File No. 5037916

TYRONE WILSON,

Claimant,

vs.

ANDERSON ERICKSON DAIRY

COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,

Defendants.

File No. 5037916
File No. 5041786
1/1/2014

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

A P P E A L
D E C I S I O N
Head Note Nos.: 1800; 2500

Claimant, Tyrone Wilson, appeals and defendants, Anderson Erickson Dairy Company and Travelers Insurance Company, cross-appeal from an arbitration decision filed in this matter on December 27, 2013.

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The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

ISSUES ON APPEAL

It is noted by the undersigned and counsel for defendants that claimant's statement of issues for consideration on appeal found at pages one and two of the appeal brief diverges from the subsections of argument in claimant's appeal brief. Therefore, upon review of claimant's arguments, the following issues are considered on appeal:

I. Did the presiding deputy err in failing to find claimant sustained a permanent partial disability resulting from his stipulated right shoulder injury of June 1, 2009?

II. Did the presiding deputy err in his assessment of claimant's permanent partial disability following a successive work injury on December 20, 2011 to his left shoulder and back?

III. Did the presiding deputy err in failing to award alternate medical care for claimant's right shoulder treatment?

IV. Did the presiding deputy err in failing to find that claimant's headaches are causally related to his left shoulder work injury of December 20, 2011.

V. Did the presiding deputy err as to claimant's rate of compensation for the work injury of June 1, 2009?

ISSUES ON CROSS-APPEAL

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I. Did the presiding deputy err in failing to award a credit under the successive disability statute found in Iowa Code section 85.34(7)?

II. Did the presiding deputy err as to claimant's rate of compensation for the work injury of June 1, 2009?

FINDINGS OF FACT

Claimant, Tyrone Wilson, was 64 years of age on the date of the arbitration hearing in this matter. (Transcript, page 14) Claimant is left hand dominate. (Tr., p. 38) Claimant is a high school graduate and has only limited additional vocational training he received from his first employer. (Tr., p. 15) His entire career has been spent in the dairy plant business. He worked for Ex-Cell-O/Pure-Pak as a service technician from 1969-1977, Meadow Gold Dairy in Ottumwa, Iowa for about a year in the maintenance and mechanical department, and then about 28 years at Roberts Dairy in Des Moines, Iowa as an equipment troubleshooter until the plant closed in 2004 or 2005.

Claimant then commenced work at Anderson Erickson Dairy Company (AE Dairy) in 2005 as a maintenance engineer. (Exhibit 22, p. 5) Claimant performed and passed a comprehensive pre-employment physical at the time he commenced his employment. (Tr., p. 24) He has worked in the same job since and continued to do so on the date of hearing – his work consists of working on the packing machines, conveyors, and working with boilers and ammonia. (Tr., p. 21) Claimant's job description requires heavy lifting which claimant can clearly not perform following the stipulated injuries to his shoulders and his back. (Ex. 20) On most days claimant limits his lifting to between 10-12 pounds, but he has lifted objects between 50-100 pounds as well. (Tr., p. 23) Claimant is a valued employee due to his knowledge on conveyor maintenance and troubleshooting of problems. (Tr., p. 55) Claimant's employer and his coworkers provide accommodations necessary for claimant's continued employment, but claimant does not believe he would be hired into his present position due to his work restrictions. (Tr., p. 69) Following both injuries claimant still works 40 hours per week, plus some overtime if available. (Tr., p. 53) Claimant also has the same job title and duties and claimant has received regular pay increases from his union contract through the Teamsters Union. (Tr., p. 53)

On October 23, 2006 claimant was injured at AE Dairy when he was struck by a forklift. (Ex. D, p. 8) He injured his lower back, left hip, and left leg in that accident and was

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treated at Concentra Medical Centers by Jerry M. McCauley, M.D. Claimant testified that the low back and left leg pain he began to experience after that accident has never gone away. Claimant further testified that he has had to limit his lifting after the forklift accident, but that he could perform whatever his boss told him to do. (Tr., p. 29) Claimant also gave up most, if not all, of his hobbies including hunting and fishing following the forklift accident. (Ex. H, p. 36) Medical restrictions were suggested following an independent medical examination by John Kuhnlein, D.O., including no lifting more than 50 pounds from floor to waist and no work at or above shoulder height to avoid the "moment arm" phenomenon in the lumbar spine. (Ex. H, p. 41) There is no documentation in the record to establish the extent of permanent partial disability benefits – if any – paid to claimant resulting from the 2006 injury.

The first injury to claimant that is part of this action (File No. 5037916) occurred on June 1, 2009, when claimant injured his right shoulder in an accident arising out of and in the course of his employment with AE Dairy. On that day claimant was working on a conveying machine using a breaker bar to break loose a bolt. As claimant was pulling with his right arm the bar slipped and he ripped his shoulder out resulting in immediate pain. (Tr., p. 30) Claimant treated primarily with Kyle Galles, M.D., for this work injury. (Ex. 4) Dr. Galles, on October 21, 2010, performed shoulder surgery on claimant to address impingement and arthritis. (Ex. 23, p. 33; Ex. J, p. 49) Dr. Galles discharged claimant from care on February 7, 2011 and placed him at maximum medical improvement. (Ex. P, p. 81) Dr. Galles informed claimant there were no other treatment options other than having a shoulder replacement surgery, but claimant would not be able to work if had the surgery. (Tr., p. 33) Dr. Galles provided permanent work restrictions of modified work including to avoid repetitive work above shoulder level. (Ex. P, pp. 81-82; Tr., p. 33) On April 18, 2011 Dr. Galles assigned a 6.5 percent permanent impairment rating to the right upper extremity. (Ex. P, p. 83) Claimant testified that he had no lifting restrictions on his right shoulder prior to the restrictions from Dr. Galles. (Tr., p. 35) Claimant noted neck symptoms up the left and right side of his head. Claimant testified that those specific symptoms have resolved. (Tr., p. 35) Claimant testified to ongoing pain resulting from the June 1, 2009 work injury. After an eight hour workday claimant describes his pain as excruciating and his drive home makes his arms ache. Claimant notes difficulty sleeping on the right shoulder which keeps him awake at night due to the pain. (Tr., p. 36) Claimant takes Tylenol, Tramadol, Lyrica, and Aspirin for his condition. (Tr., p. 36) Claimant seeks further treatment for his right shoulder condition. Claimant testified he would not have any reason he would not go back to Dr. Galles. (Tr., p. 37) Defendants have offered follow-up treatment with Dr. Galles – following a second opinion evaluation with Dr. Kirkland – but the record evinces that claimant has requested further treatment with Dr. Nepola at the University of Iowa Hospitals and Clinics. Claimant has chosen not to pursue additional treatment with Dr. Galles prior to the arbitration hearing. (Tr., p. 57) Dr. Kirkland did report on May 7, 2012 that claimant felt his right shoulder pain was getting worse and it wakes him up every night. (Ex. M, p. 59) Dr. Kirkland also noted:

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He does complain of a feeling of giving way and popping. He does get occasional numbness and tingling in his right ring and small finger once a week. He states he cannot lay on his right side. He states that he cannot work above shoulder or head level. He does occasionally drop things with the right upper extremity.

(Ex. M., p. 59) Dr. Kirkland recommends that it may be time to consider shoulder arthroplasty as indicated in the past by Dr. Galles. (Ex. M, p. 60)

Claimant was evaluated for purposes of an independent medical examination pursuant to Iowa Code section 85.39 on July 13, 2011 by Robin L. Epp, M.D. (Ex. 5) Dr. Epp opined claimant sustained a six percent whole person impairment resulting from the right shoulder injury. (Ex. 5, p. 8) Dr. Epp further provided impairment for the cervical spine due to pain and radicular findings. Dr. Epp provided work restrictions, but they include restrictions for both the right shoulder and the neck.

The second injury claimant sustained (File No. 5041786) occurred on December 20, 2011, when claimant injured his left shoulder and low back. On that date claimant was working with four or five coworkers changing out chains on a conveyor. As claimant was pulling out an old chain his hook on the end of the chain broke off and he ripped his left shoulder and fell backward about six feet and fell on the greasy floor and old conveyor. (Tr., p. 38) Scott A. Meyer, M.D., performed left shoulder arthroscopy, acromioplasty, arthroscopic Mumford, arthroscopic rotator cuff, and labral debridement surgery on claimant on September 6, 2012. (Ex. K, p. 51) Claimant testified that he still has left shoulder symptoms which include trouble lifting and working overhead and difficulty with pain if he lays on his left side. (Tr., p. 40) Claimant says that his left shoulder is more improved than his right shoulder. (Tr., p. 40) Claimant was released by Dr. Meyer on March 25, 2013. Thereafter, on June 26, 2013, Dr. Meyer provided permanent impairment and restrictions to the insurer upon its request. Dr. Meyer found claimant sustained a five percent whole body impairment rating for the left shoulder and confirmed by reference the significant restrictions set forth in the functional capacity examination of March 11, 2013. (Ex. P, p. 101) Claimant has not had any treatment for his left shoulder since his last appointment with Dr. Meyer.

For the low back injury, claimant treated with Cassim Igram, M.D., who ordered an MRI. After the MRI, Dr. Igram told claimant that it was a back strain and no surgery was

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required. (Ex. P, p. 89) Claimant received treatment from Dr. Klein including two epidural shots into his back which provided some relief. (Tr., p. 41) The last treatment claimant received was for the low back on September 25, 2012. At that visit, Dr. Klein noted that his examination showed claimant's back was, in essence, normal. (Ex. N, pp. 65-66) Dr. Meyer has opined a five percent body as a whole impairment from the left shoulder injury. (Ex. P, p. 101) Claimant testified he has excruciating pain from the center of his back down his back legs to around the knee in both legs. (Tr., p. 43) Claimant further testified that he had some level of back pain from his prior injury, but the pain wasn't severe prior to the December 2011 injury. (Tr., p. 43)

The only rating for the back is from Jacqueline Stoken, M.D., who performed an independent medical examination (IME) on July 12, 2013. Dr. Stoken has opined an eight percent impairment from the back and ten percent from the left shoulder. (Ex. 15, p. 11) Dr. Stoken opines that the results of a functional capacity evaluation of March 11, 2013 (See Exhibit 19) which placed claimant in a light to medium category of work are appropriate. Dr. Stoken suggested that claimant more specifically have a 2-hand lift/carry occasionally from 9 inches to waist level and a 2-hand frequent lift of 10 pounds from 9 inches to waist level. (Ex. 15, p. 12)

Claimant has alleged he developed disabling headaches as a result of his December 2011 work injury. Claimant primarily treated with his personal physician, Dr. Hawk, for the headaches as well as with Dr. Hansen who provided steroid shots and ordered physical therapy for the headaches. (Tr., p. 45) Claimant testified Dr. Hawk told him that the headaches resulted from the injury to his left shoulder. (Tr., p. 45) The opinions of Dr. Hawk are confirmed by his medical note which include the opinion that claimant's headaches are arising from his trapezius and levator scapulae muscle spasms and the spasming results from his shoulder injury sustained at work. (Ex. 14, p. 12) The opinion of Dr. Hawk is confirmed by Dr. Stoken who diagnoses a work-related chronic muscle tension headache. (Ex. 15, p. 11) A medical note from Concentra in January 2012 noted claimant's neck pain had resolved and he is no longer having headaches. (Ex. D, p. 11) The Concentra note is refuted by claimant's testimony and more recent medical records documenting ongoing treatment for headaches.

Claimant confirmed at hearing that defendant-employer, AE Dairy, has been very good to him and that he is fortunate to obtain employment at AE Dairy. He enjoys his work at AE Dairy and he hopes to remain employed with this employer until retirement. (Tr., p. 52) Claimant also noted that his boss has also been very good to him. (Tr., p. 52) Claimant's coworkers also quite clearly treat claimant well and assist him especially with lifting.

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On the date of the 2009 injury, claimant's gross earnings were $981.34 per defendants and $1,018.27 per claimant. (Ex. 6, p. 1; Ex. T, p. 110) Claimant wants only 12 weeks included in the calculation per Exhibit 6. For the week ending May 2, 2009, claimant had no earnings and therefore that particular week should be excluded. As the presiding deputy found, the week before March 7, 2009 could perhaps have been added in, but no records for that week are in the record. Claimant's calculation of rate for the date of injury in June 2009 is adopted. The rate of $638.04 is affirmed.

On the date of the 2011 injury, claimant had gross earnings of $1,158.62 per week, was married and entitled to two exemptions. As such, his weekly benefit rate is $738.46. The parties stipulated that the commencement date for permanency benefits is October 16, 2012.

Claimant was awarded various costs including reimbursement for an independent medical examination with Dr. Stoken. Those costs are not contested upon appeal or cross-appeal.

CONCLUSIONS OF LAW

The arbitration decision of December 27, 2013 found claimant failed to prove a permanent disability following his June 2009 right shoulder injury and surgery. The arbitration decision awarded 15 percent permanent partial disability for claimant's December 2011 work injury. The arbitration decision does not address nor apply the successive disability statute. Rather the arbitration decision is conclusory and those conclusions are not well-developed. It is found upon de novo review that the factual findings of the arbitration decision are significantly deficient as to some necessary findings and are incorrect as to others, such as the restrictions following claimant's left shoulder injury. It is also found that the finding claimant sustained no permanent disability following a significant right shoulder injury and surgery which has resulted in restrictions and ongoing loss of function cannot be affirmed on appeal. Therefore the arbitration decision is reversed and the appeal decision shall award benefits under the framework of successive disabilities required by the Iowa Code.

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The first issue for consideration on appeal is whether claimant has proven by a preponderance of the evidence he sustained a permanent disability resulting from his work injury of June 1, 2009.

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).

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).

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.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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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 sustained a stipulated injury to his right shoulder on June 1, 2009. As a result of the injury claimant was treated by Dr. Galles who performed surgery, imposed permanent restrictions limiting the use of the right shoulder, and provided a 6½ percent functional impairment rating. Claimant provided unrebutted testimony as to his ongoing pain and his need for accommodations in his daily work at AE Dairy. The record further establishes that claimant may reasonably require a shoulder replacement surgery, as first recommended by Dr. Galles and confirmed by Dr. Kirkland. Recent medical records establish claimant has shoulder instability and tingling in his right upper extremity. The injury and resulting disability is therefore found to be serious in extent. While claimant has returned to work in his pre-injury employment position and has increased earnings, he is clearly not capable of obtaining similar work without accommodations in the competitive labor market. Moreover, claimant's current earnings are significantly attributable to his union contract. Claimant also clearly benefits from a commendable, supportive employer. Claimant has proven he has sustained a 15 percent loss of his earning capacity following his work injury of June 1, 2009. There was no appreciable loss of earning capacity established in this matter for claimant prior to June 1, 2009 as claimant was working unrestricted prior to that time. Such findings entitle claimant to 75 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. The applicable rate found by this division is $638.04. Such benefits shall commence on February 7, 2011, which is the date claimant was placed at MMI by Dr. Galles.

Claimant has sustained a subsequent work injury on December 20, 2011. Claimant's primary injury on that date was to his left shoulder, but also resulted in low back discomfort and headaches. It is proven that claimant has sustained disability and need for work

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restrictions to his left shoulder, low back, and due to headaches resulting from the December 2011 work injury. Defendants only dispute the headaches as work related, while defendants dispute the extent, if any, of the left shoulder and low back permanent partial disability. The preponderance of the evidence – namely the opinions of Dr. Hawk and Dr. Stoken – supports that the headaches are related to the December 2011 injury. In fact no specific medical opinions dispute the opinions of Dr. Hawk and Dr. Stoken. While defendants assert the opinions of Dr. Hawk and Dr. Stoken are not credible, upon appeal the opinions are found to be persuasive. Although the headaches are related to claimant's left-shoulder condition they do not add to the level of impairment at this time, but should further treatment be necessary for the headaches such treatment with Dr. Hawk is the responsibility of defendants.

Both disabilities (June 1, 2009 and December 20, 2011) occurred with defendant-employer, AE Dairy. In cases of successive disability it is necessary to consider the combined disability as articulated in Steffen v. Hawkeye Truck & Trailer, File No. 5022821 (Appeal Decision September 9, 2009):

The legislature's creation of Iowa Code section 85.34(7) provides guidance as to how prior disabilities with the same employer are to be compensated under a modified full responsibility rule. The third paragraph of Section 20 notes that while an injured worker shall be fully compensated for all of the injured worker's disability that is caused by work-related injuries with the employer; it must be done without the employer having to compensate the employee more than once.

Steffen, at p. 12.

Following passage of H.F. 2581, the applicable statutory framework for compensation in successive disability situations emerged. More specifically, in 2004, Iowa Code section 85.36(9)(c) was stricken, Iowa Code section 85.34(2)(u) was amended, and Iowa Code section 85.34(7) was enacted.

Iowa Code section 85.34(2)(u) was amended and now requires:

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

Iowa Code section 85.34(7) requires the following inquiry for successive disabilities:

7. Successive disabilities.

a. An employer is fully liable for compensating all of an employee’s disability that arises out of and in the course of the employee’s employment with the employer. An employer is not liable for compensating an employee’s preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee’s present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee’s condition immediately prior to the first injury. In this instance, the employer’s liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

(2) If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2 , paragraph “u”, and the employee has a preexisting disability that causes the employee’s earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer’s liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee’s earnings are less at the time of the present injury than if the prior injury had not occurred.

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c. A successor employer shall be considered to be the same employer if the employee became part of the successor employer's workforce through a merger, purchase, or other transaction that assumes the employee into the successor employer's workforce without substantially changing the nature of the employee's employment.

As noted, Iowa Code section 85.36(9)(c) was stricken. That statutory provision read:

c. In computing the compensation to be paid to any employee, who before the accident for which the employee claims compensation, was disabled and drawing compensation under the provisions of this chapter, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries to which the employee shall have suffered.

Paragraph "c" of this subsection shall not apply to compensable injuries arising under the second injury compensation Act.

As it relates to claimant's subsequent disability from the December 20, 2011 work injury, consideration must also be given to his existing right shoulder disability for which AE Dairy is liable. Both the prior injury and the present injury are compensable injuries under the same paragraph of section 85.34(2). It is therefore required that defendant-employer's liability for the "combined disability" – herein the combined disability resulting from the right shoulder injury and the left shoulder and low back injury – shall be considered to be already partially satisfied to the extent of the percentage of disability for which claimant was previously compensated by defendant-employer for the right sided injury. Claimant's dominate arm is his left. He had previously lost significant use of his right shoulder from the 2009 injury and relied upon the use of his left upper extremity more after his first injury. Claimant testified as to continued pain in his left shoulder which impacts his sleep. He does note that his right shoulder is more disabled than his left – but now both upper extremities have been significantly impaired. In consideration of claimant's loss of function, the specific restrictions adopted by Dr. Meyer following the functional capacity examination of March 11, 2013 are adopted herein as most representative of claimant's present functional limitations. Those restrictions impact claimant's lifting and material handling abilities resulting from both injuries. Claimant does, however, remain employed with accommodation from his employer and coworkers. He is making a higher wage than on his date of injury due to his union contract. Claimant has a limited education, but his knowledge of conveyor systems and manufacturing processes clearly make him a valued employee despite his inability to continue to perform many of the physical aspects of his job. Should claimant lose his

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employment with AE Dairy his permanent restrictions would significantly impact his ability to regain employment unless he was hired solely for his knowledge of conveyor systems. Upon consideration of all of the industrial disability factors previously set forth herein it is concluded that claimant's combined disability at the present time to be 40 percent. Such a finding entitles claimant to 200 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 40 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. Benefits for the December 20, 2011 work injury shall be paid at the weekly rate of $738.46 and shall commence on October 16, 2012.

Claimant had higher earnings at the time of his second disabling injury and therefore Iowa Code section 85.34(7)(b)(2) does not apply to reduce the credit awarded to defendants in this matter. The credit awarded to defendants is for 75 weeks of disability benefits from the 200 weeks awarded for the second work injury. As such, claimant shall be paid 75 weeks of permanent partial disability benefits at the weekly compensation rate of $638.04 commencing February 7, 2011 for his first injury. Accrued benefits shall be paid in a lump sum with applicable interest and defendants are also granted a credit for benefits previously paid as set forth on the hearing report and order. Claimant shall also be paid 125 weeks (200 weeks minus 75 weeks= 125 weeks) at the weekly compensation rate of $738.46 commencing on October 16, 2012, with accrued benefits also being paid in a lump sum with applicable interest.

The next issue for consideration on appeal is whether the presiding deputy commissioner erred in failing to provide an order of alternate medical care pursuant to Iowa Code section 85.27 related to claimant's right shoulder.

For purposes of Iowa Code section 85.27, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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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 Company, 528 N.W.2d 122 (Iowa 1995).

Under the statute on alternate medical care, the employer is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997). The question of reasonable care is a question of fact. Claimant has the burden to prove the care offered is unreasonable. Long, 528 N.W.2d 122, 123.

Defendants have chosen Dr. Galles to treat claimant's right shoulder. In the past Dr. Galles has suggested an invasive additional surgery, but such treatment could impact claimant's work so claimant avoided the surgery. The treatment suggested by Dr. Galles was specifically reaffirmed as reasonable by Dr. Kirkland. At hearing claimant said there was no reason he would not be comfortable returning to treatment with Dr. Galles. While claimant, or his counsel, might prefer treatment by Dr. Nepola at the University of Iowa Hospitals and Clinics, there is no basis for the division to interfere with defendants' right to authorize Dr. Galles. It is therefore concluded that the denial of alternate medical care for the right shoulder is affirmed.

All other issues, including those of the weekly compensation rate and further treatment for claimant's headaches have previously been determined within this appeal decision.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of December 27, 2013 is REVERSED.

Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of six hundred thirty-eight and 04/100 dollars ($638.04) per week commencing on February 7, 2011. Defendants shall pay accrued weekly benefits in a

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lump sum. Defendants shall be granted credit for permanent partial disability benefits previously paid to claimant as set forth in the hearing order.

Defendants shall pay unto claimant an additional one hundred twenty-five (125) weeks of permanent partial disability benefits at the stipulated rate of seven hundred thirty-eight and 46/100 dollars ($738.46) commencing on October 16, 2012. Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall make payment for claimant's ongoing medical treatment for his right shoulder with Dr. Galles and for his headaches with Dr. Hawk.

Defendants shall pay the costs of this action pursuant to rule 876 IAC 4.33.

Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Defendants shall file reports with this agency on the payment of this award pursuant to rule 876 IAC 3.1.

Signed and filed this _____16th_____ day of July, 2014.

CHRISTOPHER J. GODFREY
WORKERS' COMPENSATION
COMMISSIONER

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