BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GENARO ESTRADA-COLORES,

Claimant,

vs.

HEARTLAND FINISHES, INC.,

Employer,

and

WESTERN NATIONAL INSURANCE GROUP,

Insurance Carrier,
Defendants.

File No. 5054538

ARBITRATION DECISION

Head Note Nos.: 1803

STATEMENT OF THE CASE

Genaro Estrada-Colores, the claimant, seeks workers' compensation benefits from defendants, Heartland Finishes, Inc., the alleged employer, and its insurer, Western National Insurance Group, as a result of an alleged injury on September 18, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on February 27, 2017, but the matter was not fully submitted until the receipt of the parties' briefs and argument on March 20, 2017. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. Joint exhibits were marked numerically. All pages of defendants' and the joint exhibit packages were consecutively numbered. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to Joint Exhibit 6, pages 88 through 89 will be cited as, "JEx. 6-88:89." Citations to the hearing transcript of testimony such as "Tr-4:5," or to a deposition transcript such as "Ex. 14-4" shall be to the actual page number(s) of the original transcript, not to a page number of a copy of the transcript containing multiple pages or to a page number of an exhibit package.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On September 18, 2013, claimant received an injury arising out of and in the course of employment with Heartland Finishes, Inc.

2. Claimant is not seeking additional temporary total or healing period benefits.

3. At the time of the alleged injury, claimant's gross rate of weekly compensation was $905.00. Also, at that time, he was single and entitled to 3 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $568.22 according to the workers' compensation commissioner's published rate book for this injury on the agency website.

4. Medical benefits are not in dispute.

5. Prior to hearing, defendants voluntarily paid 79.714 weeks of disability benefits for this work injury from November 14, 2013 through February 19, 2014 and from May 8, 2014 through August 10, 2015 and claimant agreed that defendants shall be allowed a credit for such payments against any award of weekly benefits in this case.

ISSUES

At hearing, the only issue submitted by the parties for determination is the extent of claimant's entitlement to permanent disability benefits with sub issues of whether the injury is a cause of a scheduled member disability to the left arm, or an unscheduled industrial disability including the application of the odd-lot doctrine.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Genaro, and to the defendant employer as Heartland Finishes.

Genaro was only a few days short of 57 years old at the time of his hearing. He is not married. He lives with his girlfriend. He has sole custody of two daughters, ages 8 and 10 from a prior marriage. Genaro reads and speaks in Spanish. He testified that he understands some English, but does not speak or read English well. A Spanish translator was used at the hearing. He is currently taking ESL classes. Genaro testified that he only finished 3rd grade in his home country of Mexico. He said that he moved to California from Mexico 30-40 years ago. He then moved to Iowa in 2002.

Before moving to Iowa, Genaro worked for several employers in California as a restaurant janitor, security guard (bouncer at bars), factory worker operating a cardboard box machine; factory worker making pallets; and, an auto body repairman. He obtained permanent residence status in 1990.

After he came to Iowa, he began a career as a union plasterer and has worked for several employers through the union hall. This work involved the hand application of plaster or stucco to the exterior walls of both residential and commercial buildings using a trowel from a standing, bent over or crouched position either at the ground level or on

wooden planks placed a various heights on scaffolds. The work also includes erecting and dismantling the scaffolds, loading and carrying heavy bags of stucco cement; mixing the cement with water; and, lifting and carrying heavy buckets of mixed water and plaster material to the work area and up a ladder to the level of scaffold that he was working on. (Exhibit 9-83) His hourly wages for this work ranged from $17.00 to $24.69 per hour. (Ex. 12-95) During his last plasterer job before coming to Heartland Finishes, the employer changed to non-union workers and he left and mowed lawns for $10.00 per hour for the rest of that season.

Genaro has a prior health history of hypertension, GERD and Type II diabetes, for which he takes medications. (Ex. 2-23) Genaro had two orthoscopic surgeries on his left knee while in California, but he returned to work after these surgeries with no restrictions. (Ex. A-4) In November 2006, Genaro sought treatment for low back pain after lifting a bucket of material. He was given home exercises, medications, a day off work and return to work restrictions. There are no other records of treatment for this injury in the record. Genaro had a prior work injury in September 14, 2010 while working on a scaffold for another employer. When the scaffolding moved, he began to fall, but caught himself and did not fall. (Ex. A-4) However, in catching himself, he twisted his left knee and experienced the onset of significant left knee pain. (Id.) Later on, the left knee pain worsened and began to radiate into the left hip and left buttocks. (Id.) Sunil Bansal, M.D., an occupational medicine physician, opined in May 2013 that this injury aggravated pre-existing arthritis in the knee and Genaro suffered a seven percent permanent partial impairment to the left leg and an additional three percent permanent partial impairment to the body as a whole from the left hip trochanteric bursitis. (Ex. A-10:11) The doctor felt that claimant should have permanent restrictions of no frequent squatting and no use of ladders, but claimant asked that these not be imposed as he could not return to his plasterer job with restrictions. (Ex. A-13) Genaro testified that despite this prior injury, he had no physical limitations prior to the work injury in this case.

Genaro began working for Heartland Finishes in April of 2013 as a commercial plasterer. This employment continued until he was laid off on November 21, 2013 due to an inability of Heartland Finishes to accommodate work restrictions imposed by physicians treating the work injury of September 18, 2013. (Ex. 6-42) He passed a required pre-placement physical examination before starting at Heartland Finishes. (Ex. 7-73:74) Genaro has not been employed in any capacity since leaving Heartland Finishes. Genaro testified that at the time of his September 2013 work injury, he was earning the standard union rate of $24.69 per hour plus benefits. (Ex. 12, Ex. 6-12) He said that he enjoyed his plasterer job and planned to work in his chosen trade until retirement.

At the time of the injury on September 18, 2013, Genaro was applying plaster to a Mary Greeley Hospital building at the 2nd level of scaffolding. (Ex. 8-1:3) While stepping onto the wooded plank, the plank shifted, causing him to fall backwards. He landed on the first floor of the scaffolding, which was only about a foot or so above the ground. See photos (Ex. 8-79:81) At hearing, Genaro estimated the fall was from a

height of 12 feet. While falling, Genaro states that he struck the scaffolding with his left hand and then landed "flat" on his back. Genaro said that after he reported the injury to his supervisor, he was directed by that supervisor to go to the Doctors Now clinic.

Genaro was first treated by a provider at Doctors Now on the same day as the injury. Notes of the visit indicate complaints of pain in the paraspinal muscles and left upper extremity and left wrist. (Ex. 1-1:2) The diagnoses were wrist sprain and lumbago. Restrictions limiting use of the left hand and lifting were imposed. (Id.) Genaro testified that next day he developed severe lower back pain on the right side which radiated down the right hip and leg and caused occasional pain in the left foot.

Genaro was seen again at Doctors Now on September 27, 2013 and October 4, 2013 and the only report of pain was in the upper extremities with a diagnosis of a fracture of the distal radius at the styloid process in the left wrist. (Ex. 1-3:6) The restrictions were changed to only limit use of the left hand and arm. (Id.)

On October 11, 2013, Doctors Now reported continued pain in both the left wrist and low back radiating down to the groin, right buttock and right leg. Restrictions against lifting were re-imposed and Genaro was referred to Capitol Orthopedics for evaluation. (Ex. 1-9:10) On October 18, 2013, claimant went to Primary HealthCare on his own because the pain was so bad he could not sit or stand for long periods. (Joint Ex. 2-33) He also complained of headaches since the work injury. (Id.)

Physicians at Doctors Now followed Genaro for wrist and low back, right hip and right leg complaints and headaches until November 21, 2013, at which time they ended their care with a referral to a pain specialist for the back problems and a referral to orthopedist, ZeHui Han, M.D., for the wrist problem. There was no referral for the headaches as the doctors felt this was not work related. (Ex. 1-10-32) The restrictions against use of the left hand/arm and restrictions for the back injury against lifting, bending, and sitting were maintained until changed by a future provider. (Id.) Genaro had been working light duty at Heartland Finishes until November 21, 2013 when he was laid off.

Clinton Harris, M.D., a pain specialist, treated Genaro from November 8, 2013 to April 1, 2015. Claimant's symptoms were described by Dr. Harris as follows:

November 8, 2013: low back pain radiates into the right buttock to back of leg above knee. (JEx. 3-35)

January 10, 2014: pain in back radiating primarily to the right buttock, but not much below. (JEx. 3-37)

March 24, 2014: pain in right buttock that wraps around into the right groin with weakness in right leg when pain is at its worst. (JEx. 3-40)

During this time, Genaro started to use a cane for stability when walking. (JEx. 3-40, JEx 4-61) Use of a cane has continued to the present day. Genaro initially

rejected injection therapy offered by Dr. Harris, but finally allowed a right S1 joint injection in March 2015. Genaro subsequently reported to Dr. Harris that the injection did not improve his symptoms. Genaro underwent physical therapy from December 2013 to May 15, 2014 which improved his symptoms somewhat (JEx. 4, 54-63) Genaro stated that physical therapy was difficult because of unresolved wrist pain. (JEx. 4-58, 59, 60) Dr. Harris's final assessment on April 1, 2015 was lumbar disc herniation at L5/S1 vertebral level with radiculopathy. (JEx. 3-51) At that time, the doctor noted continued low back and right hip pain. He recommended an epidural steroid injection. When Genaro refused that injection, Dr. Harris stated that his only recommendation for treatment is a surgical referral. Genaro has not seen Dr. Harris since that time.

ZeHui Han, M.D., an orthopedist, treated Genaro for about six weeks beginning on December 2, 2013. After his review of x-rays, he disagreed with DoctorsNow providers and found no fracture of the wrist. (JEx. 6-71) His diagnosis was De Quervain's tendonitis of the left wrist and treated the condition with injections, medications, use of a wrist splint, and restricted use of the left hand. (JEx. 6-71:75) When Genaro reported no improvement in his symptoms, on January 16, 2014, Dr. Han released Genaro from his care and back to regular duty stating that he had no objective findings to support the continued pain complaints. (JEx. 6-77) However, he did agree that a second opinion was appropriate. (Id.)

Defendants did not authorize a second opinion for the left wrist until May 8, 2014 when Genaro was seen by Lester Yen, M.D., a hand surgeon. Dr. Yen recommended surgery for a dorsal compartment release to address the De Quervain's syndrome and Dr. Han agreed. (JEx. 6-80; JEx. 7-82) Dr. Yen also suspected radial nerve damage. (Id.) Following an EMG, Dr.Yen provided an additional diagnosis of carpal tunnel syndrome (CTS) in his left wrist. (JEx. 7-83) Dr. Yen opined that because it had been eight months after the work injury, it was impossible for him to causally connect the CTS to the injury. (Ex. C-2) The surgery to address the De Quervain's syndrome was authorized by defendants and performed on September 30, 2014, but not the CTS release. In a follow-up visit on October 30, 2014, Dr. Yen felt some of the pain in the palm of the left hand was due to the untreated CTS. (JEx. 7-85) At that time, the doctor released Genaro to work but with restrictions against lifting over two pounds with the left hand and no repetitive activities. (Id.) Genaro reported to Dr. Yen on January 5, 2015, that his wrist pain is unchanged. The doctor at that time placed Genaro at maximum medical improvement (MMI) and ordered a functional capacity evaluation (FCE) of the left wrist to determine work restrictions. (JEx. 7-86) However, when two FCE's came back as invalid, the doctor recognized the possibility that these were invalid due to active CTS. (JEx. 7-88) The best the doctor could opine under these circumstances at that time is that Genaro's functionality would be higher than sedentary, but he could not be more specific. (Id.) However, Dr. Yen left the restrictions he issued on October 30 in place. (Id.)

After his release by Drs. Harris & Yen, Genaro testified that he continued to have chronic pain in his left wrist, low back and right leg. On February 4, 2015, Genaro was

seen by his family doctor, Jose Aguilar, D.O., and his assistant, Veronica Mendez, CMA, and these continued complaints were noted along with antalgic gait and use of a cane. (JEx. 9-99:101) After this office visit, Genaro was involved in a motor vehicle accident (MVA) that same day. (Id.) Genaro returned to Dr. Aguilar on February 6, 2015 complaining of neck pain and worsened wrist, leg and low back pain following the MVA. (JEx. 9-102-105) The doctor referred Genaro for orthopedic evaluation of the left wrist and medications for the neck and back pain. The doctor stated that if his symptoms did not improve, more physical therapy will be considered. (Id.)

Genaro testified his back and leg condition returned to pre-accident level shortly after the February 4, 2014 motor vehicle accident. When he next saw his personal physician on May 13, 2015, he was seen for chronic low back pain that radiates to the right buttock and right posterior thigh. The doctor only noted pain from the original work injury. The motor vehicle accident was not mentioned and there was no recommendation for physical therapy. (JEx. 9-109).

At the request of defendants, Genaro was evaluated on May 28, 2015 by Lynn Nelson, M.D., an orthopedic surgeon. Dr. Nelson described and presented with pain symptoms of the same character and location as reported to his other doctors since the time of the work injury. (JEx. 12-178) His diagnoses were right-sided low back/buttock pain and right-sided L5-S1 herniated disc and L4-5 spinal stenosis. (Id.) The doctor noted positive Waddell's signs and inconsistencies and ruled out further injections or surgery. He opined that the herniated disc may be related to the September 18, 2013 work injury and gave a five percent impairment rating for the low back, but the doctor did not assign permanent work restrictions. (Id.)

At the request of his attorney, Genaro was evaluated on January 22, 2016 by Sunil Bansal, M.D., the same occupational medicine doctor who evaluated the prior left knee and left hip injury. Dr. Bansal agrees with Dr. Harris that Genaro reached MMI for the back injury on June 4, 2014 and he agrees with Dr. Yen that Genaro reached MMI for the left wrist injury on February 2, 2015. Dr. Bansal opines that the fall injury of September 18, 2013 is a cause of a low back condition which constitutes a 5 percent permanent partial impairment to the body as a whole due to radicular complaints, spasms, and loss of range of motion. He further opines that the same injury is a cause of a left wrist condition which constitutes a 10 percent permanent partial impairment to the upper extremity (6 percent to the body as a whole) due to loss of grip strength as a result of a closed fracture of the left distal radius and status post-surgical release of De Quervain's syndrome. The doctor also relates carpal tunnel syndrome to the fall injury and provided a 3 percent permanent partial impairment to the upper extremity due to sensory deficits. The doctor recommends permanent restrictions no lifting over 15 pounds; no lifting over 5 pounds occasionally, and no frequent lifting with the left hand. Also, Genaro should avoid standing more than 20 minutes and walking more than 15 minutes with his cane.

After receipt of a letter from defense counsel and a follow-up telephone conversation with that attorney concerning Waddell's signs and inconsistencies including two failed FCEs and other "outside records," Dr. Nelson changed his opinions.

In a letter dated March 29, 2016, Dr. Nelson stated that he could not opine that Genaro sustained a permanent impairment attributable to the work injury and that he continues to not recommend permanent restrictions. (Ex. E-1)

At the request of his attorney, Genaro underwent a third FCE on September 19, 2016, which was found valid by the evaluator. (JEx. 14-208:218) This FCE was provided by counsel to Dr. Yen. In a letter to Dr. Yen dated September 27, 2016, Dr. Yen agreed that based on the valid FCE, Genaro's functional classification would be in the light category as it concerns the use of the left wrist and hand. (Ex. 5-34)

Based on Dr. Nelson's most recent opinions, defendants on March 31, 2016, refused to authorize further medical treatment for the low back. (Ex. 10-85) Claimant has since received treatment at Broadlawns Medical Center for his back. He has been prescribed hydrocodone for pain, received another injection, and was seen by orthopedic surgeon, Daniel McGuire, M.D. (JEx. 13-187:201) Genaro's attorney provided Dr. McGuire with medical records and asked the doctor for his opinions regarding the fall injury in September 2013. Dr. McGuire states in a letter to claimant's counsel dated August 14, 2016, that Genaro's low back has reached MMI; that no overt future treatment for this back is recommended and that multiple entries in the medical records would indicate the back symptoms started with the fall in September 2013 and Genaro has sustained a 5 percent permanent partial impairment to the body as a whole. (Ex. 2-16) Dr. McGuire was then contacted by defense counsel and provided Dr. Aguilar's records after the motor vehicle accident in February 2014. Dr. McGuire then agreed that the MVA may just as likely be the cause of Genaro's back problems, but the doctor qualified this by asking if Genaro had symptoms prior to the MVA. (Ex. G-2) Then claimant's counsel provided Dr. McGuire with all of claimant's medical records before and after the MVA and then Dr. McGuire agreed that the MVA only temporarily aggravated the back condition; and that he had been treating the same back symptoms that Genaro had after the fall at work in September 2013; that Genaro's present disability was substantially caused by the fall injury of September 8, 2013. (Ex. 2-18:19) He also opined that the left hip condition is not related to his present diagnosis and if Genaro had prior left hip or knee pain, it did not impact his ability to work. (Id.)

In a report to the Iowa Department of Human Resources dated August 9, 2016, Dr. McGuire opined that claimant's lumbar radicular pan was permanent and requires opioid medications. As a consequence of his injury and required medications, Genaro is not to operate machinery or perform manual labor. The doctor expects the disability to last a lifetime. Genaro can only lift five to eight pounds. Also, his language barrier, pain and inability to sit for long periods of time will limit his ability to be retrained. (Ex. 15-104:105)

At the request of his attorney, Genaro was evaluated by Lewis Vierling, M.S., a vocational rehabilitation expert. Vierling opines that due to his physical limitations after the work injury, Genaro has lost 100 percent of his access to jobs within the labor market for the specific occupational categories he was qualified for including the inability to perform material and non-material handling physical demands that are a part of his

specific pre-injury occupational profile. (Ex. 6-39) Given his language barrier, Genaro, has limited access to the labor market without a disability, but with this disability he has lost access to those limited number of jobs. (Id.) Vierling adds that Genaro was employable before his September 2013 work injury. (Ex. 6-40)

Although claimant did file a personal injury tort claim against the driver of the vehicle involved in the February 2014 MVA (Ex. H-1), after hearing, claimant filed a dismissal with prejudice of that claim. (Ex. 15)

Genaro's application for social security disability benefits was granted on October 7, 2016 finding that he has been disabled since November 21, 2013. (Ex. 13, 96-97)

I find the work injury of September 18, 2013 is a cause of a significant permanent impairment to the body as a whole. In doing so, I found that the injury was not limited to the left wrist or arm, but extended into the body as a whole due to a permanent lumbar radiculopathy. This finding is based on the views of Dr. Harris, the treating pain management specialist for the low back pain; Dr. Yen, the treating hand surgeon for the left wrist injury; Dr. McGuire, a treating orthopedist for the lumbar radiculopathy; and, Dr. Bansal, claimant's IME physician. I did not find convincing the views of Dr. Nelson for a variety of reasons. First, the doctor does not adequately explain his change in his views such as why a failed FCE for only the wrist should impact his opinions regarding the low back, especially in light of Dr. Yen's view that those FCEs were adversely impacted by ongoing CTS symptoms. Dr. Nelson did not describe the so called "outside records" he relied upon in changing his views. His first opinion described the records he reviewed in detail. Also, his use of so called "Waddell signs" to arrive at his opinions has been discredited by this agency in prior decisions as will be discussed later in this decision.

I further find as a result of the work injury of September 18, 2013, Genaro is no longer able to perform manual labor or operate machinery as opined by Dr. McGuire. Although he could do light work given his wrist condition according to Dr. Yen, the low back condition renders him unable to lift or carry more than five to eight pounds as opined by Dr. McGuire. Also, the vocational expert's views that Genaro is no longer able to compete in the competitive labor market are uncontroverted. The only services Genaro can perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

Lastly, from examination of all of the factors for industrial disability, I find that as a result of the work injury of September 18, 2013, Genaro has lost 100 percent of his earning capacity and is permanently and totally disabled.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only

cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the

injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

This agency has rejected the opinions of physicians who use non-organic findings and positive Waddell testing solely to conclude the injured worker is malingering. Guerrero v. Carroll Auto Wrecking, File Nos. 5034380/5034381 (App. February 18, 2013); Maldonado v. Performance Contractors, Inc., File No. 5056343 (Arb, March 21, 2017). The basis for these decisions is that the medical community, including Dr. Waddell, the originator of Waddell testing, has largely rejected the use of such testing and/or other non-organic signs to solely determine malingering, secondary gain and/or the lack of any significant injury. see Fishbain, David; R. B. Cutler; H. L. Rosomoff; R. Steele Rosomoff (November–December 2004). Is There a Relationship Between Nonorganic Physical Findings (Waddell Signs) and Secondary Gain/Malingering?, Clinical Journal of Pain, American Academy of Pain Medicine, 20 (6): 399–408.; Ranney, DA. A Proposed Neuroanatomical Basis of Waddell's Nonorganic Signs, Am J Phys Med Rehabil 2010; 89: 1036-1042; and, Main, Chris J., and Gordon Waddell. Behavioral Responses to Examination: A Reappraisal of the Interpretation of "Nonorganic Signs", Spine 23.21 (1998): 2367-2371.

I found in this case that the work injury is a cause of permanent impairment to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earning capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffen v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

In this case, claimant had some pre-existing conditions, but he returned to the labor market before starting with defendant employer in this case, thereby resetting his earning capacity to 100 percent.

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

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Claimant asserts the odd-lot doctrine. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105. Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive

on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

In this case, claimant demonstrated he was odd-lot and a prima facie case for permanent, total disability. Defendants failed to sufficiently go forward to show that suitable employment was available. As a result of the factual finding of a 100 percent or total loss of his earning capacity as a result of the work injury, claimant is entitled, as a matter of law, to permanent total disability benefits under Iowa Code section 85.34(3), which is weekly benefit for an indefinite period of time during the period of the disability. Absent a change of condition, such benefits last a lifetime.

ORDER

1. Defendants shall pay to claimant permanent total disability benefits at the stipulated rate of five hundred sixty-eight and 22/100 dollars ($568.22) per week commencing September 18, 2013 and continuing thereafter during the period of disability. Defendants shall receive credit against this award for the payment of weekly benefits as stipulated in the hearing report from November 14, 2013 through February 19, 2014 and from May 8, 2014 through August 10, 1015, a total of 79.714 weeks.

2. Defendants shall pay accrued weekly benefits in a lump sum.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

5. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 20th day of April, 2017.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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LPW/srs

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.