BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAY 25 2017
WORKERS COMPENSATION

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| SIGFRIED JESKE,<br><br>Claimant,<br><br>vs.<br><br>SEPTAGON INDUSTRIES, INC.,<br><br>Employer,<br><br>and<br><br>OLD REPUBLIC GENERAL INSURANCE CORPORATION,<br><br>Insurance Carrier,<br>Defendants. | File Nos. 5052209, 5052210<br><br>ARBITRATION DECISION<br><br>Head Note Nos.: 1108, 1801, 2203, 2401 |

## STATEMENT OF THE CASE

Sigfried Jeske filed two petitions for arbitration seeking workers' compensation benefits from, the employer, Septagon Industries, Inc., and the insurance carrier, Old Republic Insurance.

The matter came on for hearing on June 15, 2016, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Claimant's Exhibits 1 through 15; Defense Exhibits A through H; as well the sworn testimony of claimant, Sigfried Jeske. Amy Rose-Coenen was appointed court reporter. The parties argued this case and the matter was fully submitted on July 15, 2016.

## ISSUES AND STIPULATIONS

All stipulations presented by the parties in the hearing report and order are accepted and should be deemed enforceable at this time.

File No. 5052209:

The parties stipulate that the claimant was employed by the employer on the date of the alleged injury. Claimant has alleged that he sustained an injury which arose out of and in the course of his employment on February 15, 2013. The defendants deny that the injury occurred, and further deny that the alleged injury resulted in any permanent or temporary disability. The claimant alleges he is entitled to healing period benefits commencing on December 31, 2015, through April 4, 2016. The defendants deny this for the reasons stated above. In addition, the defendants have asserted the

affirmative defenses of notice and statute of limitations. The claimant alleges he is permanently and totally disabled as a result of the work injury. The defendants dispute this. Claimant seeks medical expenses as outlined in Claimant's Exhibit 14 and payment of an independent medical evaluation (IME) in Claimant's Exhibit 8. Defendants dispute liability for these bills on the basis of the denial of the injury and medical causation. The claimant seeks a penalty on the basis of the unreasonable denial.

The parties have stipulated to the elements which comprise the rate of compensation. Defendants have waived all affirmative defenses with the exception of the notice and statute defense as set forth above. The parties agree there is no issue regarding credit and no benefits have been paid.

File No. 5052210:

The parties stipulate that the claimant was employed by the employer on the date of the alleged injury. Claimant has alleged that he sustained an injury which arose out of and in the course of his employment on December 23, 2013. The defendants deny that the injury occurred, and further deny that the alleged injury resulted in any permanent or temporary disability. The claimant alleges he is entitled to healing period benefits commencing on December 31, 2015, through April 4, 2016. The defendants deny this for the reasons stated above. In addition, the defendants have asserted the affirmative defenses of notice and statute of limitations. The claimant alleges he is permanently and totally disabled as a result of the work injury. The defendants dispute this. Claimant seeks medical expenses as outlined in Claimant's Exhibit 14 and payment of an IME in Claimant's Exhibit 8. Defendants dispute liability for these bills on the basis of the denial of the injury and medical causation. The claimant seeks a penalty on the basis of the unreasonable denial.

The parties have stipulated to the elements which comprise the rate of compensation. Defendants have waived all affirmative defenses with the exception of the notice and statute defense as set forth above. The parties agree there is no issue regarding credit and no benefits have been paid.

## FINDINGS OF FACT

Sigfried Jeske is a 71-year-old construction worker. He is a high school graduate. He became employed by Septagon Industries from 1996 through 2015. He was a working foreman. He usually worked alongside three to six employees. Together, they performed demo work, set steel studs and sheetrock, set concrete forms, poured concrete and hung doors. He also used subcontractors for painting and finishing. Mr. Jeske performed heavy lifting regularly and he did overhead work as well. He also used vibratory and power tools. (Claimant's Exhibit 6, page 60)

The record suggests Mr. Jeske had some shoulder issues prior to 2013. In 2006, he was evaluated for right shoulder pain and diagnosed with a partial right rotator cuff tear. (Def. Ex. B, p. 1) Patrick Sullivan, M.D., stated the following: "Since his clinical problems are not significant at this point, we can simply observe it." (Def. Ex. B, p. 1)

In January 2012, Mr. Jeske saw his family physician, Amy Mitchell, D.O. While he was being treated for a left hand condition, he complained of his left shoulder as well. (Cl. Ex. 2, p. 32) She took x-rays of the shoulder but the claimant ultimately returned to work without any further treatment, restrictions or limitations. There is little question that claimant, however, had some ongoing symptoms since approximately 2006 that never resolved. (Cl. Ex. 3, p. 52; Tr., pp. 57-60)

In February 2013, Mr. Jeske's symptoms became significant to the extent that he reported his condition to his supervisor and asked to see a company physician. He testified his symptoms built up to this point. This portion of the claimant's testimony is not rebutted by the defendants.

> Q. Okay. And what did you – in February of '13 what do you recall happening when you discussed your shoulder pain?
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> A. I called, well, Brad Leonard [Septagon President, Grimes Branch] up on the phone to see if I could go in and, well, check on my shoulder, and could I go to Concentra.
>
> Q. Okay.
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> A. And he said, "Yes, go ahead." So I made an appointment the following Friday, because I was working out of town, and I made it late in the afternoon so I could get there, and when I got there, I filled out the paperwork, and they took me in the back to get my temperature and start the exam, and then a nurse come in and said, "Well, we called Brad Leonard, and he said to go see your personal physician."

(Tr., pp. 20-21) This testimony is verified by contemporaneous documentation from the operations director at Concentra. (Cl. Ex. 9, p. 74)

After his medical care was denied, claimant decided not to seek treatment at that time. Rather, claimant waited until December 2013, to seek treatment on his own. In the meantime, his left shoulder pain gradually continued to worsen. He finally returned to Dr. Sullivan on December 23, 2013. Dr. Sullivan documented the following.

> Sigfried Jeske is a 68-year-old white male who worked for his most recent company for sixteen to seventeen years. He works in heavy construction. He is usually a supervisor, but he also does some manual labor. With the activities at work, he continues to have pain and discomfort in both shoulders that is progressive. We diagnosed a partial tear of the rotator cuff of the right shoulder in 2006. With conservative management, this improved.
>
> Now, he has severe pain in the left shoulder that is aggravated at work and this makes it difficult for him to do the manual labor. However, he is still working.

(Cl. Ex. 1, p. 2) Dr. Sullivan diagnosed "[i]mpingement with possible rotator cuff tear with AC degenerative joint disease" and he related this to claimant's employment. (Cl. Ex. 1, pp. 2-3, 16) He performed left shoulder surgery on March 6, 2014. Thereafter, Mr. Jeske underwent physical therapy and subacromial injections to treat the pain. He was, apparently, continuing to work for the employer during this treatment. (Tr., p. 52)

Mr. Jeske began treating for the right shoulder in May 2015. Mr. Jeske was laid off by the employer in May 2015. (Tr., p. 29) In October 2015, Dr. Sullivan prepared expert opinions for defense counsel, stating that there was not a specific work-related incident that caused his left shoulder injury. (Def. Ex. B, p. 6) After attempting conservative care on the right shoulder, claimant sought a second opinion with Jeffrey Davick, M.D. Dr. Davick opined his shoulder condition was related to his repetitive work at Septagon. (Cl. Ex. 1, p. 29) Mr. Jeske finally opted for surgery, which, after appropriate diagnostic tests, was performed on December 31, 2015. Mr. Jeske was off work, recuperating from this procedure from the date of surgery through April 4, 2016. (See Hearing Report Stipulation) Dr. Davick did not place any formal restrictions on him when he was released. (Tr., p. 29)

Mr. Jeske testified that he could no longer perform the physical work which was required by Septagon. (Tr., p. 32) He testified that he could not return to the vast majority of his past employment, however, he believed he could operate some types of heavy machinery. (Tr., pp. 34-38) Claimant has performed a thorough and legitimate work search since being laid off and recuperating from his surgeries. (Cl. Ex. 12) At the time of hearing, he remained unemployed. He is not computer literate. He was offered a position with a company on a "crusher crew" prior to hearing. (Tr., p. 55)

Claimant was evaluated by Mark Taylor, M.D., on April 20, 2016. Dr. Taylor performed a thorough review of the medical history as well as a thorough examination of the claimant. He opined that claimant suffered from bilateral shoulder impingement with rotator cuff tears. He opined claimant's work activities were a substantial contributing factor to these diagnoses. (Cl. Ex. 6, p. 65) He assigned impairment ratings of 11 percent whole person for the right shoulder and 10 percent whole person for the left side. (Cl. Ex. 6, p. 66) The combined whole body loss of function was deemed to be 20 percent. For restrictions, he recommended the following:

> I would generally recommend approximately a 30-pound lifting limit between floor and chest level on an occasional basis as long as Mr. Jeske is able to keep both arms relatively close to his body. As he extends his arms out away from his body, his lifting tolerances will decrease. I would recommend 20 pounds or less above chest/shoulder level due to his bilateral shoulder conditions.
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> There are no specific restrictions with regard to sitting, standing, walking, squatting, bending, or kneeling as it pertains to his shoulders. I would recommend stepladders only on an occasional basis but he will not likely tolerate extension ladders that require the ability to reach upward in order to safely climb. I would recommend overhead tasks only on a rare

> to occasional basis. He will not tolerate sustained or repetitive tasks at or above shoulder level.

(Cl. Ex. 6, p. 66)

On May 4, 2016, Mr. Jeske was evaluated by Scott Neff, D.O. (Def. Ex. C) While Dr. Neff opined that claimant did not suffer any specific injury to his shoulders on the specific dates alleged, he did not actually address the appropriate standard to determine medical causation. (Def. Ex. C, p. 6)

In June 2016, Dr. Davick assigned an impairment rating of nine percent of the whole person for the right shoulder condition. (Cl. Ex. 1, p. 30)

Mr. Jeske testified that he has a dull pain in his left shoulder which becomes sharp if he reaches out quickly. (Tr., p. 27) His symptoms are more intense on the right. (Tr., p. 44) He is on hydrocodone, which he takes two times a day. (Tr., p. 46)

Claimant began receiving Social Security retirement benefits when he turned 70. He is eligible to receive these benefits and work.

## CONCLUSIONS OF LAW

The first question is whether the claimant suffered a cumulative injury to his bilateral shoulders which arose out of and in the course of his employment.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if

brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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

By a preponderance of evidence, I find that the claimant has met his burden of proof. He sustained an injury to his bilateral shoulders which came on gradually as a result of his work activities for the defendant employer. This finding is based upon the claimant's credible testimony, the contemporaneous medical notes and the opinions of Dr. Sullivan, Dr. Davick and Dr. Taylor.

There is really no question that the claimant suffered a cumulative injury. The closer question is the date that the injury manifested. The claimant filed two petitions herein, alleging the manifestation of two separate cumulative injuries. The first theory is based upon the date the claimant reported his work injury and sought treatment: February 15, 2013. The second date is when the claimant actually began receiving substantial medical treatment for his left shoulder: December 23, 2013.

I find, by a preponderance of evidence that the evidence establishes that the claimant's bilateral shoulder injury manifested on or about December 23, 2013. The evidence in the record is that this date is when an objective, work-connected condition was medically documented by an appropriate expert. The claimant continued to work full-duty through that date and his condition worsened and progressed until that date. Dr. Sullivan documented the following on that date.

> Sigfried Jeske is a 68-year-old white male who worked for his most recent company for sixteen to seventeen years. He works in heavy construction. He is usually a supervisor, but he also does some manual

> labor. With the activities at work, he continues to have pain and discomfort in both shoulders that is progressive. We diagnosed a partial tear of the rotator cuff of the right shoulder in 2006. With conservative management, this improved.
>
> Now, he has severe pain in the left shoulder that is aggravated at work and this makes it difficult for him to do the manual labor. However, he is still working.

(Cl. Ex. 1, p. 2) While there is no doubt that claimant had experienced difficulties with his shoulders (primarily his right) prior to that date, viewing the entire record as a whole, this is the most appropriate manifestation date.

As a consequence of this, I find that the claimant's injury did not manifest on February 15, 2013. Claimant takes nothing for File No. 5052209.

The defendants have raised the defenses of statute of limitations under section 85.26 and notice under section 85.23. These arguments were predicated upon the assertion that the claimant's injury manifested long before December 2013. The defendants assert that claimant's shoulder condition is very old. Since it has been determined that the injury manifested in December 2013, these affirmative defenses fail.

The Iowa Workers' Compensation Act imposes time limits on injured employees both as to when they must notify their employers of injuries and as to when injury claims must be filed.

Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. If the employer has paid the employee weekly benefits on account of the claimed injury, however, the employee must bring an original proceeding within three years from the date of last payment of weekly compensation benefits.

That the employee failed to bring a proceeding within the required time period is an affirmative defense which the employer must plead and prove by a preponderance of the evidence. See Dart v. Sheller-Globe Corp., II Iowa Industrial Comm'r Rep. 99 (App. 1982).

Since the injury manifested on December 23, 2013, and the petition was filed in February 2015, there is no valid statute of limitations defense.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably

conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). Notice of a cumulative injury must be provided on or before the date of manifestation. See Callahan v. Horseshoe Casino, File No. 5042457 (App. June 25, 2015)

The injury manifested on December 23, 2013. The defendants had actual knowledge of the injury even prior to December 23, 2013. In February 2013, Mr. Jeske reported his work injury and asked to see the company doctor. He testified he was initially told that he could go to Concentra, however, at the clinic he was told that his employer had directed him to see his family doctor. (Tr., pp. 20-21; Cl. Ex. 9, p. 74) From this point forward, the defendants were on notice and had actual knowledge that the claimant had suffered a work-related injury.

The next issue is whether the injury is a cause of temporary or permanent disability, and if so, the extent of such disability. By a preponderance of evidence, I find that the December 23, 2013, work injury is a proximate cause of disability in the claimant's bilateral shoulders.

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).

The expert opinions as to the medical impairment in this case are found to be relatively consistent. Dr. Sullivan, Dr. Davick and Dr. Taylor all rendered medical

causation opinions favorable to the claimant. While Dr. Neff opined that the claimant did not suffer any specific incident of injury on December 23, 2013, he did not address the appropriate legal standard of whether the claimant's work activities substantially contributed to the development of his bilateral shoulder conditions. As such, his opinions are given little weight. The claimant underwent substantial medical treatment from December 23, 2013, through April 2016, including two surgeries, injections and physical therapy. He was off work from December 31, 2015, through the date he recuperated and he has substantial permanent functional impairments in both shoulders.

For these reasons, I find the claimant has met his burden that his injury is a proximate cause of both temporary and permanent disability.

Claimant seeks medical expenses as set forth in Claimant's Exhibit 15. 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. Iowa Code section 85.27 (2013).

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).

I have reviewed Claimant's Exhibit 15. The defendants have denied these expenses on the basis of medical causation (and that the defendants are not otherwise liable for this condition). The defendants also disputed authorization, however, authorization is not a defense for any of the bills after the claim was denied.

I find the bills set forth in the bill summary to be causally connected to claimant's work injury. The defendants are responsible for these bills as set forth herein.

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.

The defendants are responsible for healing period from December 31, 2015, through April 4, 2016, for the period of time claimant was off work, recovering from his work injury.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in 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, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing

availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (Appeal Decision November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

The refusal of defendant-employer to return claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995). Meeks v. Firestone Tire & Rubber Co., File No. 876894, (App. January 22, 1993); See also, 10-84 Larson's Workers' Compensation Law, section 84.01; Sunbeam Corp. v. Bates, 271 Ark. 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F. Supp. 865 (W.D. La. 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer who chooses to preclude an injured worker's re-entry into its workforce likely demonstrates by its own action that the worker has incurred a substantial loss of earning capacity. As has previously been explained in numerous decisions of this agency, if the employer in whose employ the disability occurred is unwilling to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so. Estes v. Exide Technologies, File No. 5013809 (App. December 12, 2006).

The claimant seeks benefits for permanent total disability. The defendants argue his industrial disability is limited.

After carefully considering all the factors of industrial disability, I find the claimant has suffered a 70 percent loss of earning capacity as a result of his work injury.

Mr. Jeske is 71 years old as of the date of hearing. Although he is 71, and drawing Social Security retirement, claimant had clearly not chosen to retire at this time. He is obviously a hard worker and highly-motivated. He has performed hard and heavy work for his entire adult life. He is a high-school graduate, however, is not computer literate. He has significant demand construction skills, however, many of his skills

require manual labor. Claimant, however, is also skilled in running machinery and supervising workers. Based upon the evidence before the agency, I cannot find that claimant is permanently and totally disabled. He testified that he believed there were jobs he could perform and he actually had a job offer.

His functional impairments are significant. I find the ratings of Dr. Taylor are generally reflective of claimant's combined loss of function to his body as a whole (20 percent). Dr. Taylor's restrictions are likely realistic, however, claimant was provided no formal restrictions by his treating physicians. In fact, the record shows, claimant asked for no restrictions.

The employer laid the claimant off and never recalled him. This is likely because claimant is not capable of performing the same work he did for the employer at the time of the injury. This is significant evidence of claimant's lack of employability. Claimant had undertaken a significant and meaningful work search prior to hearing, yet had not secured employment. Given his advanced age and significant medical impairments, it will likely take claimant longer to secure employment.

The next issue is whether the claimant is entitled to reimbursement for an IME from Dr. Taylor as set forth in Claimant's Exhibit 8.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In this case, claimant obtained an independent evaluation from Dr. Taylor before any other physician had provided a rating. Therefore, section 85.39 is inapplicable. I cannot award this as an IME.

While the IME is not reimbursable under section 85.39, a portion of it may be assessed as a cost. In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845 (Iowa 2015), the Iowa Supreme Court held that only the cost of drafting a report in lieu of testimony by a physician is taxable as a cost in a workers' compensation case. In other words, claimant cannot recover the cost of Dr. Taylor's examination but may recover the cost of having the physician draft a report following that examination. Id.

In this instance, Dr. Taylor's bill is clearly split out. (Cl. Ex. 8, p. 71) I find that $2,260.00 of the total bill was for the "report." This amount is taxed as a cost against defendants.

The final issue is penalty. Claimant seeks penalties for late payments based upon the underpayment of rate. Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse.

In this case, the defendants have not presented any evidence as to why they denied the claim when claimant sought treatment in February 2013. The defendants also did not submit any evidence that they performed a contemporaneous investigation. There is no evidence that defendants sent the claimant a denial letter as required by 876 IAC section 3.1(2). Defendants point to evidence in the record calling into question medical causation to support the reasonableness of their denial. (See Def. Ex. B) Reviewing the file as a whole, I find that the denial was fairly debatable.

## ORDER

THEREFORE IT IS ORDERED

All weekly benefits shall be paid at the rate of five hundred and seventy-nine and 18/100 ($579.18).

Defendants shall pay the claimant healing period commencing December 31, 2015, through April 4, 2016.

Defendants shall pay the claimant three hundred and fifty (350) weeks of permanent partial disability benefits commencing April 5, 2016.

Defendants shall pay accrued weekly benefits in a lump sum.

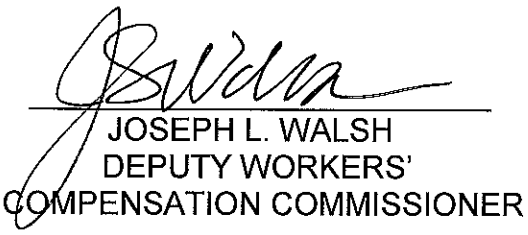
Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay medical expenses as set forth in claimant's exhibit 15.

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

Costs are taxed to defendant, including two thousand two hundred sixty and 00/100 dollars ($2,260.00) for the report of Dr. Taylor in claimant's exhibit 8.

Signed and filed this 25th day of May, 2017.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/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.