

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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RODNEY CLARK,

Claimant,

vs.

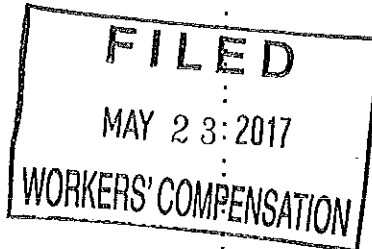
CITY OF OSCEOLA.,

Employer,

and

IMWCA.,

Insurance Carrier,  
Defendants.



File No. 5054494

ARBITRATION DECISION

HEADNOTE NO: 1803

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STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Rodney Clark, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on September 8, 2015. Claimant alleged he sustained a work-related injury on February 7, 2014. (Original notice and petition.)

For purposes of workers' compensation, The City of Osceola, defendant, is insured by IMWCA, defendant. A first report of injury was filed on February 22, 2014. Defendants filed their answer on September 4, 2014. They admitted the occurrence of the work injury.

The hearing administrator scheduled the case for hearing on August 23, 2016. The hearing took place in Des Moines, Iowa, at the Iowa Workforce Development Building. The undersigned appointed Ms. Amy Pedersen as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Ms. Valerie Jean Clark, spouse of claimant, also testified. Defendants elected not to call any witnesses at the hearing. The parties offered exhibits. Claimant offered exhibits marked 1 through 15. Defendants offered exhibits marked A through K.

Post-hearing briefs were filed on September 30, 2016. The case was deemed fully submitted on that date. The transcript of the proceedings was filed on October 4, 2016.

### STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on February 7, 2013 which arose out of and in the course of her employment;
3. Temporary benefits are no longer an issue;
4. The parties agree permanency is found,
5. The permanency is an industrial disability;
6. The parties agree; claimant reached maximum medical improvement on March 11, 2014;
7. The parties agree, the weekly benefit rate is \$1,079.79;
8. Medical benefits are not at issue;
9. Prior to the date of the hearing, defendants paid claimant 95 weeks of permanent partial disability benefits at the rate of \$1,079.79 per week; and
10. The parties agree certain costs that are detailed were paid by claimant.

### ISSUES

The issues presented are:

1. To what extent is claimant's permanent partial disability?
2. For which costs are defendants liable?

### FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and his spouse at hearing, after judging their credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

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

Claimant is 62 years old and right hand dominant. Claimant is morbidly obese with a protuberant stomach. His body mass index is approximately 39.

Claimant is married with adult children. He has a high school diploma from Afton, Iowa. He has taken a few college courses, especially in fire safety.

Claimant has been a volunteer fire fighter for the City of Osceola since 1981. Prior to 1981, claimant volunteered as a fire fighter for the City of Afton. Usually claimant drove the fire truck in Osceola and operated the pumper.

He resides in Osceola, Iowa. The town has fewer than 5,000 residents and is located in Clarke County. There are two unique aspects about the town of Osceola. Amtrack Rail Service stops in the town and there is a medium-sized gambling casino with a hotel and concert theatre. The casino employs many people in and around the area.

Claimant detailed his work history in his answer to defendants' interrogatory 3. (Exhibit 14 page 185) He held positions at Lakeshore Golf and Country Club, Spahn and Rose Lumber Company and Jimmy Dean Meat Company.

In 1992, claimant and his spouse opened their own business, Clark's New & Used Consignments. Claimant testified the business was in operation at the time of the arbitration hearing. Claimant testified he sells furniture, accessories and tools.

All the parties are in agreement; claimant sustained an injury on February 7, 2014, which arose out of and in the course of claimant's duties as a volunteer fire fighter for the City of Osceola. Claimant slipped and fell on the ice while he was battling a house fire. Claimant has no actual recall of the accident.

Claimant was air-lifted by helicopter to Mercy Medical Center in Des Moines from a medical facility in Clarke County. A myriad of CT scans was taken of various parts of claimant's body. For example:

#### CT HEAD AND CERVICAL SPINE WITHOUT CONTRAST

Impression:

1. No acute intracranial pathology.
2. No acute process involving the cervical spine.

(Exhibit D, p. 17)

### PORTABLE PELVIS

1. An AP view of the pelvis demonstrates an intact pelvic ring. There is no diastasis of the public symphysis or SI joints. Alignment at the hips is anatomic.

(Ex. D, p. 18)

Brandon Sumner, M.D., opined claimant had no acute traumatic injuries. (Ex. D, p. 4) Because of a negative work up, claimant was released home. (Ex. D, p. 4)

Three days later, claimant presented to Clarke County Family Medicine. Claimant reported to Julia C. Jenkins, D.O., how he had lost consciousness when he was out on a fire call. Claimant indicated he was experiencing headaches, memory issues, problems with his balance and some low back pain. (Ex. 2, p. 8) Dr. Jenkins diagnosed claimant with back pain, a concussion, a resolved fall and a head injury. (Ex. 2, p. 9) Several weeks later, the doctors at the clinic ordered physical therapy. (Ex. 2, p. 12) Drug therapy was introduced too. Later, claimant also complained of some head swelling. (Ex. 2, p. 15) On occasion claimant experienced muscle spasms around the lumbosacral spine. (Ex. 2, p. 16) On March 24, 2016, claimant reported daily headaches. (Ex. 2, p. 20) Claimant related his headaches to activity. (Ex. 2, p. 22)

A referral to Steven Adelman, D.O., a neurologist, was made because of claimant's headaches, memory issues and back pain. The initial encounter occurred on May 8, 2014 at the Mercy Ruan Neurological Clinic. (Ex. C, p. 9) Dr. Adelman noted claimant had a family history of Alzheimer's disease. (Ex. C, p. 10) Dr. Adelman diagnosed claimant with:

1. Cerebral Concussion
2. Posttraumatic headache.

(Ex. C, p. 11)

Dr. Adelman summarized claimant's condition as follows:

Mr. Clark is a 59-year old man who fell on the ice on February 7 striking his head and back and suffering transient loss of consciousness. He was airlifted to Mercy and had a normal CT scan of his brain, CT scan of the cervical spine, chest x-ray, and pelvis x-ray.

He has current complaints of headache particularly worse if he bends over or laughs, mid back pain, and memory disturbance. I will defer to his primary care physician regarding his mid back discomfort as there is nothing on his examination to suggest an underlying myelopathy or radiculopathy. Whether in fact is back pain simply musculoskeletal in

nature or he has some degree of the thoracic compression fracture is not clear.

I believe his memory disturbance is related to issues of chronic pain and lack of focus as opposed to primary cognitive dysfunction following his trauma.

I believe he did suffer a cerebral concussion and currently is experiencing posttraumatic headaches. I've elected to place him on naproxen to take 375 by mouth twice a day with meals for 10 day course in call us with a progress report. Should he remain symptomatic consideration for MRI of the brain would be entertained. I would not change the restrictions that have been placed on him primarily because of his mid thoracic discomfort.

(Ex. C, p. 11)

On June 11, 2014, claimant had MRI testing of his brain. (Ex. D, p. 15) Indunil Karunasekera, M.D., interpreted the results as:

Impression:

1. No intracranial mass, infarction or extra axial collection.
2. Scattered foci of nonspecific supratentorial white matter T2 hyperintensities suggestive of mild small vessel ischemic change.

(Ex. D, p. 15)

Claimant returned to Dr. Adelman on July 22, 2014. (Ex. C, p. 12) Claimant reported his headaches were worse than they had been in May. (Ex. C, p. 12) Dr. Adelman assured claimant there was no "serious or structural cause for the headaches." (Ex. C, p. 14)

Claimant treated with his family physicians for his cervical, thoracic and lumbar spine. (Ex. 2, p. 16) Claimant participated in physical therapy. The muscles adjacent to the spine were tender. (Ex. 2, p. 28) Claimant was advised to use hot and cold for his back. (Ex. 2, p. 30)

With respect to the spine, George N. Fotiadis, M.D., noted:

Neck: Some tenderness over the posterior neck on either side of the cervical spine. It is worse at the base of the neck and the top of the trapezius muscle.

Upper back shows tenderness on either side of the thoracic spine from the area between the tips of the scapula to the back of the neck. There is

some tenderness extending from the thoracic spine to the medial edges of the scapula. Trapezius muscle tenderness is felt to be present.

(Ex. 2, pp. 31-32)

The lower lumbar spine is tenderness throughout the lumbar curve. Most of tenderness on either side lumbar spine. The sacroiliac joints show tenderness as well.

(Ex. 2, p. 34)

Defendants authorized treatment with Charles Mooney, M.D., at McFarland Clinic in Ankeny, Iowa. The initial appointment occurred on January 20, 2015. (Ex. 6, p. 69) Dr. Mooney assessed claimant's condition as:

1. Evidence of closed head trauma with brief loss of consciousness, with questionable ongoing cognitive deficits.
2. Symptoms of chronic low back pain without significant radicular pain, but questionable radicular symptoms.
3. Mildly positive Romberg, and possible mild myelopathic findings.

(Ex. 6, p. 72)

Dr. Mooney did not impose specific work restrictions. However, Dr. Mooney recommended claimant refrain from driving hazardous machinery or from placing himself in safety sensitive positions due to claimant's perceived cognitive deficits. (Ex. 6, p. 72)

Per a referral from Dr. Mooney, Derek A. Campbell, Ph.D., a clinical neuropsychologist, examined and tested claimant for cognitive and emotional difficulties following claimant's concussion. (Ex. 7) In his report, Dr. Campbell summarized his findings as follows:

1. This presentation and history suggests moderate neuropsychological dysfunction consistent with a moderate traumatic brain injury suffered on 02/06/2014.
2. The most striking cognitive features of the neuropsychological profile are moderately diminished learning and delayed recall capacities (consistent with his report of forgetfulness). Additionally, formal assessment appears to substantiate his report of occasional word-finding difficulty, as he performs within impaired ranges on measures tapping fluency of speech and naming skills. Milder compromise is suggested in abstract reasoning.

3. The cognitive difficulties suggested by report and testing do not appear significantly attributable to somatic discomfort at this point in recovery (note is made of his neurologist's suspicion offered during a consult in April 2014 that pain significantly interfered with mental focus).
4. In addition to cognitive dysfunction, available reports suggest mood dysregulation and personality change following the injury. Most notably, he appears depressed, much less tolerant of frustration, and mildly more impulsive relative to pre-injury functioning.
5. Further spontaneous neurologic improvement is not anticipated from this point forward, given that this exam is completed in the chronic epoch of recovery. Nonetheless, our impression is that he has not reached maximum improvement from a neuropsychological standpoint and further treatment efforts appear reasonable (see below).

(Ex. 7, pp. 94-95)

Dr. Campbell made some recommendations for claimant's treatment. They included:

1. He likely would benefit from several sessions of cognitive rehabilitation to improve focus in the face of distractions and develop compensatory strategies for learning and memory difficulties. This treatment likely would be available from a speech-language pathologist near his locale.
2. We recommend that he consider psychotropic medication for the treatment of depressive symptomatology.
3. He might benefit from several sessions of psychotherapy to address irritability, improve control of impulses, and possibly develop coping strategies for chronic pain.

(Ex. 7, p. 95)

On April 16, 2015, claimant commenced psychological counseling with Amy Mooney, PhD, a licensed mental health counselor. (Ex. 9, p. 119) Dr. Mooney's early diagnosis was:

1. Depressive Disorder due to medical condition-Traumatic Brain Injury
2. Moderate Traumatic Brain Injury

(Ex. 9, p. 122)

Dr. Mooney taught claimant certain coping skills. The psychologist provided alternative ways and methods for claimant to handle stressors in his life, to control impulsive behavior and to reduce irritability. Dr. Mooney attempted to educate claimant and his spouse about traumatic brain injuries, and how to relax. The last therapy session occurred on August 26, 2015. (Ex. 9, p. 134)

Claimant also consulted with Jerry L. Augspurger, M.D., a board certified psychiatrist. Dr. Augspurger diagnosed claimant with:

1. Depressive Disorder due to medical condition-Traumatic Brain Injury
2. Traumatic Brain Injury

(Ex. 10, p. 137)

Dr. Augspurger prescribed various medications to treat claimant's depression and anxiety. (Ex. 10, p. 137) Claimant was advised to follow up with an appointment in six months. Claimant did not do so. (Ex. 10, p. 137)

On April 8, 2016, claimant presented to Dr. Charles Mooney for an evaluation in anticipation of a permanent impairment rating. (Ex. 6, p. 89) Dr. Mooney conducted a physical examination of claimant's spine, lower extremities, and upper extremities. (Ex. 6, pp. 89-90) Dr. Mooney assessed claimant as having the following conditions:

1. Status post closed head trauma with ongoing symptoms of headache, evidence of mild to moderate findings of brain injury on neuropsychiatric testing associated with symptoms of depression and mild cognitive dysfunction.
2. Evidence of ongoing thoracic back pain, status post radiofrequency ablation.
3. Ongoing complaints of low back pain with loss of motion.
4. Evidence of right shoulder motion limitation unrelated to date of injury 02/06/14.

(Ex. 6, p. 90)

Dr. Mooney provided a permanent impairment rating for claimant. The following is the method the physician used to calculate the rating:

**IMPAIRMENT:**

It is my opinion based on the Guides to Evaluation of Permanent Impairment published by the AMA 5<sup>th</sup> edition, that Mr. Clark does



demonstrate evidence of partial permanent impairment. This is found on the guide beginning on page 384 under DRE lumbar category 2. It is my opinion that a 5% whole-person impairment is evident related to ongoing lumbar pain with loss of motion and non-verifiable radicular complaints.

Further, it is my opinion that he has evidence of thoracic spine impairment found on page 389 under DRE thoracic category 2, also demonstrating loss of motion, non-verifiable radicular complaints, and aggravation of underlying degenerative facet disease. A 5% whole-person impairment is applicable.

It is my opinion that additional impairment is found on page 320, table 13-6. It is my opinion based on his evidence of mild to moderate brain injury that a 10% whole-person impairment is applicable as it relates to his cognitive dysfunction and depression symptoms related to closed head trauma. It is my opinion that this impairment should be corroborated by consulting psychiatrist, Dr. Terry Augspurger.

Using the combined values tables this provides for a 19% whole person impairment.

(Ex. 6, p. 90)

Dr. Mooney also imposed various restrictions. The physician opined claimant was capable of working within the light category of work. (Ex. 6, p. 90) In other words, claimant was capable of lifting a maximum lift of 40 pounds on a rare occasion. Claimant was able to lift from floor to waist of 20 pounds on an occasional basis and he could lift 10 pounds from knee to waist on a frequent basis. (Ex. 5, p. 90) Dr. Mooney precluded claimant from climbing stairs repetitively, climbing open ladder rungs, and from working above ground. Claimant was also precluded from operating hazardous machinery. He was allowed to operate his own personal vehicle. (Ex. 6, p. 90) Dr. Mooney recommended a functional capacity evaluation for claimant.

On June 29, 2016, claimant underwent a functional capacity evaluation at Physio@Work. (Ex. 11, p. 138) Mr. Marc Vander Velden, DPT, determined there was consistency of effort on the part of claimant. The physical therapist opined:

Based on the results obtained Mr. Clark is able to perform within the LIGHT Physical Demand Category of work with occasional lifting from floor to waist height to 19 pounds. Knuckle to Waist to 40 pounds. Mr. Clark lifted 20 pounds to shoulder height and 15 pounds overhead. Mr. Clark carried 35 pounds. Pushing abilities were evaluated and Mr. Clark pulled 35 horizontal force pounds and pushed 40 horizontal force pounds respectively.

....

Mr. Clark is able to work part time and perform sitting occasionally and standing occasionally throughout the workday. He needs to change sitting and standing position every 30 minutes.

(Ex. 11, p. 138)

On July 1, 2016, Sunil Bansal, M.D., M.P.H., performed an independent medical examination pursuant to Iowa Code section 85.39. Dr. Bansal diagnosed claimant with the following conditions:

HEAD:

Traumatic brain injury.

BACK:

Aggravation of lumbar facet arthropathy.

DEPRESSION:

Depression

(Ex. 12, p. 171)

Dr. Bansal rated claimant as having a permanent impairment. The following paragraphs explain how Dr. Bansal arrived at his ratings:

HEAD:

Ms. [Mr.] Clark suffers from a constellation of neurological impairments classified under the general descriptor traumatic brain injury. While the Guides do not proffer an absolute tabular impairment percentage for traumatic brain injuries, it is left to the medical examiner to infer from the Guides a ratable percentage based on qualitative categories set forth. This inference is based on correlating neurological impairments into functional impairments.

He has considerable cognitive problems as reflected by the deficits in his short term memory, concentration and focus. He performed poorly on his MMSE and his neuropsychological evaluation indicating moderate dysfunction.

The National Institute of Neurological Disorders states that cognitive and emotional symptoms include behavioral or mood changes, confusion, and

trouble with memory, concentration, attention, or thinking are quite common ("NINDS Traumatic Brain Injury Information Page" National Institute of Neurological Disorders and Stroke. 2008-09-15).

The Guides base neurological impairments on the clinical dementia rating scale (CDR). Looking at Tables 13-5 and 13-6, we find that Mr. Clark has mostly elements of Class I (CDR of 0.5) with some elements of Class 2 (CDR of 1.0). **I assign a rating of 8% of the whole person based on the above assessment.**

VERTIGO:

Per Table 11-4, he qualifies for a Class II impairment. He is assigned a **2 % whole person impairment**. He has objective signs of vertigo (positive Dix-Hall Pike). It is functionally impairing.

RIGHT ARM

No ratable impairment.

BACK:

With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides)**, Table 15-3, based on his current symptomatology and physical examination, he meets the criteria for a DRE Category II impairment. He has radicular complaints, guarding and loss of range of motion. He is assigned a DRE Category II rating of **5% of the whole person**.

DEPRESSION:

The AMA Guides of Evaluation for Permanent Impairment does not have a rating methodology system for mental health disorders. However, per Table 14-1 they have a method for classifying the level of functional impairment based on five areas.

At the time of the examination, he was assessed a class 2 on social function, class 2 on concentration, class 2 on activities of daily living, and class 2 on adaption.

(Ex. 12, pp. 172-174)

In other words, claimant had a mild impairment for any mental health disorders. (Ex. 12, p. 174) He was capable of useful functioning in most situations. (Ex. 12, p. 174) Dr. Bansal agreed with the restrictions imposed by the physical therapist who conducted the June 29, 2016 functional capacity evaluation. (Ex. 12, p. 174)

Defendants hired surveillance to be conducted on claimant during six days in 2016. Surveillance was conducted on May 18, 2016, May 19, 2016, May 20, 2016, June 12, 2016, June 13, 2016, and June 14, 2016. Claimant was unaware the surveillance was being conducted during the time claimant was engaging in a variety of physical activities.

The undersigned reviewed the DVD. It was submitted as evidence by defendants. The DVD was slightly longer than one hour. This deputy observed claimant unloading a variety of furniture pieces including chairs, a recliner, dressers, a bed frame, end tables, and a mirror. There was a large entertainment center too. Many of the items were loaded on a two wheel dolly, and claimant would push the cart into his furniture store in Osceola. At times claimant would have some individuals with him. However, those individuals did not always provide a great deal of assistance to claimant. He performed the yeoman's portion of the lifting and pushing. There was one senior gentleman present on several occasions but he basically just opened the door for claimant. I did not witness the elder gentleman offer much in the way of physical labor. There was a woman who had a splint on one hand. She could not provide much help either. She did carry some very light objects. Claimant pushed the very heavy furniture.

The undersigned did not expect claimant to be able to handle such physical work after listening to his hearing testimony. Claimant testified he hires other people to move and deliver products at \$10.00 per hour. During cross examination, claimant testified he drives his truck and trailer only when needed. The undersigned observed claimant performing physical labor that appeared to be outside the Light category of labor.

Once the DVD had been prepared, it was sent to Dr. Charles Mooney for review and comment. Dr. Mooney issued a revised report with the date of July 14, 2016. (Ex. B, p. 7) In the revised report, Dr. Mooney opined claimant was capable of working in the Medium category of work and he could lift at least 50 pounds. (Ex. B, p. 7) Dr. Mooney changed his opinion as to the necessity of work restrictions. The physician determined no work restrictions were necessary. (Ex. B, p. 7) Dr. Mooney also saw no need for additional medical treatment. (Ex. B, p. 7)

Mr. Phil Davis, M.S., a vocational specialist, was retained by claimant to provide a vocational opinion. (Ex. 13) Mr. Davis opined in relevant portion:

When taking into the consideration the physical and cognitive restrictions as set forth in case file information, I would opine that although Mr. Clark maintains the knowledge and experience obtained from his past employment and volunteer fire fighting activities, his current physical restrictions and cognitive sequela related to his traumatic brain injury now prohibit his ability to perform the essential job duties of any of his past employment activities. This is further evidenced in the fact that his spouse has now taken over all of the primary work functions that Mr. Clark

previously performed in operation of their furniture and consignment shop. As described, Mr. Clark is now available as a "known face" to his their customers. The preponderance of the actual work activities are now being performed by his wife and other hired individuals.

I would opine that the extent of accommodations that are being provided as a result of his self-employment would not be available in a competitive work environment. I further opine that Mr. Clark is now, as a result of the physical restrictions and cognitive sequel from his Volunteer Fire-Fighting injury, is not incapable of being employed within the competitive labor market.

(Ex. 13, pp. 182-183)

Mr. Davis was not provided a copy of the DVD to review in order to render an opinion about employability. As a result, he did not have all the evidence available to him when he rendered his opinion.

Defendants retained the services of Ms. Amanda J. Ruhland, MA, CRC, to provide a rebuttal employability assessment. The report was dated August 6, 2016. Ms. Ruhland performed a records review; she did not personally interview claimant. Ms. Ruhland did not review a copy of the surveillance DVD but she did consider Dr. Charles Mooney's report of July 14, 2016 where he discussed the surveillance.

Ms. Ruhland's report states in relevant portion:

In an effort to identify jobs in the Medium physical level (per Dr. Mooney's letter dated 7/14/16) that would be available to Mr. Clark in the Osceola, IA area at the current time if he were to seek employment in the open labor marker, labor market research was completed on his behalf. Examples of jobs that were identified as potential placement options for Mr. Clark based upon his educational background, work history, demonstrated aptitudes, transferable skills, and physical restrictions include: Production Laborer; Assembler; Shipping and Receiving Clerk; Custodian; Stock Clerk; Warehouse Worker; and Cashier. These positions were found to pay weekly wages in the \$400.00 to \$520.00 range in the Osceola, IA labor market area.

Based upon Mr. Clark's prior employment, he possesses transferable skills that include the ability to work independently with a team, the ability to manager [sic] employees and tasks, the ability to engage in customer service activities and the ability to meet specified deadlines and expectations and work under pressure.

Although restrictions have been placed upon Mr. Clark's work activities by Dr. Mooney, no restrictions have been placed on his work hours. Therefore, in formulating the opinions contained in this Analysis, it is assumed that Mr. Clark has the ability to tolerate a full-time work schedule as long as he observes the 50 lb. lifting restriction recommended by Dr. Mooney in his letter dated 7/14/16.

Taking into consideration the lifting restrictions that have been recommended by Dr. Mooney, it is my opinion that Mr. Clark is employable in the open labor market. The above opinion is expressed with a reasonable degree of vocational certainty and has taken into consideration Mr. Clark's age, educational background, transferable skills, physical restrictions and access to jobs in the Osceola, IA labor market area.

(Ex. I, p. 59)

Ms. Valerie Jean Clark testified on behalf of her spouse. She and her husband have been married for more than 40 years. She testified about the changes in claimant's behavior since he sustained his concussion on February 7, 2014. Ms. Clark testified claimant is now short-tempered when he waits on customers or interacts with his grandchildren. He is no longer able to operate a calculator. When there is commotion in claimant's immediate environment, he becomes frustrated. Ms. Clark testified she now opens and closes the store more often than prior to the accident, and she does the scheduling for claimant. She testified she feels as if she is babysitting a child when she looks after her spouse. Ms. Clark admitted no physician precluded claimant from working alone in the store.

#### RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and

circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

The parties stipulated claimant sustained a permanent injury to the body as a whole. As a result, he is entitled to have his disability calculated by the industrial method.

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.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

After reviewing the DVD, this deputy is fully convinced claimant is capable of operating his furniture store on a full time basis. Physically, claimant appears able to perform the essential duties of his job. He has been self-employed for 24 years, and there does not seem to be any reason for him to dispose of his business. He has not looked for other work, nor is he interested in pursuing other opportunities.

This deputy does acknowledge claimant has sustained a minor traumatic brain injury. The effects of the brain injury do impede claimant in the business with respect to the accounting aspects of the job. However, the business is jointly owned with Ms. Clark and she testified she has taken over the cognitive duties for her spouse. In short, due to Ms. Clark's willingness to accommodate her husband's mental deficiencies, he is able to pick up and deliver furniture and goods. They are working as a team in the business they co-own.

This deputy also acknowledges claimant is unable to return to the City of Osceola as a volunteer fire fighter. In order to work as a fire fighter, one must be mentally alert. Claimant's spouse testified her husband often becomes confused about directions. When there is commotion in his immediate environment, he is frustrated. Claimant's primary responsibility at the fire department is to drive the truck. It would not be appropriate for him to drive a fire engine when he is confused by directions or he is frustrated when there is commotion. A fire fighter is required to remain calm in times of emergency. It is absolutely clear to this deputy that claimant's traumatic brain injury prevents him from returning to active duty.

Therefore, after considering all of the factors involving industrial disability, it is the determination of the undersigned; claimant has sustained a permanent partial disability in the amount of fifty-five (55) percent. Defendants shall pay unto claimant 275 weeks of permanent partial disability benefits at the stipulated rate of \$1,079.79 per week and commencing from the stipulated date of March 11, 2014. Defendants shall take credit for 95 weeks of permanent partial disability benefits previously paid to claimant at the rate of \$1079.79 per week.

The final issue is costs to litigate.

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is



unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The following costs are assessed to defendants:

Filing fee: \$100.00

Service fee: Unknown

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant two hundred seventy-five (275) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of one thousand seventy-nine and 79/100 dollars (\$1,079.79) and payable from March 11, 2014.

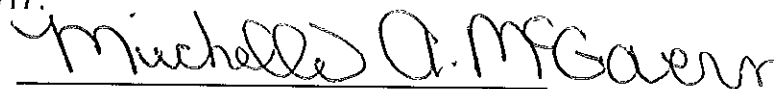
Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Defendants shall take credit for all benefits previously paid to date.

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all reports as required by law.

Signed and filed this 23<sup>rd</sup> day, May 2017.



MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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MAM/kjw

**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.