., claimant's independent medical evaluator, opines that the left shoulder is causally related to the March 18, 2013 fall.

Given the initial reports of two falls, the fact that claimant sustained an admitted right shoulder injury via a similar mechanism of injury, and given the reports of claimant's shoulder being painful and giving away on March 20, 2013, I find that claimant has proven that his left shoulder injury is causally related to the March 18, 2013 fall at work.

Mr. L'Estrange began missing work after the March 18, 2013 fall. He was terminated by Old Dominion on June 11, 2013 because his FMLA leave had expired. (Ex. 21) Mr. L'Estrange has proven he was off work after the March 18, 2013 fall.

Dr. Atzen referred claimant to an orthopaedic surgeon, Mark Fish, who ultimately performed a right biceps tenotomy as well as an arthroscopic repair of the right rotator cuff on June 12, 2013. (Ex. 6 & 7)

Following surgery on his right shoulder, some physical therapy and post-operative care, Dr. Fish released claimant without permanent work restrictions on November 18, 2013. (Ex. 6, p. 76) On cross-examination at hearing, claimant testified that he believed he was capable of returning to work when he spoke with his terminal manager in November 2013. (Claimant's testimony)

On October 30, 2013, claimant demonstrated in a physical therapy session that he was "Able to tolerate simulate pulling up with one arm, push and pull to simulate attaching his dolley [sic] together without pain or fatigue." (Ex. 8, p. 109) Similarly, a physical therapy note dated November 13, 2013 noted, "Able to pull himself up to simulate getting into his truck back." (Ex. 8, p. 111) The treating therapist recommended release to return to work full duty. (Ex. 8, p. 111)

A functional capacity evaluation performed on January 22, 2014 demonstrated that claimant had difficulties simulating climbing into a truck cab. However, the difficulties exhibited were related to claimant's right knee and not as a result of his right or left shoulder injuries. (Ex. 9, p. 121) Claimant did not seek treatment for either the right or left shoulders following the release by Dr. Fish between November 2013 and September 2015.

Dr. Schulte evaluated claimant in September 2015. However, Dr. Schulte did not impose any work restrictions as a result of the left shoulder condition. When considering the length of time without any treatment and comparing the treating therapists comments in October and November 2013 with the full duty release by Dr. Fish and the subsequent FCE, I find that claimant was capable of performing substantially similar employment by November 18, 2013 when Dr. Fish released him without restrictions.

I note that there is a medical report from claimant's independent medical evaluator, Sunil Bansal, M.D., who imposes a work restriction against overhead reaching with claimant's left arm. (Ex. 14, p. 155) Given the physical therapy findings in October and November 2013 as well as the long gap with no treatment from November 2013 until July 2015, I do not find Dr. Bansal's restrictions to be necessarily appropriate. Instead, I find the opinions of Dr. Schulte, who is now treating claimant, to be more convincing and appropriate.

I also find the opinion of Dr. Schulte convincing that claimant requires further orthopaedic care for the left shoulder. I find that defendants are not currently and have not offered treatment for the left shoulder injury. By contrast, claimant located Dr. Schulte, an orthopaedic surgeon, who believes further treatment of the left shoulder is medically reasonable and necessary. I accept Dr. Schulte's opinions and note that Dr. Bansal offers a similar surgical recommendation in this circumstance.

Additional treatment may provide beneficial results and improvement of strength, range of motion, function, and symptoms in claimant's left shoulder. Therefore, I find that claimant has not reached maximum medical improvement for the left shoulder. Instead, I find that claimant has identified more extensive treatment through Dr. Schulte than is offered by defendants. I find that the care requested by claimant is reasonable and the lack of care offered by defendants is not reasonable.

Having found that claimant proved a left shoulder injury occurred as a result of his work activities on March 18, 2013, I must determine if the medical expenses contained at claimant's exhibit 23 are causally related to the March 18, 2013 work injury. All of the medical bills contained in exhibit 23 appear to be for treatment through Dr. Schulte or diagnostic testing of claimant's left shoulder at Dr. Schulte's request. Therefore, I find that the medical treatment expenses contained in exhibit 23 are causally related to claimant's March 18, 2013 work injury and that those expenses were reasonable and necessary.

Claimant also asserts a claim for a left elbow injury arising out of the March 18, 2013 work injury. Claimant was ultimately referred by defendants and authorized to be evaluated by an orthopaedic surgeon, Teri Formanek, M.D. Dr. Formanek evaluated claimant on July 30, 2013 and diagnosed him with signs of cubital tunnel syndrome in the left arm. However, due to the impending right shoulder surgery, Dr. Formanek recommended only the use of a pad on claimant's left elbow. That pad ultimately resolved claimant's left elbow condition and symptoms.

I find that claimant proved his left elbow injury and treatment were causally related to the March 18, 2013 fall at work. However, I also find that claimant failed to prove the left elbow injury caused any permanent disability or lost time, other than as noted above for claimant's shoulder conditions. In fact, I accept Dr. Formanek's opinion in which he released claimant without work restrictions related to the left elbow on July 30, 2013. (Ex. 6, p. 66)

Dr. Bansal evaluated claimant and declared the left elbow to be at maximum medical improvement. Dr. Bansal opined that claimant has no permanent impairment as a result of the left elbow condition. (Ex. 14, p. 150) I concur with Dr. Bansal's opinion that claimant achieved maximum medical improvement of the left elbow by at least August 15, 2013 and that there is no permanent impairment or need for future medical treatment related to the left elbow injury.

With respect to the March 1, 2013 right shoulder injury, I find that Mr. L'Estrange has proven he is not capable of returning to prior lines of work such as with UPS, as a janitor for the State of Iowa, or in security. Although I found claimant was capable of substantially similar employment with essentially "no touch" loads as performed for Old Dominion, I find that claimant would not be capable of more physically demanding truck driving positions in which he would be required to manipulate product, loads, or tarps.

Claimant is now limited to light to medium category work according to a functional capacity evaluation performed in January 2014. (Ex. 9, p. 118) Although Dr. Fish provided a full duty release, he had concerns about claimant's continued ability to work with the right shoulder. Certainly, if claimant attempted a more strenuous employment, I would anticipate that Dr. Fish would provide limitations and restrictions on claimant's right shoulder condition. Dr. Bansal opines that claimant requires a 10 pound lift restriction on an occasional basis and a 5 pound frequent lift restriction. Dr. Bansal also requires lifting to be at or below chest level with limited reaching of the right arm.

When considering the competing physicians' opinions, I find that it is not likely Dr. Fish's full duty release on November 18, 2013 is truly representative of claimant's abilities. Nor do I find Dr. Bansal's restrictions to be entirely accurate in light of the January 2014 functional capacity evaluation. Ultimately, I find the restrictions outlined in the January 2014 functional capacity evaluation to be fairly persuasive, though I find that claimant was capable of climbing into his cab as demonstrated in the earlier physical therapy sessions. (Ex. 8, pp. 109, 111; Ex. 9)

Considering claimant's age, educational background, employment history, permanent impairment, permanent restrictions, motivation, ability to retrain, as well as all other factors of industrial disability as outlined by the Iowa Supreme Court, I find that claimant has proven a 50 percent loss of future earning capacity as a result of the March 1, 2013 right shoulder injury. I find that although claimant fell onto the right arm on March 18, 2013, he has not proven additional impairment or disability resulted from the right shoulder as a result of the later fall.

CONCLUSIONS OF LAW

With respect to the March 1, 2013 work injury (File No. 5060106), the parties stipulated that claimant sustained a work-related injury and that the injury caused permanent disability. Having found that claimant sustained a right shoulder injury as a result of the March 1, 2013 work accident, I consider the ramifications of that injury and the permanent disability resulting from that injury.

The parties stipulate that claimant's injury should be compensated industrially. (Hearing Report) When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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.

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Having found that claimant proved a 50 percent loss of future earning capacity as a result of the March 1, 2013 right shoulder injury, I conclude that claimant is entitled to 250 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u). The parties stipulated these benefits should commence on November 15, 2013 and be paid at the weekly rate of $811.54. (Hearing Report)

Claimant also seeks an award for reimbursement of his independent medical evaluation. Section 85.39 permits an employee to be reimbursed for subsequent

examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Defendants authorized treatment for the right shoulder injury through Dr. Fish. Dr. Fish issued a permanent impairment rating on January 28, 2014. (Ex. 6, p. 77) Claimant obtained a permanent impairment rating from his independent medical evaluator, Dr. Bansal, on March 18, 2015. (Ex. 14) I conclude that claimant has demonstrated the necessary prerequisites of Iowa Code section 85.39 have been met and that claimant is entitled to reimbursement of Dr. Bansal's fee.

In making this finding and conclusion, I note that Dr. Bansal actually submitted two fees. I conclude that claimant is entitled to the examination fee required for the initial evaluation and permanent impairment rating. I conclude that claimant is not entitled to the supplemental report fee billed on September 29, 2015. (Ex. 24, p. 227) Therefore, I conclude claimant has proven entitlement to reimbursement for Dr. Bansal's fee totaling $3,395.00. (Ex. 24, p. 226)

With respect to File No. 5052159, claimant asserts injuries to his left elbow and left shoulder. Defendants assert a notice defense, contending that claimant is barred from any recovery because he did not give timely notice of the injury.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

In this instance, I found that claimant gave timely notice of his March 18, 2013 fall and was directed by the employer's supervisor to seek medical attention. Defendants have not proven their affirmative defense and their notice defense fails.

Defendants also denied liability for the March 18, 2013 left shoulder injury, challenging whether claimant sustained a left shoulder injury that arose out of and in the course of his employment on March 18, 2013.

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

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Having found that claimant proved by a preponderance of the evidence that he sustained a left elbow and left shoulder injury as a result of his fall at Old Dominion on March 18, 2013, I conclude that claimant has proven entitlement to worker's compensation benefits for both the left elbow and left shoulder injuries. However, I found that the left elbow injury did not cause any permanent disability or require any future medical treatment.

With respect to the left shoulder, I found that claimant requires additional medical treatment for that injury. I conclude that Mr. L'Estrange is not yet at maximum medical improvement for his left shoulder injury. As such, claimant's entitlement to permanent disability benefits as a result of the March 18, 2013 injury is not yet ripe for determination. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010).

Instead, Mr. L'Estrange asserts a claim for a running healing period from the date of injury, March 18, 2013, to the present and continuing into the future. 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.

Claimant proved he was off work after March 18, 2013. After the functional capacity evaluation and release by Dr. Fish, claimant was deemed medically capable of performing substantially similar employment as of November 18, 2013. Claimant has proven entitlement to temporary total disability, or healing period benefits from March 19, 2013 through November 18, 2013. Iowa Code section 85.34(1). All temporary disability, or healing period benefits shall be paid at the stipulated weekly rate of $811.54. (Hearing Report)

Claimant requested a running healing period. In this case, I determined that claimant is not entitled to ongoing weekly benefits. However, he does remain within a medical healing situation in which additional medical treatment will be needed for his left shoulder. Should additional treatment take place for the left shoulder that renders claimant unable to perform substantially similar employment into the future, claimant may qualify for additional temporary disability, or healing period, benefits.

Mr. L'Estrange seeks an award of past medical expenses related to treatment he obtained for his March 18, 2013 injuries. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Having found that claimant sustained a left shoulder injury on March 18, 2013 and that the medical expenses at Des Moines Orthopaedic Surgeons and for the left shoulder arthrogram at Iowa Diagnostic Imaging and Procedure Center were related to treatment of the left shoulder and were reasonable and necessary, I conclude that claimant has proven entitlement to satisfaction of his medical expenses contained in exhibit 23. Having found that some of the medical expenses were satisfied by a third-party payer and that claimant did not establish that he paid premiums to purchase third-party payer coverage, I conclude that defendants may pay these expenses directly to claimant, satisfy any outstanding balances with the medical providers, and/or reimburse any third-party payer to fully satisfy the claimant's medical expenses. See Midwest Ambulance Service v. Ruud, 754 N.W.2d 860 (Iowa 2008); Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

Claimant seeks an award of alternate medical care specifically for his left shoulder injury.

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

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner, 78 (Review-Reopening 1975).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

Having found that claimant sustained his left shoulder injury as a result of his work activities on March 18, 2013, having found that claimant requires additional medical treatment for his left shoulder, and having found that defendants have denied liability and are not offering any treatment for the left shoulder injury, I conclude that claimant has proven entitlement to an order for alternate medical care. Claimant has clearly identified more extensive treatment that could be offered, while defendants have simply denied liability for the condition. Therefore, I conclude that claimant's request for alternate medical care should be granted and I will order care provided through Dr. Schulte. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1987).

Claimant also seeks an award of his independent medical evaluation fee as part of the March 18, 2013 case. Having already awarded the evaluation fee in the March 1, 2013 claim, I conclude claimant is not entitled to be reimbursed twice for that evaluation. Therefore, I deny the request for an independent medical evaluation pursuant to Iowa Code section 85.39 in File No. 5052159.

Mr. L'Estrange requests the assessment of his filing fee in each litigated file. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Claimant has prevailed on the substantial merits in both cases. Therefore, I exercise this agency's discretion and conclude that it is appropriate to assess claimant's costs against defendants. Agency rule 876 IAC 4.33(7) specifically identifies claimant's filing fees as a permissible cost. Therefore, I assess claimant's $100.00 filing fee in each file against defendants.

ORDER

THEREFORE, IT IS ORDERED:

In File No. 5060106:

Defendants shall pay to claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of eight hundred eleven and 54/100 dollars ($811.54) per week commencing on November 15, 2013.

Defendants shall reimburse claimant's independent medical evaluation totaling three thousand three hundred ninety-five and 00/100 dollars ($3,395.00) pursuant to the parties' stipulation on the hearing report.

In File No. 5052159:

Defendants shall pay claimant temporary total disability, or healing period benefits from March 19, 2013 through November 18, 2013 at the rate of eight hundred eleven and 54/100 dollars ($811.54) per week.

Defendants shall reimburse claimant, reimburse any third-party payer, pay directly to medical providers, or otherwise satisfy all of claimant's past medical expenses as contained in exhibit 23.

Defendants shall authorize and pay for all reasonable, necessary and causally related medical treatment for claimant's left shoulder through and at the direction of Kary Schulte, M.D.

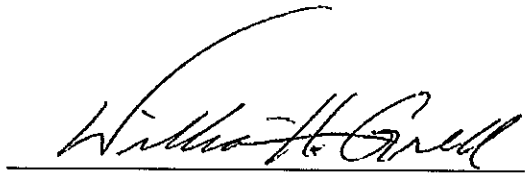
With respect to both File Nos. 5052159 and 5060106:

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30 and shall be entitled to credit for all permanent partial disability benefits paid to date.

Defendants shall reimburse claimant's costs totaling two hundred and 00/100 dollars ($200.00).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 24th day of February, 2016.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.