BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JAN 16 2019
WORKERS' COMPENSATION

ALLEN WERNER, Claimant, vs. NCI BUILDING SYSTEMS, Employer, and THE INSURANCE CO. OF THE STATE OF PENNSYLVANIA, Insurance Carrier, Defendants.	File No. 5044478 ARBITRATION DECISION Head Notes: 1108.50, 1402.40, 1804, 2501, 2502, 2907, 4000.2

STATEMENT OF THE CASE

Allen Werner, claimant, filed a petition in arbitration seeking workers' compensation benefits from NCI Building Systems, employer and Insurance Company of the State of Pennsylvania, insurance carrier as defendants. Hearing was held on August 9, 2018 in Des Moines, Iowa.

Allen Werner and Nancy Werner were the only witnesses to testify live at trial. The evidentiary record also includes joint exhibits 1, 3, 4, 6, 7, 10-16, 18-23, claimant's exhibits 1-10, and defendants' exhibits A-K and M-N. Only the written reports of defendants' exhibit L are admitted; any video evidence is excluded because it was not properly produced to claimant's counsel.

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

The parties submitted post-hearing briefs on October 9, 2018.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant is entitled to a running healing period?
2. If claimant is not entitled to a running healing period, then the extent of permanent disability claimant sustained as a result of the stipulated July 30, 2012 work injury.
3. If claimant is not entitled to a running healing period, then the appropriate commencement date for any permanency benefits.
4. Whether defendants are responsible for payment of past medical expenses?
5. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39?
6. Whether claimant is entitled to alternate medical care?
7. Whether claimant is entitled to reimbursement for medical mileage?
8. Whether penalty benefits are appropriate?
9. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

On July 30, 2012, claimant, Allen Werner, sustained an injury which arose out of and in the course of his employment with NCI Building Systems. At the time of the injury, Mr. Werner was unloading steel I-beams from a semi-truck using an inside crane. While the truck was being unloaded, a wooden 4 x 4 used to support the I-beams broke causing a pile of I-beams to fall on Mr. Werner. He was trapped between several I-beams and a conveyor belt. One I-beam struck his lower back and pinned him against the conveyor. He was trapped by several I-beams on top of him for approximately 45 minutes. Mr. Werner did not lose consciousness during the 45 minutes he was trapped. While he was trapped under the I-beams, he felt pressure on his testicles, kidneys, and pelvis area. The local fire department was eventually able to free him with the use of airbags. Mr. Werner was then airlifted to the University of Iowa Hospitals and Clinics (UIHC). (Testimony)

The UIHC's initial impression included "[c]omminuted pelvic fractures with pubic symphyseal and bilateral sacroiliac diastases, bilateral extraperitoneal and left

retroperitoneal small to moderate hematoma. Hemorrhage extends into the scrotum and is present in the left perineum abutting the penile bulb." (JE3, p. 3) On July 31, 2012, he was taken to surgery for a closed reduction of his dislocated total hip. Following surgery, he was placed in traction and bedridden until August 3, 2012, when he had to undergo a second operation. In the second operation, hardware was used to stabilize the multiple fractures he had on both sides of his pelvis. He also had an external fixator attached to each side of his pelvis. After this surgery, Mr. Werner had a foot drop on his right side. He was immediately taken back to surgery and the screw that was thought to have caused nerve damage was removed. Unfortunately, Mr. Werner's foot drop has not gone away. While at the UIHC he was also diagnosed with T8-9 compression fractures. (JE3, pp. 1-36; Testimony)

Mr. Werner was hospitalized from July 30, 2012 until August 18, 2012. During this time, he developed other complications. Because he was bedridden during much of his stay a catheter was placed. When the catheter was removed he could not urinate. Mr. Werner was again placed under general anesthesia and a Foley type balloon device was inserted through the penis and inflated. He was eventually able to urinate before he was released from the hospital. (JE3, pp. 1-36; Testimony)

The UIHC physicians were concerned about Mr. Werner developing blood clots. To reduce the chances of a blood clot Mr. Werner was put on Heparin. Mr. Werner had an adverse reaction to this medication and developed heparin-induced thrombocytopenia (HIT). He developed blood clots in both of his legs. He was eventually placed on Xarelto, an anti-coagulant, which he will need to take for the remainder of his life. (JE3, pp. 1-36; Testimony)

Mr. Werner was released from the UIHC and transported via ambulance to St. Luke's Hospital in Cedar Rapids where he underwent 11 days of inpatient rehabilitation. He was then released home where he received in-home medical care services for approximately two months. He continued to follow-up with the surgeon, John L. Marsh, M.D. at the UIHC. While he was at St. Luke's rehab, Stanley J. Mathew, M.D. treated him. Dr. Mathew referred Mr. Werner to his personal physician, Michael B. Weston, M.D. at Monticello Family Medicine for medication management. (Testimony)

On October 24, 2012, Mr. Werner underwent a total left hip replacement. The surgery was performed at the UIHC under the supervision of Dr. Marsh. He was in the hospital from October 24, 2012 until November 4, 2012. Once he was released home he received in-home medical services for almost three months. (JE3, pp. 43-48; JE1, pp. 7-9; Testimony)

Mr. Werner continued to receive ongoing medical care. At one point there were two physicians prescribing medications, Timothy J. Miller, M.D. at the Finley Pain Clinic, and Dr. Weston, his personal physician. The defendants sought to have Dr. Miller manage all of the prescriptions. However, Dr. Miller decided to withdraw from the case. (JE12, p. 26) Subsequently, Robert Federhofer, D.O. was placed in charge of Mr. Werner's medication. Dr. Federhofer also ordered a low back MRI and EMG studies of

the lower extremities. (JE21, p. 22) The testing revealed nerve injury in the pelvic area. The doctor increased Mr. Werner's Gabapentin and recommended consideration of stem cell/regenerative therapy for the nerve injuries. He recommended Joseph Purita, M.D. at stemcellorthopedic.com. He also recommended the Mayo Clinic chronic pain program for reduction of opioid mediation. Additionally, he recommended additional physical therapy with Dr. Kim, a pain specialist in Cedar Rapids. Dr. Federhofer noted if all those options failed he would recommend consideration of a spinal cord stimulator. Unfortunately, Mr. Werner would have to be off of all anti-coagulants during surgical implantation of the stimulator. Also, he recommended treatment for sleep apnea if Allen was to continue on opiate pain medications. Dr. Federhofer also recommended continued psychiatric care and cognitive behavioral therapy. (Testimony; JE21)

Claimant requested the recommended treatment in the spring of 2017. There was a delay in obtaining the treatment due to confusion regarding scheduling and lodging expenses. On June 11, 2018, claimant filed a petition for alternate medical care. As the result of that petition, another deputy from this agency entered a consent order on June 21, 2018. The order reflected the parties' agreement that the claimant would be referred to the Mayo Clinic for assistance in tapering off opioid medication and for other pain management therapies; defendants would provide ongoing psychiatric care; and defendants would provide reasonable travel and living expenses for the claimant while he was at the Mayo Clinic. Unfortunately, Mr. Werner had not yet started the program at the time of this arbitration hearing. He was scheduled to begin in mid-September 2018. (Testimony)

The undersigned must evaluate claimant's conditions based on the evidence available as of the time of the August 9, 2018 arbitration hearing. From an orthopaedic standpoint, Dr. Marsh placed Mr. Werner at MMI for his hip replacement, chronic low back pain, nerve palsy on the right, and bilateral leg numbness as of February 12, 2014. (JE3, p. 56) Dr. Miller at the Finley Hospital in Dubuque placed Mr. Werner at MMI from a neurologic standpoint as of April 21, 2014. (JE12, p. 8)

On May 13, 2014, Mr. Werner underwent a functional capacity evaluation (FCE) with E3 Work Therapy Services. The valid FCE placed Mr. Werner in the medium work category. He could lift from waist to floor up to 55 pounds on an occasional basis, from waist to shoulder 20 pounds on an occasional basis, carry with both hands up to 20 pounds occasionally, sit constantly, stand and walk frequently, squat frequently, and stoop and bend frequently. He was to avoid kneeling. (JE18)

Mr. Werner had a final evaluation and impairment rating with Joseph Chen, M.D., at the UIHC on June 16, 2014. Dr. Chen adopted permanent restrictions as set forth in the May 28, 2014 FCE. His report also stated:

> [b]ecause of his extensive work-related injuries, he can be rated as having the following impairments according to <u>the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition</u>:

> 1) Open book pelvic fracture including left acetabulum with recurrent left hip dislocation requiring left total hip arthroplasty. His post surgical function result of 34 points yields a 30% whole person impairment (Table 17-34 page 548).
>
> 2) Penile injury with sexual dysfunction yields a 20% whole person impairment (Class 3 impairment according to Table 17-5 page 156)
>
> 3) Right foot drop yields a 17% whole person impairment including (Table 17-37 page 552 with a 15% impairment for common peroneal nerve motor impairment 2% for sensory dysesthesias)
>
> 4) TB compression fracture yields a 5% whole person impairment according to DRE Category II Table 15-4 page 389.
>
> 5) SI Joint Fracture yields a 3% whole [sic] impairment according to Table 17-33 page 546.
>
> These impairments can be added according to the Combined Values Chart on pages 604-605 to yield a 57% impairment of the whole person.

(JE3, pp. 64-65)

At the request of his attorney, Mr. Coggins underwent an IME with Robin L. Sassman, M.D. on August 18, 2014. Dr. Sassman examined Mr. Coggins and reviewed the documentation that was provided to her by claimant's counsel. Dr. Sassman's diagnoses were as follows:

1. Open book pelvic fracture
    - Status post closed reduction of dislocated left hip on July 31, 2012, by Carolyn Hetrich, M.D.
    - Status post opern reduction of acetabular fracture, internal fixation of acetabulum, percutaneous skeletal fixation of posterior pelvic bone fracture and disruption of the pelvic ring on August 3, 2012, by John Marsh, M.D.
    - Status post hardware removal acetabular/pelvic fracture on the right on August 4, 2012, by John Marsh, M.D.
    - Status post left pelvis hardware removal, left total hip arthroplasty on October 25, 2012, by John Marsh, M.D.
2. T8 and T9 fracture
3. Lumbosacral plexopathy resulting in

- Right foot drop
- Erectile dysfunction

4. Post-traumatic stress disorder
5. Heparin-induced thrombocytopenia

(CL. Ex. 2, p. 11)

Dr. Sassman opined that the above diagnoses were directly and causally related to the work injury on July 30, 2012. She specifically noted that the erectile dysfunction was the result of the lumbosacral plexopathy that resulted from the accident. Dr. Sassman recommended that Mr. Werner be evaluated by a urologist to determine if any further treatment options would be beneficial. She also recommended a second opinion from a pain management specialist and that Mr. Werner continue to follow-up with Dr. Marsh. She also recommended that Mr. Werner continue with his mental health professionals. Dr. Sassman felt that Mr. Werner had not reached MMI and would not until her treatment recommendations had been completed. However, if the treatment was not pursued then she considered him to be at MMI as of August 18, 2014. Dr. Sassman assigned Mr. Werner permanent impairment pursuant to the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment. For the physical injuries she assigned a combined total of 73 percent of the whole person. Dr. Sassman noted that Dr. Chen had assigned 57 percent impairment. However, Dr. Sassman felt that Dr. Chen did not assign appropriate impairment for the pelvic open book fracture. Also, Dr. Chen did not assign impairment using the range of motion method for the thoracic spine and thus she felt her impairment rating was more accurate. Dr. Sassman restricted Mr. Werner to limit lifting, pushing, pulling, and carrying to 5 pounds occasionally using one hand only due to the use of the cane. He was to limit sitting, standing, and walking to an occasional basis. He needed to change positions frequently. She did not recommend the use of vibratory or power tools. She did not recommend stooping, bending, crawling, kneeling, walking on uneven surfaces or ladders. He could only rarely use stairs, and should always employ the use of a handrail. She also did not recommend the use of his right foot to operate a foot pedal due to his right foot drop. (CL. Ex. 2, pp. 1-16)

On October 2, 2014, Dr. Chen stated that he could not attribute Mr. Werner's need for a urology consultation for sexual dysfunction to the work injury. Dr. Chen felt that Mr. Werner had many more common primary care problems such as obesity, endocrine problems or hypertension that may lead to erectile dysfunction. (JE3, p. 67)

Dr. Sassman evaluated Mr. Werner again on July 26, 2017 to update her findings. Her opinions regarding diagnoses, causation, impairment, and restrictions remained unchanged. Dr. Sassman still recommended that Mr. Werner be evaluated by a urologist for the erectile dysfunction. She also recommended that Mr. Werner

continue his treatment with Dr. Mittauer and to follow-up with Dr. Marsh. (Cl. Ex. 2, pp. 17-39)

Defendants do not dispute that Mr. Werner's pelvic and hip injuries are related to the work injury. Defendants do dispute Mr. Werner's back claim. Defendants argue that prior to the July 30, 2012 work injury, Mr. Werner had a longstanding history of low back symptoms. In support of their contention defendants point to chiropractic treatment that Mr. Werner received from 2003 through July 12, 2012. Defendants also note that he treated with his family doctor for low back pain and radicular symptoms in 2005. He was taken off of work for a short period of time in 2005. He also received injections for his pain, which he said were not helpful. Prior to the injury, a doctor indicated that Mr. Werner should have help with lifting more than 15-20 pounds. However, the doctor did not give him any formal restrictions. In fact, the doctor released him to full duty on August 22, 2005. (Def. Ex. A & B) I do not find defendants' argument regarding claimant's prior low back pain to be persuasive. Mr. Werner did not have any permanent restrictions placed on his activities prior to the work injury. Furthermore, both Dr. Chen and Dr. Sassman have assigned permanent impairment and restrictions for the back as the result of the work injury. Thus, I find that Mr. Werner's ongoing back symptoms are related to the work injury of July 30, 2012.

Defendants also argue that the claimant's erectile dysfunction is not related to the work injury. In support of their argument they rely on the October 2, 2014 report of Dr. Chen. At that time Dr. Chen stated he could not attribute the need for a urology consultation for sexual dysfunction to the work injury. Dr. Chen felt that Mr. Werner had many more common primary care problems including obesity, endocrine problems, or hypertension that may lead to erectile dysfunction. (JE3, p. 67) This statement is not consistent with Dr. Chen's earlier statement where he stated that due to Mr. Werner's "extensive work-related injuries, you can be rated as having the following Impairments . . ." Dr. Chen then assigned 20 percent whole person impairment for penile injury with sexual dysfunction. (JE3, pp. 58-59) Because Dr. Chen has provided conflicting statements with regard to causation on the issue of erectile dysfunction, I do not find his causation opinion to be persuasive.

Defendants also contend that the opinion of Logan D. Hoxie, M.D. supports their position. However, a review of Dr. Hoxie's note reveals he stated, "at this point [sic] time I cannot state with 100% certainty that his pelvic injury is the route [sic] of his erectile dysfunction." (JE20, p. 7) In Iowa 100 percent certainty is not required to prove causation. Thus, I do not find the opinion of Dr. Hoxie with regard to causation to carry much weight.

In support of his claim, Mr. Werner relies on the opinions of Dr. Sassman who relates the erectile dysfunction to the injury. Dr. Sassman's opinion appears to be consistent with the opinion of urologist, Alex Horchak, M.D. He saw Mr. Werner in February of 2016. The urologist indicated that the erectile dysfunction was due to nerve injury rather than circulatory or other issues because the Viagra did not result in any erections. Additionally, Dr. Horchak's note states, "Erectile dysfunction that clearly

appears to be related to a traumatic accident in July 2012." (JE 19, p. 5; JE 19, pp. 3-5; Testimony) Dr. Federhofer has also indicated that the erectile dysfunction is related to the work injury. In his November 29, 2016 clinical note he stated, "he has had depression due to inability to work with significant disability (approximately 50% loss of function) allotted to him as well as sexual dysfunction impotence resulting from this injury." (JE21, p. 1) Based on the testimony of Mr. and Mrs. Werner, and on the opinions and notes of Dr. Sassman, Dr. Horchak, and Dr. Federhofer, I find that the claimant has carried his burden of proof to show that his erectile dysfunction is related to the July 30, 2012 work injury.

Mr. Werner has made a claim for alternate medical care in this case. He is requesting that defendants provide further treatment with a physician of defendants' choosing for his erectile dysfunction issues. Because defendants denied that this condition was related to the work injury, a request for alternate care is not technically correct. However, because I found that claimant's erectile dysfunction is causally connected to the work injury defendants are responsible for any reasonable and necessary medical treatment. Defendants shall promptly provide such care.

Mr. Werner also treated for his mental health following the work injury. He has been diagnosed with post-traumatic stress disorder and depression. His wife testified about his change in personality since the injury. Since the injury he has been grumpy, irritable, and emotional. Mrs. Werner also testified that Allen gets confused easily and that is why she arranges his medications for him. At the time of hearing he was taking 16 pills per day. (Testimony)

Mr. Werner received treatment for his mental health which included medication and counseling. He eventually treated with Mark W. Mittauer, M.D., a psychiatrist. Dr. Mittauer diagnosed major depressive disorder, chronic physical pain in the back, feet, and legs. He also noted insomnia due to nightmares which Mr. Werner related to the work accident. Dr. Mittauer opined that Mr. Werner's work injury was more likely than not a substantial factor in causing major depressive disorder and post-traumatic stress disorder. Dr. Mittauer felt that the prognosis for complete resolution of the major depressive disorder was poor because the pain tended to exacerbate the depression, and the depression can exacerbate the pain. Therefore, as long as Mr. Werner had persistent pain and associated disability and limitations regarding his ability to work, he would likely experience persistent symptoms of major depressive disorder. Dr. Mittauer felt the diagnosis of major depressive disorder was likely a permanent condition which was the result of the work injury. He recommended continued treatment. Dr. Mittauer stated that if the major depressive disorder persisted, Mr. Werner's ability to be gainfully employed in the future would be affected. Dr. Mittauer noted the symptoms of recent memory and concentration problems as well as fatigue would interfere with gainful employment. Mr. Werner's irritability would also cause difficulties in the work environment. Overall, Mr. Werner's prognosis for complete resolution or even substantial improvement of his major depressive disorder is poor. (JE3, JE10, JE14, Def. Ex. C.)

At the request of the defendants, Scott Jennisch, M.D. evaluated Mr. Werner in June of 2015. Dr. Jennisch felt that Mr. Werner's medical records and examination were consistent with the diagnosis of posttraumatic stress disorder and major depressive disorder. Dr. Jennisch indicated that the depressive symptoms seemed to have improved with treatment. Dr. Jennisch felt Mr. Werner's symptoms of cognitive difficulties, fatigue, and temperament were not related to psychiatric conditions. Rather, Dr. Jennisch felt that those symptoms were a sequela of chronic pain issues and side effects of the pain medicine regimen. Dr. Jennisch did not feel that the issues with temperament were disabling. He noted that Mr. Werner may be occasionally short-tempered with grandkids, slam down his coffee cup, or walk away from something, but he did not feel this meant Mr. Werner was incapable of working. Dr. Jennisch opined Mr. Werner did not have any restrictions on employment due to his psychiatric conditions. However, the exception to this would be if Mr. Werner returned to his prior job, then he would likely request additional counseling services for him and possibility medication adjustment. (Def. Ex. C)

With regard to Mr. Werner's mental health claim, I find Dr. Mittauer's opinions to carry the greatest weight. His opinions are well-reasoned and consistent with the record as a whole. Thus, I further find that Mr. Werner has carried his burden of proof to show that his mental health issues are related to the July 30, 2012 work injury.

We now turn to the issue of whether claimant is entitled to a running award of healing period benefits. Defendants contend that claimant's healing period has ended. There are numerous physicians who have placed Mr. Werner at maximum medical improvement (MMI). Dr. Marsh stated that Mr. Werner reached MMI as of February 18, 2014. Dr. Chen also confirmed that Mr. Werner was at MMI. Dr. Miller placed Mr. Werner at MMI as of April 21, 2014. Mr. Werner testified that he has not had any substantive treatment since he was released by Dr. Marsh. Instead, his treatment of medications has been to soothe his pain, not to substantially change the underlying conditions.

Claimant argues that a running award of healing period benefits is appropriate. Both Dr. Sassman and Dr. Federhofer made recommendations for further treatment. Claimant would like to pursue all available treatment through the Mayo Clinic. As of the time of the hearing, Mr. Werner was scheduled to begin treatment at the Mayo Clinic in September of 2018. Although there have been recommendations for additional treatment and the defendants have agreed to additional treatment, the record does not demonstrate that the treatment will provide substantial change to Mr. Werner's industrial disability. Therefore, I find that Mr. Werner's healing period should not be prolonged and the issue of permanency is ripe for determination.

A determination must be made regarding the amount of permanent benefits Mr. Werner is entitled to receive as a result of the July 30, 2012 work injury.

At hearing, Mr. Werner testified about his ongoing symptoms which he relates to the work injury. He has pain in his left hip which varies, depending on the changes in

the weather; standing and walking also increase his pain. He testified that his pain varies between a five and an eight on a scale of one to ten. He takes Oxycodone and uses Fentanyl patches in an attempt to control the pain. As previously noted, his right foot drop has not gone away. The foot drop makes it difficult for him to walk, especially on uneven surfaces. He testified that he has difficulty walking more than 100 feet at a time. At times his right foot catches on things, causing him to trip or stumble. He also experiences numbness in his right leg. Ever since the accident he feels like his right leg is dead, without any feeling. His right foot has still has numbness. Mr. Werner still has pain across his beltline where the beam pinned him. Walking or lifting increases his pain level. He is at risk for blood clotting requiring him to take Xarelto for the remainder of his life. Mr. Werner testified that his nightmares about the accident have decreased considerably with the use of prescription medications. At the time of the hearing Mr. Werner was taking ten different medications per day. He changes his Fentanyl patch, which he takes for pain, every three days. He also takes Oxycodone twice per day for pain. Mr. Werner takes a blood thinner to prevent blood clotting due to his heparin-induced thrombocytopenia. He also takes Gabapentin for nerve pain. For his depression he takes Effern, Wellbutrin, and Lamotrigine. Mr. Werner takes Prazosin to suppress his nightmares. He testified he takes Omeprazole to protect his stomach from all the other medications. Finally, he takes Abilify at bedtime for his depression. Mr. Werner testified that he is not as social as he was prior to the accident and he is not as patient with people as he was before the accident. He also testified that he is impotent, a problem he did not have prior to the accident. (Testimony)

Mrs. Werner testified that Mr. Werner always appears to be in pain. He has difficulty walking even 100 feet. He walks very slowly because of his foot drop. If he is on uneven ground, he uses a cane. Mr. Werner has to use a handrail to traverse steps. Because of his pain he is in bed by 7:30 each night. She testified that her husband used to be an easygoing, fun-loving kind of guy but now he is depressed, very sad, and in constant pain. (Testimony)

Mr. Werner does have permanent restrictions placed on his activities as the result of the work injury. He underwent two FCEs. The first one was performed on May 28, 2014 at E-3 Work Therapy Services. The FCE was considered valid and placed him in the medium work category. Dr. Chen adopted these restrictions.

A second FCE was performed at Advantage Physical Therapy and Rehab on May 21, 2015 with a follow up on July 26, 2017. Both of these FCEs were considered valid. In the summary portion of the July 26, 2017 report the therapist noted that Mr. Werner's functional abilities placed him in the sedentary work category. He also stated:

> His greatest limiting factors were directly related to lower extremity weakness, neurological weakness of right lower leg (ankle/foot), and right foot drop. This resulted in overall having poor balance, difficulty with performing force production activities of lifting, pushing/pulling, and carrying, transitioning from standing to low-level postural positions without the use of external support. In comparison to the FCE that I performed on

> Mr. Werner on May 21, 2015, I have noted that there has been a deterioration of his overall functional ability and decreased overall balance. The FCE performed on May 21, 2015, placed Mr. Werner in the upper end of the sedentary to the lower end of the light work category. Upon review of the FCE performed on May 21, 2015, in comparison to today's FCE, I conclude that Mr. Werner's functional ability has deteriorated.

(Cl. Ex. 3, pp. 16-17)

The therapist made specific recommendations with regard to restrictions. I find that the most recent FCE, the one that took place on July 26, 2017, most accurately reflects Mr. Werner's physical capabilities. Even though Dr. Chen stood by his opinion that the 2014 FCE best represented his level of physical ability, I do not find this opinion to be persuasive. In the same 2018 letter wherein Dr. Chen reaffirms his opinion regarding the 2014 FCE restrictions, he goes on to state that Mr. Werner has a reduced level of physical ability since 2014. (JE 3, p. 78)

Dr. Sassman placed permanent restrictions on Mr. Werner's activities. She recommended that he limit his lifting, pushing, pulling, and carrying to 5 to 10 pounds occasionally using one hand only due to the use of his cane. She recommended limiting sitting, standing, and walking to an occasional basis. She noted that he would need to change positions frequently due to his symptoms. She did not recommend the use of vibratory or power tools. She did not recommend stooping, bending, crawling, kneeling, walking on uneven surfaces or ladders. Mr. Werner is allowed to rarely use stairs, but only with the use of a handrail. Dr. Sassman also does not recommend the use of his right foot to operate a foot pedal due to his foot drop. (Cl. Ex. 2, pp. 13-14) With regard to permanent restrictions, I find Dr. Sassman's opinion to carry the greatest weight. He estimates that he can walk about 100 feet on even surfaces before he needs to stop and rest. He has to walk slowly because of his right foot drop or he falls. (Testimony)

At the time of the hearing, Mr. Werner was 58 years old. He does have a high school diploma, but testified that his grades were mostly C's and D's. He was not a good student and did not enjoy school. He has no other formal training or education. (Testimony)

Mr. Werner's work history is limited to manual labor. After high school he served in the Army National Guard for six years. He was a machine gunner and was honorably discharged at the end of his service. He has also worked for Swiss Valley Farms where he loaded milk onto trucks. He worked there from approximately 1979-1986 and earned $3.50 per hour. He then went to work for Galaxy Homes as a drywaller. Mr. Werner described this work as extremely physical. Next, he worked milking cows and shoveling manure until 1989 when he began working for the defendant-employer, NCI Systems, Inc. NCI constructs steel buildings. During Mr. Werner's 23 years at NCI he worked as a laborer and as a forklift operator. He cut, shaped, and punched holes in angle iron.

He also unloaded steel products from trucks. The unloading was done by hand and by indoor cranes. (Cl. Ex. 10; Testimony)

Given the restrictions assigned by Dr. Sassman and the testimony regarding Mr. Werner's physical abilities I find that Mr. Werner is not capable of returning to the jobs he held before and at the time of the July 30, 2012 injury. (Def. Ex. H; testimony) Since the injury, Mr. Werner did work for an Amish construction crew as a driver for a short time. He worked in 2017 driving a pickup truck and pulling a tool trailer. He would not have to hook up the trailer or load anything; he merely drove. He would drive the crew up to 50 miles away to a job site. Once he arrived at the job site, he would sit and wait for the workers to complete their day and then drive them back home. He was only paid per mile, so he was not making any money while the carpenters were working. During the six months that he worked for them he earned $11,831.00. He was paid $1.00 per mile, but had to pay for all the fuel and vehicle expenses. As a result, he only netted $1,517.00, which equated to $58.35 per week, or approximately $1.00 per hour. He quit this job because he was not earning enough. I find that Mr. Werner was not capable medically of returning to employment substantially similar to his pre-injury employment. I further find he was able to perform other work consistent with his disability. I find he earned $58.35 per week. (Testimony; Def. Ex. I, p. 19)

There is one vocational report in evidence. At the request of his attorney, Mr. Werner met with Barbara Laughlin, M.A., a vocational specialist. Ms. Laughlin reviewed the medical records, interviewed Mr. Werner, and performed an employability assessment. Ms. Laughlin ultimately concluded that Mr. Werner's limitations were so severe that he was unemployable. In support of her conclusion she noted his lack of competitive computer skills. She also referenced Dr. Mittauer's opinion that Mr. Werner's symptoms would interfere with his ability to be gainfully employed. She also noted his mood, which would affect his ability to interact with people at work. (Cl. Ex. 4)

Throughout Mr. Werner's adult life, he demonstrated that he was a motivated worker who, prior to his injury, had only been unemployed for one week of his work life. However, since this accident he has been unable to return to any of his prior employment and unable to perform 40 hours of work a week. As a result of the July 30, 2012 work injury he has substantial restrictions placed on his activities and abilities. He has limited work experience and very few transferrable skills. He testified that he had been looking for work but has not been able to find anything that he is capable of performing.

Considering claimant's age, education, employment history, permanent impairment, permanent restrictions, motivation level, intelligence, as well as all other industrial disability factors outlined by the Iowa Supreme Court, I find that the injuries from the July 30, 2012 work injury wholly disable Mr. Werner from performing work that he would otherwise be qualified and capable of performing. I find that Mr. Werner has proven he is permanently and totally disabled as a result of his July 30, 2012 work injury.

Claimant is seeking payment of past medical expenses as set forth in the attachment to the hearing report. Three of the expenses appear to be related to erectile dysfunction. These expenses are Physician's Clinic on February 5, 2015 ($318.00); Finley Urology Clinic on February 22, 2016 ($193.00); prescription for Viagra on February 5, 2015 ($122.11). I found that this condition was related to the work injury. As such, defendants are responsible for these expenses.

Claimant is seeking payment for the prescription Fentanyl totaling $500.75. This prescription is used to treat pain and prescribed by Dr. Miller at the Finley Pain Clinic. I find that these prescriptions were necessary and causally connected to the work injury. Defendants are responsible for these expenses. (JE 12, p. 19)

Defendants are disputing several expenses for treatment at Monticello Family Medicine. The August 20, 2015 visit was related to treatment for Mr. Werner's pain. The diagnostic code listed on the billing is for chronic pain due to trauma. I find that this is related to the work injury and that defendants are responsible for the expense in the amount of $121.00.

Defendants dispute the expenses for the November 15, 2016 ($77.00) and March 9, 2017 ($125.00) office visit and testing at Monticello Family Medicine with Dr. Weston. These expenses appear to be related to Mr. Werner's sleep apnea. Defendants argue that because claimant had some of these issues prior to the injury, these expenses are not their responsibility. However, Dr. Weston was an authorized treating physician. Furthermore, Dr. Federhofer has indicated that any sleep apnea treatment is necessary if the clamant is on opioids. Claimant is on opioids because of the work injury. I find that these expenses were reasonable and necessary because of the work injury. Therefore, I find that these expenses are also the defendants' responsibility.

Claimant is seeking payment of the $190.00 expense for the March 28, 2018 appointment at Monticello Family Medicine. A review of the clinical notes reveals the visit was for his back and pelvis pain, both work-related conditions. I find that this expense is also the responsibility of the defendants.

Therefore, defendants are responsible for the above noted medical expenses.

Claimant is also seeking payment of medical mileage as set forth in the attachment to the hearing report totaling $8,052.91. As of the date of the hearing defendants had paid a total of $4,739.20 in medical mileage. Claimant seeks to recover the difference of $3,331.71. Claimant asserts that the mileage includes the contested visits related to the erectile dysfunction and the sleep apnea. Based on a review of the mileage log it appears that the submitted mileage was reasonably necessary because of the work injury. Defendants offer no argument why the mileage should not be paid. I find that defendants are responsible for the submitted medical mileage.

Claimant is also seeking penalty benefits for failing to continue paying benefits past April 10, 2017 and for failure to promptly notify claimant of the reason weekly benefits were discontinued. Prior to the hearing defendants paid the equivalent of 31 percent industrial disability. Claimant alleges, given the facts of this case, that there is no reasonable basis for defendants to have not paid more than 31 percent. Defendants contend that penalty is not appropriate because payment of 31 percent industrial disability was reasonable based on the assessments of Dr. Chen and the medium vocational category release from the FCE. Additionally, claimant was notified on several occasions in February of 2017 that his weekly benefits were going to be ending. (Def. Ex. G)

I find that the determination of the extent of a claimant's industrial disability is based on numerous factors set forth by the Iowa Supreme Court. I further find that there are no clear guidelines on how much weight is to be given to each factor. In the present case, I find what defendants paid was reasonable based on the assessments of Dr. Chen and the medium vocational category release from the FCE. While I disagree with their assessment of industrial disability, I find that their conduct was not unreasonable and does not rise to the level of penalty.

Claimant is seeking reimbursement pursuant to Iowa Code section 85.39 in the amount of $3,582.50 for the IME report from Medix dated September 26, 2014. I find that the prerequisites of Iowa Code section 85.39 were met. Defendants make no argument as to why this IME should not be reimbursed. I find that defendants shall reimburse claimant $3,582.50 for the IME.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. I find that the claimant was generally successful in his claim and that an assessment of costs is appropriate.

Claimant is seeking an assessment of costs for two filing fees. Claimant filed a petition in this case on June 16, 2014. That petition was voluntarily dismissed by the claimant on June 23, 2015. Claimant re-filed the petition on February 23, 2017. Claimant is seeking reimbursement for a total of $200.00 in filing fees. I exercise my discretion and assess one filing fee in the amount of $100.00 as a cost under 876 IAC 4.33(7).

Additionally, claimant is seeking an assessment of costs in the amount of $320.00 for a review of records and authoring a report by Dr. Mittauer. The bill fails to clarify how much time was spent on review of the records versus writing the report. Therefore, I find this is not an appropriate cost under 876 IAC 4.33.

Claimant is also seeking an assessment of costs for the 2015 Advantage Physical Therapy and Rehab FCE services in the amount of $750.00 pursuant to 876 IAC 4.33(6). There is no itemization of the $750.00. Therefore, it is unknown what cost was for the evaluation and what cost was for the report. I find this is not an appropriate cost under 876 IAC 4.33.

Claimant also asserts a claim for reimbursement of his vocational experts' charges under 876 IAC 4.33. Vocational expert charges have been determined to be within the definition of practitioners' reports under 876 IAC 4.33. See 876 IAC 4.17; Rodriguez-Contreras v. JBS Swift & Co., File No. 5029197 (App. May 8, 2012). However, only the costs of the report are recoverable. Therefore, I find the only portion of the vocational costs that may be assessed is the 4.4 hours spent on the report at the rate of $110.00 per hour, for a total of 484.00. Defendants are assessed costs for the vocational report in the amount of $484.00 pursuant to 876 IAC 4.33(6).

Claimant is seeking as an assessment of costs for the 2017 Advantage Physical Therapy and Rehab FCE services in the amount of $850.00 pursuant to 876 IAC 4.33(6). There is no itemization of the $850.00. Therefore, it is unknown what cost was for the evaluation and what cost was for the report. I find this is not an appropriate cost under 876 IAC 4.33.

Claimant is also seeking an assessment of costs for the supplemental IME report from Medix in the amount of $1,852.50 under 876 IAC 4.33(6). The bill details $237.50 for abstract medical records and $1615.00 for a follow-up examination. I find that these are not appropriate costs under 876 IAC 4.33.

Thus, I find defendants are assessed costs totaling $584.00.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

Based on the above findings of fact, I conclude that the issue of permanent impairment is ripe for determination. The Iowa Court of Appeals has held that "[t]he healing period may be characterized as that period during which there is a reasonable expectation of improvement of the disabling condition." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.d2d 60, 65 (Iowa App. 1981). The persistence of pain alone does not extend the healing period, if the underlying condition(s) are stable. See Myers v. F.C.A. Services, Inc. 592 N.W.2d 354, 358 (Iowa 1999). If continued treatment will only soothe the injured work, but provide no substantial change to industrial disability, the healing period will not be prolonged. See Pitzer v. Rowley Interstate, 507 N.W.2d 389, 392 (Iowa 1993).

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).

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).

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 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

In this case, I considered all of the relevant industrial disability factors and found that Mr. Werner is wholly disabled and is physically unable to perform work that his experience, training, education, and intelligence would otherwise have allowed him to perform. Thus, I conclude that claimant has proven he is permanently and totally disabled. Defendants shall pay weekly permanent total disability benefits commencing on July 30, 2012, and continuing weekly so long as claimant remains totally disabled. However, defendants shall pay temporary partial disability benefits during the period of claimant's Amish employment in late June 2017 through December 31, 2017. Those benefits shall be based on claimant earning $58.35 per week.

Claimant is seeking payment of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975). Based on the above findings of fact, I found that defendants are responsible for the medical expenses, including mileage, as set forth above.

Next, claimant is seeking penalty benefits against the defendants. 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.

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

Based on the above findings of fact, I conclude what defendants paid was reasonable based on the assessments of Dr. Chen and the medium vocational category release from the FCE. While I disagree with their assessment of industrial disability, I conclude that their conduct was not unreasonable and does not rise to the level of penalty.

Next, claimant is seeking reimbursement for the IME conducted by Dr. Sassman. 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 shall reimburse claimant for the IME of Dr. Sassman as set forth above.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. 876 IAC 4.33. Based on

the above findings of fact, I conclude that defendants are assessed costs in the amount of $584.00.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of five hundred twenty-nine and 08/100 dollars ($529.08).

Defendants shall pay claimant permanent total disability benefits commencing on July 30, 2012, and continuing weekly so long as claimant remains totally disabled except for the period from June 2017 through December 2017 when claimant should instead receive TPD benefits.

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

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall be responsible for the medical expenses, including mileage, as set forth above.

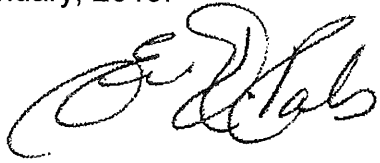
Claimant shall remain entitled to causally related medical expenses pursuant to Iowa Code section 85.27.

Defendants shall reimburse claimant in the amount of three thousand five-hundred eighty-two and 50/100 dollars ($3,582.50) for the IME.

Defendants shall reimburse claimant costs as set forth above.

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

Signed and filed this 16th day of January, 2019.



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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.