

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE HAYES,

Claimant,

VS.

GEORGIA PACIFIC CORP.,

Employer,

and

OLD REPUBLIC INSURANCE,

Insurance Carrier,
Defendants.

File No. 5067990

ARBITRATION DECISION

Head Note Nos.: 1402, 1402.20,
1803, 3000

STATEMENT OF THE CASE

The claimant, Dale A. Hayes, filed a petition for arbitration seeking workers' compensation benefits from Georgia Pacific Corp., as the employer, and Old Republic Insurance, as the insurance carrier. Mark Sullivan appeared on behalf of the claimant. Christopher Fry appeared on behalf of the defendants.

The matter came on for hearing on August 6, 2020, before deputy workers' compensation commissioner Andrew M. Phillips in Des Moines, Iowa. An order issued on March 13, 2020, and updated June 1, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: <https://www.iowaworkcomp.gov/order-coronavirus-covid-19> (last viewed July 29, 2020)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and September 14, 2020. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. The matter was fully submitted on August 28, 2020, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-4, Claimant's Exhibits 1-5, and Defendants' Exhibits A-G. Testimony under oath was also taken from the claimant, Dale Hayes. Stephanie Cousins was appointed the official reporter and custodian of the notes of the proceeding. The exhibits were accepted without objection.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.
2. The claimant sustained an injury, which arose out of and in the scope of employment, on March 15, 2018.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The permanent disability is an industrial disability, and the commencement date of permanent disability benefits, if any are awarded, is January 3, 2019.
5. The claimant was single, and entitled to 1 exemption.
6. The defendants are entitled to certain credits.
7. The claimant is entitled to temporary partial disability benefits for a three-week period in April of 2018, dependent on the rate determined. The claimant may be entitled to additional temporary partial disability benefits for June 6, 2018 through August 15, 2018, and October 12, 2018, through January 3, 2019, depending on the determination of the proper rate of compensation.

Additionally, there is no dispute as to the entitlement for temporary disability and/or healing period benefits. There is no dispute as to medical benefits. Defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the alleged injury is a cause of permanent disability.
2. The extent of permanent disability.
3. The appropriate rate of weekly workers' compensation benefits.
4. Assessment of costs.

FINDINGS OF FACT

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

Dale Hayes, the claimant, was 54 years old at the time of the hearing. He is currently a resident of Dubuque, Iowa. He is single. Mr. Hayes graduated from Dubuque Senior High in 1983. (Testimony). This is the highest level of education that he completed. (Testimony). He received average grades. (Testimony).

Immediately after completing high school, Mr. Hayes worked at a meat packing plant pulling ribs. (Testimony). He made \$15.00 per hour on a part-time basis. (Testimony). In 1987, Mr. Hayes left the meat packing business and commenced employment with Eagle Window in Dubuque, Iowa. (Testimony). He wanted to make as much money as he could at the time, and realized Eagle Window was offering a great deal of overtime. (Testimony). Mr. Hayes worked at Eagle Window until 2014, which is 27 years. (Testimony). While employed by Eagle Window, Mr. Hayes worked in the maintenance department. (Testimony). He repaired machines when they broke down, and did "a lot of welding." (Testimony). He made \$21.00 per hour at Eagle Window. (Testimony).

Unfortunately, in 2010, Mr. Hayes sustained an electrocution injury while working for Eagle Window. (Testimony). In 2010, 480 volts of electricity coursed through Mr. Hayes' body. (Testimony). The electrocution burned the hair off of his arms, and caused blistering. (Testimony). Since 2010, Mr. Hayes has had significant neck and arm trouble. (Testimony). He received a 60 percent industrial disability rating along with ongoing care at Dubuque Pain Clinic. (Testimony). Mr. Hayes is also deaf in his left ear. (Testimony). During another work incident at Eagle Window, in which Mr. Hayes fell from a semi-trailer, he struck the left side of his head. (Testimony). His eardrum ruptured, and he severed three bones behind his eardrum. (Testimony).

Eagle Window terminated Mr. Hayes' employment in 2014. (Testimony). Subsequent to his employment with Eagle Window, Mr. Hayes worked for Hormel at a meat packing operation. (Testimony). He only worked there for a few days or weeks before leaving because the canning work was too physically demanding. (Testimony). After working at Hormel, Mr. Hayes moved to J & J Pools for a short time. (Testimony). He winterized pools for J & J Pools. (Testimony). This involved heavy lifting, so he could not perform the job for a long period. (Testimony). In 2017, Mr. Hayes began employment with Kwik Stop as a part-time cashier. (Testimony). He made \$10.00 per hour. Then he moved to Casey's General Store where he worked part-time for \$10.00 per hour making pizzas and sandwiches. (Testimony). That lasted two weeks because he was looking for full-time employment. (Testimony). In the summer of 2017, Mr. Hayes started a full-time position at Blaine's Farm & Fleet in Dubuque. (Testimony). He made \$13.00 per hour. (Testimony). He worked in the warehouse unloading pallets from delivery trucks. (Testimony). Part of his responsibilities included unloading lawn mowers, snowblowers, kayaks, and grills. (Testimony). He was the only one performing this work, but would have periodic assistance. (Testimony). In August of 2017, Mr. Hayes left employment with Farm & Fleet, due to being hired at Georgia Pacific. (Testimony).

At Georgia Pacific, Mr. Hayes drove a forklift 100 percent of the time. (Defendants' Exhibit C:11; Testimony). He earned \$17.25 per hour. (Testimony). Mr. Hayes was a member of the union at Georgia Pacific, and for seniority purposes was one of the lowest on the forklift operations team. (Testimony). Mr. Hayes took boxes from a conveyor belt, and stacked them at different locations within the factory using the forklift. (Testimony). The job description for a forklift driver at Georgia Pacific indicated the following activities would be occasional: low lifting up to 25 pounds, pushing and pulling between 20 and 60 pounds, gripping with both hands between 10 and 15 pounds, reaching, and standing. (DE C:11). He would rarely need to carry 3 to 25 pounds, pull 15 pounds, use his preferred hand to grip 5 to 40 pounds, perform forward bending, walk, and climb stairs. (DE C:11). Mr. Hayes would be frequently rotating while sitting, using coordination, operating a foot pedal, and continuously sitting, according to the job description. (DE C:11). The essential functions of the job were noted as follows, "[d]rives forklift/pullpack throughout the building to move scrap and product stacks." (DE C:13). Mr. Hayes described the work as fast paced, but noted that he operated the forklift in a sitting position. (Testimony).

Mr. Hayes described significant issues with the concrete flooring at the Georgia Pacific plant. These included damaged and broken out concrete, issues with the seams in the floor, and deep ruts in the floor. (Testimony). Some of the ruts were as deep as two inches and were two feet by two feet in size. (Testimony). The ruts were located in main aisles of the plant, where Mr. Hayes operated the forklift. (Testimony). Mr. Hayes described the forklifts as having hard rubber wheels with no suspension. (Testimony). This made riding around the plant highly uncomfortable for Mr. Hayes. (Testimony). Despite this, Mr. Hayes enjoyed the work. (Testimony). He worked at minimum 40 hours per week. (Testimony). Because he was one of the shortest-tenured employees, he worked the most overtime. (Testimony). Mr. Hayes described weeks where he would work 12-hour days, and sometimes working Saturdays. (Testimony). Mr. Hayes complained that the continual passage over the damaged concrete floors caused his back to become sore. (Testimony). He noted that prior to working at Georgia Pacific, he experienced back pain after performing heavy lifting. (Testimony). He also indicated that his back pain would come and go, as he experienced issues in 2001, 2009, 2014, and 2015. (Testimony). The ongoing lower back issues are noted in the records discussed below. Mr. Hayes further complained that the lower back pain increased throughout the years. (Testimony). Eventually, by February or March of 2018, the pain and muscle spasms in his lower back increased to an extent that Mr. Hayes felt he needed treatment, as discussed below. (Testimony).

Mr. Hayes resigned his employment with Georgia Pacific effective March 8, 2019, and indicated in his notice of voluntary resignation that his reason for separation was needing a break. (Defense Exhibit B:10).

On July 1, 1999, Mr. Hayes visited Tri-State Occupational Health for evaluation of low back pain. (JE 4:66). He lifted metal onto a table while employed at Eagle Window & Door. (JE 4:66). He felt immediate pain in the right side of his lower back

(JE 4:66). By July 9, 1999, Mr. Hayes noted being nearly asymptomatic with minimal interference with activities of daily living. (JE 4:67). Mr. Hayes was returned to his usual duties. (JE 4:68).

On July 10, 2001, Mr. Hayes arrived at Tri-State Occupational Health with complaints of back pain with radiation into his right leg. (JE 4:69). He lifted 50-pound sand bags when he felt a sharp pain in his lower back. (JE 4:69). He was assessed with a lumbosacral strain with radiculopathy. (JE 4:69). By August 10, 2001, Mr. Hayes reported a return to full work activity with minimal display of symptoms. (JE 4:70). In January of 2014, Mr. Hayes reported to Duane Taylor, M.D., that he had lower back pain for two days with no known injury. (JE 4:71). He also reported a complaint of cramping pain and tingling in his upper and lower extremities bilaterally. (JE 4:70). Since his electrocution injury three years prior, he has had continued issues in his upper extremities. (JE 4:71). In October of 2014, he reported to the DBF Emergency Department with a three-week history of right lower back pain. (JE 4:74). He reported occasional back pain every two years in the same area. (JE 4:74). The pain caused him difficulty in walking upright. (JE 4:74).

In March of 2015, Mr. Hayes continued to complain of lower back pain starting about one year prior that worsened over the past few months. (JE 4:78). Mr. Hayes told the doctor that he had years of lower back pain "about every 6 months." (JE 4:78). In 2015, Mr. Hayes received an injection into his lower back. (JE 4:80). In April of 2015, Mr. Hayes visited DBF Pain Clinic with new and worsening low back and bilateral lower extremity pain radiating down the right side greater than the left. (JE 4:82). His diagnoses indicated an exacerbation of chronic back pain. (JE 4:88). In May of 2015, Mr. Hayes' diagnoses and complaints were radicular in nature from the back into the right leg. (JE 4:92). A report noted an MRI showing a 2-level disk bulge with an annular tear, in addition to his ongoing treatment for the electrocution injury. (JE 4:92). Mr. Hayes had another lumbar epidural steroid injection in May of 2015. (JE 4:93). A diagnostic facet joint injection into the lumbar spine followed in June of 2015, due to ongoing complaints of pain in the lumbar spine. (JE 4:95).

Mr. Hayes had an independent medical evaluation (IME) performed by Robin Sassman, M.D., M.P.H., M.B.A., C.I.M.E., F.A.C.O.E.M. on May 16, 2016. (DE F:25-39). In addition to Mr. Hayes' upper back, neck, and upper extremity pain stemming from the electrocution injury, Mr. Hayes complained of lower back pain. Mr. Hayes' lower back pain worsened due to constipation. (DE F:34). Once his bowel function improved, his back pain improved. (DE F:34). Dr. Sassman assigned a 15 percent whole person impairment rating due to his upper back, neck and upper extremity complaints. (DE F:37).

In 2017, Mr. Hayes began physical therapy due to lower back pain which began about 30-days prior, around the time that the claimant reported shoveling snow. (JE 4:99). He reported to the therapist that he suffered chronic lower back pain for at least 5 years since his electrocution injury, and that the pain was constant and achy but could

become sharp for no reason. (JE 4:99). He reported radicular pain being present before the incident precipitating this round of therapy. (JE 4:99). In March of 2017, Mr. Hayes attended an examination with Hiroto Kawasaki, M.D. at the University of Iowa Hospitals and Clinics. (JE 4:103). Mr. Hayes indicated to Dr. Kawasaki that he experienced low back pain for many years, but that it was worse over the previous two months. (JE 4:103). The pain was mostly in his back, but radiated down into his legs and ankles with the right being worse than the left. (JE 4:103). Dr. Kawasaki reviewed an MRI performed in 2015 and noted only minimal degenerative disease to the lumbar spine. (JE 4:103). In June of 2017, Mr. Hayes continued to complain of lower back pain and issues to providers at the DBF Pain Clinic. (JE 4:105). By August of 2017, Mr. Hayes' complaints centered on his upper back and cervical area and he did not make many complaints about his lower back. (JE 4:106).

Mr. Hayes visited DBF Pain Clinic on February 27, 2018, with continued complaints of cervical and lumbar degenerative disc changes with bilateral upper extremity radiculopathy and pain post electrocution injury, also known as cervical spinal stenosis and idiopathic neuropathy. (JE 4:108).

On March 15, 2018, Mr. Hayes began to notice pain in his lower back. He was bouncing around on a forklift hitting chunks of concrete on a daily basis.

Mr. Hayes presented to DBF Pain Clinic, where Angel Keller, ARNP examined him on April 25, 2018. (JE 3:28-32). He reported persistent low back and neck pain radiating down both of his upper extremities. (JE 3:28). He felt he was managing pain well, and utilized the lowest daily dose of hydrocodone just to take the edge off at bedtime. (JE 3:28-29). Mr. Hayes either filled out or walked through a form indicating his quality of life with medications. (JE 3:31). Mr. Hayes indicated he could lift up to 10 pounds, could sit comfortably for a few minutes, could sleep but woke frequently, needs rest before interacting with friends, felt sad, and only enjoyed life a little. (JE 3:31). He could walk for a few blocks, was able to do most of his activities of daily living, could complete tasks and remember most things. (JE 3:31).

On June 6, 2018, Mr. Hayes reported to Tri-State Occupational Health reporting lower back pain following an injury sustained while working at Georgia Pacific. (Joint Exhibit 1:1-2). He indicated his low back pain started on March 15, 2018, though he could not recall a specific incident which precipitated the symptoms. (JE 1:1). After the injury, he took a few days off, rested and put ice on his low back, but he returned to working full eight hour days while his symptoms improved. (JE 1:1). Over the previous weeks, he was working 12 hour days, 6 days per week, which caused his pain to increase. (JE 1:1). Bouncing on the forklift on rough-surfaced concrete caused increased symptoms. (JE 1:1). He reported difficulty getting on and off the forklift, and radiating sharp pain to his calf. (JE 1:1). The doctor noted that Mr. Hayes ambulated with a slight limp. (JE 1:1). Mr. Hayes demonstrated tenderness along the right lumbar paraspinal muscles, and significant pain with minimal palpation to the right paraspinals. (JE 1:1). The examiner assessed Mr. Hayes with an injury of the muscle of the lower

back, and lumbar back pain with radiculopathy affecting his right lower extremity. (JE 1:1). The examiner ordered x-rays of the lumbosacral spine, as well as starting physical therapy. (JE 1:1-2). His symptoms may be related to prolonged exposure to constant vibration, and intermittent jarring related to forklift truck driving and prolonged sitting. (JE 1:1). The restrictions recommended included a trial of working 40 hours per week, limited twisting at the waist, and no lifting greater than 25 pounds. (JE 1:1).

On June 12, 2018, Mr. Hayes began outpatient physical therapy with Tri-State Occupational Health due to his complaints of low back pain. (JE 2:25). Mr. Hayes could not remember a specific incident that led to his low back pain, but remembered that it started in March of 2018. (JE 2:25). His pain increased when he sat for too long, rose from a chair, or bent over. (JE 2:25). His pain decreased with rest, lying down, taking ibuprofen, using ice, and stretching. (JE 2:25). He reported being awakened by the pain. (JE 2:25).

Mr. Hayes followed-up with Tri-State Occupational Health on June 20, 2018, for continued low back complaints. (JE 1:5). Mr. Hayes reported being stiff, having limited range of motion, and radiating pain down his right leg. (JE 1:5). Mr. Hayes attended three sessions of physical therapy since his last visit. (JE 1:5). His response to pain was noted to be out of proportion with light touch. (JE 1:5). His restrictions were increased to include no driving a forklift, no working more than 40 hours per week, no overtime, and no lifting greater than 25 pounds. (JE 1:5). The provider indicated that Mr. Hayes' problems may be twofold with SI joint and disc involvement. (JE 1:5). The provider advised Mr. Hayes to follow-up in one week and continue physical therapy. (JE 1:5).

Mr. Hayes returned to DBF Pain Clinic on June 27, 2018, where he visited with Nurse Practitioner Keller. (JE 3:33-37). He continued to complain of pain, and noted that his lower back pain flared up due to riding in the forklift. (JE 3:33). His pain remained serious enough to continue requiring opioid management. (JE 3:34). His restriction of working 8-hour days was noted. (JE 3:33).

On June 28, 2018, Mr. Hayes returned to Tri-State Occupational Health, where Kelly Lindblom, ARNP, examined him. (JE 1:7-8). Mr. Hayes reported pain of 3/10 in his lower back along with improvement in his pain overall with physical therapy. (JE 1:7). Ms. Lindblom recommended a return to work with restrictions including a 25-pound lifting restriction, occasional bending or twisting of his back, no driving a forklift for an additional week, no working more than 40 hours per week, to be followed with a trial of return to driving the forklift in early July. (JE 1:7). Ms. Lindblom indicated that Mr. Hayes should continue therapy and steroids. (JE 1:8).

Mr. Hayes returned to Tri-State Occupational Health on July 26, 2018, where Ms. Lindblom examined him for a follow up on his lower back pain. (JE 1:9-10). The pain in his back was in the lower back and right SI joint area. (JE 1:9). He reported doing well until being discharged from physical therapy, at which time his back spasms returned.

(JE 1:9). He tolerated his first week back to work on the forklift, as work was slow. (JE 1:9). Ms. Lindblom recommended restarting physical therapy, trying ibuprofen, and icing his low back. (JE 1:9). Mr. Hayes returned to work with restrictions including not working greater than 40 hours per week, but he could begin driving the forklift again. (JE 1:9).

On August 15, 2018, Mr. Hayes returned to Tri-State Occupational Health, where Ms. Lindblom once again examined him. (JE 1:11-12). Mr. Hayes reported continued lower back pain, but indicated he improved since the last visit. (JE 1:11). Therapy improved his symptoms, and he tolerated his current work restrictions with no issues. (JE 1:11). Mr. Hayes noted being pain-free at the time of his examination, but also indicated flooring defects persisted at Georgia Pacific. (JE 1:11). Mr. Hayes hoped that the flooring defects would be repaired in order to minimize sudden jarring when driving the forklift. (JE 1:11). Ms. Lindblom recommended a return to full duty with no restrictions. (JE 1:11). She also advised that a follow up with physical therapy would be appropriate if his pain increased over the next 2 to 3 weeks. (JE 1:11). Ms. Lindblom discussed with Mr. Hayes that it was unclear as to whether Mr. Hayes was physically fit to perform the essential functions of his job, or if a reasonable accommodation could be provided. (JE 1:11). If an exacerbation occurred, Ms. Lindblom recommended a functional capacity evaluation (FCE). (JE 1:11). Ms. Lindblom anticipated that Mr. Hayes would achieve maximum medical improvement on September 5, 2018. (JE 1:11). Mr. Hayes could return to work on a full and unrestricted status effective August 15, 2018. (JE 1:12).

Nurse Practitioner Keller examined Mr. Hayes at DBF Pain Clinic during a follow-up visit on September 17, 2018. (JE 3:38-41). His lower back pain persisted, along with neck pain radiating down both of his arms. (JE 3:38). His diagnoses continued to be cervical and lumbar degenerative disc pain with bilateral upper extremity radiculopathy and bilateral arm pain post electrocution. (JE 3:39). He denied side effects from his opioid medications, specifically regarding his bowels. (JE 3:39). He was recommended for a sleep study, but could not have one because his work hours were "too crazy right now." (JE 3:39).

Mr. Hayes returned to Tri-State Occupational Health on October 12, 2018. (JE 1:13-14). He reported that he did well with working until the last few weeks when his lower back pain returned. (JE 1:13). He worked an increasing amount of overtime on the forklift. (JE 1:13). His pain continued to be sharp and burning at the right low back and radiating to his right posterior thigh. (JE 1:13). He stretched as instructed, which provided some relief. (JE 1:13). The safety manager from Georgia Pacific informed the provider that Georgia Pacific intended to perform a major floor renovation "at some point." (JE 1:13). Physical therapy was ordered especially with exercises that were previously effective. (JE 1:13). His restrictions were increased to working 8 hours per day for five days per week with 2 hour increments on the forklift to be interspersed with 20 minutes off of the forklift. (JE 1:13).

On October 26, 2018, Mr. Hayes returned to Tri-State Occupational Health for a re-check of right-sided lower back pain. (JE 1:15-16). Mr. Hayes indicated that for the past two weeks, he had a difficult time sleeping due to pain. (JE 1:15). Mr. Hayes awaited approval for physical therapy. (JE 1:15). He only slept for one hour at a time before being awakened by pain. (JE 1:15). The provider prescribed Flexeril for muscle spasms and to facilitate sleep. (JE 1:15). Mr. Hayes' restrictions remained unchanged from those provided in the October 12, 2018, visit. (JE 1:15-16).

Between November 2, 2018 and December 21, 2018, Mr. Hayes attended 12 visits of physical therapy at Tri-State Occupational Health. (JE 2:26-27). He met a number of goals during this time including reducing his pain to no greater than 2/10, being able to negotiate stairs without an increase in pain, tolerate riding on a forklift for greater than 3 hours without the onset of pain. (JE 2:26). The only goal unmet was an inability to lift 50 pounds from the floor to waist with his bilateral upper extremities and no onset of low back pain. (JE 2:26-27).

Mr. Hayes followed-up with Tri-State Occupational Health on November 16, 2018, noting improvement in his symptoms. (JE 1:17-18). After starting Flexeril, he indicated improvement in his sleep. (JE 1:17). He rated his pain 6-8/10 in his right lower back without radiation, but noted that the pain was sharp. (JE 1:17). Mr. Hayes utilized ibuprofen for his pain. (JE 1:17). Mr. Hayes reported that the floors at Georgia Pacific were being patched and then were scheduled to be completely replaced within a few months. (JE 1:17). The provider assessed him with right low back pain, a stiff back, and a muscular strain/sprain. (JE 1:17). Further, the provider noted "[w]e are spinning our wheels, it appears, until the floor surface is improved." (JE 1:17). His restrictions remained the same as those provided on October 12, 2018. (JE 1:17).

Mr. Hayes visited Nurse Practitioner Keller at DBF Pain Clinic for a follow-up of his low back and neck pain. (JE 3:42-45). Mr. Hayes reported a regimen that enabled him to continue working on a full-time basis, but also noted that he was looking forward to a break for Thanksgiving. (JE 3:42). He also reported that his bowels were working well. (JE 3:43).

On November 30, 2018, Mr. Hayes attended a follow-up visit with Tri-State Occupational Health. (JE 1:19-20). Mr. Hayes reported improvement to his symptoms with physical therapy and a reduction in his hours. (JE 1:19). Mr. Hayes showed that he could lift up to 30 pounds, which he indicated was about what he would lift at work. (JE 1:19). His pain reduced to 4-6/10 with work, and further reduced when he was off work. (JE 1:19). He could bend with his fingertips to mid-shin, which reproduced his back pain. (JE 1:19). He could also extend and rotate fully, squat, raise on heels and toes, with sensation to light touch remaining intact. (JE 1:19). Mr. Hayes' restrictions were to work a maximum of 8 hours per day for five days until all floors are repaired. (JE 1:19-20). His goal remained to lift up to 50 pounds. (JE 1:21).

Mr. Hayes sought treatment on January 3, 2019, at Tri-State Occupational Health for continued lower back complaints. (JE 1:23-24). Mr. Hayes completed physical therapy and was "doing ok." (JE 1:23). He rated his pain 2-4/10 with work. (JE 1:23). His pain improved when he did not work. (JE 1:23). Upon bending over, his pain was "very mild." (JE 1:23). He remained on a permanent restriction of 8 hours per shift and 5 shifts per week until the floors at Georgia Pacific were replaced. (JE 1:23). Upon replacement of the floors, the claimant was to try overtime. (JE 1:23). The provider at Tri-State Occupational Health indicated Mr. Hayes was at MMI (maximum medical improvement) without permanent impairment, but placed the above permanent restrictions. (JE 1:12-24).

On January 21, 2019, Mr. Hayes returned to Nurse Practitioner Keller at DBF Pain Clinic, for continued follow-up of his pain complaints. (JE 3:46-50). Mr. Hayes' biggest complaint was right-sided low back pain. (JE 3:46). He requested rescheduling a trigger point injection previously scheduled with Dr. Miller. (JE 3:46). He reported increasing difficulty sleeping at night due to pain. (JE 3:46).

Mr. Hayes followed-up with Nurse Practitioner Keller at DBF Pain Clinic, for his continued low back and neck pain that radiated down both of his arms, on March 27, 2019. (JE 3:51-54). His previous trigger point injection was canceled due to issues with his job. (JE 3:51). Mr. Hayes changed jobs due to difficulties working long shifts on a forklift. (JE 3:51). He appeared well rested. (JE 3:52). His bowels were functioning well. (JE 3:52).

On May 22, 2019, Mr. Hayes returned to DBF Pain Clinic and Nurse Practitioner Keller. (JE 3:55-58). Due to his chronic neck pain radiating down both of his arms, he has issues keeping a job that he can manage. (JE 3:55). He noted a desire to find a job with FedEx, as he hoped to be able to sit and stand as needed. (JE 3:55). His pain was noted to stem from his previous electrocution. (JE 3:56).

Mr. Hayes followed-up with Nurse Practitioner Keller at DBF Pain Clinic on August 16, 2019, with continued low back pain. (JE 3:59-63). He also complained primarily of neck pain that radiated down both of his arms. (JE 3:59). His constipation was under control. (JE 3:59). Nurse Practitioner Keller diagnosed him with cervical and lumbar degenerative disc pain with bilateral arm pain after an electrocution injury. (JE 3:60). His pain caused a struggle on some days, but he was able to continue working with a medication regimen. (JE 3:60). His pain continued to require opioid management, according to Nurse Practitioner Keller. (JE 3:60).

On October 28, 2019, Nurse Practitioner Keller re-examined Mr. Hayes at DBF Pain Clinic. (JE 3:64-65). He continued to complain of persistent low back and neck pain radiating into both shoulders and arms. (JE 3:64). Pain interrupted his sleep and caused him to wake about every hour. (JE 3:64). He continued working full-time, but noted his difficulty in doing so. (JE 3:64). He hoped to be able to travel to Arkansas over Christmas to spend time with his sister and family. (JE 3:64). Nurse Practitioner

Keller noted a diagnosis of cervical and lumbar degenerative disc pain with bilateral arm pain after an electrocution injury. (JE 3:64).

Mark C. Taylor, M.D., M.P.H., C.I.M.E., F.A.C.O.E.M., conducted an independent medical evaluation (IME) on January 14, 2020, and issued a report regarding the same dated February 11, 2020. (Claimant Exhibit 2:3-14). The IME was arranged by the claimant's attorneys. (CE 2:3). Dr. Taylor is board certified in occupational and environmental medicine, and is a certified independent medical examiner. (CE 2:3). Mr. Hayes worked for Georgia Pacific from about August of 2017 through his resignation in January of 2019. (CE 2:3). Because he was lower in seniority, overtime hours were often passed down to him, resulting in him working 50 to 60 hours per week. (CE 2:3). Mr. Hayes estimated to Dr. Taylor that 60 percent of his work was between waist and shoulder height, 30 percent was below the waist level, and 10 percent was above shoulder level. (CE 2:3). He was constantly sitting at his job. (CE 2:3). Dr. Taylor recounted Mr. Hayes' history of medical treatment. (CE 2:4). Mr. Hayes described his current symptoms to Dr. Taylor, indicating that he had persistent pain on the right side of his low back. (CE 2:6). His pain averaged 5/10 but periodically dropped to 3 or 4/10 and sometimes increased to 10/10. (CE 2:6). He could not predict when his pain would intensify. (CE 2:6). Pain caused difficulty in sleeping for a prolonged period of time and periodically caused his right leg to feel fatigued. (CE 2:6). At the time of the IME, he worked at Hodge Warehouse. (CE 2:6). He held that job since May or June of 2019, and was able to change positions from sitting to walking or standing. (CE 2:6). He continued to drive a forklift, but only for a few hours and no more than 15 to 20 minutes at a time. (CE 2:6). Dr. Taylor noted Mr. Hayes' significant workers' compensation injury sustained at Eagle Windows and Doors wherein he was electrocuted. (CE 2:7). This injury caused significant issues to his cervical spine, bilateral upper extremities, and deafness in his left ear. (CE 2:7).

Dr. Taylor diagnosed Mr. Hayes as follows:

1. Chronic lumbago, or low back pain, with pain extending into portions of the right buttock, and records indicating occasional symptoms into the right thigh.
2. Prior history of electrocution injury resulting in chronic neck and upper extremity pain – not specifically addressed as part of this evaluation.

(CE 2:9). Dr. Taylor indicated that Mr. Hayes had occasional aches and pains with his low back, but that his primary pain was in the cervical spine. (CE 2:9). Dr. Taylor explained that the low back issues developed after operating a forklift on a "particularly rough floor," and after working prolonged hours. (CE 2:9). Dr. Taylor opined,

Given the history, and the currently available medical records, it appears that it has been well documented that Mr. Hayes developed low back pain with symptoms into the right lower extremity as a result of the significant

jarring, bounding and vibration associated with his operation of a forklift at Georgia Pacific.

(CE 2:10). Dr. Taylor further opined that it was “more likely than not that his work activities operating a forklift in that facility served as a substantial contributing factor to his low back and right buttock and lower extremity pain for which he required treatment.” (CE 2:10). Dr. Taylor assessed Mr. Hayes with a 7 percent whole person impairment rating due to radicular complaints, mild swelling and guarding noted during the IME. (CE 2:10). Dr. Taylor proposed permanent restrictions to include a 35 pound lifting limit up to waist level, 30 pounds between the waist and chest level, and 25 pounds or less below the knee level or above the chest level. (CE 2:10). Dr. Taylor also noted that Mr. Hayes should be able to alternate sitting, standing, and walking as needed for his comfort. (CE 2:10). Mr. Hayes could squat and bend occasionally, and could kneel occasionally to frequently. (CE 2:10). He could also travel occasionally, but would need the ability to stop and get out of the vehicle. (CE 2:10). Finally, Dr. Taylor indicated that Mr. Hayes could not tolerate the operation of equipment over particularly rough surfaces. (CE 2:10). Dr. Taylor provided January 3, 2019, as a date of maximum medical improvement (MMI) for Mr. Hayes. (CE 2:10). Despite indicating Mr. Hayes reached MMI, Dr. Taylor recommends that Mr. Hayes be allowed to visit Dr. Miller specifically for his low back injury. (CE 2:11).

In his testimony, Mr. Hayes described an incident where he hit a pothole or rut with such force that he felt like it jarred something. (Testimony). He had to get off of the forklift and doubled over in pain. (Testimony). Eventually, he returned to work. (Testimony). Georgia Pacific attempted to fix the damaged floors, but this was a temporary fix, and eventually the same problems returned. (Testimony). As noted above, Mr. Hayes resigned his employment with Georgia Pacific due to the continued pain and lack of improvements made to the plant floors. (Testimony).

Upon separating from Georgia Pacific, Mr. Hayes found work via a temp agency with Hodge Material Handling in Dubuque, Iowa. (Testimony). For half of his day, Mr. Hayes unloads parts racks from John Deere with a forklift. (Testimony). For the other half of his day, Mr. Hayes removes bar codes from the racks, and replaces them with new bar codes and stickers. (Testimony). The flooring at Hodge is “in great shape,” and the physical demands of his new job are limited. (Testimony). He works 40 hours per week, and earns \$13.00 per hour. (Testimony). Mr. Hayes testified that, while he enjoys the work at Hodge, he is looking for other employment, as he would like to make more money. (Testimony). He did not have any current leads for employment. (Testimony).

Mr. Hayes reported continued lower back pain on the right side of his back, right above the buttocks. (Testimony). His pain was between 3 and 10 out of 10, depending on the day and activity. (Testimony). If he was bending and lifting, or sometimes walking, his low back will flare up. (Testimony). He also continues to notice tingling and sharp pain in his legs. (Testimony). He reports missing 10 days in two months due to

his back pain. (Testimony). Mr. Hayes claims that he cannot sit for more than a half hour before his back stiffens up. (Testimony). Interestingly, Mr. Hayes sat for over two hours during the arbitration hearing in this matter without asking for a break or standing.

Mr. Hayes reports that he can maintain his lawn, but that there are times that he has difficulty shoveling snow due to his back pain. (Testimony). He also reports issues with sleep. (Testimony). Mr. Hayes reports that he would have difficulty performing any of the previous physically demanding jobs in which he was employed due to either the lifting involved, or the floors at Georgia Pacific. (Testimony).

CONCLUSIONS OF LAW

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

Permanency

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 medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

A personal injury contemplated by the workers’ compensation law means an injury, the impairment of health or 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 of 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 85.61(4)(b); Iowa Code 85A.8; Iowa Code 85A.14.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Mr. Hayes has a lengthy history of low back pain dating back to 1999. In July of 1999, Mr. Hayes complained of low back pain after lifting metal onto a table, which caused pain to the right side of his lower back. His back pain returned in July of 2001, and radiated into his right leg. There were no records of lower back pain reported until January of 2014, when the claimant noted lower back pain for several days. In October of 2014, Mr. Hayes again reported lower back pain on the right side present for the previous three weeks. Mr. Hayes told the provider that the lower back pain would come every two years. In March of 2015, Mr. Hayes reported low back pain that began one year earlier and worsened over the past few months. He indicated to the provider that he experienced years of lower back pain that would increase every six months. An injection to his lower back followed. In May of 2015, Mr. Hayes reported radicular low back pain into his right leg. An MRI performed showed a two level disk bulge with an annular tear. Another injection into the lumbar spine followed the MRI. In June of 2015, Mr. Hayes received a diagnostic facet joint injection due to ongoing complaints of pain in his lumbar spine. During a May of 2016, IME with Dr. Sassman, Mr. Hayes continued to note lower back pain, which worsened due to constipation. In 2017, Mr. Hayes undertook a course of physical therapy for lower back pain which began while he was shoveling snow. Mr. Hayes reported to the therapist that he suffered low back pain for 5 years, and especially since the electrocution injury. In March of 2017, Mr. Hayes visited Dr. Kawasaki with complaints of lower back pain for years that worsened over the previous 2 months. By March 15, 2018, the alleged date of injury in this matter, Mr. Hayes again began to notice pain in his lower back after hitting chunks of concrete on a daily basis.

The claimant attempts to discredit Dr. Kennedy in their post-hearing brief; however, I believe this does Dr. Kennedy's opinions a disservice. Dr. Kennedy

indicated that Mr. Hayes required restrictions of working 8 hours per day for 5 shifts or days per week until the floors at Georgia Pacific were replaced. This is a tacit, if not explicit acknowledgment that the floors at Georgia Pacific were “lighting up” and/or causing the lower back pain experienced by Mr. Hayes. Additionally, there are notes in the records that his back pain improved when he was not working. Mr. Hayes also indicated that he no longer has an exacerbation of back pain from his subsequent employment at Hodge. This is buttressed by the opinions of Dr. Taylor from the January 14, 2020, IME, wherein Dr. Taylor explicitly connects the lower back pain to Mr. Hayes’ work at Georgia Pacific. The claimant clearly had a preexisting lower back condition. Based upon the medical evidence and the opinions of Dr. Kennedy and Dr. Taylor, it appears that his work at Georgia Pacific, including driving over pothole-filled floors exacerbated or lit up his back pain causing the need for treatment and some extent of permanent disability.

Since the claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: “[i]t 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; however, 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).

In assessing an unscheduled, whole-body injury case, the claimant’s loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

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. Iowa Code 85.34.

I find that Mr. Hayes sustained an industrial disability. In their post-hearing brief, the defendants allege that Mr. Hayes should only be awarded a functional disability, rather than industrial disability. I reject this notion, as the parties previously stipulated, and are thus bound, to the fact that if Mr. Hayes suffered a permanent disability, it was industrial in nature.

Dr. Kennedy assessed Mr. Hayes with no permanent impairment based upon her treatment of Mr. Hayes. Further, she placed him at MMI on January 3, 2019. She placed permanent restrictions on him of working no more than 8 hours per day for 5 shifts or days per week. Dr. Taylor, the claimant's retained IME doctor, placed no such restrictions on Mr. Hayes, and simply relied on lifting restrictions, which were more stringent than those from Mr. Hayes' previous injury. Dr. Taylor assessed Mr. Hayes with a 7 percent body as a whole impairment. Considering that Mr. Hayes is currently working within the restrictions promulgated by Dr. Kennedy, I find Dr. Kennedy's restrictions to be more persuasive. I find Dr. Taylor's permanent impairment rating to be more persuasive. Mr. Hayes now makes \$13.00 per hour with Hodge, compared to \$17.25 per hour, plus some overtime, with Georgia Pacific. He has clearly suffered income loss based upon his disability. However, Mr. Hayes admits that he has no issues driving a forklift for his new employer. He admits to looking for new employment, but notes that he is only doing so because of his displeasure with his rate of pay. Considering all of the factors in an industrial disability analysis, as discussed above, I award Mr. Hayes a 10 percent industrial disability. This award entitles the claimant to 50 weeks of permanent partial disability benefits (10 percent x 500 weeks = 50 weeks), commencing on the stipulated date of January 3, 2019.

Rate of Compensation

Iowa Code 85.36 states that the base 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 scheduled for the work or employment. The various subsections of 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a biweekly pay period, the earnings are one-half of the biweekly gross earnings. Iowa Code 85.36(2). For an employee who is paid on a daily or hourly basis, the weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Iowa Code 85.36(6). Any week that does not fairly reflect the employee's customary earnings is excluded.

For six weeks prior to the injury, Mr. Hayes earned \$17.25 per hour. For eight weeks prior to that, he earned \$16.13 per hour. The actual wages earned over the 13 weeks preceding the injury are the wages to be utilized to calculate the basis of compensation based on the plain language of Iowa Code 85.36(6). Therefore, I conclude that the proper average weekly wage is \$793.60 per week, which rounds up to \$794.00 per week. For a single individual entitled to one exemption during the July 1, 2017 to June 30, 2018, rate table, the compensation rate is \$484.98.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 7. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

[c]osts 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, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows taxation of costs for the claimant's filing fees. In this case, the claimant identified \$100.00 in costs for two dates of injury. Based upon my discretion, I award the claimant \$50.00 in costs.

ORDER

IT IS THEREFORE ORDERED:

The defendants are to pay unto claimant fifty (50) weeks of permanent partial disability benefits at the rate of four hundred eighty-four and 98/100 dollars (\$484.98) per week from the stipulated commencement date of January 3, 2019.

All weekly benefits shall be paid at the rate of four hundred eighty-four and 98/100 dollars (\$484.98).


That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants shall be given credit for benefits previously paid.

That defendants shall reimburse claimant for costs totaling fifty and 00/100 dollars (\$50.00).

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

Signed and filed this 29th day of September, 2020.

A handwritten signature in black ink, appearing to read "Al M. Phillips", written over a horizontal line.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark J. Sullivan (via WCES)

Christopher C. Fry (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.