BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MILFORD COOK, Claimant, vs. YRC WORLDWIDE, Employer, Self-Insured, Defendant.	FILED JUN 17 2016 WORKERS COMPENSATION	File No. 5051985 ARBITRATION DECISION Head Note Nos.: 1402; 1803; 3001

STATEMENT OF THE CASE

Milford Cook, claimant, filed a petition in arbitration seeking workers' compensation benefits from self-insured employer, YRC Worldwide. Hearing was held on March 11, 2016. Presiding at the hearing was Deputy Workers' Compensation Commissioner Erin Q. Pals.

Claimant, Milford Cook, was the only witness who testified live at trial. The evidentiary record also includes claimant's exhibits 1-12 and defendant's exhibits A-C. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties requested the opportunity for post-hearing briefs which were submitted on April 13, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. The nature and extent of industrial disability, if any, sustained by claimant.
2. Claimant's gross earnings at the time of the injury.
3. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Milfred Cook was born on December 19, 1962 and was 53 years of age at the time of the hearing. He graduated from high school in 1981. Subsequently, he did take some college classes; approximately 1 semester of classes.

Mr. Cook began working for Yellow Freight, the predecessor of YRC, in 1998. For the first 12 years of his employment he worked as a team driver with a co-employee. They worked in the lower 48 states, but mostly went to Yellow terminals west of Kansas City. They pulled 24 foot dry vans and were required to drop and hook full and empty trailers at Yellow terminals. Although there was no loading or unloading involved, he still performed heavy work because some of the western states required chains in the wintertime. Mr. Cook estimated that the chains weighed 90 pounds per tire. (Testimony)

In 2010, Mr. Cook began driving alone in a day cab tractor running the "St. Paul bid." (Testimony) According to Mr. Cook, this was a three-run bid. He would leave Kansas City Sunday, Wednesday, and Friday at midnight and drive towards the YRC terminal in St. Paul. Depending on the trip, he may or may not need to stop along the way in Des Moines, Mason City, or Owatonna, Minnesota. Once he arrived in St. Paul, he would be picked up by the motel van and taken to a motel for a mandatory ten hour rest period. Following the rest period, he would be driven back to the YRC terminal and then he would drive his truck back to Kansas City. Again, depending on the trip, he may or may not have to stop at YRC terminals along the way. (Testimony)

According to Mr. Cook, this could be very physically demanding work. This position did not require him to load or unload. However, he hauled two 24 foot trailers and frequently had to drop empty trailers and hook up loaded trailers. This meant that he had to break his own set of two trailers and break into another set of two trailers which was very physically demanding. This task required numerous trips in and out of the truck and jockeying around the tractors and trailers. (Testimony)

The parties have stipulated that Mr. Cook sustained a work injury on January 15, 2014. He was on his way back from St. Paul when he stopped in Mason City to drop an empty trailer in his set and was to pick up a loaded trailer from another set. Mr. Cook referred to this as a "dark terminal" because there was no one there. Thus, he was required to perform his work alone in the dark. On this particular night the ground was covered with ice and snow. While he was breaking apart the other set of trailers he slipped and fell on the ice. He was left hanging by his left arm and then fell to the ground, striking his back and right hip on the frozen surface. Mr. Cook testified that he had an immediate onset of pain in his left shoulder and low back. He was hurt but he

knew he had to complete the job. He testified that his pain increased as he continued working. He was eventually able to get the full and empty trailers jockeyed around and re-hooked. He drove to Kansas City where he reported his injury to YRC. (Testimony)

Mr. Cook received treatment at Concentra on January 20, 2014, five days after the injury. He was sent there by the defendant. Mr. Cook reported right-sided lower back pain and persistent left shoulder pain, which he felt was related to the January 15, 2014, work injury. Mr. Cook is right-hand dominant. Wendy Bisset, M.D. assessed him as having lumbosacral strain and left shoulder strain. He was prescribed hydrocodone and physical therapy. He was also placed on modified duty. (Exhibit 1, pages 1- 2)

Mr. Cook returned to Concentra in early February and reported that his left shoulder pain and lumbar pain were actually worsening. Swetha Sridhar, M.D. ordered an MRI of the left shoulder and lumbar spine. He remained on modified duty. (Ex. 1, pp. 3-4) He was referred to physiatry for further management of his left shoulder and low back pain. Modified duty was continued. (Ex. 1, pp. 6-7)

On February 10, 2014, an MRI of the lumbar spine revealed postsurgical and/or degenerative changes of the L5-S1 disc space and mild bilateral facet arthropathy at L5-S1. (Ex. 3, pp. 2, 4) The MRI of the left shoulder showed no rotator cuff or labral tear. There was mild acromioclavicular joint degenerative changes. The MRI report also noted tiny cystic areas in the posterior lateral humeral head, which were thought to be related to chronic repetitive trauma. (Ex. 3, p. 3)

On February 18, 2014, Mr. Cook saw Joseph F. Galate, M.D. at Metro Spine and Rehab. Dr. Galate provided conservative treatment for Mr. Cook's shoulder and low back. Dr. Galate restricted Mr. Cook's activities. Dr. Galate continued to provide conservative treatment until September 4, 2014. His treatment included injections into the left shoulder and the low back, but these injections did not provide any relief. On September 4, 2014, Dr. Galate noted that the patient had not responded to conservative treatment. He recommended a surgical evaluation of his lumbar spine. (Ex. 2, pp. 3-48)

Mr. Cook was seen at the Kansas City Bone and Joint Clinic by Gerald R. McNamara, M.D. on May 1, 2014. Dr. McNamara assessed Mr. Cook with left shoulder pain, and left shoulder impingement syndrome. He recommended arthroscopic surgery. He restricted Mr. Cook's activities. (Ex. 4, pp. 2-4)

Dr. McNamara performed an arthroscopic decompression and acromioplasty with distal clavicle excision on May 16, 2014. (Ex. 5, pp. 2-4)

Mr. Cook spent the next several months recovering from shoulder surgery and treating for his lumbar spine injury. He returned to see Dr. McNamara on August 11, 2014. He reported ongoing improvement. The doctor noted clear benefit from surgery. The doctor felt he would benefit from more therapy. (Ex. 4, pp. 7-8)

Mr. Cook's final appointment with Dr. Galate was on September 4, 2014. At that time, Mr. Cook reported continued aching in his low back that radiated to his bilateral lower extremities. The doctor noted that Mr. Cook was comfortable with home exercise and was not interested in any further work-up or treatment at that time. Dr. Galate set Mr. Cook up with a surgical evaluation of his lumbar spine. He stated that if he was deemed to be nonsurgical then he would recommend a functional capacity evaluation (FCE). Dr. Galate did not have any recommendations for further conservative treatment. (Ex. 2, pp. 34-47)

Mr. Cook returned to see Dr. McNamara on September 8, 2014, and reported that his shoulder was improving well. The doctor gave him one final prescription for Tramadol. Dr. McNamara released Mr. Cook to full work duties without restrictions. He did not see a need for any follow-up. Mr. Cook was placed at maximum medical improvement (MMI) under his care. (Ex. 4, pp. 9-10)

On October 14, 2014, Mr. Cook saw Alexander Bailey, M.D. at Precision Spine for back and leg pain. The doctor examined Mr. Cook and educated him on treatment options. The patient wanted to think about his treatment options. (Ex. 6, pp. 1-5)

On January 12, 2015, Dr. McNamara stated that Mr. Cook had undergone surgical intervention for his shoulder. He further stated, "[h]e may still have progress with time and physical therapy, and ended up with essentially full range of motion and good strength." He related the injury to his work and assigned four percent upper extremity impairment. (Ex. 4, p. 11)

On February 13, 2015, Dr. Bailey performed an anterior posterior lumbar spinal fusion. (Ex. 5, pp. 5-12) Mr. Cook returned to Dr. Bailey on February 26, 2015 and reported that he was better than his preoperative status. His overall function and activity had been increasing. He was prescribed physical therapy. (Ex. 6, pp. 6-7)

Mr. Cook saw Dr. Bailey again on March 26, 2015 and reported that he was 40 percent better than before surgery. The doctor noted that he did not have a job to return to, but recommended that he slowly advance his overall function. Physical therapy was continued for an additional 4 weeks. It was anticipated that an FCE would be performed at the end of that 4 weeks. (Ex. 6, p. 8)

There is a second note from Dr. Bailey also dated March 26, 2015. According to the note, Mr. Cook indicated that he has been nearly 100 percent better following surgery until he was at physical therapy doing exercises which irritated his back. However, he still felt he is at least 75 percent better than before surgery. Mr. Cook still had some numbness, tingling, and burning in his feet. Dr. Bailey did not feel this was a significant issue. (Ex. 6, p. 9)

Mr. Cook returned to Dr. Bailey on April 23, 2015. He reported he was 80 percent better than prior to surgery. He felt he was making strides in physical

therapy and could not be happier. Dr. Bailey recommended work conditioning and work hardening. He anticipated an excellent response and ultimately a regular duty release. (Ex. 6, p. 11)

Dr. Bailey saw Mr. Cook on May 21, 2015. Again, Mr. Cook reported he was 80% better than before surgery. Dr. Bailey ordered 4 more weeks of work conditioning. He was to follow-up in 4 weeks. Dr. Bailey anticipated being able to place him at MMI with a release to regular duty. (Ex. 6, pp. 13-14)

On June 16, 2015, Mr. Cook reported to Dr. Bailey that he had recently had an increase in symptoms in his work conditioning and work hardening. Mr. Cook was now reporting that he was only 40 percent better. Dr. Bailey noted pain in his back that was diffuse in nature. Dr. Bailey recommended continued medication management and continued work conditioning and work hardening. (Ex. 6, pp. 15-16)

Mr. Cook returned to Dr. Bailey on July 17, 2015. He reported that his condition fluctuated from 40-80 percent better than he was before surgery. Dr. Bailey noted he had a good clinical and radiographic outcome from the surgery. Mr. Cook demonstrated quite a bit of hesitancy about going back to being a truck driver. Dr. Bailey felt an FCE was reasonable. Once Dr. Bailey received the FCE he planned to place him at MMI and provide an impairment rating. (Ex. 6, pp. 17-18)

The FCE was performed on August 10, 2015. The report indicates that Mr. Cook demonstrated consistent and valid effort. According to the report, the FCE lasted nearly four hours. (Ex. 7)

On August 13, 2015, Dr. Bailey issued a letter. He placed Mr. Cook at MMI. Dr. Bailey had received the FCE results, which were considered consistent and valid. The FCE placed Mr. Cook in the heavy physical demand level; Dr. Bailey felt this was reasonable and permanent. Dr. Bailey stated, "I believe he can return to his previous job functions and activities." (Ex. 6, p. 20) He assigned 10 percent permanent partial impairment to the body as a whole. (Ex. 6, pp. 19-20)

To the credit of both parties in this case, at the time of hearing Mr. Cook was back to work for defendant performing the same job he did at the time the injury occurred. He testified he was back to full duty with all the same duties he had prior to the injury. (Testimony)

With regard to his left shoulder, Mr. Cook testified that he has ongoing pain, weakness, and limited range of motion. He has problems at work because he has to steer with his left hand, while he shifts with his right. The work truck he drives is a 10-speed manual transmission. He also experiences some trouble with his left shoulder when he is hooking and unhooking trailers; he is slower and weaker now. Mr. Cook estimated that he takes 6 ibuprofen and 4 tramadol daily. Mr. Cook testified that his low back injury also continues to cause him problems. He testified that he still experienced

pain and numbness down his legs and pain in his right hip. His pain made it difficult to sleep at times. (Testimony)

Mr. Cook testified that he would not be physically capable of returning to any of the jobs he held before his employment with the defendant. Prior to working for YRC he worked for a couple different jobs as a route driver delivering oil, drums, tires, and car parts, including transmissions. He does not believe he would be physically capable of unloading the parts because this was a physically demanding job. He also worked delivering furniture and other small electronics. Again, he does not feel he is physically capable of returning to this work. For his first 12 years at YRC, Mr. Cook worked as an over-the-road truck driver. He does not believe that he could return to over-the-road trucking because he would not be capable of chaining the tires as required during certain weather in some western states.

The first issue to be determined is the extent of industrial disability Mr. Cook sustained as a result of the January 15, 2014, work injury. I find that Mr. Cook has sustained 4 percent functional impairment as a result of his left shoulder and 10 percent functional impairment as a result of his low back. Mr. Cook contends that the only reasons he does not have any formal restrictions placed on his activities is because he requested no restrictions so he could continue working. This may well be, but the fact remains that he currently has no formal restrictions placed on his activities by a medical provider. He did undergo an FCE, which placed him in the heavy work category. The FCE report indicated that he demonstrated the ability to occasionally lift up to 60 pounds floor to waist, 70 pounds waist to shoulder, carry up to 60 pounds, push 109 pounds of force, and pull 96 pounds of force. Mr. Cook testified that he continues to have pain. He also credibly testified that he is less physically capable of performing certain activities and job duties than he was prior to this work injury. Although there are aspects of his job that give him difficulty, he continues to work through the pain. Considering his age, educational background, employment history, ability to retrain, motivation to continue working, length of healing period, permanent impairment, and lack of permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that Mr. Cook has sustained a 25 percent loss of future earning capacity as a result of his work injury with YRC.

We now turn to the issue of rate. There is a dispute among the parties about claimant's gross weekly earnings at the time of the injury. Claimant contends that the gross weekly earnings were $1,515.36. (Ex. 8) Defendant contends Mr. Cook's gross weekly earnings were $1,443.91. (Ex. A) Both parties agree that the rate should be calculated pursuant to Iowa Code section 85.36(6), which states:

> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive

> calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

The rate dispute centers on which weeks preceding the injury should be used to calculate the claimant's gross weekly earnings. Mr. Cook contends that 6 of the 13 weeks preceding the injury should not be used in the rate calculation because they are "short" weeks; thus, they do not reflect his "customary earnings." Claimant testified that when he received the bid for the St. Paul run it was "a 3-run bid." He would go back and forth to St. Paul 3 times per week. Claimant testified that the weeks that were excluded in his rate calculation were all "short" weeks because only 2 runs to St. Paul were made in those weeks. Mr. Cook testified that having only 2 runs would be due to YRC not having enough freight or because he was ill. Mr. Cook agreed that any week where he was paid less than $1,000.00 was a 2-run week. (Ex. 8; Testimony) Defendant argues that those "short" weeks were not unusual. In fact, in 2013, the 12 months immediately preceding the January 2014 injury, Mr. Cook earned less than $1,000.00 per week 25 percent of the time. I note that the parties are not arguing over whether any week is "short" due to reasons personal to the employee. Rather, the argument is that this was a 3-run bid and therefore, any 2-run weeks should be excluded.

The statute states that the gross average earnings shall be based on the last completed period of 13 consecutive calendar weeks immediately preceding the injury unless a week does not fairly reflect the claimant's customary earnings. In reviewing all of the wage records provided by the defendant it does appear that their rate calculation accurately reflects Mr. Cook's customary earnings. I find that the weeks utilized by defendant in its calculations do fairly reflect his customary earnings. Under claimant's theory, almost half of the 13 consecutive calendar weeks would need to be excluded and there has been no showing that those weeks do not fairly reflect his customary earnings. Therefore, I adopt the defendant's calculation. Thus, I find claimant's earnings at the time of the injury were $1,443.91. The parties have stipulated that for rate purposes claimant is married and entitled to 3 exemptions. Thus, the appropriate weekly workers' compensation rate for claimant is $891.31.

Claimant is also seeking an assessment of costs in this matter. Because claimant was generally successful in his claim, I find it is appropriate to assess costs in this matter against defendant. Specifically, claimant is seeking the $100.00 filing fee; I find this is an appropriate cost under rule 876 IAC 4.33(7). Claimant is also seeking $102.89 for a deposition transcript. Rule 876 IAC 4.33(1) allows for the costs of an

evidentiary deposition. The record is void of any evidence of an evidentiary deposition in this case; therefore, I find that is not an appropriate cost. Thus, I find defendant is assessed costs in this matter in the amount of $100.00.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6)(e).

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 personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition

of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Because 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.

Based on the above findings of fact, I concluded that claimant has demonstrated by a preponderance of the evidence that he sustained 25 percent industrial disability as a result of the January 15, 2014, work injury.

We now turn to the issue of rate. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Based on the above findings, I conclude that the defendant's rate calculation accurately reflects the claimant's customary earnings. Claimant failed to show that the weeks he excluded in his calculation were not representative and should have been excluded. Therefore, I conclude that claimant's gross weekly earnings at the time of the

injury were $1,443.91. Based on married and 3 exemptions, the appropriate weekly workers' compensation rate for Mr. Cook is $891.31.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in his claim, I find it is appropriate to assess costs against the defendant as set forth above. Thus, defendant shall reimburse claimant costs in the amount of $100.00.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the rate of eight hundred ninety-one and 31/100 dollars ($891.31).

Defendant shall pay one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on the stipulated date of August 14, 2015.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendant shall be entitled to credit for all weekly benefits paid to date.

Defendant shall reimburse claimant's costs in the amount of one hundred and no/100 dollars ($100.00).

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

Signed and filed this 17th day of June, 2016.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Jacob John Peters
Attorney at Law
PO Box 1078
Council Bluffs, IA 51502-1078
jakep@peterslawfirm.com

Christopher A. Sievers
Attorney at Law
13305 Birch Dr., Ste. 101
Omaha, NE 68164
csievers@prentissgrant.com

EQP/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.