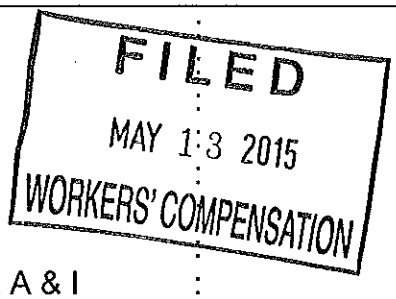
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ROBERT LEE MINOR, Claimant, vs. DEERE & COMPANY, d/b/a A & I PRODUCTS, Employer, and CHARTIS AIG NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5048569 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Robert Lee Minor, the claimant, seeks workers' compensation benefits from defendants, Deere & Company, d/b/a A & I Products, the alleged employer, and its insurer, Chartis AIG New Hampshire Insurance Company, as a result of an alleged injury on April 24, 2012. Presiding in this matter is Larry P. Walshire, a Deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 31, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on April 16, 2015. Oral testimonies 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. It should be noted that both parties consecutively number the pages of their entire exhibit packages, not each exhibit. Citations to a transcript will be to the page number of the original transcript, not the page number of a copy containing 4 pages of transcript on each page.

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

1. On April 24, 2012, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is seeking temporary total or healing period benefits only from his last day of work on July 31, 2012 through the date he achieved maximum medical improvement or alternatively to the present time if there is a running award of weekly benefits.

3. The injury is a cause of some degree of permanent, industrial disability to the body as a whole.

4. At the time of the alleged injury, claimant's gross rate of weekly compensation was $497.77. Also, at that time, he was single.

5. Prior to hearing, defendants voluntarily paid weekly benefits which total $16,159.44 for healing period and permanent disability.

At the end of the hearing, I directed claimant to submit to defendants a list of medical expenses claimant claims are unpaid and I directed defendants to respond to these claims in the post hearing brief. Claimant provided such a list and defendants responded as ordered.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to weekly healing period benefits and permanent disability benefits, including the appropriate weekly rate of compensation; and,

II. The extent of claimant's entitlement to medical benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Robert, and to the defendant employer as A & I.

Defendants challenged Robert's credibility in this proceeding. From observation of Robert's demeanor at hearing, Robert appeared sincere; however, a number of inconsistencies were pointed out by defendants in their post hearing brief where his testimony at hearing conflicted with the facts or prior testimony. Consequently, I am unable to rely solely on Robert's testimony either because he is very poor historian or he was less than candid in his testimony.

The following evidentiary summary was gleaned in part from defendants' post hearing brief which I found more complete than claimant's post hearing brief. However, many changes were made to conform to the evidence.

Robert, age 41, is single and lives with his brother in Canwood, South Dakota. (Transcript pages 32-33, 102; Exhibit X, page 5) He is a high school graduate. (Tr. p.

35; Ex. B, p. 3; Ex. X pp. 13-14) Robert has a prior criminal history that includes three OWIs, multiple open container violations, and failure to pay child support. (Tr. p. 56; Ex. O, p. 40; Ex. X, p. 9) He does not have a driver's license due to his legal troubles. (Tr. pp. 35, 84-85)

About a month prior to the stipulated injury on April 24, 2012, Robert's personal doctor provided the following diagnoses about a month before the work injury: Generalized Anxiety Disorder, Hypertension and Diverticulitis. (Ex. L, pp. 31-33) There are no records in evidence that any physician provided a permanent impairment rating or permanent work restrictions prior to the date of the stipulated work injury. However, Robert has a significant history of alcohol abuse which will be discussed later in this section.

Robert's work history shows that he had had at least 15-25 jobs since 1995. (Tr. p. 40; Ex. I, pp. 14-16; Ex. X, p. 14) The various types of work have included bartending, factory labor, meat cutter, welder, and farmhand. (Tr. pp. 38-43; Ex. B, p. 3; Ex. I, pp. 14-16; Ex. X, pp. 17-19) In one of his last jobs before A & I, Robert worked at Sioux Falls Regional Livestock, and his employment there was terminated. (Ex. I, p. 14; Ex. X, p. 15)

On September 26, 2011, Robert started working for A & I (Tr. p. 89; Ex. C, p. 4) At the time of his employment, he also worked part time as a bartender. (Tr. p. 89) Robert's job title at A & I was distribution warehouser, and he was paid $11.00 per hour at the time of the April 24, 2012 work injury. (Ex. H, p. 13) After his work injury, Robert returned to work at A & I performing light duty work within his restrictions. Robert continued this light duty work until July 30, 2012, his last day at work at A & I. (Tr. pp. 16-17) The circumstances which lead to the end of Robert's employment with A & I are in dispute and will be discussed later in this decision.

The stipulated work injury on April 24, 2012 involved the right shoulder and occurred while lifting a work. (Tr. p. 45) Robert was initially treated with an in-house nurse before seeing ARNP Paula Sanderson on May 30, 2012. (Ex. M, p. 34) She noted Robert is a heavy drinker and his high blood pressure was untreated with noncompliance. (Ex. M, p. 34) A shoulder x-ray was negative. (Ex. N, p. 36)

On July 16, 2012, Robert saw Corey Rothrock, M.D., on referral by Sanderson for an orthopedic consultation. (Ex. W, p. 78) Dr. Rothrock diagnosed anterior shoulder pain with symptoms of instability, and he recommended an arthrogram and provided Robert with activity restrictions. (Ex. W, pp. 78-79) When the arthrogram revealed some abnormalities, Dr. Rothrock referred Robert to another orthopedist, Evan Hermanson, M.D., who specializes in shoulder conditions.

On November 5, 2012, Dr. Hermanson diagnosed right shoulder impingement, AC arthritis, and possible labral tear and recommended arthroscopic surgery and continued work restrictions. (Ex. W, p. 80) Dr. Hermanson performed the surgery on January 22, 2013. The postoperative diagnoses were anterior labral tear, subacromial

impingement, and AC arthropathy. (Ex. R, p. 52) The operative report also states that Robert has a normal biceps, superior labrum, posterior labrum, glenoid, humeral head, and rotator cuff. (Ex. R, p. 52) Robert started physical therapy (PT) on February 22, 2013. (Ex. S, p. 55) On June 18, 2013, Robert was discharged from physical therapy because he had achieved the range of motion goal, Robert rated his pain at 2/10. (Ex. S, p. 60) On September 18, 2013, Dr. Hermanson provided a subacromial injection and stated "I am not sure what else we could do." (Ex. W, p. 84)

At the request of Robert's attorney, Robert was evaluated by Paul Cederberg, M.D., another orthopedic surgeon. In his brief report, Dr. Cederberg stated that Robert had not yet achieved maximum medical improvement (MMI) and stated that Robert could only return to work under temporary restrictions of no lifting with the right arm more than 5 pounds. Also, this doctor recommended a repeat MRI and consideration of another corticosteriod injection. (Ex. Y)

On January 29, 2014, Dr. Hermanson responded to written inquires by Robert's attorney. The doctor causally related his treatment of Robert's right shoulder problems to the April 24, 2012 work injury. He agreed with Dr. Cederberg that Robert had not yet achieved MMI and agreed with Dr. Cederberg that Robert's shoulder condition required another MRI. However, the doctor disagreed with the suggestion of another subacromial injection. He recommended an ultra sound guided biceps tendon injection. The doctor also felt that Robert should have four more weeks of physical therapy. Finally, the doctor disagreed with Dr. Cederberg's lifting restriction and opined that Robert's restrictions of no overhead work, no work above shoulder height and no lifting over 20 pounds should continue. (Ex. 4, pp. 38-41)

On January 29, 2014, James Brunz, M.D., performed an ultra sound guided biceps tendon injection as recommended by Dr. Hermanson. (Ex. W, p. 85) Robert returned to Dr. Hermanson on February 5, 2014, stating that the injection did not give him any improvement in his symptoms. The doctor then ordered another MRI. This was done the next day on February 6, 2014. (Ex. W, p. 89) On February 12, 2014, Dr. Hermanson made a chart note indicating that the MRI was normal, and it was explained to Robert there is "nothing further to do at this point." (Ex. W, p. 90)

On March 11, 2014, at the request of Robert's attorney, Robert underwent a functional capacity evaluation (FCE) by Timothy Saulsbury, PT, DPT. The FCE results were found to be valid, and the examiner concluded Robert can work in the medium category for eight hours per day. Robert's specific right shoulder lift capacity was found to be 30 pounds and the overhead lift capacity was found to be 20 pounds. The evaluator also found a 66.7 percent functional strength deficit. (Ex. 1, p. 1) The examiner also indicated that Robert could achieve a higher physical demand level if he were to improve his fitness. (Ex. 1, p. 17)

On May 23, 2014, Dr. Hermanson indicated he would see Robert on September 3, 2014 for a "final impairment evaluation." (Ex. W, p. 92) This evaluation did not take place due to the doctor's schedule.

On September 17, 2014, Robert returned to Dr. Hermanson with continued symptoms. The doctor reports that he discussed various treatment options at that time with Robert. The doctor stated that he was worried that Robert may have a herniated disc in his neck or a pinched nerve. He recommended starting with electrodiagnostics and possibly a cervical spine MRI. He also wanted an FCE to determine Robert's long term restrictions. Robert, at this time, received another injection. (Ex. 6, p. 45) The doctor apparently was not aware of the March 2014 FCE.

The procedures recommended by Dr. Hermanson for a possible neck injury were not authorized by defendants and claimant at hearing stated that he is not claiming any benefits for a neck injury. (Tr. pp. 112-113) Although the repeat MRI and the ultra sound guided injection was performed, there was no additional physical therapy as recommended by the doctor in his report to Robert's attorney.

On February 26, 2015, defendants authorized an FCE by Terry Nelson, PT, DPT. This testing of Robert's abilities was deemed valid although the evaluator did report some inconsistencies such as distracted versus undistracted testing. However, these were insufficient to invalidate the results. In this FCE, Robert's physical capabilities were found to be similar to the March 2014 FCE in that he was found be in the medium, workload category, but with no overhead activity with the right arm. The lifting was limited to occasional lifting from waist to shoulder not to exceed 30 pounds; occasional lifting up to 40 pounds floor to waist; and occasional lifting from floor to shoulder not to exceed 30 pounds. Robert is restricted to only occasional, stair climbing, squatting, kneeling, crawling, ladder climbing and hand grasping. (Ex. T, pp. 71:74) What is confusing about this report is the results for forward and below shoulder reaching activities. The report says that Robert is capable of such activity on an "occasional and frequent" basis. (Ex. T, pp. 73, 74) According to a vocational expert in this case, whether this is occasional or frequent is very significant as will be discussed below. The March 2014 FCE found Robert to be capable of only occasional reaching with the right arm. However, this is also confusing because he was found not able to reach more than occasionally using his uninjured left arm as well. (Ex. 4, p. 15)

On March 6, 2015, defense counsel sent a copy of Nelson's FCE report to Dr. Hermanson asking him to provide a permanency rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and permanent restrictions.

On March 13, 2015, Robert returned to Dr. Hermanson asking for another injection. The doctor reports that Robert "basically refused to move his arm at all" so he could not determine range of motion. His impression was status post previous shoulder arthroscopy with some recurrent subacromial bursitis and other symptoms of unclear etiology. He again provided Robert with another injection. (Ex. 6, p. 45) This is the last time before hearing that Robert saw Dr. Hermanson.

On March 20, 2015, Dr. Hermanson authored a letter to Robert informing him that he is scheduled for a final impairment evaluation on June 17, 2015. (Ex. W, p. 95)

Obviously, a report of this final evaluation is not in evidence because the hearing was conducted on April 31, 2015.

With regard to Robert's work status after his work injury, as stated previously, he continued working light duty. (Tr. p. 120) At the hearing, Robert denied he was involuntarily terminated. He testified that he gave two-week's notice of his intent to leave A & I and seek a job that is lighter on his shoulder. (Tr. pp. 56-57, 91, 105) He also denied that he missed work before his termination for personal reasons. (Tr. p. 91)

In March and June 2012 Robert was warned about excessive absenteeism. (Ex. F, p. 10) On July 30, 2012, Robert was suspended for three days for being absent although Robert had called in prior to these absences. Finally, on August 8, 2012, A & I sent a letter to Robert informing him that he was terminated for failing to call in and not appear for work after the suspension. (Ex. G, p. 11) Travis Rozeboom, A & I's warehouse manager, testified that Robert never provided two-weeks' notice of quitting. He stated that if he had, Robert would have been required to sign a resignation form. (Tr. p. 118) Rozeboom explained there is no such request and no such form in Robert's personnel file. (Tr. p. 118)

On August 16, 2012, Robert, in an email to A & I, apologized for not providing notice of his absences stating that he was experiencing unmanageable life circumstances and recently checked himself in to a hospital to address these problems. Also, in this email, he inquired about the possibility of returning to his job. The only reply from A & I managers was that he had lost his job. At no time did Robert assert in this email that the absences from work were due to disability or pain from his work injury. (Ex. 12, p. 12) This email contradicts his testimony at hearing concerning the reasons for leaving A & I and that his absences were not due to personal reasons. I find that Robert lost his job at A & I due to excessive absenteeism.

Also, at the hearing, Robert discussed his hospitalization on August 12, 2012. He stated he remained in the hospital for four-days to receive treatment for alcohol abuse. (Tr. pp. 57, 92-93.) The hospital records show that when Robert was admitted, he listed his current stressors as infidelity to his girlfriend, limited contact with his children, his money and job problems, the recent loss of his job, his alcohol addiction and an upcoming court date for nonpayment of child support. (Ex. O, p. 37) The treating psychiatrist stated that Robert was admitted because of increasing alcoholism, depression and sexual addiction. He had been drinking 18 beers every day and had attempted suicide. The primary diagnoses was substance induced mood disorder and major depressive disorder from job loss and relationship problems. There is no mention of the work injury to his shoulder or any problems relating to shoulder injury in these hospital records. (Ex. pp. 37-45)

Robert testified he has been unemployed since leaving A & I. (Tr. p. 64.) At the hearing, he submitted a document which lists his job search history between January 2014 and March 2015. (Ex. 5, pp. 42-43) Robert received unemployment benefits. He

has not applied for any Social Security disability benefits or any other disability benefits except for his petition to this agency (Tr. pp. 38, 101; Ex. X, p. 49)

Robert's attorney retained Rick Ostrander, a vocational rehabilitation consultant, to provide an assessment of the impact of his work activity restrictions upon his access to the labor market and his loss of earning potential. Ostrander submitted to two reports. The first report in March 2014 dealt only with the restrictions imposed at that time by Dr. Hermanson and Dr. Cederberg. Ostrander did not address the results of the March 2014 FCE. Using Dr. Hermanson's restriction of no overhead work and lifting restricted to 20 pounds, Ostrander found that Robert has lost 90 percent of his previous access to the labor market and opined that Robert would suffer a 60 percent reduction in earning capacity. Using Dr. Cederberg's restriction to no lifting over 5 pounds, Ostrander found a 98 percent loss of access to the labor market and opined that Robert would be unsuccessful in maintaining regular employment. (Ex. 3 p. 32)

In his second report, Ostrander addressed the February 26, 2015 FCE and noted the confusing assessment concerning forward reaching as discussed above. Based on that FCE and an ability to frequently reach, Robert's loss of access to the labor market would be similar to the loss under Dr. Hermanson's restrictions and the loss of earning capacity is 60 percent. However, adding an ability to only reach occasionally, Robert's loss would be similar to Dr. Cederberg's restrictions and he would be unsuccessful in retaining any employment.

In assessing Robert's disability, I must first decide whether or not he has achieved MMI. No doctor has opined to date that he has.

However, I find that Robert has achieved MMI. First, the views of Dr. Hermanson, the treating orthopedic surgeon, are more convincing that the views of the one-time evaluator Dr. Cederberg. Dr. Hermanson had greater clinical experience with Robert for almost two years and he has greater knowledge of Robert's right shoulder condition given his arthroscopic surgery observations. Admittedly, Dr. Hermanson has not issued an opinion finding Robert at MMI. However, it appears that the doctor had no further treatment options for Robert's shoulder. The only remaining treatment he recommended in his previous report to Robert's attorney that has not been done is additional physical therapy. However, he did not mention additional physical therapy when discussing treatment options with Robert at the September 17, 2014 office visit. Apparently, he no longer felt that would be appropriate. The only options suggested at that time concerned testing for a possible neck problem. Hermanson has not recommended any other treatment and his sole involvement in this case after September 17, 2014 has been to provide final restrictions and an impairment rating. I find that Robert achieved MMI on September 17, 2014. Dr. Hermanson did provide Robert another injection in March 2015, but such injections appear to be just pain management and not designed to improve Robert's overall condition.

Although Dr. Hermanson did not provide final permanent restrictions, I find it likely that he would accept the results of the valid February 26, 2015 FCE which limited Robert to the medium physical demand level with no overhead work. This report is more convincing than the earlier FCE because it is more recent. However, the results of the two FCEs are similar.

Therefore, I find that the work injury of April 24, 2012 is a cause of the limitations set forth in the February 24, 2015 FCE which limited Robert's future employment to only jobs that fall within the medium physical demand level (no lifting over 30-40 pounds in various positions) and those jobs that do not require overhead work. In making this finding, I reject the testimony of Robert that he cannot lift anything with his right arm and his other claims that his disability is greater than found in the FCE. As stated earlier, due to his lack of credibility, I am unable to rely on testimony that is not verified by other evidence in this case. If he has such a limitation, Robert has not shown it to be related to the April 2012 work injury.

Also, I am unable to find from the evidence presented that he is limited in forward reaching. Both FCE's were found confusing in that particular activity as previously stated. Therefore, the work injury of April 24, 2012 is a cause of his restriction as set forth in the February 26, 2015 report.

Robert, again, is 41 years old. His has a high school education, but much of this involved special education. He had had many, many jobs in the past that were largely unskilled, manual labor jobs. This job jumping certainly would adversely impact his employability, although he did not have a major gap in his employment until the work injury in this case. He was fired in a previous job, but there is no evidence in this record that this was due to alcoholism. Although Robert denied he was an alcoholic at hearing, the record shows otherwise and this has caused him a lot of problems. He will not be able to drive an automobile for many years, even assuming no further OWIs.

On the other hand, Robert had no ascertainable functional impairments or permanent restrictions on the day before his work injury. His alcohol dependency was not shown to be a major problem prior to his injury at A & I. Again, there are no major gaps in past employment history and the absences which led to his termination at A & I did not begin until March 2012. Robert now has significant permanent impairment to the body as a whole due to the work injury. The exact percentage loss of impairment is really unnecessary to evaluate Robert's industrial disability. His work restrictions and the impact of those restrictions on his employability are sufficient to determine his permanent loss of earning capacity or industrial loss. Although his termination from A & I was not shown to be caused by the work injury in this case, Robert had not returned to regular duty and was terminated from an accommodated light duty job.

In assessing Robert's loss of earning capacity, I found helpful the views of Rick Ostrander that under the FCE results, Robert a significant loss access to the labor market. Robert's lack of credibility in his testimony would not appear to impact

Ostrander's views, because he was not basing his opinions on Robert's complaints, but on the work restrictions imposed by a valid FCE and on undisputed facts concerning Robert's work history, education, his vocational testing, transferable skills and his assessment that Robert is best suited for hands-on types of occupations and on-the-job training given his education and past employment. (Ex. 3, p. 31)

Defendants criticize Ostrander as being inconsistent in his first report in that he found a 20 percent loss and then opined a 60 percent loss of earning capacity. However, as explained by Ostrander, the 20 percent amount was just looking at wage loss without factoring in impact of disability on labor market access, employment status, transferable skills, work history, educational record and vocational testing. (Id.)

Defendants also criticize Ostrander for not addressing Robert's alcohol dependency and the inability to drive which would have limited his access to jobs before the injury. I fail to understand this argument. Ostrander was doing an objective analysis of comparing the valid FCE results to available jobs in the labor market before and after the injury. Robert's alcohol dependency may very well further reduce his access to the labor market, but that would not negate Ostrander's views of the loss of job opportunity caused by the work injury. If defendants disagreed with the views of Ostrander, they had ample opportunity to obtain opinions from another vocational consultant of their choice.

Therefore, I find that the work injury of April 24, 2012 is a cause of a 60 percent loss of earning capacity.

I find that Robert was not eligible for, nor did he claim, exemptions other than himself on his income tax returns at the time of his injury.

As stated before, I directed claimant to provide the defense with the medical bills they claimed to be unpaid. Claimant did so and defendant responded as follows:

1. An April 7, 2015 statement from Sioux Falls Specialty Hospital. Based on total charges of $5,065.00 for an MRI, injection, and x-ray on July 20, 2012, defendants issued a $1,973.95 payment on March 18, 2013 and a $265.23 payment on July 16, 2013. (See Ex. U.) It is unknown whether the provider used the dispute resolution procedures in Iowa Code Administrative Rule 876-10.3 if it disputed the standard reductions that were apparently made.

2. A March 6, 2013 statement from Sioux Falls Specialty Hospital for an MRI on July 20, 2012. It appears that this printout was superseded by the April 7, 2015 statement (see above) because it involves the same patient, same facility, same MRI, and same account number.

3. An October 23, 2012 statement from Anesthesiology Associates for a July 20, 2012 injection. Defendants' payment records do not show any payment to this

provider, but the statement is 2.5 years old and it is unknown whether work comp was ever billed. If it is actually owed, defendants would have no problem paying the bill.

There were other expenses requested but withdrawn by claimant in the post hearing brief.

I find that the above requested expenses constitute medical expenses for treatment by physicians authorized by defendants.

Robert desires to continue his treatment with Dr. Hermanson. I find this a reasonable request as it would largely involve pain management. Any referral by Dr. Hermanson to a pain management specialist for evaluation and/or treatment would also be appropriate.

CONCLUSIONS OF LAW

I. 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).

In this case, the parties agreed that the work injury is a cause of some degree of permanent industrial disability. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment. Claimant asserts a large, if not total, loss of earning capacity. Defendants assert that claimant's loss is no more than the disability for which he has been already paid.

In 2004, Iowa Code section 85.34(2)(u) was amended to read as follows:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

This change adopts the so-called "fresh start rule." The fresh start rule is based upon the premise that a worker's earnings in the competitive labor market at the time of a work injury are reflective of that worker's earning capacity. If that worker had any

physical or mental impairment or any other socio-economic impediment limiting his or her employment prior to a work injury, the impact of that impairment or impediment upon that worker's earning capacity, absent evidence to the contrary, has already occurred and is reflected in his earnings at the time of injury.

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 earnings 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 conditions.

The rationale for this approach is that in Iowa as well as other states, the employer's liability for workers' compensation benefits is dependent upon that person's weekly rate of compensation which a portion of the person's weekly earnings at the time of injury. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into any award of compensation for a work injury and there is no need to further apportion out that impact from any workers' compensation award. If the injured workers wages are high, despite his prior condition, then the condition apparently has not negatively impacted his earning capacity. If they are low, it is likely they are low because of his prior condition and consequently, the employer's liability is low because of the resulting low rate of compensation.

Apportionment of a permanent partial disability claim is improper under current law due to Iowa's adoption of the fresh start rule and modified full responsibility rule in successive disability cases. Roberts Dairy v. Billick, No. 13-1009, filed April 3, 2015 (Iowa Supreme Court). Unpublished as of May 1, 2015; Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

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.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). Ending a prior accommodation is not a change of condition warranting a review-reopening of a past settlement or award. U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997).

In the case sub judice, I found that claimant suffered a 60 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 300 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 60 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

Claimant's entitlement to permanent partial disability also entitles him to weekly benefits for healing period under Iowa Code section 85.34 for his absence from work during a recovery period until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

There is no dispute that claimant's work at the time of his termination on August 8, 2012 was accommodated light duty work that was within Dr. Hermanson's restrictions. Defendants assert that claimant's absenteeism which led to his termination constitutes an intentional refusal to perform suitable work and thereby disqualifies claimant from healing period benefits pursuant to Iowa Code section 85.33(3). Such an assertion is an affirmative defense. The employer must show by the preponderance of the evidence that the work was offered; that the work was suitable, that is, having a physical or mental demand level that does not exceed claimant's capacities; and, that the refusal was an intentional act. Brodigan v. Nutri-ject Systems, Inc., File No. 5001106 (App. April 13, 2004). Woods v. Siemens-Furnas Controls, File Nos. 1303082, 1273249 (App. July 22, 2003).

The argument that claimant's termination for cause constitutes an intentional refusal of suitable work which bars any recovery for healing period benefits under Iowa Code section 85.33(3) is not current agency precedent. Edwards v. Weitz Corporation, File No. 5032285 (App. August 22, 2012); Hogland v. First Resources Corp. File No. 5028766 & 67 (App. March 1, 2012). Disciplinary action such as a suspension or termination based upon misconduct or a violation of an employer's work rules is not a refusal to perform suitable work. Absences from suitable work unrelated to claimant's work injury can constitute a refusal to perform suitable work if shown to be intentional regardless of the employer's absenteeism policies. Id. However, as stated in Iowa Code section 85.33(3), the suspension of benefits is only for the duration of the refusal.

In this case, claimant's initial absences from work after July 30, 2012 were not related to the work injury and consequently intentional and not compensable. However, on August 16, 2012, claimant emailed defendants offering to return to work and this was declined. Defendants certainly had good cause for terminating claimant, but that termination does not preclude healing period benefits after the email because claimant was no longer refusing to work and his absence thereafter was due to violation of work rules, or absences without notice and permission.

At the time of the August 12, 2012 email, claimant was admitted to the hospital for reasons unrelated to the work injury. He was not released until August 15, 2012. Consequently, his healing period benefits do not begin until August 16, 2012 and shall end on September 17, 2014.

I found that claimant was only entitled to one exemption on his tax returns. This agency for many years has held that entitlement to exemptions in weekly rate determinations is governed solely by claimant's entitlement to exemptions in the Internal Revenue Code and applicable regulations. Middleton v. Des Moines Water Works, File No. 1084734 (App. March 31, 2000); Thompson v. Seed and Grain Construction, File No. 1059299 (App. December 28, 1998); Keeling v. Cedar Rapids Community Schools, File No. 891809 (App. February 26, 1993)

Based on a single exemption and the parties stipulations as to gross weekly rate and marital status, claimant's rate of weekly compensation is $321.94 according to the Commissioner's published rate booklet for the date of injury in this case. This is the compensation rate asserted by defendants.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, I found the requested expenses constituted treatment for authorized care. Employers and their insurers are liable for of the cost of medical care they authorize and direct. Becker v. Clinton Engineering, Inc., No. 1205139 (App. July 3, 2001); Janssen v. U.P.S., No. 1019753 (App. April 29, 1994).

Payment of these expenses shall be ordered.

Also, claimant is seeking continued treatment with Dr. Hermanson. I found this to be a reasonable request and I shall order that continuing care.

ORDER

1. Defendants shall pay to claimant three hundred (300) weeks of permanent partial disability benefits at a rate of three hundred twenty-one and 94/100 dollars ($321.94) per week from September 18, 2014.

2. Defendants shall pay to claimant healing period benefits from August 16, 2012 through September 17, 2014, at the rate of per week.

3. Defendants shall pay any remaining unpaid medical expenses from Sioux Falls Specialty Hospital and Anesthesiology Associates. Defendants shall reimburse claimant any out-of-pocket medical expenses paid by claimant and shall hold claimant harmless from the remainder of those expenses.

4. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for the benefits previously paid as set forth in the hearing report.

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

6. 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.

7. Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 13th day of May, 2015.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.