BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID BORG, Claimant, vs. RHODEN AUTO SERVICE CENTER, Employer, and FARM BUREAU PROPERTY & CASUALTY INSURANCE CO., Insurance Carrier, Defendants.	FILED MAY 10 2017 WORKERS' COMPENSATION File No. 5046635 APPEAL DECISION Head Note Nos: 1403, 1703, 1801.1, 1802, 1803, 2402

Defendants Rhoden Auto Service Center, employer, and its insurer, Farm Bureau Property & Casualty Insurance Company, appeal from an arbitration decision filed on December 4, 2015. Claimant David Borg responds to the appeal. The case was heard on May 8, 2015, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 22, 2015.

The deputy commissioner found claimant carried his burden of proof that he sustained a 100 percent loss of earning capacity and claimant was awarded permanent total disability benefits commencing November 19, 1997, the date of the stipulated work accident in question. The deputy commissioner found that the back surgery claimant underwent on June 18, 2013, was directly related to the November 19, 1997, work injury. The deputy commissioner found defendants failed to prove a three-year statute of limitation defense pursuant to Iowa Code section 85.26(1) because claimant proved defendant-employer paid claimant his regular wages in lieu of weekly workers' compensation benefits from June 18, 2013, through November 30, 2013, while claimant was off work for the back surgery, with the result that the payment of claimant's wages from June 18, 2013, through November 30, 2013, extended the three-year statute of limitations. The deputy commissioner found defendants are entitled to a credit for all weekly benefits previously paid. The deputy commissioner ordered defendants to pay all medical expenses incurred by claimant for the 2013 back surgery. The deputy

commissioner ordered defendants to reimburse claimant pursuant to Iowa Code section 85.39 for the $5,566.30 charge for the independent medical evaluation (IME) of claimant performed by Robin Sassman, M.D., on June 22, 2014. The deputy commissioner also ordered defendants to pay claimant's costs of the arbitration proceeding in the amount of $2,625.00.

Defendants assert on appeal that the deputy commissioner erred in finding claimant carried his burden of proof that he sustained a 100 percent loss of earning capacity and in awarding claimant permanent total disability benefits. Defendants also assert the deputy commissioner erred in finding defendant-employer paid claimant his regular wages in lieu of weekly workers' compensation benefits from June 18, 2013, through November 30, 2013, and in finding that those payments of claimant's wages extended the three-year statute of limitations.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed in this matter on December 4, 2015, which relate to the following issues:

I affirm the deputy commissioner's finding that claimant's June 18, 2013, back surgery was directly related to the November 19, 1997, work injury.

I affirm the deputy commissioner's finding that defendant-employer paid claimant his regular wages in lieu of weekly workers' compensation benefits from June 18, 2013, through November 30, 2013, and I affirm the deputy commissioner's finding that those payments of claimant's wages extended the three-year statute of limitations.

I affirm the deputy commissioner's finding that defendants are entitled to a credit for all weekly benefits previously paid.

I affirm the deputy commissioner's order that defendants pay all medical expenses incurred by claimant for the 2013 back surgery.

I affirm the deputy commissioner's order that defendants reimburse claimant pursuant to Iowa Code section 85.39 for Dr. Sassman's IME charge.

I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding in the amount of $2,625.00.

I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues.

I reverse the deputy commissioner's finding that claimant sustained a 100 percent loss of earning capacity and is permanently and totally disabled as a result of the work injury, and I reverse the deputy commissioner's finding that claimant is entitled to permanent total disability benefits commencing on November 19, 1997. I find claimant is entitled to temporary total disability benefits from November 19, 1997, through March 10, 1998, from June 3, 1998, through September 6, 1998, and from June 18, 2013, through November 30, 2013, all of which has been paid. (Exhibit A, page 1; Transcript pages. 116-117) I find claimant is entitled to temporary partial disability benefits from March 11, 1998, through June 2, 1998, from September 7, 1998, through November 22, 1998, and from December 14, 1998, through June 27, 1999, all of which has been paid. (Ex. A, p. 1) I find claimant sustained 90 percent industrial disability as a result of the work injury, which entitles claimant to 450 weeks of permanent partial disability benefits from November 23, 1998, through December 13, 1998, and from June 28, 1999, through January 20, 2008, of which 435 weeks have been paid. (Id.) I provide the following analysis for this finding:

FINDINGS OF FACT

Claimant was 57 years old at the time of the arbitration hearing. He graduated from high school in 1976. He obtained an associate of applied science degree in auto mechanics as well as completing some course work in machine tool at a community college. He continued his education taking college courses from 1994 through 1996. His goal was to obtain a bachelor of science degree in automobile technology. His work-related injury which occurred on November 19, 1997, ended his attempt to obtain the BS degree. (Tr. p. 27) Claimant continued to take training courses in the automotive field though 2014. (Tr. p. 90)

Claimant was hired by defendant-employer in 1983 as a service technician. He was promoted to shop foreman and quality control test technician in 1985. In 1987, he was promoted to Service Manager. As Service Manager, claimant did much less hands-on work on automobiles than he did as a shop foreman or service technician. He did some diagnostic work, but not as much as he was involved in working on purchasing equipment and personnel issues. (Tr. p. 31) In 1989, claimant was promoted to the position of Fixed Operations Director. (Tr. p. 88) Claimant continued to hold this position for defendant-employer at the time of the arbitration hearing. In this position he oversees the service, parts and auto-body departments. (Tr. pp. 32-33) Claimant stated most persons in the position of Fixed Operations Director have a college business background. (Tr. p. 33)

Claimant was in the Kansas City area on November 19, 1997, when his vehicle was struck head-on by a drunk driver on Interstate 435. (Exhibit 12) Claimant was gravely injured. He was first seen by paramedics and then flown by helicopter to a

trauma center at a nearby hospital. (Tr. p. 36) Claimant described a horrific accident and, in his testimony at hearing, he explained the extent of his injuries:

> **Q.** All in all, can you list all the injuries that you sustained in the accident?
>
> **A.** I believe so. I had damage to both the occipital lobes of my brain. I had a tear in the inner membrane of my ear. They call it the perilymph fistula. I kept losing my balance. After about a year of healing up, every time I'd have to get in a hospital elevator, I'd get sick to my stomach and get queasy. And then they realized that a bone had punctured it and this liquid had leaked out.
>
> I had broke the - - what they called the orbit bone around my left eye. It severed my aorta. It broke what they call the spinal process of C4 and C5 and chipped the front of them, which I never had surgery on and --
>
> because of the way they described having the surgery.
>
> It fractured - - it was open fracture of both bones in my left arm and severed the - - there's two nerves in your arm; the medial nerve, and it never has re-nerved quite correctly.
>
> It broke four ribs. And then they had to break another rib when they were doing my heart surgery to put chest - - I had two chest tubes in. They shoved one tube through a lung. And every time I have an x ray now, I still have a shadow in that lung.
>
> It crushed my acetabulum. And the acetabulum is the socket that the femur bone goes into. And it shoved the femur through the acetabulum. And so they didn't - - the first couple days - - and my wife would be better to answer this because I don't really know what transpired at that time. I was on so much medicine.
>
> But they didn't do my pelvic reconstruction right off the bat. They did my - - they did my heart first. They did do the reduction on my left arm, but then they waited about a week to do my pelvis.
>
> They did my pelvis on November 25, my birthday.
>
> It cut my scrotum and tore one of my testicles loose. And then you have a nerve that if you damage it, you have an impotence problem. It's called a pudendal nerve. And it severed that nerve. It chipped the top of the femur off, and they had to grind a flat spot on it when they rebuilt my pelvis.

It tore ligaments in my ankle and then also - - I forget the name how they call the fracture, but it basically mushroomed the ankle joint out where my foot hits my ankle. It broke one of the metatarsals, and then I also - - there's part of the ball of your foot I have -- I wear insoles in my shoes to prevent this little bone from irritating the ball on my foot. It broke my great toe, I believe, and the toe on the next to it in the left.

And then I believe it was probably the right pedal on the vehicle folded over on my right foot and tore the bottom of the foot off. So they had to stitch the bottom of my foot back on my right foot.

Oh, I have a - - later we found out - - this is an ongoing problem. It's one that keeps me awake at night. I have a intimal flap and now it's aneurized in the subclavian artery; the artery that comes off the aorta runs under your collarbone and it feeds blood to your right arm and it feeds blood to the base of your brain.

And when my aorta was severed, it pulled on this artery and the cardiothoracic surgeon that takes care of me said your arteries are made in layers, and I think the two inner layers of mine are torn. And what makes it tricky is it tore it at where there's a branch.

And so they can't repair it because I have a congenital defect in the vertebral arteries in the base of my brain. And so if they did try to repair it, they say I would stroke. And so they've just monitored it and then watched it. And now it's - - actually, it was just the flap was there. My internist found it and called it - - apparently he called it turbulence. And then they took me back in and ran another angiogram and found out.

And now they monitor it. The medicine that I take is called Bystolic. It's a beta blocker to control the contraction in my heart. And if I take too much of it, I get dizzy and it also - - you know, so I take a Bystolic for that.

That's all the injuries that I had I think.

Oh, I have a - - due to the trauma and everything, I suffer from PTSD.

(Tr. pp. 39 – 44)

As stated above, claimant was continuing to work as the Fixed Operations Director for defendant-employer at the time of the arbitration hearing. The job requirements for this position are itemized in Exhibit 15. When claimant was asked if he could perform all of the eleven essential functions of his job as Fixed Operations Director, he stated he could with the assistance of two co-workers, Jeff Spencer and

Randy Vonweihe. (Tr. p. 73) Claimant is able to work with accommodations allowed by the owner of defendant-employer. (Ex. P, pp. 2, 3)

Following claimant's return to work after the accident, he has been required to perform only the work he is comfortable performing. (Tr. p. 91) Claimant has a shop foreman who "goes above and beyond" to make sure claimant does not perform any work which might be difficult. (Tr. p. 92) Another assistant will assist claimant if he has to pick anything up, such as a dropped pencil. (Id.) Claimant said it took a number of years for him to figure out what he could do at work and he stated he does not consider himself to be at full time yet because he continues to miss time from work for medical appointments. (Tr. pp. 43, 44) Claimant said he continues to have numerous medical appointments which take him away from his work. (Tr. p. 76)

The physical requirements for the Fixed Operations Director are outlined below. The column to the right lists the limitations claimant asserts he abides by to continue his work. (Tr. p. 34)

PART III. PHYSICAL REQUIREMENTS

Standing:	Frequently	Not for any extended period of time 5 to 10 minutes
Walking:	Frequently	
Sitting:	Frequently	Not for more than 1 hour
Bending/Stooping/Squatting:	Occasionally	Rarely
Climb Stairs:	Occasionally	
Lying Down:	Rarely	Never
Push and Pull:	Occasionally	Never
Reach Above Shoulders:	Occasionally	Rarely
Climb Ladders:	Occasionally	Not at all
Grasp/Grip:	Frequently	Rarely
Finger Dexterity:	constantly	Rarely
Writing/Typing:	Frequently	
Driving/Operating Equipment:	Frequently	Occasionally

Vision-Beyond arms length: Frequently

Lifting/Carrying: Over 150 lbs	Rarely	Never
76-150 lbs	Rarely	Never
51-75 lbs	Rarely	Never
26-50 lbs	Occasionally	Never
10-25 lbs	Occasionally	Rarely
1-9 lbs	Occasionally	

Hearing Requirements: Constantly

Speaking Requirements: Constantly

Environment-Working Indoors: Frequently

Environment-Working Outdoors: Occasionally Rarely

Environment-Working in Confined Space: Occasionally Never

Environment-Exposure to Fumes, Chemicals, Solvents, Caustics, etc.: Occasionally

Environment-Extreme Temperatures: Occasionally

Coordination-Eye/Hand/Foot: Frequently

Reasoning Development: Apply principles of logical or scientific thinking to define problems, collect data, establish facts and draw valid conclusions. Interpret an extensive variety of technical instructions in mathematical or diagrammatic form. Deal with several abstract and concrete variables.

Mathematics: Algebra, Geometry, Shop Math, Trigonometry

Language Development:

Reading-read novels, tech journals, blueprints with understanding.

Writing-prepare business letters, expositions, summaries, and reports with proper format.

(Ex. 15, pp. 2, 3)

A functional capacity evaluation (FCE) done in 1999 recommended the following physical restrictions:

1. Lifting of objects to shoulder level should be limited to 20 pounds or less on an occasional basis and 10 pounds or less on a frequent basis.

2. Lifting above shoulder level should be limited to an occasional basis with 15 pounds or less.

3. David is capable of standing and walking each on a frequent basis but will require some limitation in time frames. Standing/walking is recommended at 4 to 6 hours in an 8 hour work day with occasional alteration to sitting after 30 to 60 minutes of continuous weight bearing.

4. Stair climbing is restricted to an occasional basis secondary to left hip and pelvis injuries. He should be restricted from any significant ladder climbing.

5. He is capable of squatting through a partial range of motion on an occasional basis. He should be restricted from full squatting secondary to hip and pelvis injuries.

6. Overhead reaching is restricted to an occasional basis secondary to aggravation of symptoms in his rib cage on the left with repetitive overhead reaching. He should be restricted from prolonged or repetitive work above shoulder level.

7. High impact activities such as running and jumping are not recommended.

(Ex. 3, p. 2)

It was noted claimant's lumbar range of motion was mildly restricted, and cervical range of motion is also limited, but both were not significant contributing factors to his restrictions. (Ex. 3, p. 2)

On August 30, 1999, James Neff, M.D. evaluated claimant at the request of defendants. Dr. Neff concluded claimant was at maximum medical improvement (MMI) and had a permanent functional impairment rating of 50 percent of the whole body. (Ex. 9, pp. 2, 8)

On September 20, 2006, Bruce Gutnik, M.D. performed an independent psychiatric evaluation of claimant. As a result of the work accident, claimant was diagnosed with chronic post-traumatic stress disorder (PTSD) and dysthymic disorder.

(Ex. 5, p. 13) Dr. Gutnik provided a 15 percent impairment rating for claimant's psychological injuries. (Ex. 5, p. 14)

On September 9, 2008, Jeffrey Sugimoto, M.D. of Creighton University Medical Center made a chart note stating claimant was planning to undergo back surgery. (Ex. H, p. 11) It does not appear claimant had back surgery at that time.

On June 18, 2013, claimant underwent an L4 to S1 spinal fusion. He was discharged from the hospital on June 21, 2013. (Ex. 10, p. 14) Michael Longley, M.D., the surgeon who performed the surgery, returned claimant to work on November 21, 2013, with a 40-pound lifting restriction. (Ex. N, p. 1) On April 17, 2014, Dr. Longley wrote the following:

> David Borg has been seen for a work related injury to his low back. Most recently, he underwent an L4 to S1 fusion performed on June 18, 2013. As previously stated in my dictation of May 30, 2013, it is my opinion that his condition and surgery are the result of the continuation and progression of his 1997 work accident which finally came to fruition and required surgical intervention after years of attempted conservative care. Based upon my many examinations and treatment of Mr. Borg, I see no indication that his condition and the need for surgery in 2013 were in any way caused by his continued employment or ongoing work activities. At most, perhaps his work and daily activities of life may be considered incidental to his condition, but I do not believe his ongoing employment or work activities produced any new injury or aggravation and the activities were not a substantial factor or even a factor in the need for surgery or his ongoing condition.

(Ex. N, p. 2)

Based on Dr. Longley's report, I affirm the deputy commissioner's finding that the fusion surgery claimant underwent on June 18, 2013, is directly related to the November 19, 1997, work injury.

On April 2, 2015, James T. Canedy, M.D. provided temporary restrictions of no lifting greater than 40 pounds, with limited stooping, climbing and squatting on a very rare basis. Dr. Canedy has been providing claimant with treatment for 17 years. (Ex. 1, p. 8)

Claimant missed work from June 18, 2013, through November 30, 2013, after undergoing the spinal fusion necessitated by the work injury. (Tr. p. 76) Defendant-employer paid claimant his regular wages in lieu of workers' compensation benefits during the time he was off work in 2013 for his back surgery. (Tr. pp. 94, 117)

Following the fusion surgery, claimant no longer bends his back at work. (Tr. p. 80) Prior to the surgery, claimant was able to do some bending at work. (Tr. p. 81) Stooping, bending and climbing ladders have become more difficult since the surgery. (Tr. p. 82) Claimant has also experienced more mobility problems with his ankle following the surgery. He is not able to walk as much. (Tr. p. 82) He can stand, walk and sit with moderation. (Tr. p. 83) His work is sedentary now. He needs to stand and walk around up to 30 times a day due to pain. (Tr. p. 100)

Claimant testified the owner of defendant-employer was approximately 71 years old with no heirs. Claimant believes if the business was sold his position would be eliminated. However, he admitted he had no indication the business would be sold or that his position would be eliminated. (Tr. p. 85) Claimant admitted he had no reason to believe he won't retire from defendant-employer. (Tr. p. 86)

Claimant's surgical and physical therapy costs for the fusion were incurred at the Nebraska Spine Center. (Tr. p. 86)

Michael Jensen was called by defendants to testify. Mr. Jensen has been with defendant-employer since 1999 and he is the controller. (Tr. pp. 104-105) Mr. Jensen is at the same level of management as claimant. They both report to the general manager of the dealership. Mr. Jensen said if claimant were to retire, defendant-employer would have to replace him. Mr. Jensen stated claimant has the management skills to oversee the three departments that are the responsibility of the Fixed Operations Director and claimant can delegate the physical parts of his job. (Tr. pp. 108-109) Mr. Jensen agreed with claimant, that claimant is allowed to keep a work schedule which works best for claimant. (Tr. p. 109) Mr. Jensen stated he would hire claimant to be a fixed operations director if he had a dealership. (Tr. p. 115)

Claimant spoke to Mr. Jensen and to Jim Pettit, the General Manager, in the spring of 2013 and told them he was going to have back surgery. Claimant told them his back surgery was related to the 1997 injury. (Tr. p. 113) Claimant testified in his deposition he believed his spine surgery was a result of his crushed pelvis from the 1997 injury. (Ex. P, p. 4) Claimant answered an interrogatory wherein he stated he had no other work injuries after 1997 and his spine surgery was a result of his 1997 injury. (Ex. Q, pp. 2, 3)

Mr. Jensen was asked about the wages paid to claimant while he was off work for the back surgery:

> Q. Mr. Borg was off work for a period after his back surgery. Are you familiar with that?
>
> A. Yes.

Q. Are you aware if Mr. Borg continued to receive wages, as he testified, after the back injury?

A. Yes.

Q. Did you understand those wages were being paid in relation to his work-related injury?

A. Clarify.

Q. Did you understand Mr. Borg told you that his surgery was because of the 1997 injury?

A. Right.

Q. Did you understand those wages were being paid because he was off work due to the 1997 work injury?

A. Yes. Conversation I had with Mr. Muller and Mr. Rhoden was I was directed to pay Dave's wages because he was not going to be paid at the time by the work comp carrier. And they felt that it was not fair and, hence, we would pay him his full salary while he was gone.

Q. So you stepped in and you paid those benefits in lieu of the work comp benefits?

A. Exactly.

Q. During the time that you have worked with Mr. Borg, are you aware of any reports by Mr. Borg of having suffered any further work-related injuries since his 1997 work injury?

A. No.

(Tr. pp. 116 -118)

As stated above, I affirm the deputy commissioner's finding that claimant was paid wages in lieu of workers' compensation benefits beginning June 18, 2013, through November 20, 2013. I affirm the deputy commissioner's finding that the payment of claimant's wages for those dates extends the three-year statute of limitations in this matter.

Mr. Jensen testified he did not believe the owner of defendant-employer would be as tolerant with another employee as they are of claimant, if they had to hire a replacement for claimant. (Tr. pp. 119-120)

James Pettit, General Manager, provided a written statement dated March 17, 2015. (Ex. 17, p. 1) In his statement, Mr. Pettit noted claimant was a hands-on manager before the accident. Mr. Pettit said claimant was an important part of the team and wrote, "In spite of Dave's permanent disabilities, the dealership has and will continue to help ensure he will have a customized position within our company." (Ex. 17, p. 1)

Rod Rhoden, President of Rhoden Auto Center, wrote a statement dated March 16, 2015. Mr. Rhoden noted claimant's ability to walk, stand, bend, lift, sit, concentrate and more were dramatically impacted by the 1997 accident. Mr. Rhoden noted claimant finds a great deal of satisfaction with his work. Mr. Rhoden wrote, "In spite of David's disabilities, we have and will continue to accommodate him to ensure that he can have a unique customized employment position in our company." (Ex.18, p. 1)

On October 29, 2014, Robin Sassman, M.D. performed an IME of claimant. Dr. Sassman's IME report provides a detailed history of treatments claimant received following the work injury up until April 2014. (Ex. 10, pp. 2 -15) Dr. Sassman identified 20 different diagnoses as a result of the 1997 injury. Those diagnoses are,

1. Post-traumatic aortic arch transection status post left thoracotomy, repair of aortic transection on 11/19/1997 by Thomas Prendergast, M.D.

2. Right subclavian artery chronic dissection with thrombosis of the false lumen, stable.

3. Open fracture of both bones of the left forarm [sic] status post I&D with delayed primary closure of left forarm [sic] wound on 11/25/1997 by Greg Hortan M.D. with residual weakness of grasp

4. Left brachioradialis nerve deficits

5. Left inferior orbital rim fracture

6. Left Acetabulum fracture status post ORIF of left posterior wall posterior column acetabular fracture on November 26, 1997, by Greg Horton, M.D.

7. Right middle lobe lung contusion

8. Scrotal laceration

9. Pudendal nerve injury

10. Left great toe fracture

11. Multiple right rib fractures with continued pain and intercostal neuralgia

12. Liver laceration

13. Loose tooth

14. Right ear perilymphatic fistula status post repair on February 11, 1999 by Lee Harker, M.D.

15. Right foot laceration

16. T1 spinous process fracture

17. Right ischial bursitis

18. Low back pain with radiculopathy status post L4-S1 fusion by Michael Longley, M.D. on June 18, 2013

19. Left ankle instability, peroneal tendonitis

20. PTSD/Depression

(Ex.10, pp. 20, 21)

Dr. Sassman provided a functional impairment rating for claimant of 69 percent of the whole person. Dr. Sassman noted her rating was higher than Dr. Neff's due to the fusion surgery claimant underwent after Dr. Neff's rating was issued and due to other ongoing issues. (Ex. 10, p. 25) Dr. Sassman provided the following restrictions,

> I would recommend that Mr. Borg limit lifting, pushing, pulling and carrying to 20 pounds occasionally from floor to waist, 20 pounds occasionally from waist to shoulder and 20 pounds rarely over the shoulder. I would recommend he occasionally sit, stand and walk; but, he will need to change positions frequently due to his symptoms. He should rarely stoop and bend. He should rarely crawl or kneel. I would not recommend walking on uneven surfaces or ladders. He should rarely use stairs. Gripping and grasping should be limited to a rare basis with the left hand. Upper extremity activities should be limited to at or below shoulder height on an occasional basis. I would not recommend the use of vibratory or power tools as these may exacerbate his symptoms.
>
> When compared to the functional capacity evaluation, the above are slightly more restrictive. The FCE placed his capabilities in the low range of the medium category; however, given the severity of his injuries and his ongoing symptoms with regard to those injuries as well as the fusion, in

> my opinion it is more appropriate to place him in a Light Category (based on the Dictionary of Occupational Titles).

(Ex. 10, pp. 25-26)

On November 10, 2014, James Gallagher, M.D. performed an independent psychiatric evaluation of claimant. Dr. Gallagher noted claimant had a very positive relationship with the owner and others in charge at defendant-employer. (Ex. 4, p. 1) In response to a series of questions posed by Claimant's attorney, Dr. Gallagher provided the following information:

> 1. I'm of the opinion that the primary psychiatric diagnosis is posttraumatic stress disorder followed by a depressive disorder such as a major depression, single episode. Both conditions are now fairly chronic. Both of these diagnoses are related to the November 19, 1997 motor-vehicle accident along with the related physical injuries.
>
> 2. Mr. Borg will require ongoing mental health care for the foreseeable future as a result of the MVA of 11-19-97. His PTSD symptoms remain quite prominent. Also, there are numerous "triggers," one of which is persistent pain which, variably, reminds him of the accident with concurrent negative emotional arousal. I am aware that the record suggests that he "improved" for a while, but this may have been denial on his part.
>
> 3. Given the chronicity of symptoms, a permanent impairment is likely. I think he fits into a class 3, or moderate impairment, which means that his impairment levels are compatible with some, but not all, useful functioning. When his physical pain increases or his psychiatric symptoms intensify, he may move towards the marked category, where useful functioning is further impeded. Clearly, he wants to remain employed.
>
> 4. Mr. Borg is mostly comfortable with his current work setting, as he is clearly accomplished and experienced as a master auto technician. Also, his supervisory skills are, reportedly, quite good. However, he would be very unsure of himself outside of his present work setting, as it would be unpredictable for him. He is convinced that others would not be as accommodating as is his current employer, Mr. Rhoden. According to his wife, his focus and concentration are diminished and Mr. Borg alludes to this as problematic. Given that his job involves considerable "multitasking" skills and resiliency, this could prove difficult for him to manage in a new setting. It should be kept in mind that his psychological resiliency is diminished.

(Ex. 4, pp. 9-10)

I affirm the deputy commissioner's finding that claimant has a Class 3, moderate psychological impairment. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 14 – 1, page 363.

Due to the constellation of injuries, I affirm the deputy commissioner's finding that claimant has the restrictions provided by Dr. Sassman and Dr. Gallagher. I note the deputy commissioner's finding that claimant's testimony was credible overall and especially about the functions he can and cannot perform. I also note no doctor in this case has indicated claimant is not capable of working or should not be working.

A vocational evaluation was completed on December 3, 2014, by Lewis Vierling, M.S., who opined claimant has a severely diminished work capacity due to his injuries. (Ex.19, p. 5) Mr. Vierling's opinion was as follows:

> As previously noted, it is this consultant's opinion that it is more likely than not, that if Mr. Borg is not able to retain his employment with Rhoden Auto Service Center, he would be unable to obtain and retain employment in the competitive labor market currently and into the foreseeable future.

(Ex. 19, p. 5)

When Mr. Jensen was asked at hearing about claimant's employment duties and his ability to work, he stated the following:

> Q. I'm assuming at Rhoden Auto Center, you have Mr. Rhoden at the top and who's next and who's second in charge?
>
> A. He's got a vice president and it's like the chief financial officer that helps Mr. Rhoden oversee all of his ownerships of dealer - - of car dealers.
>
> Q. And who is that person?
>
> A. Richard Muller.
>
> Q. And then where do you fit in, then, as the controller?
>
> A. We have a general manager at each dealership and then the controller would report directly to the general manager.
>
> Q. At each dealership?
>
> A. Yes.
>
> Q. And then Mr. Borg's position of fixed operations manager, does he report directly to you?

A. No.

Q. Who does he report to?

A. I would be on the same level as David. We would both report directly to Jim Pettit, James Pettit.

Q. So as controller, do you have more of the financial side of the business?

A. Yes.

Q. And then Mr. Borg has sort of the physical operations side of the business?

A. The fixed operations of service, parts and body shop.

Q. Then you are both on equal level and you report to the general manager of the dealership?

A. Yes.

Q. If Mr. Borg retired tomorrow, would Rhoden Auto Center have to hire someone to fill his position?

A. I would say yes.

Q. And what things does Mr. Borg do for Rhoden Auto Center?

A. Well, oversees the managerial and administrative aspects of the service department and the body shop and the parts department.

Q. Is that something that is separate from the job duties of the service manager?

A. Yes.

Q. And I think Mr. Borg testified to this, the service manager would report to him as the fixed operation manager. Is that how it works?

A. Yes.

Q. What are the differences between the job duties of the fixed operations manager and the service manager?

A. The fixed operations is more of an umbrella. It's a managerial oversight of the - - like I said, the service department, the body shop, and the parts department. The service manager would be more directly - - work more directly with probably the technicians and the customers. And then, you know, once the situation evolves, it gets past him and it would go to the fixed operations director.

Q. So the service manager wouldn't necessarily have any oversight over the parts department?

A. No.

Q. Whereas, Mr. Borg as the fixed operations manager has some oversight over all three of those areas?

A. That's correct, I would look at it that your body shop manager, your parts manager, and your service manager are all kind of the same level, would all report to the fixed operations manager, director, whatever terminology you want to use.

Q. And that's Mr. Borg and Mr. Borg reports to the general manager?

A. That's correct.

Q. As far as you're aware, can Mr. Borg perform all the essential functions of his job?

A. The functions that we need necessary to do as a fixed operations director, yes, he does have the administrative and managerial skills to oversee those departments.

Q. So then some of the physical parts of his job, he can delegate down a level depending on whether it's the service department or the parts department. Can it work like that?

A Yes.

Q And does it work like that?

A. Yes.

Q. If Mr. Borg retired tomorrow and you needed to hire someone as a new fixed operations manager, would he or she have the same essential duties that Mr. Borg currently has?

A. Yes.

Q. It's just possible that he or she might go about getting the job done slightly differently?

A. Every person attacks a problem differently. So, yes.

(Tr. pp. 105-109)

A little later in his testimony at hearing, Mr. Jensen stated the following:

Q. Do you believe that Mr. Borg is a valuable employee to Rhoden Auto Center?

A. Yes.

Q. And why is that?

A. Dave's got a very unique skill set. I've been in the automotive business for 37 years - - 35 as a controller. And I've worked with several different fixed operations directors. I don't think I've ever worked with one that had the skill set Dave has because of his knowledge of the vehicles themselves.

Probably the - - in fact, I don't know if I've ever worked with one before that was previously a technician. It's usually more of an administrative or managerial person with that skill set that somebody had the background Dave does. So I think Dave is very unique at what he's able to do.

Q. Some people that come over to that position are fresh out of college with a - - maybe a bachelor's in management or something like that?

A. That's a possibility. I think the car business is pretty unique and I think most of the people that get into management in a car business have to have some background in it to get into it.

I mean, it's not something that you can be taught. I mean, you go to Iowa State or Iowa and learn how to go - - manage a car business. I think somebody with those aspects would have to get in at one level and move to another, but what I was talking about with Dave is that most of the - - a lot of the people I've seen that have been in the fixed operations side of it have started out as a - - maybe a service advisor working directly with the customers and the vehicles and then a service manager, but I don't know if I've ever encountered one that had the mechanical background

that Dave has.

(Tr. pp. 110-111)

Mr. Jensen also stated the following:

Q. And you've already testified a bit that Mr. Borg is unique in that he has a great deal of knowledge actually as a mechanic with the cars as well as the business side?

A. Yes.

Q. Do you believe that that would make Mr. Borg more marketable to other dealerships, it would give him an advantage?

A. To me, yes, because, Dave, if I bought a car dealership tomorrow, I would hire you as a fixed operations director, but I think it's - - Dave's knowledge and his ability, it's pretty unique, you know, even with his physical limitations.

Q. You mentioned that if Mr. Borg were to leave Rhoden for any reason, his position would need to be filled?

A. Yes.

Q. Mr. Borg testified earlier that he felt others had to be brought on to help him be able to perform his job. Are there others that are currently working for Rhoden that would no longer be needed as employees if Mr. Borg were to leave?

A. I don't believe so. Once again, as a fixed operations manager, a lot of those are calls that are made by that person. And each one of them has its own unique management style, but, at this time, I would say no.

Q. You believe Mr. Borg provides legitimate benefit to Rhoden Auto Service?

A. Definitely.

Q. You believe he's performing the essential functions of his position there?

A. Yes.

Q. Mr. Pettit as well as Mr. Rhoden have stated that Dave contributes on a daily basis and definitely adds value to the dealership, our customers and our employees. Do you agree with those statements?

A. Yes.

(Tr. pp. 115-116)

CONCLUSIONS OF LAW

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Wal-Mart Stores v. Henle, 843 N.W.2d 476 ((Table) (Iowa Ct. App. 2014) 2014 WL 69540 the court of appeals examined the impact accommodated work has on a claim for workers' compensation. The court stated:

> Industrial disability is determined by evaluating the employee's earning capacity. Pease, 807 N.W.2d at 852. We do not focus on Henle's disability, but on her ability to obtain gainful employment. See Second Injury Fund v. Nelson, 544 N.W.2d 258, 264 (Iowa 1995).
>
> Wal–Mart contends the commissioner could not properly conclude Henle was totally disabled when she was employed and earning wages. Wal–Mart invites us to "synthesize" three Iowa Supreme Court cases: Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997); Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); and Thilges v. Snap–On Tools Corp., 528 N.W.2d 614 (Iowa 1995). Wal–Mart contends we should glean from that case law an obligation on the part of the commissioner to consider evidence of Henle's continued employment as proof she had some level of earning capacity.
>
> Our reading of those three cases does not lead to the conclusion urged by Wal–Mart. An employer's accommodation of an injured employee—like Henle's part-time job and excused sick days—may only be factored into an industrial disability award if the commissioner finds a position equivalent to the newly created job is available in the competitive labor market. See Murillo, 571 N.W.2d at 18; Ciha, 552 N.W.2d at 157–58; Thilges, 528 N.W.2d at 617 (Iowa 1995).

There is no dispute claimant is working in an accommodated job. There is also no dispute if claimant were to work elsewhere, he would need certain accommodations to perform the type of work for which he is suited. However, I find claimant's need for accommodations does not necessarily mean no other auto dealership would hire him to do the specific type of work he currently performs. While I acknowledge claimant would have some difficulty securing other employment, I also find claimant is a unique individual who is highly motivated, extremely talented and quite capable of convincing a potential employer that his abilities far outweigh his limitations. He has continued to be employed by defendant-employer for 20 years following the horrible accident which is the subject of this matter. That fact by itself strongly indicates claimant provides valuable service for defendant-employer. It suggests if claimant found himself no longer employed by defendant-employer he would be able to locate new employment elsewhere. While the position claimant occupies at defendant-employer is a "unique customized employment position," as stated by Mr. Rhoden, claimant clearly gives defendant-employer good value in return for what he is paid. There is absolutely no evidence indicating otherwise, or indicating defendant-employer is merely allowing claimant to take up space or is simply providing claimant with a place to go to get out of the house every day. Claimant is performing valuable and legitimate work and there is no indication he will not be able to continue to do so.

Claimant holds a management level position. The evidence shows defendant-employer values claimant's work and is willing to allow him to continue his work despite his limitations and accommodations. While the only vocational report submitted in this case finds Mr. Borg is not competitively employable, the testimony given by Mr. Jensen clearly indicates otherwise. While Mr. Jensen is not a vocational expert, he possesses enough practical knowledge about the automobile industry in general, and about claimant in particular, to know whether claimant remains employable. While Mr. Vierling's opinions obviously have to be given serious consideration, those opinions are not dispositive when analyzed in the light of Mr. Jensen's testimony, because Mr. Jensen has much more thorough knowledge of the automobile industry. While defendants did not offer evidence from a vocational expert, the testimony of Mr. Jensen is probative regarding the issue of claimant's employability.

The evidence also clearly indicates claimant can no longer do the more physical types of work he performed before he was promoted to the position of Fixed Operations Director in 1989. While I find claimant is employable despite the particularly serious nature of his injuries and the resulting permanent disability, I find he is employable only within the very narrow range of the specific type of job he currently has. When considering all of the factors that must be considered in analyzing industrial disability, I find claimant has sustained 90 percent industrial disability, which entitles claimant to 450 weeks of PPD benefits payable starting November 23, 1998, through December 13, 1998, and from June 28, 1999, through January 20, 2008.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision of December 4, 2015, is MODIFIED as follows:

Defendants shall pay claimant temporary total disability benefits from November 19, 1997, through March 10, 1998, from June 3, 1998, through September 6, 1998, and from June 18, 2013, through November 30, 2013.

Defendants shall pay claimant temporary partial disability benefits from March 11, 1998, through June 2, 1998, from September 7, 1998, through November 22, 1998, and from December 14, 1998, through June 27, 1999.

Defendants shall pay claimant 450 weeks of permanent partial disability benefits from November 23, 1998, through December 13, 1998, and from June 28, 1999, through January 20, 2008.

Defendants are entitled to a credit for all benefits previously paid as set forth in this decision.

Defendants shall pay all accrued and unpaid weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendants shall pay all medical costs related to claimant's June 18, 2013, back surgery and all other medical costs otherwise related to claimant's work injury of November 19, 1997.

Defendants shall reimburse claimant in the amount of $5,566.30 for Dr. Sassman's IME fee.

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of $2,625.00, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed this 10th day of May, 2017.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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