BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAY 12 2015
WORKERS' COMPENSATION

RANDY KREISEL, Claimant, vs. CURLY'S, Employer, and INDEMNITY INS. OF N. AMERICA, Insurance Carrier, Defendants.	File Nos. 5044230, 5044231, 5051153 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Randy Kreisel, the claimant, seeks workers' compensation benefits from defendants, Curly's Foods, the alleged employer, and its insurer, Indemnity Insurance Co. of North America, as a result of alleged injuries on August 22, 2011 (File No. 5044230); December 29, 2012 (File No. 5044231); and, September 12, 2014 (File No. 5051153). Presiding in this matter is Larry P. Walshire, a deputy Iowa workers' compensation commissioner. An oral evidentiary hearing commenced on March 31, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on April 14, 2015. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Joint exhibits were marked alphabetically. Defendants did not offer separate exhibits. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Exhibit 1-2:4." References to a page of a transcript shall be to the actual page number of the original transcript, not to the page number of a copy containing multiple pages of the original transcript.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On the dates alleged in the petitions, claimant received injuries arising out of and in the course of employment with Curly's.

2. Claimant is only seeking temporary total or healing period benefits as a result of the September 12, 2014 injury from November 5, 2014 through the present time. Defendants agree claimant has been off work since his last work day at Curly's on November 4, 2014.

3. The work injuries on August 22, 2011 and December 29, 2012 were a cause of some degree of permanent, industrial disability to the body as a whole. If the September 13, 2014 injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. Permanent partial disability benefits shall begin on October 11, 2013 for the August 22, 2011 injury and on June 27, 2014 for the December 29, 2014 injury.

5. Claimant's weekly rate of compensation is $431.22 for the August 22, 2011 injury; $441.67 for the December 29, 2012 injury; and, $441.67 for the September 12, 2014 injury.

6. With reference to the medical expenses requested by claimant listed in Exhibit J, the parties stipulated that the providers of the requested medical expenses would testify as to their reasonableness, and defendants are not offering contrary evidence. Also, with reference to these expenses, they are causally connected to the medical condition(s) upon which the claims herein are based, but that the issue of their causal connection to any of the work injuries remains in dispute.

7. Prior to hearing, defendants voluntarily paid 56 weeks of permanent disability benefits for the 2011 work injury at the stipulated weekly rate (The report indicates a rate of $431.55, but I assume that this is a typographical error); and 39 weeks of permanent disability benefits for the 2012 work injury at the stipulated weekly rate, and these were continuing at the time of the hearing.

The parties also agreed in the hearing reports that defendants' liability for the combined permanent disability as a result of the last two injuries shall be considered satisfied to the extent of the percentage of disability for which the employee was previously compensated as set forth in Iowa Code section 85.34(7)(b)(1). Although parties to litigation cannot limit this agency or the courts to any particular interpretation or application of a statute, the parties' agreement that subsection 85.34(7)(b)(2) does not apply is essentially an agreement that claimant's actual earnings at the time of the last two injuries in this case were not decreased as a result of a preexisting disability. Such is a factual issue that can be stipulated and honored by this agency.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to weekly temporary total or healing period benefits for the 2014 injury and the extent of claimant's entitlement to permanent disability benefits for all of the injuries.

II. The extent of claimant's entitlement to medical benefits set forth in Exhibit J for either or both work injuries in 2012 and 2014, and claimant's entitlement to alternate care for the 2014 work injury.

There was an issue concerning claimant's entitlement to medical mileage reimbursements at the time of hearing. However, defendants have paid claimant these expenses, and both parties agreed that medical mileage is no longer a disputed issue.

FINDINGS OF FACT

In this section of my decision, I shall refer to claimant by his first name, Randy, and to defendant employer as Curly's.

Randy is 59 years old and lives in Ponca, Nebraska with his wife and daughter. Apparently, he dropped out of public school because he testified that he has a GED. (Tr-6:7)

In June 2012, Randy received training in non-destructive nuclear testing in St. Louis. Such testing involves x-raying oil drilling pipes and well heads to verify their specification thickness and to ensure proper welding. He passed the required course and was certified to work with live radiation. His plan was to go to the oil fields in North Dakota in spring 2013. Randy testified he was unable to pursue this work because of the weight lifting limitations imposed by physicians after the stipulated work injury on December 29, 2012. The cameras involved in this job weighed about 45 pounds. He stated the job involved very long hours, but a lot of this was driving to and from testing locations. Despite the long hours, the job provided an opportunity to earn over $200,000.00 annually. (Tr-7:9, 57:59; Ex, 1-1:2)

Randy has had medical problems involving cancer and a stroke unrelated to any of the injuries in this case. Randy states that he has no physical or mental restrictions as a result of these conditions, and there is nothing in the evidence to suggest otherwise. (Tr-53:55)

Randy began working at Curly's as a meat processer in 2004. Before Curly's, he was in federal prison for seven years. He was serving time after pleading guilty to conspiracy to manufacture methamphetamine. Randy states that he has not been in trouble since that time. (Tr-9:10, 75) Before prison, he was a commercial fisherman in Washington, a job requiring heavy manual labor. (Tr- 61).

Randy's first job at Curly's was working on the back rib skinning production line. He subsequently became a forklift driver and was working as a full-time forklift driver at the time of his first injury in this case. (Tr-10)

As stipulated, on August 22, 2011, Randy injured his right shoulder while lifting a heavy "chep" wooden pallet weighing about 75-100 lbs. Randy had previously injured this shoulder and undergone a rotator cuff repair about two to three years prior to this injury. Randy states he suffered no permanent impairment from the prior injury and was subsequently returned to full duty by treating physicians. (Tr-11:13) There is no evidence to the contrary in this record.

Randy was initially treated for a shoulder injury by Mark Morishige, M.D. a board-certified orthopedic surgeon. When conservative treatment failed to improve claimant's symptoms, the doctor performed surgery to repair a rotator cuff tear. Following recovery from that surgery, this doctor provided a permanent impairment rating of 10 percent to the body as a whole, but released Randy back to full-duty work. (Ex. I-169) Randy said that he thought the doctor imposed a restriction against overhead lifting (Tr-18), but I cannot find any change in the release to full duty by Dr. Morishige. Randy states the surgery improved his symptoms and he then returned to his same forklift job at Curly's without problems. (Tr-13:15)

About 1 ½ years later, he suffered an increase in his right shoulder pain again after lifting a pallet, but this time he was primarily treated by Ryan Meis, M.D., another board-certified orthopedic surgeon, because Dr. Morishige had left the area. Dr. Meis recommended another surgery and returned Randy to his forklift job with restrictions. (Tr-15:16)

Before the second shoulder surgery was performed by Dr. Meis, Randy suffered the second stipulated work injury involved in this case. On December 29, 2012, Randy was driving a motorized pallet jack in the plant and was struck by a large stack of wooden pallets that were being moved by another employee driving a traditional fork lift truck. The motorized pallet jack was one that allows an operator to ride on the front end of the jack. Randy was thrown off the jack and he fell into a stack of shelving. The incident was recorded by surveillance camera and shown on a disc in evidence. (Tr-20:25; Ex. 5; Ex-A)

After the forklift incident, Randy was initially treated at a local ER. Defendants then authorized Douglas Martin, M.D., an occupational physician, to treat the symptoms following the injury. On December 31, 2012, Dr. Martin reported contusions to the left knee, left hip and low back and assessed Randy as suffering from left knee and low back strains. Dr. Martin took him off work until the shoulder surgery and prescribed a rubber knee sleeve and use of a knee scooter. (Tr-25:26; Ex. G-137:139)

After the shoulder surgery on January 2, 2013 by Dr. Meis, Dr. Martin continued to follow Randy for the next few months for his knee, hip and back pain with numbness

into the left lower extremity. The doctor prescribed physical therapy. On March 12, 2013, Dr. Martin referred Randy to Wade Jensen, M.D., another board-certified orthopedic surgeon to address Randy's back complaints. Also, at this time, Dr. Martin added a diagnosis of cervical degenerative disc disease. The neck issue will be addressed further below. (Tr-26: 31, Ex. G-140:150) There are no treatment records from Dr. Martin after March 12, 2013. I must assume Dr. Martin ended active treatment for the December 29, 2012 forklift injury about this time.

As previously stated, Dr. Meis performed Randy's second right shoulder surgery on January 3, 2013. After recovery from this surgery, Dr. Meis opined on October 11, 2013, that Randy did not suffer from any additional permanent impairment under the AMA Guides, Fifth Edition, beyond the impairment rated previously by Dr. Morishige. (Ex. B-10) Dr. Meis stated as follows concerning permanent restrictions for the low back injury he treated:

> At this point in time, since he cannot lift his arm above shoulder level, we are going to recommend a permanent restriction of no overhead with a 20 pound lifting restriction because of his weakness.

(Ex. B-8)

This wording of Dr. Meis is a bit confusing. Claimant asserts that the wording provides a restriction against overhead work and a general lifting restriction to 20 pounds. Defendants apparently assert that Dr. Meis only restricted overhead work to 20 pounds.

In response to an inquiry by Randy's attorney to clarify his opinions, Dr. Meis stated as follows:

> For clarification, I would not be able to medically relate any additional range of motion loss from the revision decompression performed on 01/03/2013. Unfortunately, Mr. K (blank space) has additional risk factors for his range of motion loss that would play a larger role in his current limitations. Based on these risk factors, I would be unable to assign any additional rating per the 5th edition above Dr. Morishige's prior review.
>
> At this time, I have not been asked to address the rationale for his permanent restrictions given on his 10/11/2013 exam.

(Ex. B-15)

Randy testified the second shoulder surgery by Dr. Meis did not improve his shoulder pain, and he began to experience neck pain. Dr. Meis then obtained an MRI of the neck. Claimant denies any prior neck problem and wanted further treatment of the neck, but this was initially denied because Dr. Martin opined that the continued neck symptoms were not related to the work injury both before and after reviewing the video of the forklift incident. (Tr-26:29, 66:67) Dr. Martin opined on February 22, 2013 as

follows concerning the causal connection of claimant's neck pain at that time and the fork lift incident in December 2012:

> Please do not misunderstand. I am not trying to say that forklift injury did not occur. I am not trying to say that it may have caused some temporary cervical muscular discomfort. However, to suggest that his current cervical spine situation has causative correlation to the work related incident is simply a lack of understanding of medical science, from the standpoint of causation analysis. As previously indicated, the disk osteophyte complexes and the multilevel degenerative changes are not due to this incident, accumulate over years, and are due to a combination of genetics and other anthropomorphic factors.

(Ex. G-146)

The doctor went on to say that claimant would likely be able to find a physician outside of the specialty of occupational medicine who would causally relate the degenerative condition to Randy's injuries at Curly's because they would be unfamiliar with the scientific literature on the subject. (Id)

Dr. Jensen and Nichole Friessen, PA-C, his assistant, followed Randy's low back problems after the referral by Dr. Martin. When conservative treatment modalities such as physical therapy failed to alleviate Randy's symptoms, Dr. Jensen performed fusion surgery on November 7, 2013, which involved the installation of metal hardware. Randy testified that his condition worsened after this surgery. The doctor released Randy back to work with a permanent restriction against lifting over 49 lbs, and only occasional lifting of weights between 35 and 49 pounds. (Ex. B-16) However, he referred Randy for a functional capacities evaluation (FCE). This was performed on September 9, 2014. Dr. Jensen then adopted the results of that FCE as Randy's permanent restrictions for his low back injury. (Tr-31:33), Ex. B-19) Dr. Jensen opines that Randy suffered a 20 percent permanent partial impairment to the body as a whole from his back injury. (Ex. B-16)

From his testing, the FCE evaluator, Timothy Saulsbury, PT, DPT, reports that Randy is restricted to the sedentary-light physical demand level. Randy was found to be able to work 8 hours a day, but his lifting is limited to 18 pounds and back lifting is limited to 15 pounds. Randy also was found to be only capable of infrequent squatting, kneeling, and stair climbing, but cannot crawl. I find the report of Randy's bending abilities confusing because on page 107 the report states that Randy is able to bend constantly, but later on page 117, the report shows him only able to bend infrequently. The evaluator did not limit Randy's standing, sitting, walking or forward reaching abilities. Finally, the evaluator found the overall results of the FCE valid after applying validity criteria. (Ex. E-105:107)

Randy testified that he has more limitations than reported by the FCE. He states that he can only stand in a bent over position for 30 minutes before experiencing

unbearable pain. He states that he can only stand about 10-15 minutes before his legs go numb and he experiences pain. (Tr-33:34)

Upon referral by Dr. Jensen, Frederick Fisher, M.D. began treating Randy on April 5, 2013 for pain management. (Tr-41) This treatment consisted of injection therapy and pain control with opioid medications. Randy continues under Dr. Fisher's care today and is currently taking Morphine Sulfate and Oxycodone-Acetaminophen prescribed by Dr. Fisher. Randy has signed the usual drug use agreements required by law for long-term opioid use. Randy states that he is complying with that agreement and has not sought additional narcotics from any other source. (Ex. K) There is no evidence in the record to suggest otherwise.

Randy returned to work under the FCE limitations by Dr. Jensen. He testified that he was assigned to light duty cleaning the floor in the skinning room. While performing this job, he suffered his third stipulated work injury on September 12, 2014. Randy stated that as he was exiting the area near the trash compactor, a co-worker pulled the garage door down and the top of his head was struck by the door. Apparently, there was a video of this incident. A disc supposedly containing this video was submitted into evidence (Ex. 6), but it could not be played at hearing and I was unable to review it as well. Randy stated that he did not report the incident, which occurred on a Friday to his supervisor until the following Monday. The incident was investigated by Curly's management, and Randy was disciplined for committing an unsafe act and failure to immediately report the injury. Randy testified that he believes the language used by the human resources manager, Kathy Peterson, suggests he intentionally injured himself to advance his neck injury claim. (Tr-38) Peterson testified the report does not suggest an intentional injury. (Tr-86:87, 91:92) I agree with Peterson. The disciplinary report only states that Randy committed an unsafe act by dodging underneath the door while it was closing and injured himself. I do not see this language as implying an intentional injury. (Ex. 2) Peterson, however, testified that she does not believe Randy has been credible in asserting the neck injury because of the delay in reporting his neck pain to treating doctors after the forklift injury. (Tr-99)

Following the door incident, Randy was provided initial care by Dr. Martin for neck and thoracic spine pain. This doctor subsequently referred Randy to William Samuelson, M.D., another board-certified orthopedic surgeon to address the neck and thoracic symptoms. Dr. Samuelson evaluated Randy in January 2015 and recommends surgery for the neck symptoms. However, the doctor refuses to perform the surgery until Randy ends his use of opioids, because the doctor believes such use hampers healing. The doctor recommends that Randy undergo drug addiction therapy to accomplish this. A neurologist in the doctor's clinic agrees. (Tr-39; Ex. I-171:172) Dr. Samuelson states that if Randy chooses not to go through detoxification, he would place him at MMI for the neck injury. (Ex. I-173) The doctor simply adopts the results of the September 2014 FCE as the restrictions for the neck injury, but adds that an on-site evaluation could be done by the physical therapist to assist the employer in job placement. (Ex. I-174) Dr. Martin continues to opine that Randy's neck problems are unrelated to any work injury in this case. (Ex. G-161)

Randy testified that he discussed the views of Dr. Samuelson with Dr. Fisher, and Dr. Fisher told him he is not comfortable taking Randy off his medication. Dr. Fisher has referred Randy to a neurosurgeon, a Dr. Durward, for another opinion on surgery. Randy's first visit with this doctor was not scheduled until after the hearing. (Tr-39:41)

Randy continued working at Curly's after the door injury and he states he was getting along fine with the trash cleanup job because he was able to change positions and avoid the lifting prohibited by the FCE. However, he was taken off that job and placed into a regular production line job of spare rib line dumper. Randy states that he cannot do production line work due to his inability to stand in one place for long periods of time. Randy also testified Curly's management took him off that job because he was too slow. Randy states that he is unable to use his right hand to rapidly hook the meat. He then was placed on the back rub line skinning ribs. At this time, Randy said that after eight days he began to have sweating spells from the pain. He then was taken off that job and according to Randy he was sent home. Randy said the nurse case manager then referred him to Dr. Wynkoop, at Tri-State Specialists, the same clinic as Drs. Meis, Jensen and Samuelson. Randy said Dr. Wynkoop gave restrictions against standing as a result of his neck complaints, and he has not returned to Curly's since. (Tr- 43:46) There is a physician by the name of Walter Wynkoop at Tri-State, but no records or reports from him appear in the evidence received at hearing.

Randy states that in September 2014, he was asked by Curly's management to sign a written form stating he was refusing to accept the production line jobs discussed above that were within his work restrictions. Randy refused and attached an affidavit stating that he is unable to perform these jobs due to weakness in his right arm and shoulder and inability to stand for long periods of time. Randy stated that he is unable to stand for more than 15 minutes without changing positions. (Ex. 3)

Peterson, the human resources manager, testified that this change in job assignments occurred when she discovered that a lead person was assisting Randy in lifting, and there were too many people assigned to that task. She claims that all of the production line jobs assigned to him after the trash job and many other jobs in the plant are within the restrictions set forth in the September 2014 FCE report. She states there are no standing restrictions in that report or in any other report possessed by her. (Tr-88:90, 94:100)

Randy continues under the care of Dr. Fisher. Randy states that defendants' nurse case manager attends all of his appointments with Dr. Fisher. The doctor referred Randy for psychological counseling, and a listing of the counseling sessions from June 6, 2014 through January 28, 2015 appears in Exhibit J. These expenses total $4,500.00. Defendants have not shown they provided to claimant any notice that Dr. Fisher is not an authorized physician.

In September 2014, at the request of his attorney, Randy was evaluated by Sunil Bansal, M.D., an occupational medicine specialist. Dr. Bansal agrees with the

10 percent impairment ratings by the treating orthopedists for the shoulder injury. He, however, adopts the September 2014 FCE as the restrictions for this injury. (Ex. C-38:39)

Dr. Bansal adds an additional 1 percent impairment rating to the 20 percent rating by Dr. Jensen and causally relates all of the impairment to the December 29, 2012 injury. He also adopts the limitations in the FCE report for this injury, but adds an additional restriction against standing more than 30 minutes based on Randy's complaints. He explains that the limited time during the FCE would not accurately ascertain Randy's ability to stand for long periods of time. (Ex C-21)

Finally, Dr. Bansal disagrees with Dr. Martin and causally relates the neck problems to the December 29, 2012 forklift injury and the September 2014 door injury. Dr. Bansal explains that these injuries did not cause the preexisting arthritis, but they did light up or aggravate the preexisting condition. He bases this opinion on claimant's report of no prior neck problems. (Ex. 41:42) He recommends further treatment of the neck problems. However, he opines that absent further treatment, Randy would suffer an 8 percent permanent impairment to the body as a whole for the neck injury.

I find that the right shoulder injury of August 22, 2011 is a cause of a 20 percent loss of Randy's earning capacity. I find that this work injury is a cause of a 10 percent permanent partial impairment to the body as a whole and permanent restrictions against overhead work and a general restriction against lifting over 18 pounds. I do not find convincing defendants' interpretation of Dr. Meis' restriction to only restrict overhead work that exceeds 20 pounds. It would be unlikely for Dr. Meis to place a weight limit on just overhead work when the doctor clearly states that Randy cannot raise his arm above shoulder level which would prohibit any overhead work. I find the September 2014 FCE assessment limiting shoulder lifting to 18 pounds and prohibiting overhead work is more descriptive of Randy's current shoulder condition and quite similar to the restrictions imposed by Dr. Meis. An inability to lift more than 18 pounds and to perform any overhead work with his right arm, would result in a significant loss of access to a large number of manual labor jobs. His advanced age also aggravates his ability to secure such work. On the other hand, following treatment for the August 22, 2011 injury, Randy was able to return to his forklift job without any loss of wages and to avoid competing with younger, healthier workers in the labor market.

I find that both the right shoulder injury of August 22, 2011 and the low back injury of December 29, 2012 resulted in a combined permanent loss of earning capacity of 60 percent. The restrictions set forth in the FCE are again significant. The limitation of back lifting to 15 pounds further prohibits any return to medium or heavy work and many light duty jobs. Such a loss of employment opportunity for a man of Randy's age is particularly troublesome. Also, Randy is now dependent on opioid medications for pain relief as a result of these work injuries. Even Dr. Martin questions the appropriateness of a return to work while being prescribed opioid medications. (Ex. G-141)

Randy's last day at Curly's was November 4, 2014. I find that at that time Randy refused suitable work offered to him. Randy asserted that he is unable to perform these jobs due to an inability to rapidly use his right arm hooking meat due to weakness and inability to stand for long periods in one place. However, the FCE does not prohibit repetitive reaching or prolonged standing. If Randy does indeed have such limitations, he has not shown they are related to any of the injuries in this case. Dr. Bansal, as an occupational physician, certainly provides a restriction against standing, but that is not convincing when compared to the views of Drs. Jensen and Samuelson, both of whom are treating, board-certified, orthopedic surgeons. Randy claims that another board-certified orthopedist has restricted standing, but this has not been shown in this proceeding.

I find that Randy's neck complaints are causally related to both the shoulder injury on August 22, 2011 and the back injury of December 29, 2012. I agree with the views of Dr. Bansal that the injuries lighted up or aggravated a preexisting condition. A delay of a few weeks in experiencing symptoms is not unusual when a significant shoulder or back injury initially masks other problems. Dr. Martin apparently concedes that there was at least a temporary neck injury, but he fails to explain why Randy continues to have this chronic neck pain after these injuries and did not have such chronic pain before these work injuries. Dr. Martin appears to only address the cause of the degenerative condition. However, Randy is not claiming the underlying condition is work related, only the aggravation of that condition which apparently continues to this day. Admittedly, Dr. Bansal's report shows a history of a few prior neck complaints in 2006 and 2011. Such a history appears to conflict with claimant's assertion that he had no prior neck problems. However, there is no evidence of any prior chronic neck pain, as it appears that these prior symptoms subsided after treatment and did not adversely impact his employment.

I am unable to find at this time whether or not the neck or cervical spine pain adds to the permanent disabilities caused by shoulder and back injuries. Claimant has not achieved maximum medical improvement for the neck problems because he requires additional surgery, and the treating doctors, Dr. Fisher and Dr. Samuelson, disagree as to the propriety of ending Randy's use of opioids before undergoing such a surgery. An additional evaluation by Dr. Durward may shed more light on this issue.

I find that claimant is in need of reasonable and necessary treatment of his current cervical spine or neck complaints, and this includes further evaluation by Dr. Durward or further treatment modalities recommended by Dr. Fisher.

CONCLUSIONS OF LAW

I. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404.408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192.

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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 workers' 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 worker's qualifications intellectually, emotionally and physically; the worker's earnings 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 Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

The parties agreed in the hearing reports submitted at hearing that the shoulder and back injuries are a cause of some degree of permanent industrial disability to the body as a whole. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

A showing that claimant had no loss of his job or actual earnings as a result of a work injury does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. However, advanced age's adverse impact on employability is a proper factor in determining industrial loss. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995).

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

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, 617 (Iowa 1995). Ending a prior accommodation is not a change of condition warranting a review-reopening of a past settlement or award. U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997).

This case involves successive injuries with the same employer. This invokes the provisions of Iowa Code section 85.34(7)(b) which govern how successive injuries are to be assessed and what credits should be given to the employer for past payments of weekly benefits. As stated in the first part of this decision, the parties correctly chose the application of subsection 85.34(7)(b)(1) to the facts of this case, as claimant's income did not decrease after the injuries.

Under 85.34(7)(b)(1), when a subsequent work injury occurs while working for the same employer and the subsequent injury is compensated under the same subsection of Iowa Code section 85.34(2), then this agency is to determine the combined disability that is caused by both injuries and then the employer's liability for the combined disability shall be considered satisfied to the extent of the percentage of disability for which the employee was previously compensated. For the reasons set forth in the Findings of Fact, I found that claimant suffered a 60 percent loss of his earning capacity as a result of both the injury on August 22, 2011 and the injury on December 22, 2012. Such a finding entitles claimant to 300 weeks of permanent partial disability benefits as a matter of law, which is 60 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in Iowa Code section 85.34(2)(u).

Because we are assessing disability for both first injury and the combined disability from the first and second injury in the same proceeding, ambiguity arises in awarding benefits 85.34(2)(b). If we are to award benefits for the first injury for a 20 percent industrial loss and then award benefits for the combined industrial loss of 60 percent, claimant would receive a double recovery for the first injury.

To avoid this double payment, we could only award benefits for a combined disability from the successive injuries pursuant to subsection 85.34(7) and not award benefits separately for the first injury, which we would normally do under subsection 85.34(2). On the other hand, we could award full benefits for the first injury and then deem that portion previously paid because the employer would be ordered to pay for this disability in this proceeding. To do this, however, would ignore the plain language of section 85.34(2)(b)(1) that provides a credit only for a prior disability that was previously satisfied.

Another ambiguity arises concerning the credit for the voluntary payment by defendants for permanent disability arising from the second injury. Such payments could be interpreted as a credit under section 85.34(7)(b) as partially satisfying the prior disability. On the other hand, the credit to be given under section 85.34(7)(b) must be for only payments made prior to the second injury. I agree with the second interpretation as consistent with the purposes of the statute, although in this case either interpretation would result in the same award of weekly benefits.

Unfortunately, I have no guidance from the courts or agency precedent to guide me in applying Iowa Code section 85.34(7)(b) or resolving the ambiguities arising in this proceeding.. In cases of ambiguity or unclearness, it has long been the law of Iowa that a statutory provision in the Iowa Workers' Compensation Acts should be interpreted in favor of the injured worker. Ewing v. Allied Const. Services, 592 N.W.2d 689 (Iowa 1999); Myers v. FCE Services, Inc. 592 N.W.2d 354 (Iowa 1999); Danker v. Wilimek, 577 N.W.2d 634 (Iowa 1998); Haverly v. Union Const. Co., 18 N.W.2d 629 (Iowa 1945); Conrad v. Midwest Coal Co., 3 N.W.2d 511 (Iowa 1941).

Therefore, the best interpretation of subsection 85.34(2)(b)(1) in a case where we are adjudicating disability for the first and second injury in the same proceeding is to not separately award permanent disability benefits for the first injury under subsection 85.34(2) and only award benefits for the combined disabilities for the first and second injuries pursuant to subsection 85.34(7)(b). We should also limit the credit under that subsection to only the weekly benefits paid for the first injury prior to the second injury. Indeed, this interpretation does compensate the portion of the combined disability caused by the first injury at the higher rate of compensation for the second injury. However, this is not a new concept. Under the former full responsibility rule, there was no apportionment of the prior disability, and the combined disability was always paid at the weekly rate for the second injury. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995); Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995). The Supreme Court has recently held that apportionment is still improper under Iowa Code section 85.34(2)(b). Roberts Dairy v. Billick, (Iowa Supreme Court opinion, No. 13-1009, April 3, 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009). The only change in the law from Iowa Code section 85.34(7)(b) is to provide a credit for the employer who has previously compensated a prior disability. (Id)

Defendants shall still receive a full credit against the award for the combined disability for weekly benefits paid to claimant after the second injury and prior to hearing.

Therefore, I shall provide no credit against the employer's liability for the combined disability of 60 percent, and award benefits accordingly using the commencement date and weekly rate stipulated in the hearing report for the December 22, 2012 injury. This entitles claimant to 300 weeks of permanent partial disability benefits as a matter of law, which is 60 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in Iowa Code section 85.34(2)(u). It was stipulated that claimant was paid 56 weeks of benefits for this injury at the stipulated rate of $441.67 prior to hearing. Defendants shall receive a credit for this prior payment against the award for the combined disability.

Although I found the neck problems causally related to the December 22, 2012 injury and the September 12, 2014 work injuries, I was unable to determine the permanent impact of the neck problems because I did not find claimant had achieved

maximum medical improvement for his neck condition because he requires additional medical for that condition. I will be awarding the alternate care.

Claimant's entitlement to permanent partial disability also entitles him to weekly benefits for healing period under Iowa Code section 85.33 and 85.34(1) for his absence from work during a recovery period until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first. A refusal of suitable work terminates these weekly benefits for the period of the refusal pursuant to Iowa Code section 85.33(3).

In this case, the claimant only sought temporary total or healing period benefits after claimant's last day of work at Curly's. I found that claimant refused to accept work offered by the employer which was within claimant's permanent restrictions caused by his work injuries. Therefore, claimant is not entitled to further temporary total or healing period benefits. If, indeed, he has additional physical limitations beyond the FCE, he has not shown them to be related to any of these injuries in this proceeding.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Iowa Code section 85.27 also provides this agency the authority to order medical care different than was authorized by the employer upon a proper showing of the necessity of such care.

In this proceeding, claimant is seeking payment of unpaid expenses for psychological counseling set forth in Exhibit J. I found that claimant was referred to the counselor by Dr. Fisher. I also found that Dr. Meis referred claimant to Dr. Fisher and defendants have not objected to treatment by Fisher. I found that Dr. Meis was authorized to treat claimant by defendants. I also found that defendants have not shown that they provided prior notice that Dr. Fisher or the counselor are not authorized and they will no longer pay for such care, as required in Iowa Code section 85.27(4). Treatment received by a provider referred by an authorized provider generally constitutes authorized treatment absent a showing by defendants that they provided notice to claimant that they will not be paying for such care. Workers' Compensation, Iowa Practice 15, (2014-2015), section 15-2, p. 199.

ORDER

1. Defendants shall pay to claimant three-hundred (300) weeks of permanent partial disability benefits at the stipulated rate for the second injury of four-hundred forty-one and 67/100 dollars ($441.67) per week from the stipulated commencement date for

the second injury which is June 27, 2014. Defendants shall receive a credit for the fifty-six (56) weeks previously paid.

2. Defendants shall pay accrued weekly benefits in a lump sum.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay or hold claimant harmless from the costs of the counseling sessions set forth in Exhibit J which total four-thousand five-hundred and 00/100 dollars ($4,500.00).

5. Defendants shall provide all reasonable and necessary medical care for claimant's current neck or cervical spine symptoms. This shall include further care for the neck problems by Dr. Fisher or further care upon referral by Dr. Fisher, including the assessment and any care recommended by Dr. Durward.

6. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

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

Signed and filed this 12th day of May, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.