BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH EDWARDS, Claimant, vs. BROCK ATLANTIC SERVICES Employer, and ILLINOIS NATIONAL INS. CO., Insurance Carrier, Defendants.	FILED JUL 17 2019 WORKERS COMPENSATION File No. 5059300 ARBITRATION DECISION Head Note Nos.: 1100, 1801, 1803, 2500

STATEMENT OF THE CASE

Claimant, Kenneth Edwards, filed a petition in arbitration seeking workers' compensation benefits from his employer, Brock Atlantic, Services, and Illinois National Insurance Co., the insurance carrier as defendants. The matter proceeded to hearing on May 29, 2019. The parties submitted post-hearing briefs on June 21, 2019, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Exhibits JE1 through JE7; Claimant's exhibits 1 through 6; and, Defendants' Exhibits A through G. Claimant provided testimony at hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations are accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury on August 10, 2015, that arose out of and in the course of his employment with the defendant employer.

2. Whether the alleged injury is the cause of temporary disability. Claimant alleges temporary benefits for the period of September 16, 2015, through May 16, 2017.

3. Whether the alleged injury is the cause of industrial disability and the extent thereof.

4. Whether claimant is entitled to payment of medical expenses as set forth in the attachment to the Hearing Report.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant, Kenneth Edwards, was 41 years old at the time of the hearing. He presented at hearing as an intelligent and thoughtful individual. He answered questions clearly, testifying in a straightforward manner. Claimant gave the undersigned no reason to conclude that his testimony was anything but credible.

Claimant graduated from high school in 1995. After high school, claimant joined the U.S. Army. He was honorably discharged in 1999. Claimant served as an Infantry Squad Leader. (Ex. B-2) He testified that he obtained combat certifications, but did not receive any job training that was directly transferable to jobs outside the military. Claimant later studied business management for about one year at Joliet Junior College. He did not obtain a degree or certificate. Claimant more recently re-enrolled at Joliet Junior College and took classes in the area of construction management. (Ex. F-3, depo. p. 8)

Claimant spent the majority of his adult life working as a forklift operator. He worked in this capacity off and on until about 2014. He also worked for about two years doing brick masonry. Claimant enjoyed the construction aspect of masonry work.

In 2014, claimant followed his interest in construction and became a union carpenter apprentice, which required that he complete a nine week course. As a union carpenter, claimant worked for Central Illinois Construction. The work involved remodeling a McDonald's restaurant. He later worked for Monarch Construction, building an assisted living facility. He was paid about $17.00 per hour by both employers. Each job lasted about three months.

In 2015, claimant worked for Brock Atlantic, the defendant employer, at a fertilizer plant in Wever, Iowa. His job involved building scaffolds for other trades. In order to build the scaffolds, claimant frequently handled bars and floor pans ranging from 1 to 10 feet in length. Claimant stated that his crew would also build wooden boarders around the scaffold and cover them in plastic sheeting. He was uncertain of the specific weight of the various materials, but stated that the job required him to frequently bend and lean forward, backward and sideways. When claimant began this

job, he initially worked 7 days per week, 12 hours per day. The work eventually slowed a bit to 6 days per week, 10 hours per day, which was still a significant amount of overtime.

Claimant testified that in July, 2015, he began to notice pain in his back. He stated that it resolved, but then resurfaced in August, 2015.

Claimant testified that in August, 2015, he woke up really sore and felt like it was more than just normal soreness. He had not felt that type of pain before this.

Claimant testified that during the summer of 2015, he was not engaged in any strenuous activity outside of work that might have caused back pain. He also testified that he had never had this kind of back pain prior to the summer of 2015.

On August 10, 2015, claimant reported the pain in his back and left hip/buttock and leg to his employer. (Ex. A-1) He told his employer that the pain had started about six weeks earlier. (Ex. A-2) When he was asked to describe what happened before, during and after the accident, claimant indicated that he was carrying and passing material and building scaffold daily. (Ex. A-2) There was no specific incident that claimant believed caused the pain to return, rather claimant asserts a cumulative injury.

On August 10, 2015, the employer advised claimant that he "will not be able to return to work until he has a doctor's work release." (Ex. A-3) He was then off work.

After reporting the injury, claimant testified that he was told by his employer to go to a chiropractor, but he was not directed to a specific chiropractor. So, claimant looked on-line and selected David Sherbondy, D.C., in Burlington, Iowa, which is near Wever, Iowa, where claimant was working. He saw Dr. Sherbondy and described pain in his mid and lower back and left hip and leg. (Ex. JE1-1) Claimant treated with Dr. Sherbondy four times between August 14, 2015 and August 25, 2015. (Ex. JE1, pp. 1-9) On August 14, 2015, Dr. Sherbondy reported that claimant's pain was constant at a level of up to 9/10. Concerning range of motion, he had "a positive objective finding for functional impairment . . ." (Ex. JE1-1) Dr. Sherbondy also noted "marked palpatory tenderness along the left sciatic nerve trajectory," which was "a positive objective finding for segmental dysfunction (subluxation complex) at the level of L5 and the sacroiliac region." (Id.) Dr. Sherbondy found claimant's "functional impairment consistent with [his] subjective complaints." (Id.)

On August 25, 2015, claimant's pain level was reported as "occasional" and at a level of 0 to 1 on a 0-10 scale. (Ex. JE1-8) Dr. Sherbondy noted, "improvement in cervical and thoracic spinal range of motion," which "is a positive objective finding for reduction of the subluxation complex and confirms improvement in Kenneth's ability to function normally." (Ex. JE1-9) Claimant's "palpatory tenderness along the left sciatic nerve trajectory" was noted to be "resolved." (Id.)

Claimant testified that the chiropractic care provided by Dr. Sherbondy was helpful, and did relieve symptoms, but only temporarily.

Claimant stated that he was provided a release to return to work from Dr. Sherbondy and he took the release to his employer. However, he was told that the release from the chiropractor was insufficient and he needed a release from a medical doctor. The defendant employer scheduled an appointment for him with a medical doctor who apparently provided a release to return to work. Claimant testified that he returned to work thereafter for about a week or so.

However, on or about September 16, 2015, claimant testified that he woke up in significant pain and had difficulty standing up. He went to Great River Medical Center and reported lower back pain radiating down his bilateral legs that began a couple months earlier. (Ex. JE2-1; Ex. D-1) Claimant testified that he was told to follow-up with the occupational medicine doctor. The records support this claim. (Ex. JE2-4)

Claimant returned the following day to Great River Business Health for his follow-up appointment with the occupational medicine doctor. He was told to sit in the waiting room while the office tried to get authorization for the visit from the employer. Claimant waited for several hours and was then told by office staff to go home. He was advised that he would receive a phone call if Great River Business Health received authorization for the appointment. Claimant never received a call from Great River Business Health. When claimant was told to go home, personnel at the Great River Business Health provided the name of Abby Cling, P.A., and suggested that claimant see Ms. Cling if they did not get authorization to provide treatment. Claimant never received a call.

Claimant went to see Ms. Cling on his own and testified that she gave him some medicine, but it did not really help that much. (Ex. JE3-1)

Claimant never returned to work for the defendant employer after trying to see the occupational medicine doctor on or about September 17, 2015. He received a call from his supervisor shortly after his failed visit and was told that he was laid-off. He was not given any explanation for the lay-off. Claimant testified that after losing his job and being denied authorized medical care, he "was on [his] own after that." (Testimony) With no job or medical care, he moved back to his hometown of Joliet, Illinois.

After arriving in Joliet, claimant sought medical care at Silver Cross Hospital in January, 2015. (Ex. JE4-1) A CT scan indicated spondylolisthesis and spondylosis at L5-S1 with bulging annulus, with changes at the left descending L5 nerve and bilateral moderate neuroforaminal narrowing at this level. (Id.)

He was referred to Kamran Amir Kahn, M.D., who ordered an MRI. (Ex. JE4-2) Claimant reported low back pain and left lower extremity symptoms which were aggravated with functional activities of sitting, standing and performing duties as a carpenter. (Ex. JE4-4)

Claimant testified that Dr. Kahn initially prescribed conservative treatment of physical therapy and injections for several months. However, by June, 2016, it was clear that conservative care was not helping. (Ex. JE4, pp. 4-15; Ex. JE5)

On October 4, 2016, claimant underwent surgery with Dr. Kahn, which included: bilateral laminectomies at level L5-S1; medial facetectomy; foraminectomies at L5-S1; and, fusion with instrumentation at L5-S1.

Dr. Kahn told claimant that he should be able to return to work in six to eight weeks. However, claimant had difficulty with Illinois Medicaid approving the physical therapy after surgery, which slowed recovery. Also, claimant testified that he has smoked cigarettes over the years and has tried unsuccessfully to quit. He understands that smoking can inhibit the healing process.

Claimant contacted Dr. Kahn in January, 2017, to inquire about his work status. (Ex. JE5-36) He was told that he could attempt work at that time, but that he should do physical therapy first. (Id.)

On July 31, 2017, claimant was released by Dr. Kahn with no restrictions. (Ex. JE5-37) Claimant testified that this release was given by Dr. Kahn with the understanding that claimant was returning to work as a forklift driver, not carpentry.

Claimant testified that he returned to work as a forklift driver, but the pain in his back caused him to miss days at work. He agreed in his testimony that no doctor took him off work on these days.

On August 13, 2018, Avi Bernstein, M.D., authored a letter following an independent medical evaluation (IME) conducted at the request of defendants. Dr. Bernstein noted that claimant had been working for the defendant employer since December 2014 as a scaffold builder. He recorded claimant's complaints of chronic low back pain. He stated that the pain was aggravated by prolonged standing, sitting and stairs. Dr. Bernstein opined that claimant "apparently developed low back pain as the result of a lytic spondylolisthesis," which "is a congenital and a degenerative condition." (Ex. D-3) However, he admitted that "it would be helpful to look at his preoperative MRI scans to further evaluate his preoperative condition," and that he was "not in receipt of any of his preoperative other radiographic studies." (Ex. D, pp. 2-3) He stated that the condition of spondylolisthesis "frequently become symptomatic as patients age through middle-age." (Ex. D-3) Dr. Bernstein stated that he did "not believe that his cumulative work activities resulted in low back condition." (Ex. D-3) Dr. Bernstein admits that trauma may cause an aggravation, but stated his opinion that the history of a cumulative injury does not support causation. He opined that claimant was at maximum medical improvement (MMI) and assigned a whole person impairment rating of 7 percent based on assessment under the "Guide to the Evaluation of Permanent Impairment, 6th edition." (Ex. D, pp. 3-4) It is unclear why Dr. Bernstein did not assess impairment under the AMA Guides, Fifth Edition, which is accepted and relied upon by this agency. The 6th Edition has not been adopted by this agency.

Claimant was seen for ongoing back pain by his family physician, Dr. Patel who ordered physical therapy.

On November 30, 2018, claimant's physical therapist noted he had low back pain with radiculopathy, myofascial pain, thoracolumbar region, and right shoulder pain. Claimant has made no claim that any cervical or shoulder pain is related to this work injury. The therapist noted that claimant was, "very compliant with attendance and follow through with recommendations from home program over this past 4-6 weeks," and has "demonstrated significant improvement with posture awareness, body mechanics and flexibility program to manage low back pain." (Ex. JE7-15) Also, the therapist recommended the "possibility of doing an aggressive work conditioning program and/or assessment with work capacity eval or functional capacity eval for which patient was in favor of trying if the physician agreed." (Id.) At that time, claimant still had "some limitations with prolonged standing" and "general endurance and conditioning for heavy activities greater than 15-20 pounds." (Ex. JE7-16)

On April 26, 2019, Mark Taylor, M.D., of Medix Services, issued a report following an IME conducted at the request of claimant's counsel. (Ex. 1-1) Dr. Taylor confirmed that claimant began working for the defendant employer in December 2014. (Ex. 1-1) Dr. Taylor discussed claimant's job duties, which included long hours and "repeated lumbar flexion and extension, as well as various twisting movements and arching his back." (Ex. 1, pp. 1-2) Dr. Taylor described claimant's condition of spondylolisthesis as one that can occur from birth or may develop from spondylolysis due to a defect in the pars interarticularis, which can be "associated with various risk factors, including individuals exposed to hyperextension-type motions of the lumbar spine." (Ex. 1-7) He also acknowledged degenerative spondylolisthesis can occur in older individuals, as well as trauma related spondylolisthesis. Dr. Taylor considered claimant's medical history and current symptoms of constant left buttock and low back pain, greater left than right, ranging from 3-10 out of 10. He also conducted a physical examination and noted restricted lumbar range of motion. Dr. Taylor noted that claimant had no prior back complaints before this work injury and opined that:

> In light of the number of hours that he was working and the tasks that he was performing over the course of each and every day, it is my opinion that his work activities more than likely represented a significant contributing factor to the symptoms that occurred. I am not aware of any old x-rays that may reveal when the spondylolysis and spondylolisthesis actually occurred from a radiographic standpoint. As such it may be true that his work activities did not "cause" the radiographic abnormalities. These types of findings are not uncommon in an asymptomatic population. He became symptomatic while performing his work duties, and the pain quickly intensified.
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> As such, one possibility is that Mr. Edwards coincidentally developed pain from a previously unknown condition that basically went from nonexistent as far as symptoms to severe over the course of a very brief

> period of time. **The more reasonable explanation is that the significant work activities that he was performing led to his condition becoming symptomatic.** As such, this could be viewed as a "lighting-up" or as an acceleration of a pre-existing condition.

(Ex. 1, pp. 7-8)(emphasis added)

Dr. Taylor agreed with Dr. Bernstein that August 13, 2018 was a reasonable date for MMI and he assigned 22 percent whole person impairment based on placement in the DRE Lumbar Category IV, Table 15-3, page 384 of the AMA Guides, Fifth Edition. The rating is based on claimant's loss of range of motion due to the arthrodesis at L5-S1. Dr. Taylor stated that permanent restrictions "are a bit difficult to predict in light of the fact that Mr. Edwards' original injury was in August 2015," but assigned restrictions of: lifting 30 pounds occasionally from knee and to chest level; alternate sitting, standing and walking as needed for comfort; partially squat on a rare to occasional basis; kneel occasionally and bend on a rare basis; climb stairs occasionally; use ladders rarely; rarely engage in lumbar extension movements, with as little extension as possible; and stop and stretch as needed during travel. (Ex. 1-8)

After being laid off by the defendant employer in September, 2016, claimant was able to work for other employers, albeit sporadically. Claimant returned to work for Paramount Staffing on May 16, 2017. (Ex. B-2) However, he had increased back pain that caused him to miss work and prompted his return to Dr. Kahn in July, 2017.

After Dr. Kahn released claimant to return to work without restriction on July 31, 2017, he again returned to forklift driving at Paramount Staffing. He worked full-time and earned about $16.00 per hour. He was there for about two months before he was terminated because he missed too many days of work, which claimant testified was due to back pain. Claimant agreed that no physician took him off work after July 31, 2017 and he did not recall seeking a doctor's note excusing him from work. Although the employment records discuss transportation problems affecting his work, claimant did not recall that to be accurate. (Testimony; Ex. B-3)

Claimant then worked for Aerotek, doing industrial housekeeping, cleaning floors and walls. He worked for one week and stopped. He testified it was because of his back pain.

Claimant began working at Joliet Cold Storage in March, 2019, driving a forklift earning $15.00 per hour, working full-time. Claimant was suspended from employment for missing too many days. Claimant testified that he was missing work due to this pending litigation. (Testimony) He testified that he was told to call the employer when the litigation was completed, with the assumption that he would be reinstated. Claimant was not employed at the time of the hearing.

Claimant testified that he would like to return to the construction industry, but "on the office side." (Testimony) He testified that he has taken three semesters of school for construction management, but he put school on hold while he was doing physical therapy because it was too much to do both at the same time.

Claimant testified that he did not believe he could return to the type of work he performed for the defendant employer, but he did believe that he could do less physically demanding work.

This claim was generally denied by defendants and claimant incurred substantial medical expenses to treat his radicular back pain as set forth in Exhibits 2 through 6, which are summarized in the attachment to the Hearing Report.

Considering the expert opinions, I accept Dr. Taylor's opinion concerning causation. I find his opinion to be the most thorough and persuasive. Dr. Taylor reviewed claimant's medical history, he had an understanding of claimant's job duties, and he explained claimant's condition. I find Dr. Taylor's opinion to be consistent with and supported by the medical evidence and testimony of claimant. I also note that Dr. Bernstein, defendants' IME physician, admitted that he did not have the opportunity to review the preoperative MRI to further evaluate claimant's pre-operative condition, and Dr. Taylor did.

I therefore, find that claimant sustained an injury that arose out of and in the course of his employment on August 10, 2015, when he reported the injury and was taken off work by the employer awaiting a doctor release.

I find that claimant sustained 22 percent whole person impairment, based on Dr. Taylor's assessment. Dr. Taylor noted claimant's loss of motion associated with the arthrodesis at L5-S1 in his physical exam, which was the basis for placement in category IV of the DRE assessment on page 384 of the AMA Guides, Fifth Edition. Dr. Bernstein assigned 7 percent, but he relied on the 6th Edition of the AMA guides, which is not accepted by this agency.

Dr. Taylor was the only doctor to assign work restrictions. I find that the same may be overstated given claimant's lack of restrictions from the treating surgeon and Dr. Taylor's admission that restrictions are "a bit difficult to predict" in light of the age of claimant's original work injury from August 2015. (Ex. 1-8) Nevertheless, I find some restrictions would be appropriate.

At the time of the hearing, claimant was not taking any prescription medication related to this work injury. Also, claimant was not working under any work restrictions at his most recent job.

Considering industrial disability I note the severity of the injury, claimant's functional impairment of 22 percent of the body as a whole, and I recognize that some restrictions may be appropriate, but have concluded that Dr. Taylor's statement of

restrictions may be overstated. I note claimant's age, education and motivation to work. In light of these and all other appropriate factors for the consideration of industrial disability, I find claimant sustained 40 percent industrial disability, which is 200 weeks of permanent partial disability benefits.

I find that the medical treatment claimant has received has been reasonable and beneficial for the treatment of claimant's condition.

The parties have stipulated that the appropriate rate in this case is $534.60, and that any permanent partial disability benefits should commence on July 31, 2017. (Hearing Report)

CONCLUSIONS OF LAW

1) Did claimant sustain an injury that arose out of and in the course of his employment on August 10, 2015?

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).

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).

An 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.

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).

"When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion." Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995) (Citations omitted.)

In this case I have found above that the most persuasive opinion is that of Dr. Taylor. In reliance upon his expert opinion I conclude that claimant sustained an aggravation of a preexisting condition and that the aggravation arose out of and in the course of his employment with the employer on August 10, 2015.

I noted that Dr. Bernstein did not have access to certain medical records to assist in his evaluation. I also note that Dr. Taylor's evaluation was thorough and well-reasoned, and consistent with claimant's testimony concerning the history of the injury and the medical records, despite defendant's criticism to the contrary.

2) Temporary Disability

Healing Period benefits are payable to an employee who has sustained a permanent partial disability "beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code section 85.34(1)

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In this case, claimant has asserted a claim for healing period benefits from September 16, 2015 (the date of claimant's lay-off) until May 16, 2017. Therefore, any healing period claim prior to September 16, 2015 is not at issue in this matter and is not addressed herein.

September 16, 2015, this is the date that claimant was laid off by his employer. Claimant was not taken off work on this date by a physician. Rather he was laid-off by his employer. Claimant testified that he was not told the reason for the lay-off. Although the timing is curious, I am unwilling to speculate whether claimant was laid-off specifically due to the injury. Without a physician taking claimant off work, I conclude that claimant is not entitled to healing period benefits beginning on September 16, 2015.

However, claimant eventually had surgery with Dr. Kahn on October 4, 2016 and was not released to return to work by Dr. Kahn until July 3, 2017. (Ex. JE5-36) However, the evidence indicates that claimant actually returned to work on May 16, 2017. (Ex. B-2) Therefore, I conclude that claimant is entitled to healing period benefits for the period of October 4, 2016 through July 31, 2017.

3) Extent of Industrial Disability

Because 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 Ry. Co. of Iowa, 219 Iowa 587, 593; 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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.

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

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

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 (Iowa 2009).

In this case, I have found above for the reasons there stated that claimant sustained 40 percent industrial disability.

4) Medical Benefits

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).

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

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)

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

I have found above that the medical treatment claimant received was reasonable and beneficial to treat claimant's condition.

I conclude that claimant is entitled to medical benefits as summarized in the attachment to the hearing report and as set forth in claimant's exhibit 2 through 6.

5) Costs

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter. Defendants shall pay costs pursuant to 876 IAC 4.33 and Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from October 4, 2016 through July 31, 2017.

Defendants shall pay claimant industrial disability benefits of two hundred (200) weeks, beginning on the stipulated commencement date of July 31, 2017, until all benefits are paid in full.

All weekly benefits shall be paid at the stipulated rate of five hundred thirty four and 60/100 dollars ($534.60) per week.

Defendants shall be entitled to credit for all weekly benefits paid to date.

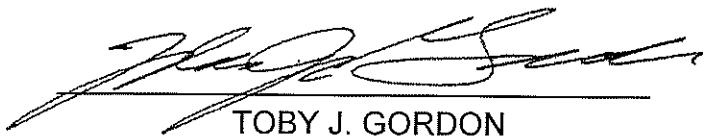
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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)

Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in Claimant's Exhibits 2 through 6 and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses contained therein.

Defendants shall pay costs as set forth above.

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

Signed and filed this 17th day of July, 2019.



TOBY J. GORDON
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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.