BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES D. RILEY,

Claimant,

vs.

CITY OF PEOSTA,

Employer,

and

IMWCA,

Insurance Carrier,
Defendants.

File No. 5065660

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

James Riley, claimant, filed a petition in arbitration seeking workers' compensation benefits from City of Peosta and its insurer, IMWCA as a result of an injury he sustained on November 20, 2014, that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa, and fully submitted on February 7, 2018. The evidence in this case consists of the testimony of claimant, Joint Exhibit 1, Claimant's Exhibits 1 through 7 and 9 through 10 and Defendants' Exhibits A through E. Both parties submitted briefs.

ISSUES

1. Whether the alleged disability is a scheduled member disability or an unscheduled (industrial) disability.
2. The extent of claimant's disability.
3. The commencement of any permanent benefits.
4. Whether penalties are warranted for underpayment of rate.
5. Assessment of costs.

STIPULATIONS

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 claimant emailed the undersigned post-hearing stating that the claimant had received a check for the underpayment and independent medical examination so those issues were resolved by the parties.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Claimant has a stipulated work injury that arose out of and in the course of his work as the Chief of Police for the City of Peosta.

James Riley was 63 years old at the time of the hearing. Claimant graduated from high school. He completed a 9-month welding program and also graduated from truck driving school at a community college. Claimant graduated from the Iowa Law Enforcement Academy in 1978. (Exhibit 7, page 71) Claimant has worked many jobs since high school. (Ex. 7, p. 72) Generally, claimant has worked for security firms, driver/trucker, a dispatcher at sheriff's office and police officer. (Transcript, pages 33 – 40) Claimant became the Chief of Police for the City of Peosta in 2005. (Ex. 7, p. 73) Claimant started working part-time for the City of Peosta in 1999 and became full-time in 2005. (Ex. C, p. 8) Claimant did not identify that he had a dependent stepchild until his deposition of September 2017. (Tr. p. 91)

Claimant testified that he was generally heathy before his November 20, 2014 work injury. Claimant had a low back injury in November 1995 while working as a police officer for the City of Epworth. Claimant went to physical therapy and had epidural steroid injections. (Tr. pp. 41, 42) Claimant was off work for about three months. Claimant testified he recovered from this injury and had no restrictions. (Tr. p. 44)

On Thursday, November 20, 2014, claimant responded to a call of a resident of Peosta who was locked out of her apartment, with her child inside. Claimant attempted to gain entrance by kicking in the back door. Claimant kicked at the door several times. The frame was reinforced and claimant's efforts were unsuccessful. (Tr. p. 53) A pry bar was used to open the door. Claimant worked the rest of the day. Claimant was not in pain on that day.

Claimant went for a medical examination on Monday, November 24, 2014. Claimant was seen by Joseph Garrity, M.D. Dr. Garrity pointed out to claimant he had a bruise in his groin area, which claimant was not aware he had. (Tr. p. 57) Claimant's bruise was caused by his ammo pouch hitting him when he was kicking at the door. (Tr. p. 55) Claimant said that his back pain did not start for a few days after he saw Dr. Garrity. (Tr. p. 57)

Claimant was referred to Erin Kennedy, M.D., who ordered physical therapy. In the first few visits, claimant did not complain of back pain to Dr. Kennedy. On December 22, 2014, claimant did discuss low back and right leg symptoms with Dr. Kennedy. (Tr. p. 59) Dr. Kennedy ordered an MRI which showed some degenerative changes. Claimant said that Dr. Kennedy considered the MRI normal. (Tr. p. 61) Claimant testified that when he discussed low back pain with Dr. Kennedy he was told that his back pain was secondary. (Tr. p. 61)

Claimant was receiving physical therapy in January 2015 that was focusing on low back stabilization. (Tr. p. 64) Dr. Kennedy returned claimant to light work on January 15, 2015 and regular work at the end of February 2015 and found him to be at maximum medical improvement. (Tr. pp. 68, 92) Claimant returned to Dr. Kennedy and had additional treatment and physical therapy from June through November 2015. In November 2015, Dr. Kennedy released claimant from her care and ordered a functional capacity examination (FCE). (Tr. p. 72) Dr. Kennedy provided permanent restriction to the claimant on February 16, 2016. (Tr. p. 75) Claimant saw Dr. Kennedy in January 2017 as he was having pain in his buttock and pain in his back. (Tr. p. 99) Dr. Kennedy released claimant from care again. In May 2017, she diagnosed claimant with "stable right femoral neuropathy and resolved piriformis syndrome[1]." (Tr. p. 103; JEx. 1, p. 148)

Claimant acknowledged that after an EMG suggested peripheral polyneuropathy of the leg Dr. Kennedy focused her treatment on that condition. (Tr. pp. 97, 98) Claimant said that in May 2017 Dr. Kennedy prescribed an inversion table for his sciatica and back. (Tr. p. 122)

Claimant was not taking any prescription medications for his injury and has not had any type of surgery. (Tr. pp. 106,107) Claimant does take ibuprofen for back pain. Claimant agreed that his knee only bothered him if he climbed more than 20 stairs, that his right thigh pain was intermittent, and the pain in his buttock was also intermittent. He testified that he has low back pain most days and it is also intermittent. (Tr. p. 108) Claimant has no restrictions or physician recommended limitation about driving. (Ex. C, p. 8) Claimant testified that his duty as chief of police, at the time of the hearing, was a desk job. (Tr. p. 113; Ex. C, p. 9) Before his injury, claimant performed more patrol work. (Tr. 114) Claimant's understanding of his restrictions from Dr. Kennedy are:

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[1] In Dennis v. Lowe's Home Centers, File No. 5023346, (Arb. September 8, 2008, p. 6), piriformis syndrome was described as;

> Piriformis syndrome is understood to be a condition in which the piriformis muscle in the hip exerts pressure on the sciatic nerve, eliciting pain, tingling, weakness of the muscles of the lower limb, etc. See Schmidt's Attorneys' Dictionary of Medicine, Volume 4, 1998, p. 264)

> A. No running, jumping, climbing ladders, lifting weight more than 50 pounds above the waist, from, like, knee to waist. No risk for physical altercations, no restraining.

(Ex. C, p. 9) Claimant stated that his current wages at the City of Peosta are the highest wages he has ever earned. (Tr. p. 117)

Claimant was seen by Dr. Garrity on November 24, 2014. The intake note indicated:

> 'Numbness/tingling in right leg/foot.' States he attempted to kick open a locked door several times. States the next day he had tightness in upper leg, then day after he gets a numbness from hip to knee.

(JEx. 1, p.1) During this visit claimant denied any back pain. Dr. Garrity assessed claimant with "Strain of tendon of medial thigh muscle-right." (JEx. 1, p. 1)

On December 1, 2014 claimant saw Dr. Kennedy for the first time. Dr. Kennedy noted:

> States the numbness has eased up but has a feeling of fluid running down his leg. States he gets that feeling after walking awhile. States he did have some bruising but has cleared up. States he doesn't have pain just a feeling of his leg being asleep.

(JEx. 1, p. 4) Dr. Kennedy's assessment was paresthesia of the lower extremity due to the forceful impact of the bottom of his foot. (JEx. 1, p. 5) On December 8, 2014, Dr. Kennedy wrote that claimant denied any back pain. (JEx. 1, p. 10)

Claimant was referred to physical therapy and saw Daniel Focht, MA, OTR, on December 15, 2014. Mr. Focht wrote that claimant had an injury to the low back and hip and his chief complaint at present is pain into the right SI and medial thighs. Mr. Focht's assessment was "[R]ight SI dysfunction." (JEx. 1, p. 12)

On December 22, 2014, Dr. Kennedy noted claimant was being seen for a recheck of his low back and right leg symptoms. Dr. Kennedy ordered imaging and recommended a trial of Lyrica for nerve pain. Dr. Kennedy's assessment was "Low back pain." (JEx. 1, p. 15) X-rays of the lumbar spine showed mild degenerative change and was otherwise negative. (JEx. 1, p. 19) On December 23, 2014, Mr. Focht noted claimant's pain had decreased, but his radicular symptoms follow an L4-5 dermatome. (JEx. 1, p. 20) On December 24, 2014, Mr. Focht noted that claimant had no evidence of any radicular complaints below his interior thigh on the right. (JEx. 1, p. 21)

On December 30, 2014, an MRI of the spine showed early degenerative disk desiccation in the L1-2 through L4-5) Mild disk bulges are seen at L2-3 through L4-L5. There were no findings of significant spinal canal narrowing or neuroforaminal compromise. The impression was, "Mild multilevel degenerative disk changes with no spinal or neuroforaminal compromise." (JEx. 1, p. 23)

On December 31, 2014, Dr. Kennedy noted the results of claimant's MRI were entirely normal. Her assessment was, "Sprain of sacroiliac region." (JEx. 1, p. 24) On January 15, 2015, Dr. Kennedy returned claimant to work with restrictions. Her diagnosis was:

> Diagnosis: Right leg: 1) groin strain – resolved. 2) anterior thigh paresthesia from periph nerve irritation – improving on lyrica, 3) SI strain – stable. 4) Normal MRI.

(JEx. 1, p. 33)

On February 23, 2015, Dr. Kennedy noted the claimant's SI (sacroiliac) complaints have fully resolved and the claimant was at maximum medical improvement (MMI) and could return to full duty with no restrictions. (JEx. 1, p. 40) Dr. Kennedy's diagnosis was:

> Diagnosis: Right leg: 1) groin strain – resolved. 2) anterior thigh paresthesia from periph nerve irritation – persistent but not of functional consequence, 3) SI strain – resolved. MMI w/o PPI.

(JEx. 1, p. 41)

Claimant returned to Dr. Kennedy on June 1, 2015 with anterior pelvis and groin myofascial tightness and anterior thigh paresthesia of the periph nerve irritation worsening his pelvis and groin condition. Dr. Kennedy ordered electrodiagnostic testing and physical therapy. (JEx. 1, p. 42)

On July 7, 2015 Peggy Mulderig, M.D., performed the electrodiagnostic testing. Dr. Mulderig impressions were:

> Electrodiagnostic impression:
>
> #1 this is an abnormal study.
>
> #2 denervation is present at the right vastus lateralis. Right femoral neuropathy cannot be ruled out.
>
> #3 findings are suggestive of a peripheral polyneuropathy

#4 there is no evidence of a right lower extremity motor radiculopathy

(JEx. 1, p. 53)

On July 27, 2015, Dr. Kennedy recommended an MRI of the right hip and noted claimant reported reoccurrence of pain in the right SI and groin. (JEx. 1, p. 57) On August 10, 2015, Dr. Kennedy assessed claimant with femoral neuropathy and knee pain. She did discuss with claimant whether he should consider retirement as she was concerned that claimant may not be disclosing deficits due to risks to his job. (JEx. 1, p. 62) On September 14, 2015, claimant's right knee pain had resolved. (JEx. 1, p. 75)

On November 20, 2015, Dr. Kennedy released claimant from care and stated claimant could continue full duty and functioning in his occupation. (JEx. 1, p. 77)

On February 2, 2016, Mr. Focht provided Dr. Kennedy with functional capacity evaluation results. The report was deemed valid. Mr. Focht noted claimant's lifting capacity was 46 pounds putting him in the medium category of work. He noted that if there were spontaneous-physical exertion that could put claimant and the public at risk. He said claimant could perform light work. (JEx. 1, p. 80) Mr. Focht noted that claimant could only drive for 35-40 minutes before he had to egress the patrol car and walk for 5-10 minutes to relieve low back pain and right lower extremity discomfort. Claimant was complaining of pain to the right lumbar-sacral region with radiation to his right buttock. (JEx. 1, pp 80, 81)

On February 11, 2016, Dr. Kennedy performed an evaluation of claimant for the purpose of case closure and providing a rating. Dr. Kennedy described claimant's current symptoms.

> A current symptom drawing reveals ongoing complaints in the low back, the right pelvis, the right leg, and the right knee. He was able to elaborate during interview. I learned that he continues to experience periodic aching in the back in the midline that is perceived as muscular. He also has pain over the area of the right SI joint that is sharper. This is also intermittent.

(JEx. 1, p. 91) Dr. Kennedy's assessment was:

> ASSESSMENT: James Riley is a 61-year-old gentleman who sustained right leg neuropathy affecting the femoral nerve, the obturator nerve, and the lateral femoral cutaneous nerve as a result of attempting to kick in a door as part of his occupational activities as a police officer on November 20, 2014. This has caused sensory deficits throughout the right thigh at all surfaces. This has also caused weakness in the right thigh affecting almost all of the muscles in the right thigh. Secondarily, due to weakness of the right thigh, he has had the development of patellofemoral syndrome in the right knee and SI dysfunction and low back strain in the right pelvis

> and back. He was placed at maximum medical improvement by me on November 20, 2015. . . .

(JEx. 1, p. 93)

> Dr. Kennedy stated:
>
> Appropriate methods for rating impairment that can be considered include the primary nerve deficit or peripheral nerve dysfunction, muscle atrophy affecting the right thigh, and muscle strength loss. The most appropriate method in my opinion is the method that rates for the primary problem, which is neuropathy of the right leg from peripheral nerve injury. Atrophy and loss of strength are secondary issues.

(JEx. 1, p. 93)

Combining ratings for the femoral, obturator, and lateral femoral cutaneous nerves, Dr. Kennedy found claimant had a 10 percent lower extremity rating. She noted claimant may require periodic physical therapy directed to the right SI joint, right hip, right thigh and right knee. (JEx. 1, p. 94) Dr. Kennedy assigned the following restrictions:

> In regard to permanent restrictions, Mr. Riley cannot perform all activities of a police officer fully. I have concern about safety-sensitive activities in particular. It is my opinion, with review of the functional capacity exam and discussion with Mr. Riley, that he requires the following permanent restrictions: He may lift up to 50 pounds and only above the knee. He can squat, kneel, and crawl occasionally. He is restricted from running and jumping. He is restricted from ladders or climbing objects such as fences. He should not engage in activities that impart risk for physical altercation, nor should he engage in pursuits. He is aware that if his employer is unable to accommodate these restrictions, that he may pursue an assessment through MFPRSI.

(JEx 1, p. 94) I find the above restrictions are claimant's restrictions as a result of his work injury of November 20, 2014. I find that with these restrictions claimant cannot work as a police officer without accommodation.

On January 16, 2017, Dr. Kennedy saw claimant for complaints of pain while sitting and difficulty sleeping due to pain. Claimant reported a substantial increase in the time he sits at a desk. Dr. Kennedy's assessment was:

1. Piriformis syndrome of the right side greater than left.

2. Sciatica of right side greater than left.

> This is not medically related to the original injury. It is the functional result of greater time in a seated capacity as is demanded by his current job duties. This allows shortening of the muscle and tension over the sciatic nerve. He would benefit from PT. There is not [sic] indication of spinal involvement as there is no tenderness identified in this area today. He will continue on permanent restrictions and f/u with me in 2 weeks to assess progress. He agrees to plan of care.

(JEx. 1, p. 97) On February 15, 2017, Dr. Kennedy noted claimant had seen improvement after physical therapy. She stated again that the cause of his symptoms was related to the greater time he spent sitting at a desk at work. (JEx. 1, p. 122)

On April 3, 2017, Dr. Kennedy reviewed MRI results for low back pain into the right buttock. The MRI was normal. (JEx. 1, p. 141) Dr. Kennedy's assessment was sciatica of the right side. She wrote, "With altered body mechanics following femoral neuropathy, it is likely that muscles have tightened and now cause sciatica at gluteal area and pain in low back. He is trying yoga on his own. This will require a careful balance not to overdo stretching which can inflame the nerve." (JEx. 1, pp. 142, 143)

Dr. Kennedy's last examination of claimant was on May 25, 2017. Her assessment was,

1. Femoral neuropathy of right lower extremity G57.21

   Stable
2. Piriformis syndrome of left side G57.02

   Resolved.
3. Sciatica of right side M54.31
4. Low back pain.

(JEx. 1, p. 148) Dr. Kennedy discharged claimant from her care. On May 25, 2017, Dr. Kennedy wrote that claimant's diagnosis was "Left piriformis syndrome resolved. Low back pain secondary to change of biomechanics from femoral neuropathy." (JEx. 1, p. 149)

On July 7, 2017, Robin Sassman issued an independent medical examination (IME). " (Ex. 1, p. 5) At the time of her examination of claimant, he noted pain in the back that was always present. (Ex. 1, p. 13) Dr. Sassman's diagnosis was,

1. Low back pain.

2. Right lower extremity peripheral neuropathy.

(Ex.1, p. 15) Regarding causation Dr. Sassman stated:

> It is my opinion that the incident that occurred on or about November 20, 2014, is directly and causally related to the femoral nerve injury. It was on this date that Mr. Riley was repeatedly kicking a steel door and subsequently noted numbness in the right leg and low back pain. It is reasonable that these nerves that traverse this area of the groin were traumatized by the repetitive and forcefully kicking of the steel door with the right leg. While I would agree that he has peripheral neuropathy of the femoral, lateral femoral cutaneous and obturator nerves in the in the [sic] right leg (that has been confirmed on EMG), this diagnostic entity does not explain his low back pain symptoms and change in sensation in the right lower leg. This can only be explained by a low back issue. Based on his symptoms, the exam findings and his MRI, I believe this incident also was an aggravating factor in his low back degenerative changes and is the cause of his ongoing low back pain as well.

(Ex. 1, p. 15) Dr. Sassman provided a rating of 14 percent of the lower extremity for the femoral neuropathy, obturator nerve and lateral femoral cutaneous nerve. (Ex. 1, p. 16) For the lumbar spine Dr. Sassman provided a 5 percent whole body impairment rating. Dr. Sassman combined both ratings for an 11 percent whole body impairment rating. (Ex. 1, p. 16) Dr. Sassman provided the following restrictions:

> Mr. Riley should limit lifting, pushing, pulling and carrying to 30 pounds occasionally from floor to waist, waist to shoulder, and over shoulder height. He should limit standing, walking and sitting to an occasional basis and will need to change positions frequently due to his symptoms. He should not crawl or stoop. He should not use ladders or walk on steep or uneven surfaces. He should not take part in high-risk activities that pose a risk for physical altercation or pursuit.

(Ex.1, p. 17)

On August 25, 2017, Barbara Laughlin M.A., completed an employability assessment of the claimant. Ms. Laughlin was not retained to find employment for claimant. (Ex. 3, p. 39) Using the restriction of Dr. Kennedy she opined,

> Per the restriction of Dr. Kennedy, Mr. Riley has the following occupational loss:

	Occupations-Pre-Injury Access	Occupations-Post-Injury Access	Occupations-Occupational Loss%
Closest match occupations:	72	65	9.7%
Good match occupations:	80	68	15.0%
Unskilled occupations	3127	2335	25.3%

(Ex. 3, p. 38) Using the restrictions of Dr. Sassman, Ms. Laughlin opined,

Per the IME of Dr. Sassman's restrictions, Mr. Riley has the following occupational loss:

	Occupations-Pre-Injury Access	Occupations-Post-Injury Access	Occupations-Occupational Loss%
Closest match occupations:	72	29	59.7%
Good match occupations:	80	43	46.3%
Unskilled occupations	3127	1243	61.4%

(Ex. 3, p. 38) Ms. Laughlin stated that claimant was severely limited in the labor market especially with Dr. Sassman's restrictions and could not be a police officer with Dr. Kennedy's restrictions. (Ex. 3, p. 50)

On September 1, 2017, Dr. Kennedy responded to statements and questions from defendants. Dr. Kennedy agreed that she "... never appreciated any low back pathology or radicular component" and found no basis to provide a whole body rating and that the restrictions of February 11, 2016 relate to the lower extremity." (Ex. A, p. 2) Dr. Kennedy stated she assessed the possibility of low back etiology but arrived at a diagnosis of piriformis syndrome and would not assign a permanency rating to piriformis syndrome. (Ex. A, p. 2) Dr. Kennedy disagreed with Dr. Sassman that claimant had a loss below the knee do to the work injury of November 20, 2014. Dr. Kennedy's opinion is that any sensory loss is a new injury. (Ex. A, p. 3)

On September 20, 2017, Dr. Sassman responded to Dr. Kennedy's September 1, 2017 letter. Dr. Sassman stated that the medical record showed claimant had sensory loss below the knee and was treated by Dr. Kennedy for low back symptoms. Dr. Sassman did not believe that claimant had a new injury, but his back symptoms were related to the original work injury. (Ex. 1, p. 20)

Dr. Sassman was asked at to opine as to whether piriformis syndrome occurs in the leg or low back. On November 2, 2017, Dr. Sassman stated:

> Piriformis syndrome is a condition where the piriformis muscle (located keep [sic] in the buttock behind the gluteus maximus) spasms and causes buttock pain. It can also irritate the nearby sciatic nerve and cause pain and numbness that radiates down the leg. The location of this irritation is in the low back as opposed to the leg. Dr. Kennedy stated that piriformis syndrome was the cause of Mr. Riley's symptoms. While I respectfully disagree with her on this point, I submit to you that even if it was the case, the pain generator of piriformis syndrome occurs in the low back.

(Ex. 1, p. 23)

On November 28, 2017, Dr. Kennedy responded to a letter from defendant. Dr. Kennedy agreed that claimant had some radicular symptoms, she ruled out those symptoms and that there was no objective evidence of low back pathology. Dr. Kennedy agreed that claimant's symptoms are explained by his femoral neuropathy. (Ex. B, p. 4) Dr. Kennedy agreed that based upon the AMA Guides that only the primary situs affected can be rated. She also agreed that there are no MRI findings to support claimant's low back pain. Dr. Kennedy agreed that claimant's injury resulted in only a ratable condition related to the right femoral neuropathy and that claimant's piriformis syndrome was secondary and not ratable. (Ex. B, p. 5)

On December 1, 2017, Dr. Sassman provided her last response to Dr. Kennedy. Dr. Sassman stated there was objective evidence of low back pathology, the December 30, 2014 MRI, and claimant's back symptoms which claimant did not have before the work injury. (Ex. 1, p. 25)

I find that the weekly workers' compensation rate is $863.75 based upon gross weekly wages of $1,393.00 with three exemptions and status of married.

RATIONAL AND CONCLUSIONS OF LAW

The parties have stipulated that claimant had an injury that arose out of and in the course of his employment with the City of Peosta. The first issue to decide is whether the claimant's injury is a scheduled injury to the leg or is an industrial disability to the back or hip.

SCHEDULED MEMBER OR INDUSTRIAL DISABILITY

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

The Iowa Supreme Court has held that "where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Schofield & Welch, 266 N.W. 480, 482 (1936). The Court explained as follows:

> If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for. Id. at 481.

Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012).

A sequela can be an after effect or secondary effect of an injury. Lewis v. Dee Zee Manufacturing, File No. 797154, (Arb. September 11, 1989) A sequela can also take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back condition can be found to be a sequela of the leg injury. Fridlington v. 3M, File No. 788758, (Arb. November 15, 1991) A sequela can also take the form of a later injury that is caused by the original injury. For example, where a leg injury leads to the claimant's knee giving out in a grocery

store, the resulting fall is compensable as a sequela of the leg injury. Taylor v. Oscar Mayer & Co., III Iowa Industrial Commissioner Report, 257, 258, (App. December 16, 1982).

I acknowledge that Dr. Kennedy provided significant treatment to claimant and had much contact with claimant. The opinions of treating doctors are not to be given greater weight simply because they are treating doctors. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994). However, consideration can be given to treating physicians due to the contacts and treatment of a patient over time. In this case, Dr. Kennedy has rated the claimant's injury as an injury to his right leg and diagnosed him with, "Femoral neuropathy of right lower extremity" and "Piriformis syndrome of left side. Resolved. . . . Low back pain, secondary to change of biomechanics from femoral neuropathy." (JEx. 1, pp. 148, 149) Based upon Dr. Kennedy's reports, claimant's low back pain is a sequela to his leg injury requires a finding of a whole body injury, even without considering Dr. Sassman's opinions. Claimant has pain in his low back, SI joint, and buttock that limits his ability to work. They are significant impairments. While the femoral neuropathy may be causing most of claimant's symptoms, the records show that he has permanent injury to the whole body, back and hip, and his right leg. Dr. Kennedy's analysis how to evaluate claimant's impairment as to how she believes the AMA guides require her to rate claimant's injury: That is rating the primary impairment. Be that as it may, it is not the correct legal analysis as to determine if a scheduled member has now caused an injury to the body as a whole.

I find Dr. Sassman's opinion the claimant has a permanent impairment to the back convincing as a result of the November 20, 2014 work injury. The physical therapy records show consistent treatment for a low back injury. I found her reply reports and citations to the record convincing as to causation and permanency of the back injury.

EXTENT OF DISABILITY

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 assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

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

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

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

Based upon the restriction of Dr. Kennedy, claimant can no longer work as a police officer without being accommodated. Claimant is being accommodated in his current position as Chief of Police for the City of Peosta. Claimant's vocationally relevant work has been in law enforcement. Claimant's education is limited to high school and the Iowa Law Enforcement Academy. While many years ago he had some vocational training, he cannot weld or drive over-the-road trucking. Dr. Kennedy discussed with claimant as to considering retirement. Claimant's age is not a positive factor.

While claimant has a significant disability, he is not precluded from all employment. The vocation evidence shows there are some light and sedentary jobs he could perform. It appears that he would, however, have a very substantial decrease in income in working in a field other than law enforcement. Considering all of the factors of industrial disability I find that claimant has a 65 percent loss of earning capacity and has a 65 percent industrial disability. Pursuant to Iowa Code section 85.34(2)u (2017) claimant is entitled to 325 weeks of permanent partial disability benefits.

The award of a 65 percent industrial disability recognizes that claimant is currently employed with the City of Peosta.

COMMENCEMENT OF PERMANENT PARTIAL DISABILITY

Permanent partial disability benefits commence upon the earliest of the three factors outlined in Iowa Code section 85.34(1). Specifically, permanent disability benefits commence upon the earliest of the claimant's return to work, medical ability to return to substantially similar employment, or achieving maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372-374 (Iowa 2016). In this case, claimant has always worked. After his injury he finished his shift and did not miss work for a number of days. Under the holding of Evenson the commencement date for permanent partial benefits in November 20, 2014.

PENALTY BENEFITS

The next issue is penalty benefits.

Iowa Code section 86.13(4) provides that:

> (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, of chapter 85, 84A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

(c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (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 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 commission must impose a penalty in an amount up to fifty 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.

Defendants relied upon the opinion of Dr. Kennedy that the claimant's injury was a scheduled member injury. While I did not agree with her opinion, it was reasonable for the defendants to rely upon her opinion.

I find the denial of benefits was not unreasonable. No penalty benefits are awarded.

COSTS

The last item is a request for payment of costs. (Attached to hearing report)

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.

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).

Claimant has requested:

1) $100.00 filing fee;
2) $1,105.00 for Ms. Laughlin's report;
3) $475.00 for phone conference on September 18, 2017 ($285.00) and a letter of September 20, 2017 ($190.00) with Dr. Sassman;
   $190.00 for a November 11, 2017 letter from Dr. Sassman;

4) $380.00 for a December 1, 2017 letter from Dr. Sassman.

The claimant is entitled to up to two reports. The phone conference with Dr. Sassman is not a cost allowed under the administrative rules.

Claimant also seeks reimbursement for the fees of the vocational specialist, Ms. Laughlin in the total amount of $1,105.00 under out costs rule 876 IAC 4.33 (6). Only costs for the preparation of two doctor or practitioner reports can be awarded as costs under our rule 876 IAC 4.33(6), not the cost of any examination performed to arrive at any findings or opinions contained in the report. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015); Lagrange v. Nash Finch Company, File No. 5043316 (App. July 1, 2015). The question is what charges are allowed as the cost of preparation of the report. Turning to the specific decision of the Iowa Supreme Court in Young, the Court discussed a previous Court of Appeals decision in John Deere Dubuque Works v. Caven, 804 N.W.2d 297, 301 (Iowa Ct. App. 2011). In Caven, the appeals court awarded the cost of a report from an audiologist which included a charge for a review of medical records and an interview of the claimant. Young had cited this case as precedent for awarding the costs of a medical examination. The Supreme Court in Young distinguished Caven by stating that the Caven court awarded the report cost under the general costs provisions of Iowa Code section 86.40, not for an examination under Iowa Code section 85.39. The Young court did not reverse Caven. Consequently, the cost of preparing a report by the practitioner can include the costs of a record review and an interview of the claimant.

Ms. Laughlin itemized her report to show she spent 1.0 hour in conference, 1.6 hours to review the file, 1.4 hours performing the OASY testing, 1.0 hour for LMS and 4.5 hours preparing the report. She charged $110.00 per hour. (Attachment to hearing report). Given the Caven case, the charges for the meeting with claimant and the charge for file review and report, which total 6.9 hours are reimbursable and shall be awarded.

Claimant may only be awarded for two reports. Claimant is awarded $759.00 for Ms. Laughlin's report. (6.9 hrs. x $110.00 = $759.00). Claimant is awarded $380.00 for the December 1, 2017 letter by Dr. Sassman. Claimant is awarded $100.00 for the filing fee. Total costs awarded is $1,239.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability at the weekly rate of eight hundred sixty-three and 75/100 dollars ($863.75) commencing November 20, 2014.

Defendants shall pay claimant costs in the amount of one thousand two hundred thirty-nine dollars ($1,239.00).

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. Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

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 27th day of November, 2018.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.