BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HERIBERTO HERNANDEZ GARCIA, Claimant, vs. METRO SALVAGE POOL, INC., Employer, and WESTERN NATIONAL MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 21007693.01 ARBITRATION DECISION Head Note Nos.: 1803, 2501, 2907, 4100

STATEMENT OF THE CASE

Heriberto Hernandez Garcia, claimant, filed a petition for arbitration against Metro Salvage Pool, Inc. (hereinafter referred to as "Metro Salvage"), as the employer, and Western National Mutual Insurance Company, as the insurance carrier. This case came before the undersigned for an arbitration hearing on November 1, 2022.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via video conference using Zoom. All participants appeared remotely for the hearing.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 8, as well as Defendants' Exhibits A through D. All exhibits were received without objection.

Claimant testified on his own behalf through an interpreter. No other witnesses were called to testify at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted, and both parties filed briefs simultaneously on December 19, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits, including a claim for permanent total disability benefits.

2. Whether claimant is an odd lot employee entitled to an award of permanent total disability benefits.

3. Whether claimant is entitled to payment of past medical expenses.

4. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Heriberto Hernandez Garcia, claimant, is a 41-year-old gentleman, who lives in Des Moines. Mr. Hernandez Garcia was born in Mexico and came to the United States in 1999. He has limited knowledge and command of the English language, estimating that he understands approximately 25-30 percent of English conversations. He testified that he cannot read or write in English, though he did perform job duties with Metro Salvage that required him to use forms written in English, and he communicated with his employer in English. Claimant further testified that he cannot read well in Spanish, his native language. In fact, claimant indicated that he could not read a book or a newspaper in Spanish at this time. (Transcript pp. 12-17)

Mr. Hernandez Garcia possesses a sixth-grade education, which he obtained in Mexico. He testified that he is not good at math. Claimant also indicated that it would take him some time to make and count change back to a customer if he worked in a retail position. (Tr. p. 14, 17)

Claimant's relevant work history since coming to the United States includes janitorial work cleaning stores for Midwest Janitor from 2001 through 2007. He described his work as performing night shift duties such as cleaning floors and bathrooms in stores. His work was performed standing, and required extensive walking. (Tr. pp. 20-21; Claimant's Ex. 5, p. 53)

From 2007 until 2009, claimant worked odd jobs for cash as a contract laborer. This included work as a laborer, as a landscaper, cutting grass, in the roofing industry lifting shingles and assisting roofers. All of claimant's odd jobs involved physical labor. (Tr. pp. 19-20; Cl. Ex. 5, p. 52)

In 2009, claimant began working for the employer, Metro Salvage and continued in that position until May 2021. Claimant indicated that Metro Salvage auctioned cars that were previously involved in motor vehicle accidents. Claimant's job required him to inventory the vehicles. It required both inside and outside work, as well as climbing, stooping, and lifting. (Tr. p. 18-19; Cl. Ex. 5, p. 52)

Mr. Hernandez Garcia asserts he sustained a work-related low back injury on January 4, 2021. Specifically, claimant testified that he fell into a hole covered by snow performing his work duties on that date. He indicated that he fell into a seated position and felt a "bolt" of pain in his bottom and moving upward when he fell. Subsequently, he described sciatica pain that went down his left leg and into his left foot.

Claimant acknowledged that he had a history of low back injury and pain prior to this work injury. In fact, claimant sustained a low back injury and required surgical intervention in 2019. (Tr. pp. 21-22) Prior medical records demonstrate that claimant presented to the emergency room in May 2019 and required a neurosurgical consultation and MRI of his low back. At that time, claimant reported a positive straight leg raise on the left with numbness and tingling in the left calf. (Joint Ex. 7, pp. 112-113). The evaluating medical provider documented that claimant was "writhing in pain" after his neurosurgical evaluation. (JE 7, p. 112) He was diagnosed with a left L4-5 disc herniation on May 9, 2019 and submitted to a left-sided, minimally invasive microdiscectomy and decompression of the L5 nerve root. (JE 7, p. 112; Cl. Ex. 1, p. 2)

Mr. Hernandez Garcia testified that he initially was under a 10-pound lifting restriction following the May 2019 surgery. However, he testified that the restriction was gradually lifted, and he was ultimately returned to full-duty work for the employer before the January 4, 2021 work injury. Claimant confirmed that he was able to perform all required job duties for Metro Salvage before his January 4, 2021 injury. (Tr. pp. 22-24)

Following the January 4, 2021 work injury, the employer directed claimant to Concentra for medical care. He was subsequently referred to an orthopaedic spine surgeon, Trevor Schmitz, M.D. Dr. Schmitz confirmed that claimant's 2021 lumbar MRI demonstrated a disc herniation and recommended surgical intervention. Claimant consented and submitted to surgery by Dr. Schmitz on July 29, 2021. (Tr. pp. 25-26)

Dr. Schmitz performed a revision bilateral hemilaminotomy, partial medial facetectomy at L4-5 with subarticular and foraminal decompression, and revision left and primary right-sided L4-5 partial diskectomy. (JE 7, p. 118) Mr. Hernandez Garcia indicated that the surgery initially relieved his symptoms, but he indicated that his pain returned five to six days after the surgery. (Tr. p. 27) He indicated that his symptoms worsened after he started physical therapy. (Tr. p. 27)

Dr. Schmitz re-evaluated claimant after surgery. He obtained a repeat MRI as well as an EMG of claimant's lower extremities. On November 19, 2021, Dr. Schmitz noted that claimant demonstrated normal strength and sensation. He recommended against further interventions and declared claimant at maximum medical improvement. (JE 5, p. 76) Claimant asserted that he could not return to work without restrictions. Therefore, Dr.

Schmitz recommended a functional capacity evaluation (FCE) be conducted. (JE 5, p. 76)

The recommended FCE occurred on November 30, 2021. The administering physical therapist deemed the FCE to be valid and opined that claimant demonstrated the ability to perform heavy category work as a result of the FCE. Specifically, the FCE demonstrated claimant was capable of occasional maximum lift of 77 pounds floor to waist, occasional maximum lift of 60 pounds knuckle to shoulder, occasional maximum bilateral carry of 60 pounds up to 50 feet, and occasional walking. (Ex. D, pp. 45-46)

Dr. Schmitz re-evaluated claimant on December 17, 2021. He noted that claimant "continues with the same symptoms regardless of treatment." (JE 5, p. 78) He noted normal range of motion, no muscle wasting, and grossly intact lower extremity strength. He reviewed and accepted the recommendations of the November 30, 2021 FCE, placing claimant in the heavy work category. Dr. Schmitz released claimant from care on that date. (JE 5, p. 79) In a December 29, 2021 report, Dr. Schmitz opined that claimant sustained 10 percent permanent functional impairment of the whole person pursuant to the AMA Guides, Fifth Edition. (JE 5, p. 81)

Mr. Garcia Hernandez has not required ongoing pain medications since July 2021. (Tr. p. 47) He does not require the use of a cane or other assistive device to walk. He maintains a valid driver's license. (Tr., pp. 47-48)

During claimant's treatment, the employer sold its business. Once claimant was released to return to work, the new owner indicated that they had filled claimant's position and had no work available for him. Therefore, claimant did not return to Metro Salvage after his low back surgery in July 2021. (Tr. p. 33-35)

Mr. Garcia Hernandez sought unemployment benefits and subsequently found employment with Alter Recycling. (Tr., pp. 34-35) Alter Recycling required claimant to submit to a pre-employment physical, which he passed. However, claimant testified that the physical examination only checked his eyes and ears: a claim that I find to be not credible. (Tr. p. 49)

Claimant commenced employment in April 2022, but ended up in the emergency room after three days of work for Alter Recycling. In the April 13, 2022 emergency room notes, it is documented that claimant was sweeping floors at Alter Recycling and experienced increased pain in his low back with radiation of pain down the left leg. (JE 7, p. 122) The emergency room nurse practitioner documented no neurologic deficits, normal range of motion, and recommended follow-up with Dr. Schmitz. (JE 7, p. 123-124) Ultimately, claimant did not return to Alter Recycling, and was terminated. (Tr. p. 35; Cl. Ex. 6 p. 56)

Mr. Hernandez Garcia returned to Dr. Schmitz on June 1, 2022. Dr. Schmitz documented ongoing pain complaints, including radicular symptoms to claimant's left foot. However, Dr. Schmitz noted "nonanatomic pain behaviors" on his examination. (JE 5, p. 83) He offered no further treatment recommendations, maintained his recommendations

placing claimant in the heavy work category, and again released claimant to follow-up only as needed. (JE 5, p. 83)

Claimant's attorney scheduled him for a second FCE performed on July 5, 2022. The second FCE was also deemed valid but yielded significantly different results and recommendations than the initial FCE. Specifically, the Workwell FCE in July 2022 determined that claimant was only capable of light duty work and was limited to occasional lifting up to 15 pounds. (Cl. Ex. 2, pp. 18-19)

The physical therapist evaluating claimant on July 5, 2022 documented ranges of motion during his evaluation. The therapist documented flexion at 55 degrees, extension at 20 degrees, left lateral bending at 22 degrees and right lateral bending at 22 degrees. (Cl. Ex. 2, p. 22)

Approximately five weeks later, on August 11, 2022, Mr. Hernandez Garcia submitted to an independent medical evaluation at defendants' request, performed by Charles D. Mooney, M.D. Dr. Mooney evaluated claimant's ranges of motion noting flexion ranges of motion of 40, 50, and 45 degrees on three attempts. He documented extension at 15 degrees on each of three attempts. Dr. Mooney also documented right side bending at 20 degrees on all three attempts as well as measurements of 20, 15, and 15 for left side bending on each of three attempts. (Ex. A, pp. 15, 21)

Dr. Mooney consulted the AMA Guides, Fifth Edition, and concluded that claimant's impairment should be calculated using the range of motion methodology. Dr. Mooney opined that claimant has an 18 percent permanent functional impairment of the whole person. He attributed or apportioned 10 percent impairment to claimant's pre-existing 2019 low back injury and surgery and assigned an additional 8 percent to the 2021 work injury. (Ex. A, pp. 16-17)

Dr. Mooney also considered and addressed permanent work restrictions. He reviewed the first FCE, noted it was a valid FCE, and adopted those restrictions for claimant's permanent work restrictions. Dr. Mooney specifically opined, "the functional abilities demonstrated on that [November 30, 2021 FCE] would be consistent with his known spinal pathology and sequelae." (Ex. A, p .17) Dr. Mooney noted the subsequent July 2022 FCE, including its ranges of motion, in his report and was clearly aware of the results of the second FCE.

On the same day as his evaluation by Dr. Mooney, claimant again sought evaluation in the emergency room. During that August 11, 2022 visit, a nurse practitioner evaluated Mr. Hernandez Garcia in the emergency room and documented that claimant presented with lumbar pain that was worsening. Claimant reported worsening of his symptoms over the past several months but denied any recent injury. (JE 7, p. 129)

The next day claimant obtained another independent medical evaluation performed by a physician of his choosing, Robin L. Sassman, M.D. (Cl. Ex. 1) Interestingly, Dr. Sassman's evaluation yielded range of motion measurements that were significantly different than those identified by the therapist conducting the FCE at

claimant's request five weeks earlier, and also different from those documented by Dr. Mooney the previous day. Dr. Sassman documented ranges of motion that included flexion at 30 degrees, extension at 10 degrees, right lateral bending at 20 degrees, and left lateral bending at 20 degrees. (Cl. Ex. 1, p. 8) Each of these ranges of motion are less than what was documented by the therapist claimant selected for his second FCE. Flexion and extension measurements made by Dr. Sassman are less than those documented by Dr. Mooney the previous day.

These changes or differences in ranges of motion are significant in this case because Dr. Sassman opines that the appropriate methodology under the AMA Guides, Fifth Edition, is to use the range of motion methods to rate claimant's permanent functional impairment. (Cl. Ex. 1, p. 9) Ultimately, using her ranges of motion, Dr. Sassman opines that claimant sustained a 21 percent permanent functional impairment of the whole person as a result of the January 4, 2021 work injury. Dr. Sassman makes no mention of the fact that her range of motion measurements are less than those identified by Dr. Schmitz, during emergency room visits, by Dr. Mooney the day prior to her evaluation, or at the FCE conducted only five weeks prior to her evaluation. Dr. Sassman provides no analysis of why claimant's range of motion varies or why her measurements are more accurate or should be relied upon in assessing permanent impairment. The variances in claimant's ranges of motion, coupled with no mention of the variances or explanation why the variances occurred, leave me uneasy and unconvinced by Dr. Sassman's measurements and impairment rating.

To some extent, this same analysis gives me hesitation with Dr. Mooney's evaluation of permanent impairment. His measurements were also significantly different than those identified by the initial FCE or by Dr. Sassman's evaluation. However, Dr. Mooney at least acknowledged the range of motion variances between providers and provided some explanation why his impairment rating should be accepted. (Ex. A, p. 21)

Dr. Sassman and Dr. Mooney both provide a convincing explanation and analysis of the AMA Guides, Fifth Edition, to explain why the range of motion methodology should be used. Dr. Sassman further explained why the DRE methodology used by Dr. Schmitz is inaccurate under the AMA Guides, Fifth Edition. I conclude that the range of motion methodology recommended by Drs. Sassman and Mooney is superior to, and according to the AMA Guides, Fifth Edition, appropriate in this case because of the re-injury and second surgery performed by Dr. Schmitz. For this reason, I reject the permanent impairment rating offered under a DRE methodology by Dr. Schmitz. Ultimately, I find the range of motion measurements, methodology, and permanent impairment rating offered by Dr. Mooney to be the most credible and accurate in this record. I find that claimant proved he has an 18 percent permanent functional impairment. I find that the January 4, 2021 low back injury constitutes a substantial aggravation of claimant's pre-existing condition that resulted in a significant increase in claimant's functional impairment and a loss of future earning capacity.

Dr. Schmitz offered an MMI date of November 19, 2021. Dr. Mooney specifically adopted and agreed with this MMI date. Dr. Sassman noted the November 19, 2021 MMI date offered by Dr. Schmitz and did not offer a contrary opinion. Dr. Sassman offered a

permanent impairment rating, which implies that she concurs claimant has reached MMI. I accept Dr. Schmitz's MMI date of November 19, 2021, particularly since the parties stipulate that permanent disability should commence on that date. (Hearing Report)

Dr. Sassman also pondered claimant's residual functional abilities. She reviewed the findings of the second FCE and opined that claimant remains capable of lifting 20 pounds on an occasional basis at waist level. She recommended against lifting from floor to waist level or above waist height. Dr. Sassman also recommended against walking on uneven ground and against climbing ladders. (Cl. Ex. 1, p. 10) It does not appear that Dr. Sassman was provided or pondered the first FCE findings and recommendations as part of her evaluation, at least she offers no analysis of those recommendations.

Claimant again returned to the emergency room on September 30, 2022 with persistent back pain. He again denied any new injury. At this evaluation, claimant denied any lower extremity radicular pain, numbness, tingling, or weakness. (JE 7, pp. 133-137) He returned to Dr. Schmitz again on October 5, 2022. Once again, Dr. Schmitz noted "nonanatomic pain behaviors" and noted no significant change in the examination. (JE 5, p. 86) Once again, Dr. Schmitz recommended claimant be permitted to work at the heavy work category pursuant to the first FCE recommendations. (JE 5,p. 86)

Considering the recommendations of Dr. Schmitz, Dr. Mooney, and Dr. Sassman, as well as the competing FCEs, I ultimately accept the recommendations of the first FCE, Dr. Schmitz, and Dr. Mooney. Therefore, I find that claimant remains capable of working at the heavy demand level. Claimant offered no convincing explanation why the FCEs differed so vastly in this situation. Both were deemed valid evaluations. It makes little sense that one returned capabilities of lifting 70 pounds on an occasional basis, while the second recommended 15 pounds of occasional lifting. Moreover, even claimant's IME physician recommended restrictions in excess of those recommended by the second FCE obtained by claimant. Dr. Sassman offered no review or comment on the initial FCE findings and recommendations. Ultimately, I find the higher demonstrated valid FCE, as adopted by the treating surgeon and Dr. Mooney, are more convincing and credible.

Claimant testified that he is willing to return to work and that he has attempted to locate alternate employment since this emergency room visit but has been unable to secure employment. He produced a work search log as Claimant's Exhibit 6, demonstrating several job applications claimant has submitted. None of these job applications have resulted in a job offer for claimant. Unfortunately, claimant has not followed the recommendations of his own vocational expert to consult the Iowa Department of Vocational Rehabilitation for assistance in locating employment. (Tr., pp. 62-63) On the other hand, claimant also testified that the pain he now experiences does not allow him to work at the present time. Claimant does not believe he could perform a full-time job. (Tr., p. 40)

Both parties presented vocational expert opinions in this case. Claimant offered the opinions of Jeff L. Johnson, MS. Mr. Johnson was only provided the opinions of Dr. Sassman and the second FCE to consider. Relying exclusively upon those opinions and restrictions, Mr. Johnson opined that claimant sustained an 86 percent loss of access to

the labor market. However, Mr. Johnson was able to identify some jobs available to claimant even within those restrictions. I accept Mr. Johnson's conclusion that there remain jobs available to claimant, even using the more restrictive limitations imposed by the second FCE and Dr. Sassman. I find that claimant is not permanently and totally disabled and that jobs remain available to claimant for which he is capable and qualified to perform within his local labor market.

Mr. Johnson also recommended claimant contact the Iowa Department of Vocational Rehabilitation for assistance in looking for work. I accept this as a reasonable recommendation and opinion. Unfortunately, Mr. Hernandez Garcia did not follow this advice. However, having rejected the opinions of the second FCE and those of Dr. Sassman regarding claimant's restrictions, I do not find Mr. Johnson's remaining opinions terribly helpful or convincing.

Defendants offered the vocational opinions of Lana Sellner, MS. Ms. Sellner was provided and considered the initial FCE and the restrictions offered by Drs. Schmitz and Mooney. Ms. Sellner was also offered the opinions and recommendations regarding restrictions offered in the second FCE and by Dr. Sassman. She considered all sets of opinions and offered contingent opinions for each set of restrictions. Having ultimately accepted the restrictions established by the initial FCE, as adopted by Dr. Schmitz and Dr. Mooney, I find Ms. Sellner's opinions utilizing those restrictions as most convincing and accurate in this record.

Ms. Sellner interviewed claimant personally and conducted a labor market survey. Applying the abilities outlined in the initial FCE, as specifically adopted by Drs. Schmitz and Mooney, Ms. Sellner opines that claimant has access to several well-known and available positions within the current local labor market. She identified at least ten positions that would currently be available to claimant for which he could reasonably compete. (Ex. C, pp. 37-38) Ms. Sellner opines, "The labor market supports full-time positions under each medical provider's imposed restrictions. As Mr. Johnson indicated, Mr. Garcia is capable of assembly, driving and newspaper delivery which are appropriate." (Ex. C, p. 39) She also identified light-driving jobs, food delivery jobs, as well as passenger driving positions, concluding, "The labor market supports employment in the light to heavy work range. Mr. Hernandez Garcia does not have as a significant loss as concluded by Mr. Johnson." (Ex. C, p. 39) She specifically opines, "Mr. Hernandez Garcia continues to be employable within Dr. Sassman and Dr. Mooney's imposed restrictions." (Ex. C, p. 39) I accept Ms. Sellner's opinions in this regard as most convincing and credible. I specifically find that claimant remains employable in the labor market, though I do find he sustained a moderate loss of earning capacity as a result of the January 2021 work injury.

I also consider claimant's odd-lot assertion. Claimant performed a job search and remains unemployed. He has documented ongoing symptoms after this injury. I find that claimant presented a prima facie case of odd-lot status. However, I also find that defendants carried their burden of production in this case. Defendants produced medical restrictions from a valid FCE, Dr. Schmitz, and Dr. Mooney. They produced a vocational opinion identifying positions within the labor market for which claimant remains capable

and qualified. Defendants met their burden of production to rebut the prima facie case of odd-lot status.

Ultimately, I find that claimant did not carry his burden of persuasion on the odd-lot claim. Even claimant's vocational expert opined that positions remain for which claimant is qualified and can compete in the known local labor market. Ultimately, I find that claimant failed to prove he was either permanently and totally disabled or an odd-lot employee.

Nevertheless, the parties stipulate that claimant is entitled to permanent disability as a result of the January 2021 work injury. (Hearing Report) Mr. Hernandez Garcia does not speak English fluently. His work history includes only physical labor, which he remains capable of performing but may experience back symptoms doing this work. Claimant lost his job with Metro Salvage after his injury and was subsequently terminated by another employer due to back symptoms. Claimant is only 41 years old and has a significant period remaining before anticipated retirement. Therefore, considering his age, proximity to retirement, education, employment history, ability to return to work, motivation, permanent impairment, permanent restrictions, the severity of his injury requiring surgery and an extended recovery, as well as all other factors of industrial disability, I find that Mr. Hernandez Garcia proved a 30 percent loss of future earning capacity as a result of the January 2021 low back injury at Metro Salvage.

Claimant also seeks an award of past medical expenses. He included the requested medical expenses at Claimant's Exhibit 8. These medical expenses include an ambulance charge for claimant's April 13, 2022 emergency room visit. (Cl. Ex. 8, p. 98) The claimed charges also include emergency room charges from April 13, 2022, as well as diagnostic imaging and physician charges from that same date. (Cl. Ex. 8, pp. 97, 99, 112-113) Claimant's claimed past medical expenses also include emergency room and physician charges for claimant's August 11, 2022 emergency room visit. (Cl. Ex. 8, pp. 100-101, 114) I find all of these medical expenses are reasonable, for reasonable medical care, and are causally related to the January, 2021 low back injury at Metro Salvage.

Mr. Hernandez Garcia also submits medical expenses ($53.00) from MercyOne Des Moines Laboratory for a date of service of July 21, 2021. (Cl. Ex. 8, p. 102) There is no corresponding medical record in evidence and claimant did not offer any testimony or evidence to explain this charge. Defendants stipulate that this charge is causally connected to the medical condition upon which this claim is based but dispute that it is causally related to the January 4, 2021 work injury. The medical billing itself only identifies this as a laboratory charge. I could potentially speculate what this charge represents, but the evidentiary record does not support a finding that claimant proved this is causally related by a preponderance of the evidence.

Claimant similarly introduces some medication receipts and requests reimbursement for these charges. These Walgreens receipts are close in time to claimant's emergency room visits with the charges occurring April 14, 2022, August 12, 2022, and September 15, 2022. Claimant testified that he did not take any pain medications for his injury after July 2021. (Tr., p. 47) However, the medications claimed

on April 14, 2022 are prednisone and cyclobenzaprine, neither of which is specifically a pain medication. Both were prescribed in the April 14, 2022 emergency room record. (JE 7, p. 124; Cl. Ex. 8, pp. 103-104) I find these charges are causally related, reasonable, and necessary medical care, and reasonable charges.

The medication charges dated August 12, 2022 again include cyclobenzaprine, or Flexeril in its generic form. (Cl. Ex. 8, p. 106) This was again prescribed in the August 11, 2022 emergency room record. (JE 7, p. 129) I find this medication charges constitutes reasonable medical care, includes a reasonable charge, and is causally related to the January 4, 2021 work injury at Metro Salvage. Therefore, I find that all medical charges listed on claimants' medical bill summary, (Cl. Ex. 8, p. 96) with the exception of the MercyOne Des Moines Laboratory charges ($53.00) on July 21, 2021, are proven by a preponderance of the evidence to be reasonable medical care, reasonable charges, and causally related to the January 4, 2021 work injury at Metro Salvage.

CONCLUSIONS OF LAW

Mr. Hernandez Garcia initially asserts a claim for permanent total disability benefits as a result of the January 4, 2021 work injury. 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 Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935).

After claimant received permanent work restrictions, Metro Salvage terminated his employment. Claimant has worked only three days for another employer since being let go by the employer. He has applied for numerous employment openings, but has not been hired. Claimant presents at least a facially possible claim for permanent total disability in this case.

However, even claimant's vocational expert was able to identify alternate employment opportunities that claimant is qualified to perform both with his employment experience and within his functional limitations. Claimant's vocational expert opined that Mr. Hernandez Garcia sustained a significant loss of earning capacity but not a total loss. Having found that claimant remains capable of performing alternate full-time employment within the well-known labor market, I conclude that claimant failed to prove he is permanently and totally disabled.

Nevertheless, Mr. Hernandez Garcia asserts he is an odd-lot employee and should qualify for permanent total disability benefits. Indeed, the intention of the odd-lot doctrine is to qualify employees that may not be able to prove permanent total disability under the traditional industrial disability analysis.

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.

As noted above, claimant generated a prima facie case of permanent total disability or that he was incapable of obtaining employment in any well-known branch of the labor market. Being terminated by the employer, being unable to perform another job for more than a few days, and a legitimate job search all suggest claimant may be incapable of obtaining employment in any well-known branch of the labor market. Therefore, I conclude that claimant met his initial burden to produce evidence of a prima facie case of odd-lot employee status and to shift the burden of production to defendants.

However, I also conclude that defendants met their burden of production. Defendants produced the medical opinions of Dr. Schmitz and Dr. Mooney suggesting claimant can return to work. Defendants obtained a functional capacity evaluation placing claimant in the heavy work category. Defendants also produced the opinion of a vocational expert, who opines that claimant remains employable within well-known branches of the labor market. With each of these pieces of evidence, defendants met their burden of production and shifted the ultimate burden of persuasion to claimant to prove his odd-lot status.

Ultimately, claimant produced a competing vocational expert, who also identified legitimate job openings for which claimant would qualify within well-known branches of the labor market. Claimant's vocational expert opined that claimant sustained less than a total loss of earning capacity, less than a full loss of access to the labor market, and performed a labor market survey that identified specific jobs available to claimant within the current labor market. Therefore, I found that claimant did not carry his burden of persuasion to establish there are no jobs available to him within any well-known branch of the labor market. I conclude claimant failed to carry his burden of proof to establish he

is an odd-lot employee or permanently and totally disabled. Therefore, I turn to his alternative claim for award of permanent partial disability benefits.

Claimant seeks an award of industrial disability benefits in this case. There does not appear to be a dispute between the parties that this injury involves an unscheduled injury, involving an injury to his low back. Claimant is no longer employed by Metro Salvage. Therefore, his permanent disability is compensated with industrial disability. Iowa Code section 85.34(2)(v).

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

Claimant’s proximity to retirement, or the number of years into the future that it would reasonably be anticipated claimant would continue to work, is also an issue for consideration in determining industrial disability. Iowa Code section 85.34(2)(v).

Considering the situs and nature of claimant’s injury, the need for surgery, claimant’s permanent functional impairment, permanent work restrictions, loss of his employment, ability to retrain, alternate employment opportunities, age, education, employment history, proximity to retirement, and motivation, I found that claimant sustained a 30 percent loss of future earning capacity as a result of the January 4, 2021 work injury. This entitles claimant to 150 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

In addition to permanent disability benefits, claimant seeks an award of past medical expenses identified in Claimant’s Exhibit 8.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The

employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

In this case, defendants stipulate that the treating medical providers would testify as to the reasonableness of their fees and treatment. Defendants offer no contrary evidence to dispute the reasonableness of the treatment provided or the fees charged for that treatment. (Hearing Report) Defendants dispute whether the medical expenses sought are causally related to the January 4, 2021 work injury but stipulate that the expenses and treatment are related to a condition upon which this claim of injury is based. (Hearing Report)

Having reviewed the disputed medical expenses, I found that the expenses itemized in Claimant's Exhibit 8 are causally related to the claimant's January 4, 2021 low back injury at work with the exception of $53.00 in laboratory charges on July 21, 2021. As such, I conclude that claimant is entitled to an order requiring defendants to pay those expenses, reimburse claimant or any third-party payor, and to generally hold claimant harmless against all of the medical expenses itemized in Claimant's Exhibit 8, page 96, with the exception of the July 21, 2021 MercyOne Des Moines Laboratory charges. Iowa Code section 85.27.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Exercising the agency's discretion, I conclude that claimant receives a significant award of permanent disability and past medical expenses. This contested case proceeding was necessary for claimant to receive the entirety of the worker's compensation benefits to which he was entitled. Therefore, I conclude that it is reasonable to assess claimant's costs in some amount against the defendants.

Claimant introduced Claimant's Exhibit 7, which contains the costs for which he seeks reimbursement. Specifically, Mr. Hernandez Garcia seeks reimbursement of his filing fee ($103.00). This is a reasonable request and awarded pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of the expense of his independent medical evaluation report. (Cl. Ex. 7, pp. 90-91) Agency rule 876 IAC 4.33(6) permits assessment of "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." Mr. Hernandez Garcia submits the invoice of Dr. Sassman, which indicates that Dr. Sassman charged $825.00 for her evaluation of claimant and an additional $2,475.00 for her record review and preparation of her written report. (Cl. Ex. 7, p. 90)

The Iowa Supreme Court has interpreted 876 IAC 4.33(6) and concluded that only the cost of the expert's written report can be taxed as a cost. The rationale provided by the Court was that "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony." Des Moines Area Regional Transit

Authority v. Young, 867 N.W.2d 839, 846 (Iowa 2015). Any expense related to the examination provided by a physician must be compensated, if possible, only under Iowa Code section 85.39 and is not considered a cost pursuant to Iowa Code section 86.40 or 876 IAC 4.33(6). Id.

In this instance, Dr. Sassman provided detailed explanation of her time spent on this case. She indicated that she spent 2.75 hours preparing her report. (Cl. Ex. 1, p. 2) Her invoice indicates that she charged $660.00 per hour for her services, including drafting a report. I conclude that Dr. Sassman charged $1,815.00 for preparation of her written report. I conclude this is a reasonable amount and should be taxed under 876 IAC 4.33(6).

Mr. Hernandez Garcia similarly requests assessment of his functional capacity evaluation as a cost pursuant to 876 IAC 4.33(6). A similar analysis must be performed. According to the invoice submitted, the therapist charged $750.00 for the cost of drafting the FCE report. In this instance, I did not rely upon the claimant's FCE report or adopt the restrictions outlined therein for claimant. I did not find this FCE to be particularly helpful in my analysis or award of permanent disability. Accordingly, I conclude this charge should not be assessed as a cost in this case. In total, I conclude it is reasonable and appropriate to assess claimant's costs totaling $1,918.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the weekly rate of six hundred thirty-three and 63/100 ($633.63).

Permanent partial disability benefits shall commence on November 19, 2021 and be paid on a continuous weekly basis until paid in full.

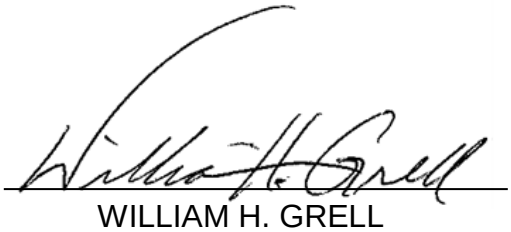
Defendants shall pay all accrued weekly benefit sin lump sum, along with interest on any accrued weekly benefits.

Defendants shall receive credit for benefits paid and stipulated to in the hearing report.

Defendants shall pay, reimburse claimant or any third-party payor, and generally hold claimant harmless for all medical expenses submitted in Claimant's Exhibit 8, page 96, with the exception of a fifty-three dollar ($53.00) laboratory charge incurred on July 21, 2021 from MercyOne Des Moines Laboratory.

Defendants shall reimburse claimant's costs in the amount of one thousand nine hundred eighteen and 00/100 dollars ($1,918.00).

Signed and filed this 5th day of June, 2023.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Tom Drew (via WCES)

Jeff Margolin (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.