BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ERIC AKKERMAN, Claimant, vs. CITY OF DES MOINES, Self-Insured, Employer, Defendant.	File Nos. 5047534, 5051969 REVIEW-REOPENING DECISION

ERIC AKKERMAN, Claimant, vs. CITY OF DES MOINES, Self-Insured, Employer, Defendant.	File No. 5061414 ARBITRATION DECISION

STATEMENT OF THE CASE

The claimant, Eric Akkerman, filed two petitions for review-reopening and one petition for arbitration. He seeks workers' compensation benefits from the City of Des Moines, a self-insured employer. The claimant was represented by Christopher Spaulding. The defendant was represented by Luke DeSmet.

The matter came on for hearing on November 4, 2019, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 10; Claimant's Exhibits 1 through 5; and Defendant's Exhibits A, B, and F through L. City Exhibits C, D, and E were excluded from the record, however, the City made an offer of proof. The claimant testified under oath at hearing, as did James Wells. Official notice was taken of the agency file, which is voluminous. Ann T. Moyna served as the court reporter for the proceeding. Both parties were well-represented and the matter became fully submitted on November 29, 2019.

On December 10, 2019, the City filed an affidavit signed by James Wells attempting to correct some of his testimony from the hearing. That affidavit was submitted after the close of evidence and is not considered. 876 Iowa Administrative Code section 4.31.

ISSUES

The parties submitted the following issues for determination.

File No. 5047534:

1. Whether the claimant is entitled to an increase of benefits under Iowa Code section 86.14.

2. The extent of claimant's industrial disability.

3. Costs.

File No. 5051969:

1. Costs.

2. It is noted that the City stipulated on the record to provide medical treatment for claimant's left knee condition.

File No. 5061414:

1. Whether claimant sustained a new, cumulative injury which arose out of and in the course of his employment to his left knee and low back which manifested on or about January 19, 2018.

2. If so, what benefits, if any, is claimant entitled to.

3. Costs.

The prehearing conference reports contained a number of stipulations for each file. These stipulations are accepted by the agency and are hereby deemed enforceable and binding.

FINDINGS OF FACT

Claimant, Eric Akkerman, was born in February 1971. He has filed three claims seeking benefits from the City of Des Moines. He has appeared before the agency multiple times seeking workers' compensation benefits and alternate medical care. I entered an Arbitration Decision on October 12, 2016, which took a snapshot of his condition in both his low back and left knee as of November 19, 2015. The findings of fact from that snapshot are deemed preclusive of what Mr. Akkerman's condition was at that time.

The most relevant portions of the findings are set forth below.

Claimant, Eric Akkerman, is a 44-year-old City of Des Moines employee. In 2014, it is stipulated that Eric was married with five (5) dependents. He has a high school education and an Associate degree from the University of Phoenix. He has a work history of physical, manual labor. He has worked in sales route positions which require fast paced selling and delivery of merchandise in addition to warehouse work. He became employed with the City of Des Moines in 2002. He became full-time in 2006. He started in the Parks Department and eventually transferred to Solid Waste. He presently works in the Sewer Department as a truck driver.

On January 15, 2014, Eric suffered an injury which arose out of and in the course of his employment. While working with Matt Morgan, he stepped out of his work truck, slipped on the ice and fell. (Transcript, pages 24-25) Matt Morgan witnessed the fall and testified under oath about it at hearing. He also testified that Eric immediately complained of low back pain, as well as throughout the remainder of the day. (Tr., pp. 16-17) Eric immediately reported the injury. There is no evidence that he immediately injured his neck or upper back in that fall.

(Arbitration Decision, page 3)

After recounting Mr. Akkerman's treatment history for his low back, I made the following findings of fact.

In September 2015, claimant was evaluated by Irving L. Wolfe, D.O., for an independent medical evaluation. Dr. Wolfe reviewed voluminous medical records, including a number of records which are not in evidence related to claimant's preexisting condition. He summarized these records in detail. (Def. Ex. F, pp. 1-15) He took a thorough history and performed a thorough evaluation. (Def. Ex. F, pp. 16-20) He opined that claimant's low back and neck conditions are related to his January 2014, work injury. (Def. Ex. F, pp. 22-23) He provided a 23 percent whole body rating for the low back and 8 percent for the neck. (Def. Ex. F, pp. 21-22) He opined that claimant's work activities for the City of Des Moines were a "substantial causal/contributing or aggravating factor in Mr. Akkerman's current left knee impairment and disability." (Def. Ex. F, p. 23) He found a 4 percent whole body rating, which he did not convert to the leg. (Def. Ex. F. p. 21)

At hearing Eric testified he still works for the City. He still has pain and limitations with his low back, neck and left knee. His symptoms wax and wane. His supervisor, Rick Powell testified that Eric is a good worker.

> He has observed Eric having issues with his low back while doing his job. Eric has difficulty getting in and out of his truck at times.
>
> The City of Des Moines presented evidence regarding claimant's credibility. He has a couple of convictions in his record. (Def. Exs. I, K, and L) The most concerning evidence relates to a charge that claimant made a false police report so that he could make an insurance claim in 2006. (Def. Ex. I) This does impact my assessment of claimant's credibility. The City also contends that claimant exaggerates his symptoms because of his opioid dependence and, in support of this position, provided numerous medical documents. (Def. Exs. P and Q)

(Arb. Dec, p. 6)

Based upon the evidence presented, I found that claimant's stipulated work injury was causally connected to the condition in his low back, but not his neck.

> By a preponderance of evidence, I find that the claimant has proven a substantial aggravation and lighting up of his low back condition. I find he has failed to prove that the neck condition is related to the work injury.
>
> The City never denied the low back condition. (Cl. Ex. 6, p. 5) The City relied upon the opinion of Dr. Troll who provided a zero rating. I am not convinced, however, that Dr. Troll is using the correct legal standard for medical causation. Specifically, he opined that "any residual symptoms are likely related to his underlying spondylosis." (Def. Ex. C, p. 17) This, however, is contrary to the facts in the case. The claimant was not having active treatment of significant symptoms following the successful recuperation of his 2010, surgery. Dr. Troll did not address whether the work injury aggravated or lit up the spondylosis.
>
> The medical opinion of Dr. Wolfe is more credible, as he clearly used the correct legal standard. I find that the claimant's January 15, 2014, work injury substantially aggravated and otherwise lit up his low back condition. The claimant now has a substantial impairment resulting from this. Undoubtedly, some of his overall impairment and disability pre-existed this work injury. The parties have stipulated that the defendant is entitled to a 23 percent credit for benefits previously paid.

(Arb. Dec., p. 7)

I then found the claimant sustained a 35 percent industrial disability as a result of the accident (in addition to his prior, work-related low back condition).

> By a preponderance of evidence, I find that Eric has suffered a 35 percent loss of earning capacity as a result of his January 15, 2014, work injury. He was 44 at the time of hearing and he has a high school education. Eric is in his prime earnings years. He is a hard worker and a valuable employee for the City. He is in his prime earnings years and he has a significant functional impairment in his low back from work-related injuries. Thus far, he has not suffered a loss of actual income and he has been able to avoid medical restrictions. He likely does not have the skills at this time to move into less physical or less demanding positions. He would have great difficulty obtaining manual labor employment in the competitive job market with his significant low back impairment. When considering all of the relevant factors of industrial disability, I find he has suffered a 35 percent loss of earning capacity. The parties have stipulated that defendant City is entitled to a credit of 23 percent whole body for his pre-existing disability. That stipulation is accepted. Therefore, claimant is entitled to 60 weeks of permanent partial disability benefits at the rate stipulated commencing on July 16, 2014.

(Arb. Dec., p. 8)

Since the original arbitration hearing and decision, much has happened. Importantly for purposes of this case, Mr. Akkerman was terminated by the City of Des Moines on January 19, 2018. Between the first hearing on November 19, 2015, and his termination, Mr. Akkerman had some treatment for his low back. He continued to follow up with Thomas Hansen, M.D. initially. In April 2015, Dr. Hansen continued to manage his medications, which included narcotics at that time. (Jt. Ex. 1, p. 1) On December 3, 2015, Dr. Hansen performed an L5 transforaminal injection and sacroiliac (SI) joint injection. (Jt. Ex. 1, p. 3) Mr. Akkerman was involved in a work-related motor vehicle accident on or about December 14, 2015 where he rear-ended another vehicle. He had some office visits and physical therapy for this, however, it did not materially contribute to the overall disability in his low back.

On April 28, 2016, Dr. Hansen noted some improvement with the injections. (Jt. Ex. 1, p. 4) Further injections were performed at that time and the medical notes indicate he was scheduled for a radiofrequency denervation. (Jt. Ex. 1, p. 5) I find no evidence in the record that a denervation was performed. He was prescribed OxyContin at this time. In September 2016, Mr. Akkerman requested to "wean off" the OxyContin. (Jt. Ex. 1, p. 6) He continued to receive injections from Dr. Hansen in 2017. His last visit with Dr. Hansen was August 17, 2017. (Jt. Ex. 1, p. 10) At that time, he was diagnosed with sacroiliitis and chronic midline low back pain with left-sided sciatica. "He cites left buttock and thigh pain. He has improved with transforaminal injections as well as SI joint injections. He notes return of his pain." (Jt. Ex. 1, p. 11) He had tenderness over the SI joint to the left and his straight leg raise test was positive on the

left. Dr. Hansen repeated the injections. (Jt. Ex. 1, p. 12) Dr. Hansen retired sometime after this appointment. Mr. Akkerman had significant difficulty getting additional care for his low back after that.

Mr. Akkerman lost his commercial drivers' license (CDL) as a result of an incident which occurred in October 2017. He was in a motorcycle accident on October 2, 2017. He was charged with OWI, and he lost his CDL effective November 24, 2017. The City contended that Mr. Akkerman failed to timely inform his supervisors of this matter and was untruthful during the investigation of this matter. (Defendant's Ex. F, G, H) He was formally terminated on January 23, 2018. His termination was upheld by the Civil Service Commission in October 2018 with little analysis and one dissent. (Def. Ex. H)

In February 2019, Mr. Akkerman filed three workers' compensation claims with the agency. He filed to reopen his January 15, 2014 low back injury. He filed to reopen his February 24, 2015 knee injury. And he filed a new arbitration claim, alleging he suffered a new cumulative injury or material aggravation to his low back and left knee conditions which manifested on the date of his termination (his last day worked).

I find that there is little evidence to support a finding that claimant suffered a new, cumulative injury to his low back and left knee as a result of his repetitive work activities.

After Dr. Hansen's retirement, Mr. Akkerman sought treatment through his attorney. Claimant testified that he had been terminated and did not know any other way to request medical treatment. Mr. Akkerman's family physician referred him to a new pain specialist. On April 2, 2018, claimant's counsel requested to have this referral authorized by the City. (Claimant's Ex. 2, p. 22) On September 6, 2018, Mr. Akkerman filed an alternate medical care petition. I granted the alternate care on September 20, 2018. It turns out that Dr. Hansen's treatment had not been authorized by the City and claimant's personal health insurance was paying those bills, including the medications and injections. I ordered that medical care for claimant's low back be authorized. The City sought judicial review in District Court and the matter was remanded in April 2019 for a determination of whether the fact that the City offered no care at all was unreasonable.

Meanwhile in October 2018, Mr. Akkerman had an independent medical evaluation (IME) with Robert Rondinelli, M.D., who prepared a report on November 6, 2018. (Cl. Ex. 1) Dr. Rondinelli took a full history and reviewed appropriate medical reports. He examined Mr. Akkerman as well.

> He continues to experience low back pain (centralized) with some radiation to his left buttock and posterior thigh proximal to the knee – possibly radicular in nature. He has impairment in activities of daily living functioning associated with these symptoms. He occasionally uses a back brace at work, and he treats with Advil p.r.n. for periodic flare ups. He is not consistently medicated with analgesics, and is on no opiates at this time.

(Cl. Ex. 1, p. 5) Dr. Rondinelli assigned medical causation to the January 15, 2014, work injury and assigned an impairment rating of 23 percent of the whole body. (Cl. Ex. 5, pp. 6-7) He indicated further medical treatment would be required. "Given that he is presently 47 years old and remains active and working, the natural history of these conditions is expected to include progression over time and will periodically produce flare-ups and probable periodic need for additional medical or surgical assessment and therapeutic interventions." (Cl. Ex. 1, p. 8) He recommended significant (sedentary to light duty) work restrictions with infrequent lifting more than 10 pounds, alternate standing and sitting, avoiding repetitive kneeling, crawling, stooping or squatting. These restrictions were for both his low back and left knee. I find Dr. Rondinelli's opinion regarding causation, treatment and medical restrictions to be highly compelling and credible.

While the matter was pending on judicial review, no medical care was authorized. Claimant filed a new alternate care petition on May 31, 2019, which coincided nicely with the Remand Order from District Court. A remand/alternate care hearing was held jointly on June 14, 2019, again before the undersigned. I again awarded alternate care. "The claimant is authorized to direct his own medical care. The Defendant City has agreed to authorize Dr. Spellman. At this time, Dr. Spellman is authorized as a gatekeeper physician to direct and authorize all treatment for claimant's January 15, 2014, work injury." (Alternate Care Decision, June 14, 2019, p. 5) Unfortunately, Mr. Akkerman did not receive any medical care for his low back between the time Dr. Hansen retired in late 2017, and this Order in 2019. The City argued this case as though Mr. Akkerman did not have any much treatment for his low back condition following the first injury. The reality is he had continuous medical treatment until Dr. Hansen retired and the City refused to provide any treatment for him.

On June 19, 2019, Andrew Spellman, D.O., evaluated Mr. Akkerman. Dr. Spellman documented an accurate medical history and diagnosed sacroiliitis and spondylosis. (Jt. Ex. 9, p. 46) He recommended a trial of injections. The injections were promptly authorized and performed a week later. (Jt. Ex. 9, p. 49) Mr. Akkerman followed up in August. Dr. Spellman documented that his pain changed from "dull ache, to a very sharp pain, feels he has a 'pinched nerve.' Some radiation to proximal thigh, no pain, numbness/tingling in the leg. States he hasn't had sharp pain like this since prior to his fusion surgery." (Jt. Ex. 9, p. 51) Dr. Spellman recommended x-rays which did not get promptly authorized. (Jt. Ex. 9, p. 55)

In August 2019, Todd Troll, D.O., reevaluated Mr. Akkerman and authored a report. (Jt. Ex. 10) He diagnosed chronic low back pain "status post lumbar fusion in 2010." (Jt. Ex. 10, p. 67) He opined that there was no change in his condition since his fusion surgery in 2010, and that his symptoms have varied in that he has occasional periodic "flares" of his symptoms. (Jt. Ex. 10, p. 67) He causally related Mr. Akkerman's current condition in his low back to the 2009 work injury and made no mention of the 2014 aggravation. (Jt. Ex. 10, p. 68)

On October 25, 2019, Dr. Spellman reevaluated Mr. Akkerman. Mr. Akkerman reported his symptoms were worse and changed. "Sharp, shooting, now down posterior leg to the shin/calf and ankle. No numbness or weakness. States leg symptoms ongoing for the last few months. Pain reaches 10/10 daily. Upset and frustrated with condition. States he considers going to the er daily." (Jt. Ex. 9, p. 62) At this time, Dr. Spellman diagnosed radiculopathy, lumbosacral region and noted that the x-rays showed "severe facet arthropathy" above the fusion. (Jt. Ex. 9, p. 64) He recommended an MRI which was not performed before the hearing.

Much of the testimony at hearing surrounded the circumstances of Mr. Akkerman's termination and the fact that the City did not allow him to return to work in any capacity. Mr. Akkerman testified that the loss of his CDL did not necessitate his termination and pointed to other examples within City employment where workers who lost their CDL due to an OWI were allowed to return to work as "seven-month laborer employees." (Tr., p. 72) City HR Director James Wells acknowledged this to some degree at hearing, although attempted to distinguish Mr. Akkerman's circumstances. (Tr., pp. 71-80) In my analysis, none of this is particularly relevant. I find that the City's termination of the claimant was founded based upon the ruling of the Des Moines Civil Service Commission. It is possible that part of the City's motivation for refusing to offer him any type of work, as they had for other employees, may have been motivated in part by the claimant's multiple workers' compensation claims, however, the claimant failed to demonstrate by a preponderance of evidence an economic change of condition that warrants an increase in compensation benefits. Mr. Akkerman did have to seek and find suitable employment within his abilities given his chronic low back condition. He quickly secured employment as a car salesman for Shottenkirk. It appears Mr. Akkerman is good at this job and is within his abilities. While his wage earnings are comparable to his earnings for the City, he has lost substantial benefits, including paid health insurance and retirement. The lost value of these benefits demonstrates a significant loss of earning capacity.

CONCLUSIONS OF LAW

The first question is whether the claimant suffered a new, cumulative injury which manifested on his first day of lost work, January 19, 2018.

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.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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).

There is very little evidence in this record that the claimant suffered a new, distinguishable cumulative work injury to either his low back or his left leg. Dr. Rondinelli did provide some evidence of this in his report, however, his opinion is vague and unsupported by contemporaneous medical records for the claimant to carry his burden of proof. I reject claimant's assertion of a new work injury. Therefore, I find that claimant has failed to meet his burden of proof with regard to File No. 5061414.

The primary question in regard to File No. 5047534, is whether the legal elements for review-reopening have been met in light of the findings of fact set forth above.

In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.14, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2) (2017). In order to demonstrate eligibility for an increase of compensation under section 86.14(2), the claimant must demonstrate what his physical or economic condition was at the time of the original award or settlement. At a subsequent review-reopening hearing, claimant has the burden to prove that there is a substantial difference in such condition which warrants an increase in compensation. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The difference can be economic or physical. Blacksmith v. All-American Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). Essentially, two snapshots of the claimant's condition are taken; one in each hearing or settlement. The claimant must prove that there is something substantially different between the two snapshots such that it warrants an increase in benefits. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968).

The principles of res judicata apply and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Kohlhaas at 392. Review-reopening is not intended to provide either party with an opportunity to relitigate issues already decided or to give a party a "second bite at the

apple." The agency, however, is forbidden from speculating as to what was contemplated at the time of the original snapshot. Id.

The burden remains upon the injured worker to prove by a preponderance of the evidence that the current condition is proximately caused by the original injury. Kohlhaas, 777 N.W.2d at 392. When a work-related injury causes another injury to the worker, this new injury (sequela) may also be considered as a work-related injury under Iowa's workers' compensation laws.

When an employee suffers from a compensable injury and another condition or injury arises that is the consequence or result of the previous injury, the sequelae rule applies. If the employee suffers a compensable injury and later suffers further disability, which is the proximate result of the original injury, such further disability is compensable. If the employee suffers a compensable injury and thereafter returns to work and, as a result, the first injury is aggravated and accelerated so that the employee is more greatly disabled than they were before returning to work, the entire disability may be compensable. The employer is liable for all consequences that naturally and proximately flow from the accident. Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480 (1936).

In order to apply the facts to the law, the two snapshots must be contrasted and compared.

At the time of his first hearing in November 2015, Mr. Akkerman was working without restrictions for the City of Des Moines. He was performing his job which he had done for many years without restrictions. When I assessed Mr. Akkerman's industrial disability based upon the November 2015, snapshot, I specifically found that he had been able to avoid permanent medical restrictions. I find that the snapshot of claimant's second injury is substantially different from the first injury primarily based upon the medical opinion of Dr. Rondinelli. His report placed substantial permanent restrictions upon Mr. Akkerman which should be followed at this time. Dr. Rondinelli's opinions are found to be highly credible and believable that Mr. Akkerman should now be working within the sedentary to light work classification in light of the progression of his condition. I find this warrants an increase in compensation pursuant to Iowa Code section 86.14.

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 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.

At the time of hearing, Mr. Akkerman was 49 years old. He had secured employment after losing his job for the City. While claimant failed to prove by a preponderance of evidence that his work injury was a substantial cause of his job loss, the job loss itself caused Mr. Akkerman to have to seek alternate employment. He secured employment relatively quickly selling cars for a prominent dealership in central Iowa. While he earns actual wages comparable to those he earned for the City, his loss of benefits, retirement and insurance benefits, has been substantial, which factors in to his overall earning capacity. He has been able to perform the essential functions of this job, at least as of the time of hearing. He now has permanent restrictions which place him in the sedentary to light work classification. These restrictions were stated by Dr. Rondinelli as follows:

> His magnitude of low back impairment, within medical probability, would warrant some material handling restrictions in a light to sedentary range with occasional lifting between 10 and 20 pounds, and infrequent lifting of 10 pounds or more. He should be afforded an opportunity to avoid prolonged standing and adjust his position and activity with sitting and walking to maintain comfort and sufficient occupational activity to tolerate an 8 to 12-hour work shift. He may experience problems shoveling or clearing snow from cars during inclement weather, and I would caution him against this. He should be afforded an opportunity to wear his lumbosacral orthosis as needed. He should avoid kneeling, crawling, stooping or squatting activities given his history of knee problems, and with specific attention to the left knee history noted above.

(Cl. Ex. 1, p. 8) I find that this is the best reflection of medical restrictions the claimant should be utilizing at this time.

It is noted that claimant alleged his condition had deteriorated further just prior to hearing. Dr. Spellman had ordered an MRI and noted new radicular complaints. This may represent a substantial worsening of his condition, or it may more likely be a flare-up of the type described by Dr. Troll. As of the time of hearing, this was not known. My findings are based primarily upon Dr. Rondinelli's report, which is supported substantially by Dr. Hansen's treatment records.

Considering all of the relevant factors of industrial disability, I find that the claimant has proven a loss of earning capacity of 45 percent. I conclude this entitles claimant to 225 weeks of compensation at the stipulated rate commencing upon the date the review-reopening petition was filed.

The next issue is claimant's entitlement to medical expenses and ongoing medical care under Iowa Code section 85.27.

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 16, 1975).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

At hearing, the City agreed to provide treatment for claimant's left knee under File No. 5051969. That stipulation is accepted and defendants shall authorize ongoing treatment as needed under both File No. 5047534 and 5051969.

The final issue is costs.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and

> subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Using the discretion set forth in section 85.40, I find the City is responsible for costs in the amount of $3,080.66. I find that one-half of Dr. Rondinelli's report should be assessed as a cost. Dr. Rondinelli did not break out his bill for specific determination of what portion was for the exam and what portion was for the report.

ORDER

THEREFORE, IT IS ORDERED

File No. 5047534:

The defendant shall pay fifty (50) weeks of benefits at the rate of six hundred six and 62/100 dollars ($606.62), commencing on February 9, 2018.

Defendant employer shall pay accrued weekly benefits in a lump sum.

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

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

File Nos. 5047534 and 5051969:

Defendant shall authorize reasonable and necessary treatment consistent with this decision.

Costs are taxed in the amount of three thousand eighty and 66/100 dollars ($3,080.66).

For File No. 5061414:

Claimant shall take nothing.

Signed and filed this 9th day of July, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Christopher Spaulding (via WCES)

Luke DeSmet (via WCES)