BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAZZ FREEMON,	FILED	
Claimant,	MAY 05 2016	File No. 5047798
vs.	WORKERS COMPENSATION	ARBITRATION
ANNETT HOLDINGS, INC.,		DECISION
Employer, Self-Insured, Defendant.		Head Note Nos.: 1802; 1803; 3001

STATEMENT OF THE CASE

Claimant, Jazz Freemon, filed petitions in arbitration seeking workers' compensation benefits from Annett Holdings, Inc., self-insured employer, as defendant, as a result of a stipulated injury sustained on December 19, 2013. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on August 19, 2015, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 12, defendant's exhibits A through L, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on September 15, 2015.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant is entitled to temporary disability benefits during the period of January 20, 2014 through March 4, 2014;
2. The extent of claimant's industrial disability;
3. The commencement date for permanent partial disability benefits;
4. The rate of compensation; and
5. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

By post-hearing brief, claimant argued entitlement to penalty benefits pursuant to Iowa Code section 86.13. Claimant's entitlement to penalty benefits was not indicated on the prehearing report nor noted during discussion at hearing of the issues presented

for consideration. It is therefore determined claimant has waived his right to consideration of this issue.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record and his deposition testimony. He was very 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 25 years of age at the time of hearing. He is a nearly lifelong resident of Holly Springs, Mississippi. Claimant is single, a father to 1 minor child and is expecting another child. (Claimant's testimony; Exhibit 6, page 3) In 2013, claimant provided significant support to his minor niece and nephew; he claimed both as dependents on his federal income taxes. Claimant is right-hand dominant. (Claimant's testimony; Ex. 6, p. 5)

Claimant graduated high school in 2009; he earned B and C grades in high school. In April 2013, claimant completed truck driver training and earned his CDL. (Claimant's testimony; Ex. 2, p. 2; Ex. 6, p. 7) Claimant testified he hoped to go to college and pursue a career in aviation maintenance, but has thus far been financially unable to do so. Claimant testified he continues to have a goal of pursuing this career path. (Claimant's testimony; Ex. 6, pp. 7, 23)

While in high school and for a time thereafter, claimant worked at a seafood restaurant as a cook, mascot, and unloading trucks. He earned $7.25 per hour, for a total income of approximately $380.00 per week. Claimant subsequently worked unloading trucks and stocking shelves at Target. He earned approximately $9.25 per hour, for a total income of $350.00 per week. Thereafter, claimant worked in a temporary placement as a line worker stacking and wrapping packages at FedEx. He earned $9.25 per hour, for a total income of $400.00 per week. He later worked in another temporary placement as a forklift driver. He earned $11.25 per hour, for a total income of $600.00 per week. Intermittently from age 13 and continuing during periods he was otherwise unemployed, claimant worked as a construction laborer for Lester Construction. His earnings in this employment varied over time and were dependent on the market need. (Claimant's testimony; Ex. 2, p. 3; Ex. 6, pp. 12-13)

After successfully earning his CDL, claimant began work at defendant in April 2013 as an over-the-road flatbed driver. His duties required driving, securing of loads, and vehicle inspections. (Claimant's testimony; Ex. 6, pp. 14-16) Defendant's job description for the position of driver sets forth various demands, including the ability to drive up to 11 consecutive hours; to tarp and secure with chains, binders, and/or straps, which required bending, twisting, lifting, pushing and pulling; to check fluids at least

once per day with the tractor hood requiring exertion of 60 to 90 pounds of force to open; and to exert 30 pounds of force to raise an empty trailer with a cranking mechanism. (Ex. 1, p. 5) Defendant also created a pictorial illustration of typical tasks required of drivers, which includes: use of a snap binder, requiring extension of arms overheard and then pulling down with force equivalent to entire body weight; lifting as much as 120 pounds; winching requiring downward force equivalent to one's bodyweight; throwing a strap over the top of a load exceeding 13 feet in height; and releasing the fifth wheel by extending one's arm and pulling the release, utilizing approximately 50 pounds of pulling force. (Ex. 1, p. 6)

In connection with beginning employment at defendant, claimant underwent a Department of Transportation (DOT) medical examination. The provider determined claimant qualified for a two-year certification. (Ex. 1, pp. 7-9)

Claimant also was required to complete employment-related paperwork for defendant, including signing off on a document entitled "Memorandum of Understanding and Consent Applicability of the Iowa Workers' Compensation Act" (MOU). The document bears what purports to be the electronic signature of claimant. The document specifically states that claimant will be covered by the workers' compensation laws of the State of Iowa. (Ex. 1, p. 10; Ex. J, p. 5) With respect to any restricted work brought about by a workers' compensation injury, the document states:

> Consistent with the Iowa Supreme Court's decision in Neal v. AHI, as a condition of your employment with the Company, you acknowledge and agree that the Company may require you to temporarily relocate to Des Moines, Iowa for modified duty work in the event you suffer a work injury. Iowa Law allows Annett Holdings to suspend workers' compensation benefits to an injured worker if an injured worker fails to accept and work in the modified duty position offered by Annett Holdings, Inc. Iowa Code, 85.33.
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> . . . .
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> Because drivers agree to be away from home as an essential function and an agreed upon term of their employment with Annett Holdings, injured workers are expected to temporarily relocate and perform their modified duty work in Des Moines, Iowa, irrespective of your state of residence. The temporary relocation will include staying away from your home for up to two weeks at a time. By accepting employment with the Company, you acknowledge there is nothing you are aware of which would prevent you from temporarily relocating to Des Moines, Iowa for up to two weeks at a time to perform modified duty work assignments in the event you suffer a work injury.

(Ex. 1, p. 10; Ex. J, p. 5)

Claimant does not specifically recall signing this MOU, but does not deny doing so. While he does not recall reviewing the document, claimant acknowledged the MOU was discussed at orientation. Specifically, claimant recalls hearing he would be required to come to Iowa for light duty in the event he was injured. (Claimant's testimony; Ex. 6, p. 17)

During the first four weeks of his employment with defendant, claimant drove with a trainer; thereafter, he worked driving solo routes. Early in his employment, claimant testified he could be away from home for a month or six weeks at a time. He eventually was placed under a new fleet manager and began to return home nearly every week. (Claimant's testimony; Ex. 6, pp. 14-16)

Claimant did not work a set route for defendant. He earned 26 or 27 percent of the value of the load he hauled, plus extra pay for issues such as load detention and bounce pay. Accordingly, the number of loads hauled and amount of earnings varied. (Claimant's testimony; Ex. 6, pp. 14-16) Review of claimant's pay records reveals claimant earned the following amounts during his pre-injury employment with defendant:

PAY PERIOD	TOTAL EARNINGS
12/7/13-12/13/13	$1,156.66
11/30/13-12/6/13	$885.12
11/23/13-11/29/13	$612.42
11/16/13-11/22/13	$1,000.61
11/9/13-11/15/13	$454.74
11/2/13-11/8/13	$939.74
10/26/13-11/1/13	$813.86
10/19/13-10/25/13	$1,045.78
10/12/13-10/18/13	$912.56
10/5/13-10/11/13	$812.03
9/28/13-10/4/13	$866.95
9/21/13-9/27/13	$711.49
9/14/13-9/20/13	$1,669.93
9/7/13-9/13/13	$867.86
8/31/13-9/6/13	$524.24
8/24/13-8/30/13	$769.00
8/17/13-8/23/13	$782.22
8/10/13-8/16/13	$705.46
8/3/13-8/9/13	$1,153.44
7/27/13-8/2/13	$891.33
7/20/13-7/26/13	$1,031.04
7/13/13-7/19/13	$756.06
7/6/13-7/12/13	$876.90
6/29/13-7/5/13	$588.89
6/22/13-6/28/13	$890.71
6/15/13-6/21/13	$235.86

6/8/13-6/14/13	$425.00
6/1/13-6/7/13	$425.00
5/25/13-5/31/13	$425.00
5/18/13-5/24/13	$425.00
5/11/13-5/17/13	$425.00
5/4/13-5/10/13	$400.00
4/27/13-5/3/13	$400.00

(Ex. 4, pp. 3-37; Ex. F, pp. 1-39)

On December 19, 2013, claimant suffered a stipulated work injury. Claimant testified he delivered a load and proceeded to roll his tarps, which were covered in snow and ice. While attempting to carry a tarp, it slid and when claimant caught the tarp, he felt immediate pain in his right arm. Claimant testified he continued to work under the hopes his arm would improve, but a few days later he was lifting tires as part of a trailer swap and realized something significant was wrong with his right arm and shoulder. Claimant then contacted defendant and reported the injury. (Claimant's testimony)

At the referral of defendant, on December 27, 2013, claimant presented to John Goodfred, D.O. at Concentra Medical Center (Concentra) in Memphis, Tennessee. Following examination, Dr. Goodfred assessed a shoulder strain and recommended use of ibuprofen, ice, and Biofreeze. He released claimant to resume full duty work. (Ex. 7, pp. 1-3; Ex. B, p. 1)

On January 20, 2014, claimant returned to Concentra in Memphis and was evaluated by James Rucker, M.D. Claimant complained of continued pain of the shoulder with work activities, as well as associated popping. Dr. Rucker assessed a rotator cuff strain and ordered a right shoulder MRI. He recommended physical therapy and imposed work restrictions of no lifting over 15 pounds, no pushing or pulling requiring over 15 pounds of force, and no reaching above shoulder level. (Ex. 7, pp. 5-6)

Shortly after being placed on work restrictions, claimant testified he was involved in a conversation with a representative of defendant regarding light duty in Iowa. Claimant testified he declined to present to Des Moines for light duty and explained his girlfriend was experiencing pregnancy complications and he did not want to come to Iowa and be at that remote a distance from her. Claimant testified he spoke to the representative about potentially working light duty at a terminal closer to his home in Mississippi, such as in Missouri or South Carolina. However, claimant testified he was advised light duty was available in Des Moines; he was not offered light duty nearer to his home. When claimant did not present to Des Moines, defendant suspended his temporary disability benefits. (Claimant's testimony; Ex. 6, p. 18)

On January 27, 2014, claimant participated in physical therapy in Memphis. The therapist's notes indicate that while an MRI had been ordered on January 20, 2014, defendant would not authorize the MRI until claimant had participated in 6 sessions of physical therapy. (Ex. 7, p. 8) Claimant participated in additional therapy sessions on January 29, 2014 and February 4, 2014. (Ex. 7, pp. 9-11)

On February 5, 2014, claimant presented to Tracye Kyles, M.D. at Concentra in Memphis. Dr. Kyles noted an MRI order was pending and a call would be placed to the insurer to discuss authorization. In the meantime, Dr. Kyles ordered an additional six sessions of physical therapy, recommended claimant continue a home exercise program, and imposed work restrictions of no lifting, pushing, or pulling over 25 pounds and no reaching above the shoulders. (Ex. 7, p. 14)

A claim adjuster from defendant authored a letter to claimant dated February 5, 2014. The letter noted Dr. Rucker had released claimant to sedentary work but claimant, in a prior conversation, had refused to accept the offered light duty in Des Moines. In the event claimant accepted the offered work, defendant represented transportation would be provided to Des Moines, as well as hotel accommodations. The letter also outlined claimant would be paid $300.00 per week by defendant, plus temporary partial disability benefits of $409.33 per week. The letter noted as claimant had chosen not to accept the light duty work offered, defendant considered claimant's actions as a refusal to perform "acceptable modified duty work" and accordingly, claimant's weekly benefits would be suspended during the period of refusal. If claimant reconsidered his refusal, he was asked to call defendant to make travel arrangements. (Ex. 3, p. 9; Ex. I, p. 1)

On February 13, 2014, claimant underwent an MRI of his right shoulder. A radiologist read the results as revealing subacromial impingement associated with a hook deformity of the acromion process, suggestion of a small tear of the supraspinatus associated with the impingement, and impingement of the acromioclavicular (AC) joint. (Ex. 8, p. 1)

Following the MRI, claimant returned to Dr. Kyles on February 18, 2014. Dr. Kyles opined the MRI revealed subacromial impingement associated with a hook deformity and suggestion of a small tear of the supraspinatus. Dr. Kyles recommended orthopedic evaluation. (Ex. B, p. 3) Dr. Kyles also altered claimant's work restrictions to allow for no lifting greater than 25 pounds and no pushing or pulling over 50 pounds. (Ex. 7, p. 15)

On February 27, 2014, at the referral of Dr. Kyles, claimant presented to Thomas Giel, M.D. of Concentra in Memphis. Dr. Giel opined the right shoulder MRI revealed a small partial thickness rotator cuff tear with impingement. He offered claimant a cortisone injection, which appears to have been denied. Dr. Giel prescribed an NSAID and physical therapy; he also imposed work restrictions of no lifting over 50 pounds at

waist level. (Ex. 7, pp. 17-18) Claimant began participating in physical therapy sessions in Memphis. (Ex. 7, p. 19)

Due to financial reasons, claimant eventually agreed to travel to Des Moines and accept light duty work. (Claimant's testimony; Ex. 1, p. 13; Ex. 6, p. 18; Ex. J, p. 6) Upon presenting to Des Moines, claimant completed an "Employee Workers' Compensation Statement" whereby claimant indicated he injured his right shoulder attempting to catch a slipping tarp and then reinjured his right shoulder the following week while moving tires on a trailer swap. (Ex. 1, p. 2) Claimant identified himself as single, with two dependent minors. (Ex. 1, p. 1) Claimant then began physical therapy sessions in Des Moines. (Ex. 9, pp. 1-3)

Claimant testified he remained in Des Moines for about 10 days and then returned home for approximately 1 week in connection with follow-up medical appointments. (Claimant's testimony) On March 27, 2014, claimant returned to Dr. Giel for evaluation. Dr. Giel performed a right shoulder cortisone injection. He recommended continued physical therapy and imposed work restrictions of a 30-pound maximum lift and no reaching above the shoulders. (Ex. 7, pp. 20-21) Claimant then returned to Des Moines for light duty. (Claimant's testimony)

Back in Memphis, claimant returned to Dr. Giel on April 17, 2014. Claimant reported approximately one week of improvement following the cortisone injection, but the return of pain thereafter. Dr. Giel assessed right shoulder impingement, a high-grade partial thickness rotator cuff tear, and possible AC degenerative joint disease. Dr. Giel recommended right shoulder arthroscopy, with claimant to continue to work under restrictions prior to surgery. (Ex. 7, p. 22)

On May 2, 2014, claimant underwent arthroscopic surgery with Dr. Giel, consisting of a right shoulder arthroscopy with subacromial decompression and distal clavicle excision. Dr. Giel issued a postoperative diagnosis of right shoulder impingement and AC joint arthrosis. (Ex. 10, p. 1) Following surgery, claimant was placed in a right arm sling and removed from work. (Claimant's testimony; Ex. 10, p. 2)

Following surgery, claimant returned to Dr. Giel in follow up on May 8, 2014. Dr. Giel prescribed Flexeril, meloxicam, and a course of physical therapy. Claimant was to remain off work and perform a home exercise program. Dr. Giel indicated he anticipated releasing claimant to light duty in approximately three weeks. (Ex. 7, p. 24) Claimant continued to follow up periodically with Dr. Giel, who recommended continued conservative care. (Ex. 7, p. 27; Ex. B, pp. 4-5)

On June 19, 2014, claimant returned to Dr. Giel. Following examination, Dr. Giel recommended additional physical therapy and work hardening. He released claimant to work under restrictions of a 50-pound maximum lift and a frequent maximum lift of 25 pounds. (Ex. 7, pp. 32-33) Claimant testified upon release with restrictions, he returned to Des Moines for light duty. Claimant testified his physical therapy sessions

continued in Des Moines; however, the sessions were much shorter and more limited in nature. When his son was born in late June, claimant returned to Mississippi. He returned to Des Moines on July 1 and returned to Mississippi on July 11, 2014. (Claimant's testimony)

On July 17, 2014, claimant returned to Dr. Giel with complaints of some continued pain; however, Dr. Giel noted considerable improvement. He released claimant to full duty work and advised claimant to perform a home exercise program. (Ex. 7, p. 35; Ex. B, p. 6)

Claimant underwent a DOT medical examination on July 21, 2014. The provider found claimant qualified for a two-year medical certificate. (Ex. C, pp. 1-3) Claimant testified he returned to work as a driver for defendant. Upon his return, he self-accommodated by relying more upon his left arm and by setting up elements of his duties ahead of time. (Claimant's testimony)

By a letter dated July 21, 2014, defendant volunteered 15 weeks of permanent partial disability benefits at the rate of $545.29, corresponding to a 3 percent whole person rating. (Ex. 3, p. 11; Ex. I, p. 3)

On August 28, 2014, claimant returned to Dr. Giel and reported continued pain from "time to time." Dr. Giel noted claimant was tolerating full duty well and placed claimant at maximum medical improvement (MMI). (Ex. 7, p. 36; Ex. B, p. 7) Dr. Giel subsequently opined by the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, claimant had sustained a permanent impairment of 10 percent right upper extremity or 6 percent whole person due to the performance of a resection arthroplasty of the distal clavicle. (Ex. 7, pp. 37-38; Ex. B, pp. 8-9)

Claimant testified in October 2014, his drivers' license was suspended due to a bookkeeping error by the State of Mississippi. Claimant explained in 2013 he had received a ticket for failure to have insurance. He then demonstrated proof of insurance at a local courthouse and paid the attendant fees. Approximately one year later, he received notification that his license had been suspended for failure to show proof of insurance. While claimant attempted to remedy the bookkeeping error, defendant terminated his employment due to his inability to drive. (Claimant's testimony; Ex. 6, p. 19) Shortly after his termination, claimant received paperwork from the State of Mississippi Department of Public Safety, notifying claimant that his driving privileges had been reinstated, as the issue at hand had been remedied prior to suspension of claimant's license. (Ex. 2, pp. 17-18)

Defendant authored a letter to claimant dated January 9, 2015. By the letter, defendant explained his ongoing permanent partial disability benefits would cease after claimant had received 30 weeks of such benefits, representing Dr. Giel's 6 percent whole person rating. (Ex. 5, p. 1; Ex. I, p. 4)

After his termination from defendant, claimant secured employment through a temporary staffing agency. He was placed at a job requiring movement of boxes of products; however, he was only able to physically tolerate such work for two days. (Claimant's testimony; Ex. 6, p. 19) Thereafter, claimant began to perform odd-jobs such as washing cars and cutting lawns, while he applied for more permanent employment. (Claimant's testimony; Ex. 6, pp. 20-21)

Claimant applied for work at trucking company, Builders Transportation Company (BTC), out of Memphis, Tennessee. (Ex. L, pp. 1-4) On April 6, 2015, claimant began work as a flatbed driver for BTC. (Claimant's testimony; Ex. 6, p. 20; Ex. L, p. 5)

In connection with his employment, claimant underwent a preemployment physical on April 6, 2015. The physical required claimant to demonstrate the ability to perform his duties as a driver, including the ability to lift 80-pound tarps. The examiner found claimant passed all requirements for employment. (Ex. L, pp. 6, 11) Claimant testified the examination involved simulation of work duties through use of various weighted objects. Claimant testified the evaluation resulted in pain and was tiring in nature, but he was capable of performing the tasks required. (Claimant's testimony; Ex. 6, pp. 22-23)

Claimant also underwent a DOT medical examination on April 8, 2015, with the examiner finding claimant qualified for a two-year medical certificate. (Ex. C, p. 4)

In his work as a flatbed driver for BTC, claimant transports primarily metal coils and steel plates within the Southeastern United States. As a driver for BTC, claimant earns 28 percent of the value of the loads he hauls. While claimant's earnings vary, he generally makes over $1,000.00 per week. Claimant testified he is able to be home nearly every weekend. (Claimant's testimony; Ex. 6, p. 21)

To perform this work, claimant is required to secure loads with chains, straps, and occasionally tarps. Claimant testified he tarps less frequently than he did at defendant and when he does tarp, the tarps are lighter in nature and he is generally not required to tarp at a level over his head. Claimant testified he attempts to utilize his left arm more in his job duties, in order to compensate for problems with his right arm. (Claimant's testimony; Ex. 6, p. 21)

On April 29, 2015, defendant's counsel authored a letter to claimant's counsel regarding claimant's claimed exemptions for purposes of calculating his rate of compensation. Defendant's counsel acknowledged claimant's tax return showed claimant claimed his niece and nephew, but counsel indicated defendant observed no evidence to demonstrate claimant provided sufficient support to these two minors such as would entitle claimant to claim then as dependents. Defendant's counsel also noted defendant had requested additional tax documentation or a release for such information during discovery, but none had been provided by claimant. (Ex. I, p. 5)

On May 4, 2015, claimant's attorney provided defendant with a signed request for a transcript of claimant's tax returns. (Ex. I, p. 7) Defendant, in turn, requested a copy of claimant's tax transcript from the IRS. A transcript was authored on June 30, 2015 which revealed in 2011, claimant had claimed only his mother as a dependent. (Ex. K, pp. 3-4)

On July 16, 2015, at the arranging of claimant's counsel, claimant presented for independent medical evaluation with board certified occupational health physician, Sunil Bansal, M.D. (Ex. 12, p. 4) Dr. Bansal issued a report of his findings and opinions dated July 20, 2015. At the time of evaluation, claimant reported injuring his right shoulder attempting to catch a falling tarp, at which time he felt a pop and burning pain in his shoulder. Claimant thereafter continued to work, unsure if he had suffered a significant injury. He subsequently developed significant pain and required assistance moving tires at work. (Ex. 12, pp. 8-9)

Dr. Bansal reviewed claimant's medical records pertaining to treatment of his right shoulder. (Ex. 12, pp. 4-8) On examination of claimant, Dr. Bansal noted tenderness to palpation, greatest at the AC joint into the subacromial bursa; positive impingement testing; and slight decreases in range of motion of the shoulder. (Ex. 12, p. 10)

Claimant informed Dr. Bansal he continued to suffer with daily shoulder pain which could reach a level 8 on a 10-point scale when working. Odd movements and weather changes also resulted in pain of the shoulder. Claimant also reported weakness of the right shoulder and arm. Claimant reported experiencing zero to mild pain of the shoulder when at rest. (Ex. 12, p. 9) Dr. Bansal noted claimant was employed by another flatbed trucking company, performing similar work as he had for defendant. However, the tarps claimant was required to lift and maneuver were lighter than those used by defendant, weighing 70 to 80 pounds. (Ex. 12, p. 10)

Following medical records review, interview, and examination, Dr. Bansal assessed a right shoulder rotator cuff tear, status post right shoulder arthroscopy with subacromial decompression and distal clavicle excision. Dr. Bansal agreed with Dr. Giel's MMI date of August 28, 2014 and recommended no further treatment. Dr. Bansal opined claimant sustained permanent impairments of 10 percent right upper extremity for the distal clavicle resection and 1 percent right upper extremity for decrements in flexion of the shoulder. In total, he opined a combined 11 percent right upper extremity or 7 percent whole person impairment. (Ex. 12, pp. 11-12)

With respect to claimant's need for permanent restrictions, Dr. Bansal opined he believed claimant "would benefit from and should have restrictions." However, claimant indicated he feared permanent restrictions would detrimentally impact his employment. (Ex. 12, p. 12) Given claimant's ability to perform his current trucking job by compensating with his left arm, Dr. Bansal opined he did not believe permanent restrictions were necessary "at this juncture." In the event claimant changed employers,

however, Dr. Bansal recommended permanent restrictions of no lifting greater than 50 pounds occasionally or 25 pounds frequently with the right arm, and no lifting more than 15 pounds above shoulder level with the right arm. (Ex. 12, p. 13)

Claimant expressed agreement with Dr. Bansal's statements regarding claimant's need for restrictions. Claimant testified he did not want to lose his job as a result of imposition of work restrictions when he was able to perform the work through self-accommodation. He also expressed agreement with the nature of the restrictions recommended by Dr. Bansal and testified he currently attempts to work within these guidelines. (Claimant's testimony)

On July 17, 2015, at the referral of defendant, claimant presented for independent medical evaluation with board certified orthopedic surgeon, Todd Harbach, M.D. (Ex. A, p. 6) Claimant complained of pain with certain activities, including sleeping on his right shoulder, certain lifting movements, reaching movements, heavy lifting, and awkward movements. Claimant reported he modified his performance of daily activities due to pain symptoms and self-treated with use of Advil and Tylenol. (Ex. 11, p. 4; Ex. A, p. 1)

Dr. Harbach's examination revealed tenderness to palpation of the right clavicle region and slightly decreased strength of the right shoulder as compared to the left. (Ex. 11, pp. 5-6; Ex. A, pp. 2-3) Dr. Harbach ordered and reviewed x-rays of the right shoulder, which he opined revealed an "attempt" at a distal clavicle excision, "although it appears incomplete." (Ex. 11, p. 6; Ex. A, p. 3) Dr. Harbach noted claimant reported experiencing discomfort with overhead work or when he leans or rests upon the right shoulder. He also noted claimant remained a "little weak" in external rotation, but demonstrated near full range of motion of the shoulder. (Ex. 11, p. 6; Ex. A, p. 3)

Dr. Harbach agreed with Dr. Giel's imposition of an MMI date of August 28, 2014. He also agreed claimant did not require permanent restrictions. However, Dr. Harbach opined claimant sustained only a three percent right upper extremity or two percent whole person impairment due to decreased range of motion with internal rotation. (Ex. 11, p. 7; Ex. A, p. 4)

On July 21, 2015, claimant's attorney provided defendant with claimant's tax records revealing no adjustments had been made by the IRS to claimant's 2013 taxes with respect to his claimed exemptions. (Ex. 4, pp. 38-42)

On July 23, 2015, following claimant's deposition and review of recently provided tax documentation, defendant agreed to revise its rate calculation to include 3 dependents, as opposed to the 1 previously utilized. (Ex. 4, p. 43; Ex. I, p. 8) Utilizing claimant's weekly earnings in the 13 weeks prior to his work injury, defendant found an average weekly wage of $913.99. Given that average weekly wage and claimant's status as single with 3 exemptions, defendant determined the rate of compensation to be $573.38. (Ex. 4, p. 44) On July 23, 2015, defendant cut a check to claimant in the

amount of $1,518.71, representing the adjustment in disability benefits owed based on this updated rate, plus interest. (Ex. H, p. 1)

Claimant testified he continues to suffer with right shoulder pain. (Claimant's testimony) Claimant testified he knows "how to work around" his shoulder injury. (Ex. 2, p. 23) He develops immediate pain when he lifts any significant amount of weight; he also develops pain with weather changes or when he lays upon the right shoulder. Claimant testified he relies more upon his left arm than upon his right arm in order to avoid developing pain. Claimant testified he also feels as if his right arm is weaker than it was prior to the work injury and that his right arm is now smaller in circumference than his left arm. Claimant self-treats with use of Tylenol or Advil approximately two or three times per week and continues to perform his home exercise program twice per week. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant is entitled to temporary disability benefits during the period of January 20, 2014 through March 4, 2014.

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

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Iowa Code section 85.33(3) states:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with

a different employer, the employee shall be compensated with temporary partial benefits.

If an employer offers "suitable work" to an injured employee, the employee must accept the work or waive the right to partial, temporary total, and healing period benefits. If an employer fails to offer suitable work, section 85.33(3) will not disqualify the employee from receiving benefits regardless of the employee's motive for refusing the unsuitable work. Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 559 (Iowa 2010). The Iowa Supreme Court has endorsed consideration of factors personal to an employee in determination of whether an employer has offered suitable employment. The geographic proximity of the proposed light duty work assignment is one such factor. See Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012).

The parties agree that following Dr. Rucker's imposition of work restrictions on January 20, 2014, defendant offered claimant modified duty work in Des Moines. The parties also agree that claimant initially refused to perform such work. The first question I must consider, therefore, is whether defendant offered suitable work for purposes of section 85.33(3).

In determining whether the work offered to claimant was suitable, a number of factors come into play. Two of these factors, the geographic proximity of the offered work and the written agreement to accept such offered work as a condition of employment, were both identified in Neal. In the instant matter, claimant relies upon Neal for the proposition work offered at such a great distance from claimant's home cannot be suitable work. Defendant notes in Neal, as specifically identified by the court of appeals, claimant had not agreed to a relocation as a condition of employment. Defendant, therefore, seeks to distinguish this matter from Neal on the basis of the MOU executed by claimant at the time of his hire.

The same MOU executed by claimant was also executed by the claimant in the matter of Annett Holdings, Inc. v. Roland, No. 15-0043 (Ct. App. Feb. 10, 2016). Although the dispute at the heart of Roland was medical care by way of an alternate medical care proceeding, the disposition of the case is relevant to the instant matter. In Roland, claimant was an over-the-road truck driver who suffered a work related injury and received authorized treatment near his home in Alabama. Pursuant to the MOU, defendant required claimant to relocate to Des Moines to perform light duty work. A dispute then arose regarding whether defendant should be forced to provide medical treatment in Alabama, as opposed to the care offered in Des Moines. Defendant argued the medical care authorized in Des Moines was reasonable, as claimant had relocated to Des Moines. The presiding deputy, as affirmed by the court of appeals, determined the MOU which compelled claimant's relocation violated Iowa Code section 85.18.

Iowa Code section 85.18 states:

> No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided.

Claimant, in the instant matter, signed an MOU identical in relevant language to the one signed by the claimant in Roland. Like in Roland, defendant used the language of the MOU to compel claimant to relocate to Des Moines for light duty, or else forfeit his weekly temporary disability benefits. Absent the MOU, defendant would have little basis to believe they could suspend claimant's temporary disability benefits due to his failure to accept light duty in Des Moines.

At the time Dr. Rucker imposed work restrictions, claimant was receiving authorized medical care in Memphis, Tennessee, near his residence in Mississippi. Although claimant was restricted following a medical appointment on January 20, 2014, defendant did not commence payment of temporary disability benefits. This failure is logistically problematic and improper, as there was no possible way claimant could have fulfilled defendant's requirement to submit to light duty on the first day of the period. If claimant was receiving authorized care in Tennessee, as a result of which he received work restrictions, he could not have physically presented to Des Moines on that same date for light duty, as is seemingly being required by defendant. Defendant, in this matter, has provided no time for claimant to coordinate with defendant or to make the physical travel to Des Moines. Defendant is denying temporary benefits from the time of imposition of restrictions, regardless of the fact defendant did not prove an offer of light duty had been made and despite the near physical impossibility of claimant complying with the request.

This logistical problem is emblematic of the inequity of considering the signing of an MOU as the only relevant factor in determining if suitable work was offered. Additionally, it is evidence that the MOU may, in practice, be used to avoid defendant's responsibility for temporary disability benefits owed pursuant to Iowa Code section 85.33(1)-(2) or 85.34(1). This is precisely the result prohibited by section 85.18.

Defendant, by section 85.33(3), is required to offer a worker suitable work. Defendant attempts to avoid or circumvent this obligation by requiring employees to sign an MOU agreeing to perform light duty in Des Moines. There are facts favorable to defendant with respect to the reasonableness of an offer of light duty in Des Moines, including claimant's extensive time away from his home while performing his full duty job and the fact claimant could have been on a haul at a distance even farther from his home. However, defendant did not disclose the nature of the work which would have been performed by claimant had he not refused to relocate. Defendant did not address the reason claimant was not permitted to perform light duty at a terminal closer to his home, as suggested by claimant. Furthermore, the work offered by defendant would

have been paid at a rate of $300.00 per week, less than one-third of claimant's average weekly wage. On these facts, it is determined defendant has not proven an offer of suitable work was made for the period of January 20, 2014 through March 4, 2014. Claimant is therefore entitled to healing period benefits during the period of January 20, 2014 through March 4, 2014.

The next issue for determination is the extent of claimant's industrial disability. The next issue for determination is the commencement date for permanent partial disability benefits. These issues will be considered together.

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 25 years of age at the time of evidentiary hearing; he is a young worker, with decades remaining in his working career. Claimant's formal education consists of graduation from high school and completion of truck driver training. His work history consists of work in a restaurant as a cook, mascot, and unloading trucks; unloading trucks and stocking shelves at Target; stacking and wrapping packages at FedEx; forklift driver; construction laborer; and over-the-road truck driver. Prior to earning his CDL and pursuing a trucking career, claimant's highest level of earnings was $11.25 per hour and $600.00 per week, which he earned operating a forklift. In the remainder of his preinjury employment, claimant generally earned in the range of

$350.00 to $400.00 per week. Claimant's work as a truck driver, both at defendant and BTC, has brought him the highest earnings of his working life.

As a result of the stipulated work injury of December 19, 2013, claimant suffered with right shoulder impingement and a high-grade partial thickness rotator cuff tear. Claimant initially underwent a course of conservative care, but ultimately required a right shoulder arthroscopy with subacromial decompression and distal clavicle excision. Following surgery, claimant participated in rehabilitation programs and ultimately was released to full duty work by surgeon, Dr. Giel on July 17, 2014.

Dr. Giel placed claimant at MMI on August 28, 2014 and opined claimant sustained a permanent impairment of 10 percent right upper extremity or 6 percent whole person due to the performed resection arthroplasty of the distal clavicle. Claimant's IME physician, Dr. Bansal, provided a consistent rating of 10 percent right upper extremity for the distal clavicle resection. Dr. Bansal also opined claimant sustained an additional 1 percent right upper extremity impairment secondary to decrements in flexion of the shoulder. In total, Dr. Bansal opined a combined impairment of 11 percent right upper extremity or 7 percent whole person.

Dr. Giel and Dr. Bansal provided entirely consistent ratings in percentage and methodology; however, defendant's IME physician, Dr. Harbach, opined claimant sustained only a three percent upper extremity or two percent whole person impairment as a result of decreased range of motion. Dr. Harbach did not provide a rating for the distal clavicle excision and opined the excision appeared incomplete on x-ray. Given Dr. Giel is the surgeon who performed arthroscopy, I find Dr. Giel's opinion on the extent of procedure performed to be entitled to the greatest weight. As Dr. Harbach did not provide a rating for the procedure performed by Dr. Giel, I find his opinion of little probative value. The consistent opinions of Drs. Giel and Bansal are found to properly reflect claimant's functional impairment as a result of the work injury.

With respect to claimant's need for permanent restrictions, claimant admits he returned to full duty work for defendant without restrictions and subsequently obtained similar employment with BTC without permanent restrictions. However, claimant credibly testified that post-injury he performed his trucking work by self-accommodating with greater use of his left arm and by modification of activities. It was in this manner that claimant was able to return to his full duty work and it was this work that claimant was tolerating at the time of Dr. Giel's release.

Although claimant does not require permanent restrictions which foreclose his ability to return to full duty as an over-the-road driver, that does not necessarily mean claimant is unrestricted in his function. This conclusion is supported by claimant's credible testimony regarding his ongoing limitations and his inability to maintain employment stacking packages post-injury. It is therefore determined that Dr. Bansal's conditional restrictions more accurately reflect claimant's physical abilities and are accordingly, utilized in determining the extent of claimant's loss of earning capacity.

The restrictions recommended by Dr. Bansal are consistent with claimant's testimony and would not foreclose claimant's return to truck driving; however, they would prevent claimant from returning to preinjury work stacking and wrapping packages, performing most construction labor, and potentially from unloading trucks.

Despite ongoing complaints of pain and limitation, claimant has shown motivation to continued employment. He has not, however, demonstrated he lost permanent earnings as a result of the work injury. Following his release from care, claimant returned to work full duty for defendant. There is no evidence claimant's earnings at defendant decreased following his return to full duty work. Claimant was ultimately terminated by defendant, but for reasons unrelated to his work injury. Claimant was unemployed, with the exception of limited odd jobs, for approximately six months thereafter. He then successfully earned employment at BTC, performing substantially similar work to that he performed at defendant. His average earnings at BTC are higher than those he earned at defendant.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 20 percent industrial disability as a result of the stipulated work-related injury of December 19, 2013. Such an award entitles claimant to 100 weeks of permanent partial disability benefits (20 percent x 500 weeks = 100 weeks). Such benefits commence at the termination of the healing period, upon release to full duty work by Dr. Giel on July 17, 2014.

The next issue for determination is the rate of compensation.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

In computing claimant's rate of compensation, defendant utilized claimant's earnings from all 13 of the weeks preceding claimant's work injury on December 19, 2013. In his computation of rate, claimant excluded the weeks beginning November 23, 2013; November 9, 2013 and September 21, 2013. Claimant argues doing so is proper because claimant's weekly earnings regularly did not fall below the upper $700.00 range.

Review of claimant's earnings throughout the whole of his employ with defendant reveals claimant's earnings varied week to week. Claimant, himself, acknowledged his weekly earnings varied based on the number of loads and value of the loads he transported during a given week. This is the nature of over-the-road truck driving where an employee's earnings is based on the percentage value of loads hauled. Claimant urges exclusion of three weeks where he earned less than his typical weekly earnings; however, claimant has not demonstrated his earnings were lower due to any reason other than his load assignments given those particular weeks. Claimant did not demonstrate he missed work for a personal reason during those periods, thus rendering himself available for less work.

Rather, claimant simply argues the three weeks in question should be excluded as essentially less-than-typical earnings. However, during the 13 weeks prior to the work injury, claimant also demonstrated higher-than-normal earnings in at least one week. During the week beginning September 14, 2013, claimant earned $1,669.93. This sum of earnings is over $500.00 greater than in any other week of claimant's preinjury employment with defendant. Claimant would surely object to defendant excluding such a week from a rate computation on the basis that week carried higher-than-typical earnings. Therefore, the undersigned does not believe it is equitable to exclude the three weeks claimant has placed in question simply because they carry lower-than-typical earnings.

Claimant has not proven his earnings during the weeks in question were lower due to personal reasons, nor has he proven his earnings during those weeks were abnormally low. Claimant's earnings undoubtedly varied over his employment with defendant based upon the number of loads hauled and the value of those loads. Given variation in earnings was an expected element of claimant's employment, I find no compelling reason to find the three weeks claimant has excluded are unrepresentative.

Accordingly, claimant's gross earnings are to be computed based upon the 13 weeks immediately preceding the work injury of December 19, 2013. During the 13 weeks prior to the work injury, claimant earned $11,888.89, thus yielding an average weekly wage of $913.99. The parties stipulated at the time of the work injury, claimant was single and entitled to 3 exemptions. The proper rate of compensation is therefore, $573.38.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $100.00 filing fee; $178.00 for claimant's deposition transcript which was entered into evidence; and $78.97 in medical record copying fees. Defendant stipulated reimbursement would be made to claimant for Dr. Bansal's independent medical evaluation. The costs of filing fee, transcription cost, and copying costs are allowable costs and are taxed to defendant.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant healing period benefits at the weekly rate of five hundred seventy-three and 38/100 dollars ($573.38) for the period of January 20, 2014 through March 4, 2014.

Defendant shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits commencing July 17, 2014 at the weekly rate of five hundred seventy-three and 38/100 dollars ($573.38).

Defendant shall pay accrued weekly benefits in a lump sum.

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

Defendant shall receive credit for benefits paid.

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

Costs are taxed to defendant pursuant to rule 876 IAC 4.33 as set forth in the decision.

Signed and filed this 5th day of May, 2016.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.