BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUN 18 2019
WORKERS' COMPENSATION

TROY CAVIL,	:	
Claimant,	:	File Nos. 5045990, 5062531
vs.	:	REVIEW-REOPENING AND ARBITRATION DECISION
CITY OF DES MOINES,	:	
Employer, Self-Insured, Defendant.	:	Headnotes: 1402.30, 1402.40, 1803. 2905, 2907

On May 30, 2017, the claimant, Troy Cavil, filed a petition in arbitration against the defendant, City of Des Moines ("the City"), File Number 5062531, alleging he sustained an injury to his right knee, right lower extremity, right hip, and low back while working for the City on July 11, 2016. The City filed an answer on June 1, 2017, admitting Cavil sustained a work injury, but denying he sustained an injury to the body as a whole. On July 10, 2018, Cavil filed a review-reopening petition against the defendant, the City, File Number 5045990, alleging he sustained a worsening of his low back and radicular symptoms from an original injury date of May 4, 2012. The City filed an answer on July 16, 2018.

A review-reopening and arbitration hearing was held on April 14, 2019 at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Nicholas Shaull represented Cavil. Cavil appeared and testified. Assistant City Attorney Michelle Mackel-Wiederanders represented the City. Joint Exhibits ("JE") 1 through 11, and Exhibits 1 through 7, and A through F were admitted into the record.

The record was held open through May 31, 2019, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. The City raised the affirmative defense of intervening/superseding cause with respect to Cavil's back condition, and waived all other affirmative defenses.

FILE NUMBER 5045990

Stipulations

1. An employer-employee relationship existed between the City and Cavil at the time of the alleged injury.

2. Cavil sustained an injury on May 4, 2012, which arose out of and in the course of his employment with the City.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.

5. If the injury is found to be the cause of permanent disability, the disability is an industrial disability.

6. At the time of the alleged injury Cavil's gross earnings were $804.96 per week, he was single and entitled to one exemption, and the parties believe the weekly rate is $500.14.

7. Costs have been paid.

Issues

1. Has Cavil sustained a change of condition warranting an award of additional industrial disability benefits?

2. Has the City proven the affirmative defense of intervening/superseding cause?

3. What is the commencement date for permanent partial disability benefits?

4. Should costs be assessed against either party?

FILE NUMBER 5062531

Stipulations

1. An employer-employee relationship existed between the City and Cavil at the time of the alleged injury.

2. Cavil sustained an injury on July 11, 2016, which arose out of and in the course of his employment with the City.

3. The alleged injury is the cause of a temporary disability to the right knee, during a period of recovery.

4. Temporary benefits are no longer in dispute.

5. The alleged injury is a cause of permanent disability to the right knee.

6. At the time of the alleged injury Cavil's gross earnings were $916.85 per week, he was single and entitled to one exemption, and the parties believe the weekly rate is $576.42.

7. Prior to the hearing Cavil was paid twenty-five weeks of healing period benefits and thirty-five weeks of permanent partial disability benefits for the right knee only.

8. Costs have been paid.

Issues

1. What is the nature of the injury?

2. Has the City proven the affirmative defense of intervening/superseding cause?

3. Is the alleged injury a cause of temporary disability to Cavil's back during a period of recovery?

4. Is the alleged injury a cause of permanent disability to Cavil's back?

5. What is the extent of disability?

6. What is the commencement date for permanency?

7. Should costs be assessed against either party?

FINDINGS OF FACT

Cavil is single and lives in Des Moines. (Transcript, page 10; Exhibit 4, p. 2) Cavil has three children. (Tr., p. 10; Exs. 4, p. 2; C, p. 2) At the time of the April 2019 review-reopening and arbitration hearing, Cavil was forty-seven. (Tr., p. 10) Cavil is right-hand dominant. (Ex. C, p. 3)

Cavil graduated from high school in Des Moines in 1990. (Exs. 4, p. 3; C, p. 3; Tr., p. 13) Cavil played basketball all four years of high school. (Tr., p. 13) Following high school Cavil attended Iowa Lakes Community College from 1990 through 1991. (Ex. 4, p. 3) Cavil attended Marshalltown Community College from 1991 through 1993, and obtained an associate's degree. (Ex. 4, p. 3) From 1997 through 1998, Cavil attended the University of Colorado in Colorado Springs. (Ex. 4, p. 3) From 1998

through 2000, Cavil attended Grand View College and he obtained a bachelor of arts degree in human services with the goal of becoming a case manager for the Iowa Department of Human Services. (Tr., pp. 13-14; Exs. 4, p. 3; C, p. 4) While in college Cavil earned A, B, and C grades, reporting he earned more A grades than B grades. (Ex. C, p. 4)

In 1999, Cavil worked as a full-time counselor for the Willkie House in Des Moines, earning between $9.00 and $10.00 per hour, where he worked with children in a before and after school program. (Tr., pp. 15-16; Ex. 4, p. 4)

Cavil left Des Moines and moved to Denver, Colorado. (Ex C, p. 4) From 2000 through 2002 Cavil worked for three employers at the same time in Denver. (Exs. 4, p. 4; C, p. 4) Cavil worked full-time as a site director for a before and after school program at Medallion School Partnership, earning between $10.00 and $12.00 per hour, as a part-time teaching assistant for Rocky Mountain School of Expeditionary Learning, earning between $10.00 and $11.00 per hour, and as a part-time substitute special education paraprofessional for the Denver Public Schools, earning between $9.00 and $10.00 per hour. (Tr., pp. 16-18; Exs. 4, p. 4; C, p. 4) Cavil later lived in Colorado Springs where he worked for a before and after school program. (Ex. C, pp. 4-5)

Cavil moved back to Des Moines. (Ex. C, p. 5) From 2003 to 2004, Cavil worked as an administrative assistant for Reliable Maintenance earning between $10.00 and $12.00 per hour. (Tr., pp. 17-18; Exs. 4, p. 4; C, p. 5) Cavil was responsible for answering the telephone, preparing bids, and filing. (Tr., p. 18)

In 2005, the City hired Cavil as a seasonal laborer where he earned $10.00 per hour. (Tr., p. 14; Ex. C, p. 5) Cavil has not used his degree in human services since 2005. (Tr., p. 14) Cavil testified he applied for a position with the City with Park Fair Mall Housing placing people into different housing settings on two occasions, but he was not hired. (Ex. C, 4) Cavil reported he was earning $25.84 per hour from the City at the time of the hearing. (Tr., p. 18)

During his first year of employment with the City Cavil worked full-time in the Parks Department as a helper or laborer, mostly for a concrete crew, picking up concrete, laying concrete, and finishing concrete. (Tr., p. 19; Ex. C, p. 6) Cavil relayed the job required him to break up concrete and throw twenty to thirty pound pieces of concrete into a truck. (Tr., p. 19)

The next year Cavil became a full-time temporary employee of the City's asphalt division. (Tr., p. 20; Ex. C, p. 6) Cavil has worked in the asphalt division since 2006, and he continued to work in the asphalt division at the time of the hearing. (Tr., p. 20) Cavil testified the City loans him to other departments, and he has performed tree work, concrete work, and fencing work as a laborer throughout the years he has worked for the City. (Tr., p. 20) Cavil's job requires him to run trucks, shovel asphalt, rake asphalt, run a jackhammer, pick up asphalt, concrete and debris, and run a roller machine. (Ex. C, p. 6)

Cavil's work is seasonal. (Tr., p. 20) He works seven months for the City, from April to November, forty hours per week, ten hours per day, Monday through Thursday. (Tr., pp. 20, 25) Cavil sometimes commences work as early as late March each year. (Tr., p. 20) Cavil is also on standby on Fridays, if the City needs additional laborers. (Tr., p. 25)

At the time of the hearing Cavil was working as a street maintenance worker raking, shoveling, and finishing asphalt. (Tr., p. 21; Ex. 1, p. 1) Cavil shovels, rakes, and carries five-gallon buckets of tack that he puts down into a hole before the asphalt. (Tr., p. 21) Cavil then uses a tamper to level out the asphalt. (Tr. p. 21) Cavil reported the City has pothole crews, but he performs the heavier work including cuts and slots from one to seven or eight tons. (Tr., p. 21) When a curb crew puts in a new curb, Cavil's crew fills in the slot area on the street, anywhere between twenty and 800 feet on the side of the street. (Tr., pp. 21-22) Cavil rakes asphalt every day. (Tr., p. 22) A machine drops piles of asphalt into the cuts and slots, and Cavil shovels and rakes the asphalt into place, ensuring it is level with the street. (Tr., pp. 22-24) Cavil reported at the time of the hearing he was working with two other coworkers, one who drove the truck, another who shoveled the asphalt, and Cavil raked the asphalt, but he also performed other duties as needed. (Tr., p. 24)

During the colder months the asphalt crew uses "MC," a cold mix that is harder to rake and shovel because it is not warm and does not have oil in it. (Tr., p. 26) The hot mix is easier to work with because it is easier to move. (Tr., p. 26) The cold mix is more grainy and less liquid than the hot mix. (Tr., p. 27)

Nine years ago Cavil began coaching with Iowa Elite, an AAU basketball organization involving children from the ages of six to seventeen. (Tr., p. 11) Three to four years ago Cavil became part-owner of Iowa Elite. (Tr., p. 11) Cavil reported he has not received any earnings from Iowa Elite. (Ex. 4, p. 5) Cavil testified 143 to 147 children are currently participating in Iowa Elite, including his two sons. (Tr., p. 12)

This case concerns two work injuries in 2012 and 2016. Cavil sustained injuries before 2012. In 2005 or 2006 Cavil was involved in a motor vehicle collision. (Ex. 4, p. 6) Cavil received treatment and reported he was diagnosed with whiplash. (Ex. 4, p. 6) Cavil reported in 2006 he injured his right knee meniscus while working for the City. (Ex. 4, p. 6) Cavil reported he received surgery from Ian Lin, M.D., and a permanent impairment rating. (Ex. 4, p. 6) And Cavil relayed in 2008 he injured his right shoulder while working for the City and he received treatment from Mark Kirkland, D.O., and an evaluation from Brian Crites, M.D. (Ex. 4, p. 6) Cavil reported he believed he sustained a permanent functional impairment caused by the work injury. (Ex. 4, p. 6)

In 2012, Cavil was working on the asphalt crew working on a large project. (Tr., p. 27) While he was pushing down the asphalt while raking he felt a sharp pain in his lower back. (Tr., p. 28)

In October 2012, Lynn Nelson, M.D., an orthopedic surgeon with Des Moines Orthopaedic Surgeons, P.C., performed a L4-L5 central and lateral decompression with foraminotomies, right L4-L5 discectomy, and right L4-L5 annulus repair. (JE 1, p. 1) Following surgery, Dr. Nelson diagnosed Cavil with L4-L5 spinal stenosis, and a central right L4-L5 herniated nucleus pulposus. (JE 1, p. 1)

Cavil attended follow-up appointments with Dr. Nelson. (JE 1, pp. 3-4) During an appointment on December 6, 2012, Cavil complained of mild right lateral calf pain he described as "tolerable," slight low back pain, and constant foot numbness. (JE 1, p. 3) Dr. Nelson imposed a lifting restriction of twenty five pounds, and forty pounds effective January 1, 2013. (JE 1, p. 3)

During a follow-up appointment with Dr. Nelson on January 17, 2013, Cavil reported he was no longer experiencing lower extremity pain, he was experiencing occasional bilateral hip pain, and he reported right first, second, and third toe numbness. (JE 1, p. 4) Dr. Nelson noted Cavil remained active with coaching his son's basketball teams, but he was on seasonal layoff from the City and he would begin work again in April. (JE 1, p. 4) Dr. Nelson found Cavil had reached maximum medical improvement and released him to return to work without restrictions. (JE 1, p. 4) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Nelson issued a permanent impairment rating on January 30, 2013, and using Table 15-3, found Cavil's "injury and findings are most consistent with a DRE Lumbar Category III impairment," and assigned a ten percent permanent impairment rating. (JE 1, p. 5) Cavil reported his back continued to hurt after the surgery, but his back was better than before the surgery. (Tr., p. 28)

Robin Sassman, M.D., an occupational medicine physician, conducted an independent medical examination of Cavil in October 2013, and issued her report on November 22, 2013. (JE 3) Dr. Sassman reviewed Cavil's medical records and examined him. (JE 3) Dr. Sassman diagnosed Cavil with a herniated nucleus pulposus, status post L4-5 central and lateral decompression with foraminotomies, right L4-5 discectomy, right L4-5 annulus repair, with continued pain, and L5 radicular symptoms with magnetic resonance imaging evidence of L4-5 recurrent disk extrusion and compression on the L5 nerve root. (JE 3, p. 6) Dr. Sassman opined Cavil was not at maximum medical improvement, and recommended a referral to a spine surgeon for further evaluation, and if no surgery was recommended to a pain specialist and physiatrist for further evaluation. (JE 3, p. 7) In the alternative, if Cavil did not receive additional treatment, Dr. Sassman opined under Table 15-3 at page 384 of the AMA Guides, she would place Cavil in DRE Lumbar Category II, and she would assign a thirteen percent whole person impairment due to radiculopathy noted on exam, and noted she placed Cavil in the upper level of the category because of his significant symptoms. (JE 3, p. 7) Dr. Sassman recommended permanent restrictions of limiting lifting, pushing, pulling, and carrying to thirty pounds rarely from floor-to-waist, fifty pounds occasionally from waist-to-shoulder, keeping his elbows at his side, and thirty pounds rarely over the shoulder. (JE 3, p.8) Dr. Sassman recommended no use of vibratory or power tools, and opined Cavil could occasionally sit, stand, and walk,

needing to change positions frequently, and recommended occasional bending and stooping, no use of ladders, and rarely using stairs. (JE 3, p. 8)

On March 29, 2013, Cavil returned to Dr. Nelson complaining of bilateral foot paresthesias, greater on the right than the left, and left medial foot pain. (JE 1, p. 6) Cavil reported the onset of the symptoms was a month ago and he denied a particular injury. (JE 1, p. 6) Cavil told Dr. Nelson he was experiencing bilateral foot "shooting" pains, and some low back and left lateral calf pain, but also noted "the pain is nothing like it was before surgery." (JE 1, p. 6) Dr. Nelson noted Cavil continued to remain active as a basketball coach, and that he planned to return to work on April 1, 2013. (JE 1, p. 6) Dr. Nelson listed an impression of bilateral foot pain and paresthesias and multiple lumbar spondylosis, recommended lumbar spine magnetic resonance imaging on April 4, 2013, and opined Cavil could delay his return to work until after the imaging. (JE 1, p. 6)

Cavil underwent lumbar spine magnetic resonance imaging on April 4, 2013. (JE 1, pp. 7-8) The reviewing radiologist listed the following impression:

1. At L4-5, there is recurrent posterior inferior central disc extrusion, which compresses the traversing right L5 and contacts the traversing left L5 nerves. There is moderate right and mild left foraminal narrowing without compression of the exiting L4 nerves.

2. L3-4 degenerative disc bulge and facet changes contributing to persistent mild central canal narrowing. There is mild to moderately left and mild right foraminal narrowing without compression of the adjacent nerves.

3. Persistent L2-3 degenerative disc bulge and mild facet hypertrophic changes contributing to bilateral lateral recess and mild left great than right foraminal narrowing without compression of the adjacent nerves.

(JE 1, p. 8) Following the imaging Cavil attended an appointment with Dr. Nelson. (JE 1, p. 9) Dr. Nelson noted the imaging showed a small recurrent posterior inferior disk protrusion that appeared "to slightly contact both the right and left L5 roots, although without significant appearing displacement," and degenerative changes at L3-4 causing mild central and right foraminal narrowing without compression of the adjacent nerves. (JE 1, p. 9) Dr. Nelson recommended Cavil pursue an aggressive reconditioning program, Cavil then undergo a functional capacity evaluation, imposed a lifting restriction of fifteen pounds, and ordered restrictions of alternating sitting and standing occasionally for work and to lift as tolerated for the functional capacity evaluation and reconditioning programs. (JE 1, p. 9)

Dr. Nelson noted Cavil underwent a valid functional capacity evaluation on April 25, 2013, and found Cavil "demonstrated 'the physical capabilities and tolerances to

function at the heavy category of work, which is indicative of two hand frequent lift of a 40 pound load from nine inches to waist level.'" (JE 1, p. 10) Dr. Nelson further noted the plan was for Cavil to begin a two-week work reconditioning program. (JE 1, p. 10)

On May 23, 2013, Cavil attended an appointment with Dr. Nelson complaining of occasional low back pain that typically occurs in the morning and with increased activity. (JE 1, p. 11) Dr. Nelson documented Cavil denied having lower extremity pain and reported his right lateral leg and dorsal foot numbness had improved. (JE 1, p. 11) Dr. Nelson noted Cavil had completed a work reconditioning program and reported he was able to shovel, lift, and walk without significant difficulty, but he had not returned to work for the City. (JE 1, p. 11) Dr. Nelson found Cavil had reached maximum medical improvement, documented Cavil reported he believed he was ready to return to work without restrictions, and noted "I agree," finding the functional capacity evaluation report indicated Cavil was functioning at the heavy physical demand capacity. (JE 1, p. 11)

The parties entered into an Agreement for Settlement, which was approved by the Workers' Compensation Commissioner on July 2, 2015. (Ex. A) The parties agreed Cavil's permanent partial disability resulted in a twenty percent loss of earning capacity, and the City had paid Cavil $25,094.62 in benefits, based on an impairment rating of ten percent issued by Dr. Nelson on January 30, 2013, following a lumbar decompression/discectomy performed on October 17, 2012. (Ex. A, pp. 1, 4) The parties agreed the City would pay Cavil an additional $25,007.00 in benefits. (Ex. A, p. 2) Cavil returned to his normal duties and he did not receive any additional medical treatment for his lumbar spine.

On July 11, 2016, the auger inside the asphalt truck stopped working and the asphalt became hard. (Tr., p. 31) Cavil climbed in the truck to try to break up the asphalt so it would come out of the machine, and as he was standing on the auger he slipped off the auger and fell on the right side of his knee. (Tr., p. 32; Ex. C, p. 6) Cavil testified he experienced immediate knee and back pain. (Ex. C, p. 6) Cavil finished his shift that day. (Ex. C, p. 6) That evening Cavil reported his work injury to the City, and the City sent him to occupational health. (Tr., p. 32; Ex. C, p. 6)

On July 13, 2016, Cavil attended an appointment with Methodist Occupational Health reporting he injured his right knee and right leg and he had pain "all the way up to back" after he slipped and fell inside a box at work. (JE 4, p. 1) Cavil completed a pain diagram showing he was experiencing pain on his right side, right knee, and lower back. (Tr., pp. 32-33; JE 4, p. 1) Von Miller, PA-C, examined Cavil, administered a Toradol injection, and ordered modified duty. (JE 4, p. 2) Cavil returned to Miller on July 21, 2016. (JE 4, p. 3) Miller imposed restrictions of lifting up to forty pounds occasionally, pushing and pulling up to 100 pounds occasionally, to limit repetitive bending and twisting to as tolerated, and to sit, stand and walk as tolerated, with no use of ladders and three steps. (JE 4, p. 3)

On July 26, 2016, Cavil returned to Miller, reporting he was experiencing pain from his right hip, down his right leg just below his right knee, and down into the calf of

his right leg. (JE 4, p. 4) Miller assessed Cavil with right leg pain/strain from a fall, ordered physical therapy, and imposed restrictions of no lifting over forty pounds, to vary sitting, standing, and walking as tolerated, and to limit three steps. (JE 4, pp. 4-5)

Cavil attended a follow-up appointment with Miller on August 9, 2016. (JE 4, p. 6) Miller noted physical therapy "think[s] he has two separate problems actually, a low back issue and a right knee issue that they are not making any progress with in physical therapy. With his information, I told Troy that we would get a soft tissue picture on his lumbar spine and right knee to see if there is any internal derangement," ordered magnetic resonance imaging, and continued Cavil's restrictions. (JE 4, pp. 6-7)

On August 26, 2016, Miller noted Cavil's magnetic resonance imaging of the knee showed "a complex tear of the posterior horn of the medial meniscus," and tricompartment osteoarthritis, and of the lumber spine showed "disc degeneration at L2-3 greater at L4-5 with interval posterior laminectomy at the L4-5 level. This is unchanged. Mild to moderate right foraminal narrowing at L4-5 and left neural foraminal narrowing at L3-4, unchanged from the previous MRI report." (JE 4, p. 8) Miller documented Cavil was ambulating slowly with a limp on the right, referred him for an orthopedic evaluation, and continued his restrictions. (JE 4, pp. 8-9)

On September 16, 2016, Cavil attended an appointment with Dr. Lin, an orthopedic surgeon with Des Moines Orthopaedic Surgeons, P.C., complaining of a right knee work injury. (JE 1, p. 12) Dr. Lin noted he had examined Cavil in 2007 for right knee osteoarthritis and a meniscus tear, noting "[a]t that point when I scoped his knee in December 2007 he was already bone-on-bone so I did not feel his arthritis was a work-related condition." (JE 1, p. 12) Dr. Lin noted Cavil was complaining of increasing pain in his right knee after slipping loading asphalt into the back of a truck, and had pain in his buttocks radiating down his leg to the lateral part of his leg to the top of his foot. (JE 1, p. 12) Dr. Lin documented Cavil reported the "pain feels like that prior to" the L4-5 discectomy performed by Dr. Nelson, but had improved in the last three days. (JE 1, p. 12) Dr. Lin assessed Cavil with right knee degenerative joint disease and noted he will eventually need a total knee arthroplasty, which he recommended be delayed, and he fitted Cavil with an unloader knee brace. (JE 1, p. 12) Dr. Lin opined he did not believe Cavil's arthritis was a work-related condition, and that he believed the injury was a temporary aggravation at that point. (JE 1, p. 12)

On November 4, 2016, Cavil attended an appointment with Dr. Nelson at the recommendation of Dr. Lin for an evaluation of right low back, hip, anterolateral thigh and knee pain and right foot paresthesias. (JE 1, p. 19) Cavil reported the onset of his symptoms occurred on July 11, 2016, when he was working with asphalt in a truck auger and he sustained a fall at work. (JE 1, p. 19) Cavil relayed the pain was significant beginning the following day. (JE 1, p. 19) Cavil reported his symptoms ranged from dull to severe, sharp and shooting in nature, occurring very frequently, and noting his symptoms are worse in the morning and at night, and variable with sitting, walking, and sleeping. (JE 1, p. 19) Cavil stated he was experiencing paresthesias throughout his right foot that had increased significantly since the July 2016 injury, and

noted he had been treated by Miller and had completed six to eight sessions of physical therapy for his back and knee in July and August 2016. (JE 1, p. 19)

Cavil testified since the July 2016 work injury he continues to feel a burning sensation on the lower side of his back when raking and shoveling. (Tr., p. 36)

Dr. Nelson ordered x-rays, reviewed Cavil's lumbar spine magnetic resonance imaging from August 24, 2016, and listed an impression of right low back pain with right lumbar radiculopathy, central L4-5 disk protrusion, mild L3-4 spinal stenosis, and L4-5 degenerative disk disease with retrolisthesis. (JE 1, p. 20) Dr. Nelson noted he did "not appreciate a marked degree of impingement on his recent MRI scan" and he offered reassurance he believed Cavil's symptoms would improve with time and conservative measures and he did not recommend surgical intervention. (JE 1, p. 20) Dr. Nelson recommended physical therapy focus on lumbar stabilization and core strengthening, and imposed work restrictions. (JE 1, p. 20)

On December 6, 2016, Cavil attended a follow-up appointment with Dr. Nelson, reporting physical therapy was helping and that he had good days and bad days with "some intermittent right lateral thigh pain that radiates to the knee" and one episode of "sharp pain" to the right medial leg. (JE 1, p. 22) Dr. Nelson noted Cavil had been off work with a forty-pound lifting restriction and he was on his regular, seasonal layoff. (JE 1, p. 22) Dr. Nelson continued Cavil's physical therapy and recommended a home exercise program. (JE 1, p. 22)

Pursuant to an inquiry from the City's third-party administrator, Dr. Nelson sent a letter to Cavil on December 13, 2016, noting Cavil had a lifting restriction of forty pounds, and while Cavil was on seasonal layoff, Cavil's lifting restriction should be lifted and noting Cavil was capable of working in his regular job capacity. (JE 1, p. 24)

Cavil was involved in a motor vehicle accident in February 2017 where he was rear-ended by a car while his vehicle was stopped at a stoplight. (Tr., p. 46; Ex. 4, p. 7) Cavil reported he sustained injuries to his neck and upper back he described as whiplash-type injuries. (Ex. 4, p. 7)

On March 8, 2017, Cavil attended an appointment with Brandon Boston, D.C., with Valley Chiropractic Center, complaining of neck and back pain following a motor vehicle accident. (JE 7, p. 1) Dr. Boston assessed Cavil with sprain of the ligaments of the cervical and thoracic spines, cervicalgia, thoracic spine pain, segmental and somatic dysfunction of the cervical and thoracic regions, and performed electrical stimulation, mechanical traction, and gave Cavil BioFreeze to apply to his upper back and neck to decrease pain. (JE 7, p. 2)

Cavil continued to treat with Dr. Boston through May 11, 2017, attending twenty-four visits, where he received electrical stimulation to his neck and upper back, mechanical traction to his upper back, left ribs, right scapula, right ribs, mid back, and

low back, and BioFreeze. (JE 7) Cavil's primary and secondary complaints were of neck and upper back pain.

During an appointment on April 18, 2017, Cavil reported he had returned to work shoveling asphalt and that he experienced increased tension in his upper thoracic region. (JE 7, p. 34) Cavil continued to complain of thoracic and lumbar spine pain, exacerbated by being on his feet and repetitive motion. (JE 7, pp. 34-45) Dr. Boston opined Cavil reached maximum medical improvement on May 11, 2017, and found that he was primarily experiencing tenderness in his low back. (JE 7, p. 47) Cavil testified he continued to have problems with his low back while he received chiropractic treatment, but he had sought chiropractic treatment for his neck and upper back injuries following the car accident. (Tr., pp. 48-49)

On March 9, 2017, Dr. Nelson wrote that in January 2013 he opined Cavil had sustained a ten percent permanent partial impairment as a result of a work injury on May 4, 2012. (JE 1, p. 25) Dr. Nelson opined using the AMA Guides, Cavil had not sustained an additional permanent partial impairment as a result of the July 11, 2016 work injury. (JE 1, p. 25)

Cavil sought medical treatment at Broadlawns Medical Center ("Broadlawns") on March 10, 2017, complaining of constant right knee pain, swelling, locking, and a feeling of instability in his right knee. (JE 8, p. 1) Timothy Rankin, M.D., an orthopedic surgeon, examined Cavil, noted he had a history of a meniscal surgery years ago, and assessed him with acute pain of the right knee and primary osteoarthritis of the right knee. (JE 8, p. 3) Dr. Rankin recommended a trial unloader brace. (JE 8, p. 3)

On June, 7, 2017, Dr. Rankin signed a letter from Cavil's counsel agreeing he believed Cavil's work-related fall served as a substantial aggravating factor in the development of Cavil's right knee pain and his underlying osteoarthritis becoming symptomatic, in light of the fact Cavil was not experiencing symptoms until after his work injury. (JE 8, p. 5) Dr. Rankin agreed with Dr. Lin that Cavil was a candidate for a total knee replacement. (JE 8, p. 6)

During an appointment with Dr. Rankin on August 24, 2017, Cavil relayed he received no relief with the unloader brace. (JE 8, p. 8) Dr. Rankin again signed a letter from Cavil's counsel, agreeing Cavil's work injury substantially aggravated his preexisting osteoarthritis, and recommended a total knee arthroplasty, which would require a three day hospital stay, and Cavil would be off work for six weeks to three months, due to the nature of his job with the City. (JE 8, p. 11)

On March 20, 2018, Dr. Rankin performed a right total knee arthroplasty on Cavil, paid for by the City. (JE 8, p. 12; Tr., p. 40) Following surgery Dr. Rankin diagnosed Cavil with right knee posttraumatic arthritis, prescribed physical therapy, performed a right knee manipulation under anesthesia for right knee postoperative stiffness, and restricted Cavil from working through August 2018. (JE 8, pp. 15, 17; JE 11, p. 12)

On September 24, 2018, Dr. Rankin issued an opinion letter finding Cavil had reached maximum medical improvement. (JE 8, p. 18) Using the AMA Guides, Dr. Rankin assigned a fifteen percent whole person impairment. (JE 8, p. 18)

Cavil underwent a functional capacity evaluation with Charles Goodhue, M.S., M.P.T., with Advantage Physical Therapy on October 23, 2018. (JE 10) Goodhue opined Cavil gave maximal, consistent effort, and that the evaluation was valid. (JE 10, pp. 3, 5) Upon reviewing the functional capacity evaluation from April 2013 that demonstrated Cavil could perform work in the heavy work category, Goodhue reported the current evaluation "does demonstrate a moderate decrease in his functional abilities as compared to the results of that FCE testing." (JE 10, p. 6) Goodhue opined Cavil could perform work in the medium work category, and recommended Cavil receive permanent restrictions. (JE 10, p. 6) Goodhue recommended restrictions of lifting floor to waist up to twenty pounds constantly, up to thirty pounds frequently, up to forty-five pounds occasionally, and up to fifty-five pounds rarely, lifting waist to overhead up to ten pounds constantly, up to twenty pounds frequently, up to thirty pounds occasionally, and up to forty pounds rarely, lifting horizontal up to thirty pounds constantly, up to forty pounds frequently, up to fifty pounds occasionally, and up to sixty pounds rarely, static pushing up to twenty-five pounds constantly, up to thirty-five pounds frequently, up to forty-five pounds occasionally, and up to fifty-five pounds rarely, static pull up to twenty pounds constantly, up to thirty pounds frequently, up to forty-five pounds occasionally, and up to fifty-five pounds rarely, right and left single upper extremity carry up to fifteen pounds constantly, up to twenty-five pounds frequently, up to thirty-five pounds occasionally, and up to forty-five pounds rarely, front carry up to twenty pounds constantly, up to thirty pounds frequently, up to forty-five pounds occasionally, and up to fifty-five pounds rarely, elevated work occasionally, forward bending/standing occasionally, rotation sitting and standing occasionally, crawling, kneeling, and deep static crouching rarely, repetitive squatting occasionally, sitting and standing frequently, and walking, stair climbing, and step ladder climbing occasionally. (JE 11, pp. 7-10)

Irving Wolfe, D.O., a neurologist, conducted an independent medical examination for Cavil on November 8, 2018. (JE 11) Dr. Wolfe reviewed Cavil's medical records and examined him. (JE 11) Dr. Wolfe opined Cavil's preexisting right knee arthritis was "materially aggravated, accelerated, worsened or lighted up" at the time of his work injury, found Cavil had reached maximum medical improvement, and using the AMA Guides, opined,

> [t]able 17-35, page 549 of the Guides, Rating Knee Replacement Results: A. Pain. Continual: 10 points. B. Range of Motion. 88 degrees range of the right knee in flexion rounded to 90 degrees. Add one point per 5 degrees. 18 points. C. Stability. Anterior-posterior: 10 points. Medial-lateral: 15 points. Subtotal: 25 points. D. Flexure/contracture, E. Extension lag, and F. Alignment: No deductions. Total rating knee replacement results: Table 17-35: 53 points. Utilizing Table 546, Impairment Estimates for Certain Lower Extremity Impairments, pages 546-547 of the Guides: 53 points equals a fair result. A 20%

> IMPAIRMENT OF THE WHOLE PERSON IS ASSIGNED TO MR. CAVIL AS IT RELATES TO HIS RIGHT KNEE.

(JE 11, pp. 19-21) Dr. Wolfe reviewed the functional capacity evaluation conducted by Goodhue on October 23, 2018, opined the evaluation was valid, and he adopted the restrictions set forth in the evaluation. (JE 11, p. 21)

Dr. Wolfe opined as a result of the July 2016 work injury Cavil had sustained an aggravation of his low back condition. (JE 11, pp. 22, 24) Using the AMA Guides, Dr. Wolfe opined:

> [t]able 15.3, Criteria for Rating Impairment due to Lumbar Spine Injury, page 384 of the Guides, DRE-Lumbar Category III: 10%-13% Impairment of the Whole Person. A history of a herniated disc at the level and on the side that would be expected from objective clinical findings associated with radiculopathy or individuals who had surgery for radiculopathy but are now asymptomatic: 13% impairment of the whole person is assigned to Mr. Cavil. As Mr. Cavil is not asymptomatic in regards to continuing pain of his lumbar spine, Chapter 18, Pain, is looked to. More specifically, Figure 18-1, Algorithm for Rating Pain-Related Impairment in Conditions Associated with Conventionally Ratable Impairment, page 574 of the Guides: 1. Determine the individual's diagnosis and measure organ function. Conduct an informal assessment of pain-related impairment. Use a conventional rating system to determine the impairment percentage (13% impairment of the whole person). 3. If pain related-impairment appears to increase the burden of the individual's condition slightly, the examiner can increase the percentage in step No. 1 by up to 3%. No formal assessment of pain-related impairment is required: 3% impairment of the whole person is assigned to Mr. Cavil. Thus, 13% plus 3% equals 16% IMPAIRMENT OF THE WHOLE PERSON AS IT REGARDS MR. CAVIL'S LOW BACK (LUMBAR SPINE).

(JE 11, p. 22) Dr. Wolfe adopted the restrictions set forth in the functional capacity evaluation performed by Goodhue in October 2018. (JE 11, pp. 24-25) Using the Combined Values Chart on pages 604-606 of the AMA Guides, Wolfe combined the twenty percent impairment for the right knee with the sixteen percent impairment for the lumbar spine, for a thirty-three percent impairment of the whole person. (JE 11, p. 25)

Cavil testified his pain improved following knee surgery, but he continues to have pain every day. (Tr., p. 41) Cavil reported his back is worse. (Tr., pp. 41-42) When he shovels asphalt he experiences a burning sensation in his back that is not there when he is not shoveling asphalt, but reported he always has back pain. (Tr., pp. 42, 44)

Cavil relayed he can still play catch football with his children, but he cannot run with them up and down the basketball court. (Tr., p. 45) He can sit and shoot with his

children, but he cannot play with them the way he would like to. (Tr., p. 46) Cavil testified he can jog, but he cannot run anymore. (Tr., p. 46)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including change of condition, extent of disability, recovery of the cost of an independent medical examination, and interest under Iowa Code sections 85.34, 85.39, 86.14, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.33 and 85.34 apply to injuries occurring on or after the effective date of the Act. These cases involve work injuries occurring before July 1, 2017, therefore, the provisions of the new statute do not apply to this case. The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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.

II. Change of Condition: May 2012 Work Injury

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an

impairment or lessening of earning capacity proximately caused by the original injury." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

The parties entered into an Agreement for Settlement, which was approved by the Workers' Compensation Commissioner on July 2, 2015. (Ex. A) The parties agreed Cavil's permanent partial disability resulted in a twenty percent loss of earning capacity, and the City had paid Cavil $25,094.62 in benefits, based on an impairment rating of ten percent issued by Dr. Nelson on January 30, 2013, following a lumbar decompression/discectomy performed on October 17, 2012. (Ex. A, pp. 1, 4) The parties agreed the City would pay Cavil an additional $25,007.00 in benefits. (Ex. A, p. 2)

No evidence was presented at hearing Cavil sustained a worsening of his lumbar spine condition following the Agreement for Settlement prior to the traumatic work injury on July 11, 2016. I find Cavil has not established a change of condition with respect to the May 4, 2012 work injury.

III. July 2016 Work Injury

Cavil alleges he sustained a traumatic injury to his right knee and low back on July 11, 2016. The City accepted the right knee condition, but alleges Cavil did not sustain a compensable injury to his lumbar spine.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of an in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> [i]t is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically

> prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

A. Nature of the Injury

Two expert physicians have given opinions with respect to Cavil's lumbar spine condition, Dr. Nelson, a treating orthopedic surgeon who performed surgery on Cavil following the 2012 work injury, and Dr. Wolfe, a neurologist who performed an independent medical examination for Cavil. I find the opinion of Dr. Wolfe to be the most persuasive.

Dr. Nelson assigned a ten percent permanent impairment rating to Cavil as a result of the May 2012 work injury, and found Cavil did not need permanent restrictions based on a functional capacity evaluation showing he was capable of engaging in heavy work. (JE 1, pp. 5, 10) Dr. Nelson assigned no restrictions to Cavil and he returned to his normal work duties from 2013 until the July 2016 work injury.

Dr. Nelson provided additional treatment to Cavil following the July 2016 work injury. (JE 1) In March 2017, Dr. Nelson opined Cavil did not sustain an additional permanent impairment as a result of the July 2016 work injury. (JE 1, p. 25) There is no evidence in the record Dr. Nelson examined Cavil after December 6, 2016.

Nearly two years after Dr. Nelson issued his opinion, Cavil underwent a functional capacity evaluation with Goodhue in October 2018. (JE 10) In November 2018, Dr. Wolfe found the functional capacity evaluation was valid, showing Cavil was capable of engaging in medium work, and he adopted the restrictions identified by Goodhue in his report. (JE 10; JE 11) Dr. Wolfe opined Cavil sustained a permanent aggravation of his low back condition caused by the July 2016 work injury. (JE 11, pp. 22, 24)

Based upon his examination, the results of the functional capacity evaluation, and a thorough review of Cavil's medical records, Dr. Wolfe assigned a thirteen percent whole person impairment under DRE-Lumbar Category III, and a three percent whole person impairment for pain, for a total of a sixteen percent whole person impairment. (JE 11, p. 22) The City did not provide Dr. Nelson with a copy of the 2018 functional capacity evaluation to request Dr. Nelson's opinions, or have Dr. Nelson examine Cavil. For these reasons I find Dr. Wolfe's opinion more persuasive.

At hearing the City raised the affirmative defense of an intervening/superseding cause, and raised the defense in its post-hearing brief. The City alleges a 2018 car accident is an intervening/superseding cause of Cavil's lumbar spine condition. It appears the City is referring to the accident from February 2017. No information was produced at hearing concerning a car accident or treatment from a car accident in 2018.

A superseding cause is an act or force that intervenes to prevent a defendant from being liable for harm to "the plaintiff that the defendant's antecedent negligence is a substantial factor in bringing about." Clinkscales v. Nelson Sec., Inc., 697 N.W.2d 836, 843 (Iowa 2005). An intervening act or force is an act or force that "actively

operates to produce harm to another after the actor's negligent act or omission has been committed." Rieger v. Jacques, 584 N.W.2d 247, 251 (Iowa 1998). Not all intervening acts or forces become superseding causes. Id. The Iowa Supreme Court has noted, "[t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about." Hollingsworth v. Schminkey, 553 N.W.2d 591, 597 (Iowa 1996) (quoting Restatement (Second) of Torts § 472 (1965)).

A force or act is a superseding cause if "the later-occurring event is such as to break the chain of causal events between the actor's [conduct] and the plaintiff's injury." Hayward v. P.D.A., 573 N.W.2d 29, 32 (Iowa 1997). "An intervening force which falls squarely within the scope of the original risk will not supersede the defendant's responsibility." Rieger v. Jacques, 584 N.W.2d at 251.

No cross-examination was conducted at hearing. Cavil testified at hearing that following the car accident he sustained injuries to his neck and upper back. There was no evidence presented to the contrary at hearing. No opinion was produced by the City that Cavil's lumbar spine condition and symptoms are attributable to a car accident. Cavil has established he sustained injuries to his right knee and lumbar spine arising out of and in the course of his employment with the City on July 11, 2016.

B. Extent of Disability

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547. In this case Cavil sustained a permanent impairment to his right knee, a scheduled loss, caused by the July 2016 work injury. I also found Cavil sustained a permanent impairment to his lumbar spine caused by the July 2016 work injury, which is compensated industrially. Because Cavil sustained an injury to his lumbar spine which is compensated industrially, compensation for the 2016 work injury is determined industrially.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa

Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

Two physicians have provided permanent impairment ratings for Cavil's right lower extremity, Dr. Rankin, a treating orthopedic surgeon who operated on Cavil, and Dr. Wolfe, a neurologist who conducted an independent medical examination for Cavil.

Dr. Rankin issued a brief opinion letter on September 24, 2018, finding Cavil had reached maximum medical improvement, and assigning a fifteen percent whole person impairment for his right lower extremity. (JE 8, p. 18) Dr. Rankin did not assign any permanent restrictions.

As discussed above, I found the opinion of Dr. Wolfe most persuasive on the issue of causation with respect to Cavil's lumbar spine condition. After reviewing Cavil's medical records, including the October 2018 functional capacity evaluation, and examining Cavil, Dr. Wolfe assigned sixteen percent permanent impairment to Cavil's lumbar spine, and a twenty percent whole person impairment to his right lower extremity. (JE 11, pp. 19-22)

Dr. Wolfe found the 2018 functional capacity evaluation was valid, showing Cavil is capable of medium work, and he adopted the restrictions identified by Goodhue in his report. (JE 11, pp. 24-25) Goodhue recommended restrictions of lifting floor to waist up to twenty pounds constantly, up to thirty pounds frequently, up to forty-five pounds occasionally, and up to fifty-five pounds rarely, lifting waist to overhead up to ten pounds constantly, up to twenty pounds frequently, up to thirty pounds occasionally, and up to forty pounds rarely, lifting horizontal up to thirty pounds constantly, up to forty pounds frequently, up to fifty pounds occasionally, and up to sixty pounds rarely, static pushing up to twenty-five pounds constantly, up to thirty-five pounds frequently, up to forty-five pounds occasionally, and up to fifty-five pounds rarely, static pull up to twenty pounds constantly, up to thirty pounds frequently, up to forty-five pounds occasionally, and up to fifty-five pounds rarely, right and left single upper extremity carry up to fifteen pounds constantly, up to twenty-five pounds frequently, up to thirty-five pounds occasionally, and up to forty-five pounds rarely, front carry up to twenty pounds constantly, up to thirty pounds frequently, up to forty-five pounds occasionally, and up to fifty-five pounds rarely, elevated work occasionally, forward bending/standing occasionally, rotation sitting and standing occasionally, crawling, kneeling, and deep static crouching rarely, repetitive squatting occasionally, sitting and standing frequently, and walking, stair

climbing, and step ladder climbing occasionally. (JE 11, pp. 7-10) I find these restrictions appropriate based upon the record evidence.

The City did not provide Dr. Rankin with a copy of the 2018 functional capacity evaluation to request Dr. Rankin's opinions, or have Dr. Rankin examine Cavil after Dr. Wolfe provided his impairment rating. As discussed above with respect to Dr. Nelson, and based on the brevity of Dr. Rankin's opinion, compared with the lengthy, comprehensive opinion of Dr. Wolfe, the entire medical record, and testimony at hearing, I find Dr. Wolfe's opinion to be more persuasive on the issue of extent of disability and permanent restrictions.

At the time of the hearing Cavil was forty-seven. (Tr., p. 10) Cavil is a high school and college graduate. (Tr., pp. 13-14; Exs. 4, p. 3; C, pp. 3-4) Cavil earned a bachelor of arts degree in human services from Grand View College in Des Moines. (Tr., pp. 13-14; Exs. 4, p. 3;C, p. 4) Cavil is articulate, and testified he earned A, B, and C grades while in college, reporting he earned more A grades than B grades. (Ex. C, p. 4) Cavil testified he has been unable to secure a position in his field of study. Based on his educational achievement and presentation at hearing, I believe Cavil is capable of retraining.

Cavil has worked as a seasonal laborer for the City many years. He continues to work for the City, and he has received regular raises. While Cavil continues to perform his normal duties, he also testified credibly at hearing he experiences a burning sensation in his lumbar spine when raking and shoveling at work. Considering all of the factors of industrial disability, I find Cavil has sustained a forty percent permanent impairment as a result of the 2016 work injury.

Cavil returned to work following the work injury that occurred on Monday, July 11, 2016. In Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360 (Iowa 2016), the Iowa Supreme Court held that the healing period set forth in the statute lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first." 818 N.W.2d at 372-74. The record evidence supports Cavil returned to work following the work injury with restrictions. Under Evenson, the commencement date for permanency is July 12, 2016. Cavil is awarded 200 weeks of permanent partial disability benefits at the stipulated rate of $576.42 per week, commencing on July 12, 2016.

IV. Costs

A. Independent Medical Examination

Cavil seeks to recover the $2,750.00 cost of Dr. Wolfe's independent medical examination for his July 2016 work injury. Iowa Code section 85.39 (2016), provides, in part:

> [a]fter an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. . . . If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . .

Following the July 2016 work injury, the City sent Cavil to Dr. Lin for treatment for his right knee condition. (JE 1) Dr. Lin referred Cavil to Dr. Nelson for an evaluation of right low back, hip, anterolateral thigh and knee pain and right foot paresthesias. (JE 1, p. 19) Dr. Nelson treated Cavil, ordered physical therapy, and imposed work restrictions. (JE 1, pp. 20-22) Dr. Nelson lifted Cavil's work restrictions, and using the AMA Guides opined Cavil had not sustained an additional permanent partial impairment as a result of the July 2016 work injury. (JE 1, p. 25) No physician provided an impairment rating regarding Cavil's work injury before Dr. Wolfe assigned his impairment rating. Cavil is not entitled to recover the cost of Dr. Wolfe's independent medical examination under the statute.

B. Other Costs

Cavil seeks to recover $850.00 for the October 2018 functional capacity evaluation, $200.00 for the two filing fees, $84.60 for Cavil's deposition transcript, $500.00 for an April 2017 conference with Dr. Rankin, $500.00 for a September 2017 conference with Dr. Rankin, and $2,750.00 for the cost of Dr. Rankin's independent medical examination.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33(6), provides:

> [c]osts 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.

I did not find Cavil was successful in proving he sustained a change of condition with respect to File Number 5045990, and thus, using my discretion I find he is not entitled to recover the $100.00 filing fee.

Cavil was successful in proving his claim in File Number 5062531. The administrative rule expressly allows for the recovery of the $100.00 filing fee, $84.60 for the deposition transcript, and the cost of two doctors' or physician's reports. The bills for Dr. Rankin are for in-person conferences, not reports. (Ex. 7, pp. 5-8) Cavil is not entitled to recover the cost of the in-person conferences with Dr. Rankin. I do find Cavil is entitled to recover the $850.00 cost of Goodhue's functional capacity evaluation, used by Dr. Wolfe in addressing permanent restrictions.

Cavil also seeks to recover the $2,750.00 cost of Dr. Wolfe's independent medical examination as a cost. In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

> [w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Dr. Wolfe's bill is not itemized. (Ex. 7, p. 9) Under Young, Cavil is not entitled to recover the $2,750.00 cost of Dr. Wolfe's independent medical examination and report. Id.

ORDER

IT IS THEREFORE ORDERED, THAT:

For File Number 5045990:

Claimant shall take nothing further.

For File Number 5062531:

Defendant shall pay the claimant two hundred (200) weeks of permanent partial disability benefits at the stipulated weekly rate of five hundred seventy-six and 42/100 dollars ($576.42), commencing on July 12, 2016.

Defendant 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. Sanchez v. Tyson, File No. 5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue).

Defendant shall receive a credit for all benefits paid to date.

Defendant shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee, eight hundred fifty and 00/100 dollars ($850.00) for the cost of the functional capacity evaluation, and eighty-four and 60/100 dollars ($84.60) for the deposition transcript.

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

Signed and filed this 18th day of June, 2019.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/sam

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.