

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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DANNY L. SPARKS,

Claimant,

vs.

P & J EQUIPMENT CORP.,

Employer,

and

ACCIDENT FUND INS.,

Insurance Carrier,  
Defendants.

**FILED**

APR 10 2019

WORKERS COMPENSATION

File No. 5058524

ARBITRATION

DECISION

Head Note Nos.: 1108, 1803

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STATEMENT OF THE CASE

Claimant filed a petition for arbitration seeking workers' compensation benefits from P&J Equipment Corporation, employer, and Accident Fund Insurance Company, the insurance carrier.

The matter came on for hearing on April 16, 2018, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 4; defense exhibits A through G; and joint exhibits 1 through 10, and the testimony of claimant, Danny Sparks, and his spouse Stephanie Sparks. The parties briefed this case and the matter was fully submitted on May 1, 2018.

As a side note, it is apparent that both parties did an excellent job of limiting the exhibits presented at hearing. It is apparent that there were hundreds or possibly thousands of pages of medical records which were not presented. Both parties were able to submit their exhibits without including unnecessary pages. This enabled the undersigned to thoroughly focus on every exhibit in significant detail because every page was highly probative. Both attorneys represented their clients well.

ISSUES

The fighting issue in the case is the nature and extent of the claimant's permanent partial disability. Claimant also seeks alternate medical care under Iowa

Code section 85.27 (2017). In addition, defendants seek credit for an overpayment of benefits under Section 85.34(4).

### STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.
2. Claimant sustained an injury which arose out of and in the course of employment on October 17, 2013.
3. The injury is a cause of some temporary and permanent disability.
4. Temporary disability benefits are not in dispute.
5. The parties have stipulated to a commencement date for benefits.
6. The weekly rate of compensation is \$715.19.
7. Affirmative defenses are waived.
8. Medical expenses are not in dispute (other than alternate medical care as set forth above).
9. Defendants have paid and are entitled to a credit of 149.143 weeks of compensation.

### FINDINGS OF FACT

Danny Sparks was born in September 1966, making him 53 years old at the time of hearing. He lives in LaPorte City with his wife and two children. He testified live and under oath at hearing. I find his hearing testimony to be highly credible. His testimony was highly consistent with the medical documentation in the record. He is found to be a reliable and accurate historian. His live hearing testimony was also highly consistent with his deposition testimony, also taken under oath. (See Defendants' Exhibit A) His testimony at hearing was straightforward, confident and easy to follow. There was nothing about his demeanor which caused the undersigned any concern about his truthfulness. On the contrary, I find him to be highly credible.

Mr. Sparks graduated from high school. He has no further education or training. He began working for P&J Equipment in 1986, when he was 20 years old. In the beginning of his employment it was just he and the owner of the company. P&J Equipment builds grain bins and associated equipment. He is a trusted and valued employee for his employer, with broad job duties and responsibilities. At hearing, he described himself as a job site foreman. His job included heavy labor, significant climbing, sometimes at great heights, lifting loads of up to 100 pounds, walking and

working on uneven agricultural land and operating heavy equipment. Prior to his work injury herein, Mr. Sparks was generally healthy with no significant pre-existing disabilities.

On October 17, 2013, Mr. Sparks suffered a serious work injury. The injury itself is stipulated. He was using a skid loader to move a long spout. While he was in the process a heavy pipe entered the cab, pinning his left arm and leg. As he attempted to escape the cab, the pipe pinned his right leg and pushed him into the rear of the cab. After he was finally able to get out of the end loader, it was apparent that his injuries were severe and he was air lifted to Covenant Medical Center in Waterloo for emergency care. (Joint Exhibit 1)

He was diagnosed with "an extensive open right distal femur fracture, as well as a severe laceration to his left hand." (Jt. Ex. 3, p. 1) Treatment was undertaken by Jason Stanford, D.O. A treatment plan was developed quickly.

At this point, given the open nature of his wounds, he is offered surgical intervention in the form of irrigation and debridement with external fixation of his right distal femur fracture with irrigation, debridement and possible wound closure of his left hand. Surgery at this point will be taken on an urgent basis given the severe and open nature of his wounds.

(Jt. Ex. 3, p. 2) The surgery was performed the same day. (Jt. Ex. 3, pp. 4-8) He was discharged on October 22, 2013, and admitted to a nursing home for intermediate care.

On November 1, 2013, he was admitted to Sartori Hospital where Dr. Stanford performed another procedure described as "open reduction internal fixation right interarticular distal femur fracture" to help correct the problem. (Jt. Ex. 4, p. 1) Essentially, the surgery placed permanent plate and screws. His healing process thereafter was slow and an attempt at use of a bone stimulator was unsuccessful. (Jt. Ex. 5, p. 1) Eventually, by July 2014, Mr. Sparks was referred to the University of Iowa Hospitals and Clinics, Nicolas Noiseux, M.D., for a possible knee replacement. Dr. Noiseux assessed his difficulties as follows:

Danny L. Sparks is a 47 y.o. male presenting to the UIHC Work Injury Recovery Center with chief complaint of right knee pain. He had right femur ORIF on 11/01/13. He is postop Grade 3-A open intraarticular distal femur fracture with nonunion, a work related injury that is reported to have occurred on 10/17/13. He had a slow healing process after surgery and his bone stimulator is reported to have showed no significant changes to this fracture, although he does have significant calcification on his MCL, as well as posterior compartment of his right knee.

(Jt. Ex. 5, pp. 1-2) Dr. Noiseux recommended a total knee arthroplasty. (Jt. Ex. 5, p. 2) The knee replacement was performed on August 5, 2014. (Jt. Ex. 5, pp. 5-10) After a course of treatment, he released Mr. Sparks to work light-duty (desk) work on

November 9, 2014. He was able to work 10 hour days.

After returning to work, Mr. Sparks began to develop pain and swelling. He had significant difficulty ambulating despite using a cane and a knee brace. According to his medical file, he was on significant pain medications during this period of time. (Jt. Ex. 5, p. 12) In January 2015, Dr. Noiseux ordered blood testing to determine whether Mr. Sparks had developed an infection. In February 2015, Dr. Noiseux opined that the pain and swelling were most likely related to the soft tissue damage from the original injury, not an infection. (Jt. Ex. 5, p. 14) He placed Mr. Sparks at maximum medical improvement (MMI), restricted him from kneeling and squatting and set an appointment to review further test results to rule out infection. (Jt. Ex. 5, p. 15) In April 2015, Dr. Noiseux provided a 75 percent impairment rating on the right leg. (Jt. Ex. 5, p. 16) He also set forth what he believed future treatment would entail at that time.

In March 2015, Dr. Stanford performed nerve conduction studies and summarized claimant's left hand injury. "Danny does have good range of motion of his hand. He does have some hypertrophic scarring just distal to his palmar wound. There are no obvious signs of deformity or limited range of motion." (Jt. Ex. 3, p. 13) He assigned a 20 percent impairment rating to claimant's left hand. (Jt. Ex. 3, p. 13)

Unfortunately, in May 2015, Mr. Sparks developed a boil and abscesses on the incision site and was referred to an infectious disease specialist.

On 5/5 Ortho clinic f/u, he reported he had developed a small erythematous area on the distal thigh just proximal to the knee [one of the traumatic horizontal incisions] on 5/2. At this point, the orthopedic service felt that he likely had a chronic prosthetic joint infection and decided to start treatment with oral doxycycline followed by a referral to ID clinic for further evaluation.

On evaluation today, the patient reports that has been failing [sic] relatively well since starting doxycycline therapy. He states that he has lymphedema treatment with compressive dressings to the right leg about a week ago that have greatly helped with reducing the swelling through the entire leg and the small, swollen area proximal to the knee. He denies any drainage from this area or any other site close to the surgical incisions. He denies any systemic signs or symptoms of illness. He feels that the pain in his right leg has also improved with the lymphedema treatments. Patient is able to walk with her [sic] cane. He has been tolerating doxycycline therapy well. Patient is otherwise healthy.

(Jt. Ex. 5, p. 20) The opinion of the infectious disease specialists was that he did in fact have chronic infection in the prosthetic knee. (Jt. Ex. 5, p. 21) He was provided with various options and ultimately chose amputation of his leg above the knee which occurred on December 11, 2015. (Jt. Ex. 5, p. 25) Benjamin Miller, M.D., performed the surgery and assumed medical care. Mr. Sparks was eventually fitted with a

prosthesis and had a normal course of follow up treatment, including fairly extensive therapy, thereafter. He underwent gait reeducation training at Covenant Clinic Rehab. (Jt. Ex. 8) He underwent 18 sessions ending on March 18, 2016. (Jt. Ex. 9) At the conclusion of his treatment, he was not reporting any pain. He was placed at maximum medical improvement on September 29, 2016, and instructed to follow up at the amputee clinic for further care. (Jt. Ex. 5, p. 34) Mr. Sparks was seen at the UIHC Pain Clinic in April and June 2016, but declined any further pain management treatment in August 2016. (Def. Ex. B, p. 16)

Mr. Sparks testified in some detail at hearing about his development of pain in his lower back and spine following the injury. He testified that during his course of treatment, prior to his amputation, he began favoring his left leg which has resulted in pain in his low back. He also testified regarding pain he developed in his left knee and right hip. This is consistent with the medical documentation produced, particularly the pain diagrams he filled out in May and July 2015. (Jt. Ex. 5, pp. 18, 24) The medical providers, however, did not provide specific treatment for these symptoms, nor did they treat these conditions as discrete diagnoses which required specific treatment.

In July 2016, Mr. Sparks was evaluated at the direction of his attorney by John Kuhnlein, D.O. Dr. Kuhnlein performed a thorough review of the records and a thorough evaluation. (Cl. Ex. 2, pp. 2-10) In July 2016, however, Dr. Kuhnlein did not have all of the pain diagrams that Mr. Sparks had filled out for the physicians at the University of Iowa Hospitals and Clinics. Based upon the information he had at that time, Dr. Kuhnlein diagnosed the following conditions:

1. Complicated comminuted and displaced right femur fracture
  - a. October 17, 2013 external fixator placement (Stanford)
  - b. November 1, 2013, external fixator removal with ORIF (Stanford)
  - c. August 5, 2014, hardware removal and right total knee arthroplasty (Noiseux)
  - d. December 11, 2015, right above-knee amputation (Miller)
  - e. Post-traumatic anemia requiring transfusion – apparently resolved
  - f. Post-operative infection – apparently resolved
  - g. Phantom pain right lower extremity
2. Hematoma left thigh – resolved. Persistent pain in the area of the vastus lateralis and the midportion of the iliotibial band
3. Laceration of the left hand

- a. October 17, 2013, Primary wound closure left hand laceration (Stanford)

4. Complaints of low back pain
5. Complaints of bilateral hip pain
6. Complaints of left knee pain

(Cl. Ex. 2, p. 10) In some detail, Dr. Kuhnlein opined that all of these conditions were causally connected to his October 2013, work injury.

Importantly, Dr. Kuhnlein specifically diagnosed “phantom pain” in the right leg, indicating it was a sequelae of the treatment associated with the amputation.

In relation to the diagnosis of low back pain, Dr. Kuhnlein noted that there was only one physical therapy record mentioned in a physical therapy record from September 2014. (Cl. Ex. 2, p. 11) “Mr. Sparks says that he mentioned his back pain to the physicians. He says that the physicians told him that they were to focus on his right leg and so that’s why his back pain complaints were not documented.” (Cl. Ex. 2, p. 11) Dr. Kuhnlein opined that he developed the back pain due to gait changes. “Given this sequence of events, it would be more likely than not that Mr. Sparks would develop back pain as a result of the gait changes, and so I would attribute his back pain to the October 17, 2013, injury as a sequelae. This may resolve as his gait normalizes over time with an appropriate prosthesis.” (Cl. Ex. 2, p. 11)

Similarly Dr. Kuhnlien opined that claimant’s left knee pain was a sequelae of the original injury.

Given Mr. Sparks’ statements, and his credibility, I believe what he is saying is accurate regarding his left knee pain, and in the case of his left knee, would state that it is more likely than not that the left knee pain is related as a sequelae to the October 17, 2013, injury, as there is evidence that Mr. Sparks mentioned his left knee pain to Dr. Noiseux that was not addressed.

(Cl. Ex. 2, p. 12)

Dr. Kuhnlein recommended claimant continue pain management treatment and assigned impairment ratings at that time. He assigned a 90 percent right lower extremity impairment (converted to 36 percent of the body as a whole) and a 4 percent impairment to his left upper extremity (converted to 2 percent of the body as a whole). He also assigned a 1 percent left lower extremity impairment and opined that the claimant had not reached maximum medical improvement for his low back condition. (Cl. Ex. 2, p. 13) All of the conditions combined (excluding the low back) resulted in a 37 percent body as a whole impairment. Dr. Kuhnlein recommended common sense restrictions with the understanding that the claimant did not want restrictions which

would cause him to lose his job. He recommended lifting restrictions in the range of 30 to 40 pounds, and recommended that he sit, stand and walk on an as needed basis, being able to change positions for comfort. He recommended Mr. Sparks not use ladders and recommended some limitations on stooping, squatting, crawling and kneeling. (Cl. Ex. 2, p. 14)

Overall, I find Dr. Kuhnlein's report to be highly credible. The report is well-reasoned and comprehensive. It takes into consideration the claimant's highly credible statements regarding his symptoms. I specifically adopt his impairment ratings of the right leg, left leg and left hand. I also adopt his recommended restrictions as base guidelines for his functional capabilities as it relates to work.

In response to this report, defendants directed Mr. Sparks to see Kenneth McMains, M.D., for an assessment of his lower back in March 2017. Dr. McMains examined the claimant and reviewed the medical file. (Def. Ex. C, pp. 1-3) Dr. McMains acknowledged the phantom pain, which did not decrease with the use of Gabapentin. (Def. Ex. C, p. 3) Dr. McMains diagnosed: "(1) chronic bilateral lumbar spondylosis, (2) chronic left hip pain, (3) chronic left knee pain, with early osteoarthritis of the medial compartment, all chronic and unrelated to the date of injury of 10/17/13." (Def. Ex. C, p. 3) When asked specifically about the claimant's back pain, Dr. McMains opined that while he could find no history of a previous problem with the back, "it appears that on the date of injury of 10/17/13, likely Mr. Sparks suffered a soft tissue symptoms in the low back that have not been addressed, up to this point, though the injury date is several years old." (Def. Ex. C, p. 4) He recommended a short course of physical therapy and opined that there would be no impairment or restrictions associated with these symptoms. Dr. McMains also assessed Mr. Sparks to be "forthright in his history", but ultimately believed that his back would heal up very quickly with some therapy. (Def. Ex. C, p. 4)

Thereafter, Mr. Sparks had two weeks of physical therapy through Wheaton Franciscan Physical Therapy beginning in April 2017. (Jt. Ex. 10) The records clearly document claimant's ongoing low back pain. (Jt. Ex. 10, pp. 1-3) Upon conclusion, the following is documented by the therapist: "No subjective improvement, pain lumbar ROM and medial L knee pain". (Jt. Ex. 10, p. 4) He was released to a home exercise program at that time.

I do not find the opinions of Dr. McMains to be nearly as convincing as the report of Dr. Kuhnlein. Importantly, Dr. McMains does not address whether the condition of spondylosis was lit up or materially aggravated or accelerated as a result of claimant's altered gait. Dr. McMains clearly believed what the claimant was telling him, yet he simply concluded, without adequate explanation, that his low back condition was chronic and unrelated to the work injury.

In January 2018, Dr. Kuhnlein prepared a supplemental report and addressed updated medical records, including the evaluation by Dr. McMains. Dr. Kuhnlein assigned a 5 percent whole body rating associated with claimant's low back condition. (Cl. Ex. 2, pp. 20-21)

R.L. Broghammer, M.D., evaluated Mr. Sparks in February 2018, at the request of defendants. (Def. Ex. B) He prepared a report on March 14, 2018. He thoroughly reviewed the relevant medical file and examined Mr. Sparks. He noted that claimant's current complaints include low back pain aggravated by prolonged sitting, standing or walking, as well as left hip pain. He assigned an 80 percent lower extremity rating related to the right leg amputation and a 3 percent upper extremity rating for the damage to his left hand. (Def. Ex. B, pp. 22-23) Regarding claimant's back, Dr. Broghammer opined the following.

In this regard, I would agree with the opinions of Dr. McMains that Mr. Sparks likely suffered a soft tissue injury, which was not addressed due to concerns for his much more serious injury to the right lower extremity and left hand. In my medical opinion to a reasonable degree of medical certainty, there is no evidence of an aggravation, acceleration, or lighting up of Mr. Sparks' preexisting lumbar spondylosis. I do believe, as referenced in Dr. McMains' letter, that Mr. Sparks likely had a temporary soft tissue injury that was not adequately addressed with Mr. Sparks now having completed a course of physical therapy.

Def. Ex. B, p. 24) He similarly opined there was no injury or disability in claimant's hips or his left knee. (Def. Ex. B, pp. 25-26)

I do not find the opinions of Dr. Broghammer compelling. While Dr. Broghammer at least recites the correct standard for medical causation, he does not adequately explain his theory given the facts of the case presented at hearing. Mr. Sparks did have two weeks of physical therapy in 2017 to treat the soft tissue symptoms. He did not heal. His symptoms did not resolve. I have found the claimant to be highly credible. Dr. McMains and Dr. Kuhnlein both commented about the claimant's strong credibility. Dr. Broghammer specifically addressed claimant's ongoing low back complaints yet provided no explanation for why he still has low back symptoms. Neither Dr. Broghammer, nor Dr. McMains adequately explain why the claimant's low back symptoms have continued upon his completion of physical therapy.

Dr. McMains also prepared an undated supplemental report just prior to hearing. He reviewed claimant's deposition, as well as the 2017 physical therapy records. He reaffirmed his opinion that Mr. Sparks had suffered no permanent disability related to the work injury. (Def. Ex. D, p. 1)



The greater weight of evidence in the record is that Mr. Sparks did suffer permanent damage to his low back as a sequelae of the original injury. This factual finding is based primarily upon the medical opinion of Dr. Kuhnlein and is also supported by the highly credible testimony of the claimant, the uncovered pain diagrams from the University of Iowa Hospitals and Clinics, as well as the 2017 physical therapy records which demonstrated his condition did not improve following treatment. The facts demonstrate that Mr. Sparks developed pain in his low back after his work injury, in all likelihood from walking differently. His symptoms have been consistent since they began and should be considered permanent at this time.

Both Mr. Sparks and his wife, Stephanie Sparks, testified about his disability's impact on his daily life. Mr. Sparks is highly motivated and has done his best to remain active in spite of his serious functional limitations. Mrs. Sparks testified in great detail about his lack of energy since the accident. She described her husband as a man who refuses to accept his limitations, yet is worn out and exhausted by them. She further described the adverse impact upon their family, as well as his leisure activities. I find Ms. Sparks to be a highly credible witness.

#### CONCLUSIONS OF LAW

The first question is the nature of the claimant's disability. Claimant contends his disability extends into his body as a whole and therefore, his disability must be calculated as a loss of earning capacity. Defendants contend his disability is limited to his right leg and his left hand and must be calculated functionally under Iowa Code section 85.35(2)(s) (2015).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t) (2015), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury,

such further disability is compensable.” Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

This agency has held that pain or other subjective complaints, even without objective findings, can establish permanent impairment or permanent disability. Suljevic v. Tyson Fresh Meats, Inc., File 5017829, (App. March 27, 2008). McGregor v. Jet Company, File No. 5011648 (App. August 30, 2006). The Iowa workers’ compensation system has a long history of compensating pain complaints as industrial disabilities if they are found to be disabling. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961) [complex regional pain syndrome formerly called Sudeck’s atrophy, causalgia, or reflex sympathetic dystrophy (RSD)]; Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450 (Iowa 1996) (tinnitus); Young v. EDS Distribution Services, File Nos. 5006837 & 5006838, (Arb. August 2, 2004) summarily affirmed (App. September 21, 2005) (permanent total disability and penalties awarded for chronic pain).

When an injury causes severe pain requiring medical treatment and there is sufficient evidence to find that the pain is disabling, the disabling pain is compensable and treated as an unscheduled injury. This includes phantom pain from loss of a limb. Dowell v. Wagler, 509 N.W.2d 134 (Iowa App. 1993). In Dowell, the Court of Appeals held:

We therefore hold that phantom pain syndrome or phantom limb syndrome may be compensable under Iowa Code section 85.34(2)(u) as an unscheduled disability. Applying the industrial disability test to a given case will require a determination both of the functional loss to the body as a whole and of the change in earning capacity of the individual.

Dowell, 509 N.W.2d at 138.

In this case, the fighting issue is primarily a medical dispute: Whether the claimant’s leg amputation has resulted in any permanent condition which extends into his body as a whole. As such, the issue is primarily an issue of medical causation.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

The greater weight of evidence supports the conclusion that claimant's disability extends into his body as a whole. I found that claimant's low back condition is a sequelae of his original injury for the reasons set forth above. In addition, I find that claimant does suffer from the diagnosis of phantom pain syndrome. The evidence in the record supports this diagnosis and suggests that his symptoms of phantom pain are independently disabling. Therefore, this condition independently establishes that claimant's disability is in his body as a whole. As such, claimant's disability must be evaluated industrially.

Finally, I find that Mr. Sparks also suffered a minor impairment to his left knee as a sequelae of his original injury.

Three or more scheduled member injuries occurring in the same incident or simultaneously over time may constitute a body as a whole injury compensated under Iowa Code section 85.34(u) as that subsection is a catch all provision to include all disabilities not previously described in the prior subsections. Giese v. J. I. Case Corporation, File No. 1282970 (Arb. October 17, 2002). There has been a long tradition in this division for calculating the permanency of three scheduled member injuries by the industrial method. Section 85.34(2)(u) is the statutory authority that allows such a calculation.

Having found that Mr. Sparks suffered functional disabilities or impairments in his right leg, left hand and left leg, I would find that claimant is entitled to industrial disability benefits even without the back impairment or phantom pain conditions.

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 Ry. Co. of Iowa, 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.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). Ending a prior accommodation is not a change of condition warranting a review-reopening of a past settlement or award. U.S. West Communications, Inc. v. Overholser, 566 N.W.2d 873 (Iowa 1997). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

Considering all of the appropriate factors of industrial disability, I find that claimant has suffered a 55 percent loss of earning capacity as a result of his October 17, 2013, work injury.

At the time of hearing, Mr. Sparks was 51 years old. He has a high school education, although he is obviously bright and industrious. He worked for the same small employer for the past 32 years performing agricultural construction work, primarily building grain bins. While his work is varied, historically, this work has included heavy physical labor.

The claimant's physical impairments and functional limitations resulting from his work injuries are severe. He has a 90 percent loss of function of his right leg which was amputated above the knee. The only remaining ability he has with that leg is the ability to utilize a prosthetic device. He has minor physical impairments in his left hand, as well as his left knee, which is a consequence of his altered gait and "favoring" his left side. In addition, he has permanent functional disability in his low back. For all of these conditions, Dr. Kuhnlein recommended common sense restrictions with the understanding that the claimant did not want restrictions which would cause him to lose his job. He recommended lifting restrictions in the range of 30 to 40 pounds, and recommended that he sit, stand and walk on an as needed basis, being able to change

positions for comfort. He recommended Mr. Sparks not use ladders and recommended some limitations on stooping, squatting, crawling and kneeling. (Cl. Ex. 2, p. 14)

Fortunately for the employer, Mr. Sparks is highly motivated. To the outward eye, Mr. Sparks has taken this life-changing disability in stride and has made the best of a bad situation. Mr. Sparks has remained active and has attempted to lead a normal life in spite of his serious disabilities.

Fortunately for the claimant, his employer has changed claimant's job duties to enable him to continue working. Because of his value to the employer, he has found a niche role. It is noted that claimant's job duties have changed significantly since the accident. Mr. Sparks now focuses on less physical aspects of the employer's business. He still supervises work crews like a foreman, however, he is unable to perform all aspects of the physical labor. He has learned to write quotes for potential customers, as well as performing other aspects of sales work. He now performs more office work and work servicing customers. Mr. Sparks is still able to perform some physical labor, including fabricating (at ground level), welding and operating equipment such as skid loaders or hand tools. I find that while there are significant accommodations, the work claimant is performing is "real work" as opposed to "make work".

The employer should be commended for utilizing claimant's excellent background in agricultural construction to transform his position into something he can do within his functional limitations. Mr. Sparks should be commended for continuing to work through his fatigue, pain and other symptoms.

Nevertheless, the greater weight of evidence supports the finding that in the competitive job market, claimant has suffered a moderate to significant industrial disability. His physical impairments objectively adversely impact his employability. By a preponderance of evidence, I find that he has suffered a 55 percent loss of earning capacity. This translates to 275 weeks of benefits, commencing as stipulated by the parties.

The next issue is the claimant's need for alternate medical care.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is

reasonable under the statute is a question of fact. *Id.* The employer's obligation turns on the question of reasonable necessity, not desirability. *Id.*; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Having found that claimant's permanent disabilities in his low back and left leg are causally-connected to his work injury, I conclude that the claimant is entitled to treatment for these conditions. In addition, I find that claimant's left hip symptoms, while not rising to the level of a permanent functional impairment, are also causally-connected. The claimant has not established treatment with any particular physician for these conditions. Defendants shall authorize a physician, other than Dr. McMains and Dr. Broghammer, to provide treatment for these conditions and symptoms.

The final issue is credit under Iowa Code section 85.34(4) (2015). The defendants argue they are entitled to a credit for overpaid temporary disability benefits in the amount of \$8,957.36. Claimant contends that under existing precedent, defendants are only entitled to such a credit against any future injury.

Iowa Code section 85.34(4) reads:

*Credits for excess payments.* If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated. (Emphasis added.)

Iowa Code section 85.34(5) provides in relevant portion:

(5) *Recovery of employee overpayment.* If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee.

Claimant argues the Iowa Supreme Court case, Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) is applicable and supports his position. In Deutmeyer, the Court rejected the defendants' assertion of a credit against temporary benefits, however, did not mention Iowa Code section 85.34(4).

In McBride v. Casey's Marketing Company, File No. 5037617 (Remand February 9, 2015), the agency held that Section 85.34(4) is controlling, in spite of Deutmeyer. Essentially, the agency has held that Deutmeyer did not address or mention Section 85.34(4). Defendants have cited approximately 15 arbitration decisions since then which have followed this opinion.

There is no real dispute about the facts here. The claimant concedes he was originally paid healing period benefits at the rate of \$844.68. (Def. Ex. G) In the hearing report, claimant conceded the correct rate was \$715.19. Claimant was paid for a total of 72.714 weeks at the incorrect rate for a total overpayment of \$8,957.36. (Def. Ex. G) The question is whether the employer is entitled to a credit against this claim or against a future claim only.

While I am concerned about the appearance of refusing to follow Iowa Supreme Court precedent, I defer to the agency precedent herein. I conclude that defendants are entitled to a credit in the amount of \$8,957.36.

#### ORDER

#### THEREFORE, IT IS ORDERED:

Defendants shall pay the claimant two hundred and seventy-five (275) weeks of permanent partial disability benefits at the rate of seven hundred fifteen and 19/100 (\$715.19) per week at the dates stipulated by the parties.

Defendants shall pay accrued weekly benefits in a lump sum.

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


Defendants shall be given credit of eight thousand nine hundred fifty-seven and 36/100 dollars (\$8,957.36).

Within thirty (30) days, defendants shall authorize a physician other than Dr. Broghammer or Dr. McMains to provide treatment for claimant's back, left hip and left knee disabilities consistent with this decision.

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

Costs are taxed to defendants.

Signed and filed this 10<sup>th</sup> day of April, 2019.

  
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JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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JLW/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.