

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS D. KUCERA,

FILED

Claimant,

AUG 02 2016

File Nos. 5040717
5040718
5040719

vs.

WORKERS COMPENSATION

CITY OF CEDAR RAPIDS,

REVIEW-REOPENING DECISION

Employer,
Self-Insured,
Defendant.

Head Note Nos.: 1801, 1803, 4100

STATEMENT OF THE CASE

Claimant Dennis Kucera ("Kucera") filed three petitions in arbitration seeking workers' compensation benefits from the defendant, City of Cedar Rapids ("the City"). An arbitration hearing was held on September 27, 2013. Joint Exhibits 1 through 11, and Exhibit A were admitted. Kucera and Richard Hamblin testified. On December 10, 2013, the deputy workers' compensation commissioner issued an arbitration decision, finding Kucera had sustained a 50 percent industrial disability, and awarded Kucera 250 weeks of permanent partial disability benefits from April 30, 2012.

On May 15, 2014, Kucera filed three review-reopening petitions, alleging he sustained injuries to his low back and body as a whole arising out of his employment with the City on September 22, 2011, November 22, 2011, and June 2, 2012. The City filed answers on June 11, 2014, admitting a work injury occurred.

On April 28, 2016, a hearing was held at the Division of Workers' Compensation in Des Moines. Attorney Matthew Petrzelka represented Kucera, who appeared and testified. Assistant City Attorney Elizabeth Jacobi represented the City. Mark Jones and Marilyn Fitzgerald appeared and testified on behalf of the City. Exhibits 1, 2, 4 through 7, A through E, and I were admitted into the record. The record was left open for the receipt of post-hearing briefs. The case was fully submitted on May 31, 2016.

Before the hearing the parties completed a hearing report listing stipulations and issues to be decided. The City withdrew all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injuries.

2. Kucera sustained injuries on November 22, 2011, June 2, 2012, and September 22, 2011, which arose out of and in the course of his employment with the City.
3. Kucera's alleged injuries caused a temporary disability during a period of recovery.
4. Kucera's alleged injuries caused a permanent disability.
5. Temporary benefits are no longer in dispute.
6. Kucera's disability is an industrial disability.
7. At the time of the alleged injury, Kucera's gross earnings were \$898.31 per week, Kucera was single and entitled to one exemption, and his weekly benefit rate is \$547.94.
8. Medical benefits are no longer in dispute.
9. Prior to the hearing Kucera was paid 210 weeks of compensation.
10. The City is entitled to a credit under Iowa Code section 85.38(2) for sick pay/disability income in the amount of \$784.33 or for payment of medical/hospitalization expenses in the amount of \$70,835.92.¹

ISSUES

1. Has Kucera sustained a change of condition warranting an award of additional industrial disability benefits than ordered by the December 10, 2013 Arbitration Decision, and if so, what is the extent of disability?
2. Does the odd-lot doctrine apply?

FINDINGS OF FACT

Kucera filed three petitions alleging he sustained injuries to his low back and body as a whole on September 22, 2011, November 21, 2011, and June 2, 2012. The matter proceeded to an arbitration hearing on September 27, 2013, and the deputy workers' compensation commissioner issued an arbitration decision on December 10, 2013, Exhibit E, finding Kucera sustained a 50 percent industrial disability. Neither party appealed the decision. The relevant findings and conclusions made by the deputy workers' compensation commissioner in the December 10, 2013 decision, Exhibit E, are set forth below.

¹ The parties did not circle that they stipulated to this issue on the hearing report. I contacted the parties on July 13, 2016, and the parties stipulated to the issue.

Kucera was born on May 9, 1958, and grew up in Cedar Rapids, Iowa. (Transcript, page 8; Exhibit E, p. 1) At the time of the review-reopening hearing he was 57. (Tr., p. 8) Kucera is a tobacco user. (Ex. B, p. 2) After graduating from high school Kucera worked as a carpet layer, as a commercial bread baker, as a stocker in a grocery store, as a carpenter, and as a loader and unloader of cement forms. (Ex. E, pp. 6-7)

The City hired Kucera in 1996 in the solid waste department. (Ex. E, p. 2) Kucera worked as an "extra board," where he drove the garbage truck and loaded garbage for three years until he moved to recycling for 11 years where he picked up recycling from homes in the community. (Ex. E, p. 2) While working in the solid waste department, Kucera would have to jump off a truck and pick up materials along the curb. (Ex. E, p. 2) He would occasionally go to homes to pick up larger items. (Ex. E, p. 2) Later the City added "curbies," which are devices that dump the garbage bins. (Ex. E, p. 2) Kucera's work for the City required him to lift 40 pounds. (Ex. E, p. 2) If a bin weighed more than 40 pounds, Kucera would tag the bin and leave it to be picked up later. (Ex. E, p. 2)

Kucera injured his low back on September 22, 2011, while working on the recycling route. (Ex. E, p. 2) The deputy commissioner found that prior to his injury Kucera had some problems for his back and received medical treatment for his problems, but the problems did not interfere with his work. (Ex. E, p. 2) On or about September 22, 2011, Kucera began limping and experiencing pain. (Ex. 7, p. 2) He received medical treatment and physical therapy. (Ex. E, p. 2) Chad Abernathy, M.D., performed a decompression at the L5-S1 level on Kucera on February 23, 2012. (Ex. E, p. 2) Before the surgery Kucera was on modified duty and he was off work after the surgery for approximately 10 weeks. (Ex. E, p. 2) Kucera returned to work on April 30, 2012, without restrictions. (Ex. E, p. 2)

Kucera returned to work on a truck as work hardening, where he was required to lift up to 100 pounds. (Ex. E, p. 2) On June 2, 2012, Kucera reported a second injury, and complained his back pain was "so intense he did not feel he could continue to work on the garbage truck." (Ex. E, p. 2) Kucera was taken off regular duty and assigned to a sit in a conference room where he would roll up plastic bags, and to sweep the shop. (Ex. E, p. 3)

Kucera returned to a truck route two or three months later. (Ex. E, p. 3) Kucera would work three hours, and during the three hours he worked he would take two or three breaks due to his low back pain. (Ex. E, p. 3) After three hours Kucera had to leave the route. (Ex. E, p. 3)

Kucera received epidural injections, which provided some relief. (Ex. E, p. 3) The City assigned Kucera to pick up litter along roads, using a grabber and a bag. (Ex. E, p. 3) In the winter he drove a sand truck where he plowed some alleys filled with snow, and occasionally streets, and put sand on the surfaces with the truck. (Ex. E, p. 3) Kucera reported the work was light-duty. (Ex. E, p. 3) After the winter the City

returned Kucera to indoor light duty work rolling bags. (Ex. E, p. 3) In March or April 2013, he returned to picking up litter. (Ex. E, p. 3)

Richard Neiman, M.D., performed an independent medical examination of Kucera and restricted Kucera to sedentary work. (Ex. E, p. 6) Dr. Neiman imposed a maximum repetitive lifting restriction of five to 10 pounds, and a maximum lifting restriction of 25 pounds. Dr. Neiman opined Kucera could not return to his work as a driver of a recycling truck because the position would require lifting in excess of his restrictions, and he would bounce up and down in the truck, which would aggravate his back. (Ex. E, p. 6) Dr. Neiman also restricted Kucera from kneeling, squatting, bending, and repetitive climbing of stairs, and noted Kucera should not sit in a motor vehicle for more than one hour at a time, and he should be able to alternate sitting and standing. (Ex. 7, p. 6)

Using the Guides to the Evaluation of Permanent Impairment, page 574 (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Neiman assigned Kucera a 23 percent permanent partial impairment of the whole person. (Ex. E, p. 6) Jeffrey Westpheling, M.D., Kucera's treating physician, assigned a 10 percent permanent partial impairment of the whole person. (Ex. E, p. 6) Dr. Abernathy Kucera's treating physician, assigned a seven percent permanent partial impairment of the body as a whole. (Ex. 7, p. 6)

In evaluating Kucera's industrial disability, the deputy commissioner found:

Claimant is currently employed, doing the roadside litter pickup in the warm months and driving a truck that dispenses sand on icy streets and alleys for the garbage trucks in the winter, as well as the indoor job of preparing litter collection kits. But his injury has required that he be re-assigned to these lighter duties. He cannot return to the garbage collection job he has done most of his work career. His work restrictions would limit the type of jobs he might apply for the future, and his impairment and restrictions, as well as his age of 55 and his limited education, make him a less attractive candidate to potential employers compared to before he was injured.

Based on these and all other appropriate factors of industrial disability, it is found claimant has, as a result of his work injury, an industrial disability of 50 percent.

(Ex. E, p. 6)

On May 15, 2014, Kucera filed three review-reopening petitions, alleging he should be awarded additional compensation. Kucera avers he is entitled to a greater award because at the time of the original arbitration hearing he was not taking pain medication and after the hearing he resumed taking medication, at the time of the hearing he was employed by the City, and after the hearing the City terminated his

employment, and he has received additional permanent restrictions. The City contends Kucera has not met his burden of proof.

At the time of the original arbitration hearing Kucera was not taking pain medication. (Tr., p. 9; Ex. E, p. 4) Kucera testified that after the hearing he resumed taking muscle relaxers and hydrocodone. (Tr., pp. 9-10) Kucera reported that for a period of time his treating physician would not renew his prescription for pain medication. (Tr., p. 9)

In October 2013, Kucera attended an appointment with his personal physician, Ann Soenen, D.O. (Ex. B, p. 1) Kucera reported he was receiving treatment from Dr. Westpheling and his back was still sore. (Ex. B, p. 1) Kucera reported sharp twinges of pain down both legs. (Ex. B, p. 1) Kucera continued to complain of back pain during an appointment with Dr. Soenen on December 17, 2013. (Ex. A, p. 9)

Kucera received medical care for his back condition following the original hearing from Ignatius Brady, M.D. (Ex. 1, p. 3) During Kucera's February 6, 2014 Dr. Brady noted:

Poor return to work, getting back on garbage and recycling truck. 10 days ago was put on a new job, reading meters. Burning low back and leg pain.

Previously had been on a very light job, 25# lift limit and no repetitious activity. Pulling staples out of boxes.

They are trying to get some work that matches his abilities.

(Ex. 1, p. 3) Dr. Brady acknowledged Kucera had been prescribed flexeril and Norco.

(Ex. 1, p. 3) Dr. Brady assessed Kucera with chronic low back pain and assigned restrictions of no lifting/pushing/pulling greater than 20 pounds. (Exs. 1, p. 4; 5, p. 2)

Kucera attended a follow-up appointment with Dr. Soenen on February 18, 2014. (Ex. B, p. 12) Kucera reported he continued to have chronic low back pain and noted the hydrocodone he had been prescribed "helps him immensely." (Ex. B, p. 12)

Kucera began receiving water therapy in February 2014. (Ex. 1-4) During a follow-up appointment on February 24, 2014, Dr. Brady documented Kucera "exhibits decreased range of motion and tenderness." (Ex. 1, p. 5) Dr. Brady noted that in March 2014, Kucera reported "[v]ery occasional norco" and that he was "[f]eeling better [sic] motion and strength." (Ex. 1, p. 5) On March 17, 2014, Dr. Brady imposed restrictions of occasional bending to pick up items, and lifting, pushing and pulling no more than a 20 pound trash bag, and noted Kucera "[m]ay do 'Litter Pick-up' with use of grabber. No repetitive bending at waist." (Ex. 5, p. 5)

Dr. Brady discontinued Kucera's water therapy and ordered occupational therapy. (Ex. 1, p. 6) During the March 27, 2014 appointment, Dr. Brady documented Kucera was taking hydrocodone and had completed water therapy. (Ex. 1, p. 6) Kucera complained of pain when using a grabber to pick up trash, and reported his pain

was a two out of 10 at rest. (Ex. 1, p. 6) Kucera continued to go to the pool on his own. (Ex. 1, p. 6) Dr. Brady documented he believed Kucera needed occupational therapy, noting “[t]he time for avoiding activities that hurt is long since past. We will see if our OT staff are able to get him stronger and more resilient.” (Ex. 1, p. 7) Dr. Brady documented, “[w]e also need to get him off the painkillers, that’s not helpful for chronic pain.” (Ex. 1, p. 7)

Kucera testified the occupational therapy did not improve his symptoms, but the water therapy improved his symptoms. (Tr., pp. 13-14) Kucera testified the occupational therapy caused him to experience back spasms. (Tr., p. 14) Dr. Brady continued with the same work restrictions. (Ex. 5, p. 6; Ex. 6, p. 2)

Dr. Brady restricted Kucera from working from April 17, 2014, and documented he could return to work on May 1, 2014. (Ex. 5, p. 7) Dr. Brady discontinued work conditioning and ordered Kucera to begin water therapy. (Ex. 5, p. 7)

Dr. Brady documented that as of May 1, 2014, Kucera was using hydrocodone occasionally, “not daily.” (Ex. 1, p. 8) Dr. Brady observed Kucera continued to exhibit a decreased range of motion and tenderness. (Ex. 1, p. 8) Dr. Brady noted Kucera had been unable resume full activities since his surgery in 2012. (Ex. 1, p. 8) Dr. Brady imposed restrictions of limited/occasional bending, and lifting, pushing and pulling no more than 10 pounds. (Ex. 5, p. 8) Dr. Brady ordered Kucera to continue with water therapy and noted “occasional hydrocodone [*sic*] okay.” (Ex. 5, p. 8)

During a follow-up appointment on June 2, 2014, Dr. Brady documented:

He has had pain since 2011/2012. This most recent aggravation has set him back and he’s not back to baseline. However, I don’t believe that further care or exercise therapy is going to benefit him or change his outcome. For this reason, I would call him MMI for this aggravation of back pain.

I’ve updated his restrictions and they should be considered permanent.

I recommend an IME to re-assess his impairment rating, at the request of the employer, insurer or legal counsel.

(Ex. 1, p. 9; Ex. 6, pp. 4-5) Kucera testified Dr. Brady lowered the lifting restriction in place at the time of the original arbitration hearing. (Tr., p. 17) Kucera has not received any additional medical treatment from Dr. Brady. (Tr., p. 15) The City did not obtain an impairment rating after Dr. Brady released Kucera from care.

Kucera returned to his personal physician, Dr. Soenen, on September 24, 2014, noting his pain went from five to six inches “below [his] waist to [his] butt,” and he had pain around his waistline “like a giant bearhug,” and “[p]opping and grinding” in his lower back. (Ex. B, p. 19) Kucera reported it was hard to get in and out of a vehicle and that

he had been experiencing back spasms that had caused him to miss work. (Ex. B, p. 19) Dr. Soenen documented Kucera's back pain had been present for more than six weeks, but was not radiating into Kucera's legs. (Ex. B, p. 20)

At the time of the original hearing Kucera was employed by the City, on modified duty, where he rolled up bags, pulled staples from old files, and picked up litter around the City. (Tr., pp. 10-11) The deputy commissioner noted that Kucera testified he did not believe his job would continue, but the deputy commissioner concluded "there is no evidence it is a temporary job, and in fact Mr. Hamblin indicates it will continue. In any event, it would be speculative to assume the job is not permanent as [Kucera's] industrial disability must be assessed as of the date of the hearing." (Ex. E, p. 6)

Kucera testified that following the original arbitration hearing he continued to work for the City, but he "bounced around" for a while. (Tr., p. 11) On October 1, 2014, the City sent Kucera a letter, which provides, in part:

The City of Cedar Rapids received the "Physician's Report to the Employer" form on June 2, 2014, which indicates you have permanent restrictions of standing no more than two (2) hours of your work shift, no bending, sitting four (4) to six (6) hours of your work shift, no climbing and lifting no [sic] more than ten (10) pounds. As a result of these permanent restrictions, you are no longer qualified to maintain active employment status in the classification of Solid Waste & Recycling Driver/Collector II. A request for accommodations under the Americans with Disabilities Act (ADA) may be submitted to the Solid Waste & Recycling Division management for consideration.

A review of classifications within the City that meet the permanent restrictions shows that you are qualified to work in the classification of Water Meter Reader. Currently, the City of Cedar Rapids does not have a vacancy in that classification. You will be given thirty (30) days to sign for a vacant position with the City of Cedar Rapids that you are qualified for. In the event you are unsuccessful in bidding for a vacant position, the City of Cedar Rapids will terminate your employment effective November 2, 2014.

(Ex. 7, p. 1)

Kucera continued to take pain medication. On October 24, 2014, Kucera returned to Dr. Soenen, and reported that he only had one-half of a container of hydrocodone and he was taking one-half of a pill at a time to be "frugal with it." (Ex. B, p. 23)

The City sent Kucera a clarification letter on October 29, 2014. (Ex. 7, p. 3) The letter provided because Kucera normally worked Monday through Friday, his final date of employment would be November 3, 2014. (Ex. 7, p. 3) Following his discharge from the City, Kucera began receiving benefits through IPERS. (Tr., pp. 30-31)

After his termination, Kucera continued to follow up with Dr. Soenen. (Ex. B, p. 26) Dr. Soenen prescribed hydrocodone for Kucera's back pain. (Ex. B, pp. 29-36) During his appointment on May 7, 2015, Kucera noted that he was experiencing trouble walking through stores and with static standing greater than 15 minutes, sitting in a chair for more than 15 to 20 minutes, and sleeping. (Ex. B, p. 37)

In May 2015, Kucera's attorney requested a second opinion by a neurosurgeon or pain specialist at the University of Iowa or the Mayo Clinic, as recommended by Dr. Soenen after he had been released by Drs. Brady and Abernathy. (Exs. 7, pp. 7-8; B, p. 41) The City requested a medical records review from Joseph Chen, M.D., with the University of Iowa Work, in July 2015. (Ex. A, p. 1) Dr. Chen responded to a form letter from the City, agreeing "[y]es, I confirm that I have reviewed the medical records and do not have further recommendations for care or treatment of his low back pain." (Ex. A, p. 1) Dr. Chen did not examine Kucera. (Tr., pp. 25-26)

In August 2015, Kristen Steidl, M.D., a physician in Dr. Soenen's practice group, assumed Kucera's care. (Ex. B, p. 47) As of his appointment on February 23, 2016, Kucera remained on hydrocodone and methocarbamol for muscle spasms. (Ex. B, p. 66)

Kucera applied for nine positions with the City after his termination through September 17, 2015. (Ex. 7, p. 5) Kucera was interviewed for one of the positions, a sewer maintenance worker position, in December 2014, but he was not hired. (Ex. 7, pp. 5-6) Jen Ketelsen with the City responded to an inquiry from Kucera on October 9, 2014, stating, "[n]ot qualified for the listings available per his restrictions." (Ex. 7, p. 6)

Kucera testified that since the original arbitration hearing his physical condition has deteriorated. (Tr., p. 27) Kucera reported that when he drove to the arbitration hearing from Cedar Rapids he had to leave at 8:15 a.m. for the 1:00 p.m. hearing and had to stop twice during the drive to walk around. (Tr., p. 28) Kucera planned to spend the night in Des Moines following the review-reopening hearing because after the original arbitration hearing he tried to drive home and he "almost didn't make it home" because of his back pain. (Tr., p. 29) Kucera noted, "[t]wo hours driving straight through is just too much for my back." (Tr., p. 29) During the hearing Kucera stood and adjusted his position several times.

CONCLUSIONS OF LAW

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening

proceeding, the deputy commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*" Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (Emphasis in original.)

Kucera has met his burden of proof subsequent to the original arbitration decision he suffered an impairment or a lessening of earning capacity proximately caused by the original injury. The original decision notes that Dr. Neiman restricted Kucera to sedentary work, and imposed a maximum repetitive lifting restriction of five to 10 pounds, and a maximum lifting restriction of 25 pounds. (Ex. E, p. 6) According to the May 1, 2014 Physician's Report to the Employer, Dr. Brady imposed a restriction of 10 pounds for lifting, pushing, and pulling, and limited/occasional bending. (Ex. 5-8) Kucera's discharge letter notes the City had received another Physician's Report to the Employer form on June 2, 2014, that provides Kucera has "permanent restrictions of standing no more than two (2) hours of your work shift, no bending, sitting four (4) to six (6) hours of your work shift, no climbing and lifting no [sic] more than ten (10) pounds." (Ex. 7, p. 1)

After receiving the June 2, 2014 Physician's Report to the Employer, the City notified Kucera he was "no longer qualified to maintain active employment status in the classification of Solid Waste & Recycling Driver/Collector II." (Ex. 7, p. 1) The City informed Kucera he was qualified for one position with the City, water meter reader, but there was no vacancy. (Ex. 7, p. 1) The City terminated Kucera's employment on November 3, 2014. (Ex. 7, p. 3) Kucera has applied for nine jobs through the City since his termination. He has not been re-hired.

Given Kucera has met his burden, it is necessary to consider the extent of his disability. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and

nonmedical. Evenson v. Winnebago Indus., Inc., No. 14-2097, 2016 WL 3125846, at *9 (Iowa June 3, 2016)

In the arbitration decision the deputy workers' compensation commissioner found Kucera had sustained a 50 percent industrial disability. In reaching his conclusion, the deputy commissioner noted that Kucera remained employed by the City. Kucera has not received a subsequent impairment rating from a physician. According to the City's October 1, 2014 letter, Dr. Brady assigned "permanent restrictions of standing no more than two (2) hours of your work shift, no bending, sitting four (4) to six (6) hours of your work shift, no climbing and lifting no [sic] more than ten (10) pounds." (Ex. 7, p. 1) The City determined it could not accommodate Kucera, and terminated his employment. Since that time Kucera has not worked. Kucera has applied for nine positions through the City and he has not been rehired. The City avers it cannot accommodate his restrictions.

Kucera alleges he is entitled to permanent and total disability benefits through the odd-lot doctrine. The City rejects Kucera's assertion. Neither party obtained an opinion from a vocational expert after the original arbitration hearing.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

A worker is totally disabled under the odd-lot doctrine if the services the worker can perform "are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985) (quoting Lee v. Minneapolis Street Railway Co., 230 Minn. 315, 320, 41 N.W.2d 433, 436 (1950)). This flows from the principle that a worker who has no reasonable prospect of securing employment has no material earning capacity. Id. The trier of fact considers whether there are jobs in the community the worker can realistically compete for. Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 198 (Iowa 2014) In

establishing total disability, "an employee need not look for a position outside the employee's competitive labor market." Id.

Under the odd-lot doctrine, a worker must present a prima facie case of total disability "by producing substantial evidence that the worker is not employable in the competitive labor market." Guyton at 106. If the worker establishes a prima facie case, then the burden switches to the employer to present evidence of suitable employment. Id. If the employer fails to produce evidence of suitable employment, and the deputy commissioner concludes the worker falls within the odd-lot category, the worker is entitled to a finding of total disability. Id. Kucera has not presented a prima facie case of total disability. Kucera lives in an urban area, Cedar Rapids. Kucera has established he applied for nine positions with the City. Kucera has not applied for any additional positions in the Cedar Rapids area. He is not motivated to work. Kucera did not obtain a vocational opinion or provide a market analysis supporting his contention.

The evidence supports Kucera has sustained a worsening of his impairment and an increase in his lack of employability since the original arbitration hearing. The record does not support Kucera is permanently and totally disabled. At the time of the review-reopening hearing Kucera was 57. (Tr., p. 8) Kucera now has "permanent restrictions of standing no more than two (2) hours of your work shift, no bending, sitting four (4) to six (6) hours of your work shift, no climbing and lifting no [*sic*] more than ten (10) pounds." (Ex. 7, p. 1) Based on the 10 pound lifting restriction and restriction of no bending, Kucera cannot return to his past relevant work as a carpet layer, commercial baker, carpenter, loader an unloader of cement forms, or garbage collector.

The City has noted Kucera could work as a water meter reader. Kucera contends he cannot perform the position. Kucera presented no testimony or evidence, other than his bare assertion that he could not perform the water meter reader position. Based on the factors for determining industrial disability, I conclude Kucera has sustained an additional 20 percent industrial disability. He is entitled to an additional 100 weeks of permanent partial disability benefits, at the stipulated rate of \$547.94.

ORDER

IT IS THEREFORE, ORDERED:

Defendant shall pay unto the claimant an additional one hundred (100) weeks of permanent partial disability benefits, at the stipulated weekly benefit rate of five hundred forty-seven and 94/100 dollars (\$547.94).

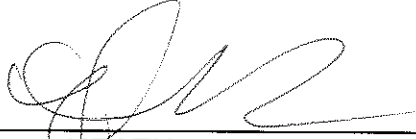
Defendant is entitled to a credit for benefits previously paid.

Defendant is entitled to a credit of seven hundred eighty-four and 33/100 dollars (\$784.33) for sick/disability income paid pursuant to the AFSCME contract.

Accrued benefits shall be paid in a lump sum together with interest as allowed by law.

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

Signed and filed this 2nd day of August, 2016.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/srs

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.