BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERTO BENITEZ HERNANDEZ,

Claimant,

vs.

HON GENEVA (HNI CORPORATION),

Employer,
Self-Insured,
Defendants.

File No. 5054655

ARBITRATION DECISION

Head Note Nos.: 1801, 1803, 2500, 3000

STATEMENT OF THE CASE

Roberto Benitez Hernandez, claimant, filed a petition in arbitration seeking workers' compensation benefits from defendant employer, Hon Geneva (HNI Corp.) a self-insured employer. The arbitration hearing was held on July 19, 2017, in Davenport, Iowa. The parties submitted post-hearing briefs on August 31, 2017, and the matter was considered fully submitted on that date.

The evidentiary record includes: Joint Exhibits JE1 through JE7, Claimant's Exhibits 1 through 8 and Defendants' Exhibits A through E.

At hearing, claimant, Roberto Benitez Hernandez, provided testimony. His first language is Spanish. This hearing was interpreted by Ernest Niño-Murcia.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of healing period.

2. The extent of permanent partial disability.

3. Rate (number of exemptions).

4. Entitlement to payment of medical expenses.

5. Independent medical examination (IME) reimbursement.

6. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

General

The parties have stipulated that Roberto Benitez Hernandez, claimant, sustained an injury on April 7, 2015, that arose out of and in the course of his employment with Hon Geneva (HNI Corp.). (Hearing Report, page 1)

At the time of the hearing, claimant was 32 years old and not married. He was living with his girlfriend and their 2 daughters. The ages of the children are 2 and 5 years old. (Transcript p. 12)

Claimant completed high school in Mexico and did not have any further education. (Tr. pp. 14-15; Exhibit 1, p. 4)

Pre-Injury Medical History

Claimant had been seen at Unity Point Health prior to this work injury. On October 21, 2011, claimant noted muscle ache in his back, but was primarily seen for dizziness, as evidenced by the diagnosis of: "[p]robable viral labyrinthitis with secondary headache and intermittent dizziness." (Ex. JE 3, p. 42) Claimant was seen at UnityPoint Health occasionally between October 21, 2011 and the injury date with no complaints of back pain.

Claimant was also seen intermittently by Eduardo Marquez at QC Core Chiropractic Wellness Center prior to the work injury. Although the records occasionally refer to the lumbar spine, it is clear that claimant's primary complaints involved headaches and neck pain. (Ex. JE7, pp. 17-29) He was last seen prior to the work injury on June 27, 2014 according to the records provided, although in another section of the records there is an indication that claimant may have been seen on July 18, 2014. (Ex. JE7, pp. 17, 31)

Pre-Injury Work History

Claimant previously worked in a turkey processing plant that required physical labor and standing on his feet during the work day. (Tr. pp. 15-16; Ex. 1, p. 5) He has also worked for Kelly Services and Sunoco, where he packed products such as toothpaste, deodorant and similar items. These jobs involved standing a majority of the

work day. (Tr. p. 16; Ex. 1, p. 5; Ex. A, p.2) Claimant also worked at Allsteel, standing all day, placing parts on and removing them from a paint line. (Tr. p. 17; Ex. A, p. 2) Each of these jobs required some degree of lifting throughout the shift. (Tr. p. 19)

The details of claimant's work history are not particularly clear. For example, I note that in claimant's answers to interrogatories, he was asked to provide a work history and in his answer he referred to only two prior jobs, both of which were in 2011. (Ex. 1, p. 5)

Concerning his former employment, claimant was questioned at hearing whether he told a former employer, Team Staffing, in August, 2011 that he "had something happen" to his back and although he had no doctor restrictions he could only lift 25 pounds. (Tr. p. 49) Claimant did not recall ever telling that to Team Staffing. (Id.) Defendant entered into evidence Exhibit D. On page eight (8) of Exhibit D, it states:

> Has STB, no dr restrictions, 25lb lift ability, $9.00/hr 1st shift. Interested in Hon/AS. Stated he is still at WLF but they know he is looking for other work so he will not need to provide much of a notice.

(Ex. D, p. 8) I find that the above note is not clearly stated as a restriction per se and is just as likely to be understood as a simple statement that claimant has no restrictions whatsoever and is therefore able to lift 25 pounds.

Work at the time of the Injury

Claimant began working for Team Staffing on or about February 21, 2012 and was placed at the defendants' location. He was hired by the defendant employer on or about June 15, 2012. (Ex. D, pp. 10-11) Claimant's job title was, Work Cell Operator. (Ex. E, p. 23) The job description for this position includes, but is not limited to, being able to: stand for up to 10 hours per day; lift and carry up to 40 pounds for a distance of 10 feet on a continuous basis; push/pull up to 25 pounds; use abdominal and lower back muscles "to support part of the body" frequently or continuously; continuous movement at the waist, back, hip and knees including bending and twisting; and, frequent reaching and lifting up to 15 pounds at and above shoulder height. (Ex. 6, pp. 48-49)

Post-Injury Employment

After the stipulated injury of April 7, 2015, claimant continued to work for defendant employer. However, he was terminated from his job in September 2015. (Tr. p. 50) Claimant testified that he was terminated due to excessive absences that he attributed to medical appointments related to his work injury, including both before and after being released from authorized medical care. (Tr. pp. 26-27, 51)

After being terminated by the defendant employer, claimant moved to Michigan and quickly found a job. (Tr. p. 51) He worked for Spring Meadow Nursery where he

cared for plants, moved them from one place to another, often working in excess of 40 hours per week. (Tr. p. 52) He earned somewhere between $9.25 per hour and $11.00 per hour. (Tr. p. 51; Ex. E, p. 12; Ex. 1, p. 6) Claimant testified that bending over and moving and cutting plants was difficult due to his symptoms. (Tr. p. 31) He stated that there were parts of his job that he was unable to do, such as repeatedly pushing carts full of plants and bedding material. (Tr. pp. 31-32)

Claimant went to North Carolina for one week to dig ditches and lay phone cable. (Tr. p. 32) Claimant testified that it was difficult for him to bend and lift heavy things on that job. Claimant then moved back to Michigan. (Id.)

When claimant returned to Michigan, he worked for Manpower and was placed at a company called Peninsula, which made parts for bridges. Claimant testified that he had difficulty with bending, lifting heavy things and extended periods of walking. Claimant testified that he did this job for two or three months. (Tr. p. 34) Claimant earned about $10.00 or $10.50 per hour. (Ex. 55) He also worked for Crystal Clean, an auto detailing business. He stated that he took this job because it was lighter work and better pay. (Tr. p. 34) He washed and cleaned cars inside and out, "[b]asically every part of a car." (Tr. p. 35) Claimant stated that he had difficulty bending over and holding that position for a long period of time. Claimant worked at this job for five or six months. (Id.)

Claimant returned to Muscatine, Iowa. He was employed by Iowa Bridge and Culvert, which required him to lift and move heavy things and walk a lot. He typically worked eight to ten hours per day. (Tr. pp. 35, 36) Claimant earned $14.00 per hour. (Tr. p. 58) Claimant testified that he stopped working for Iowa Bridge and Culvert about a month before the hearing and he had been looking for another job since then, but was unemployed at the time of the hearing. (Tr. pp. 36-37; Ex. 7)

He testified that he continues to seek labor intensive positions because the pay is better than non-labor intensive jobs and they seem to be the only type of jobs for which employers are interested in hiring him.

This Injury

I find that claimant sustained a stipulated work injury that occurred on April 7, 2015. (Hrg. Rpt., p. 1) Claimant testified on that day he was assembling office type chairs and packing them in boxes. (Tr. pp. 19-20) He grabbed a box and felt a pop and pain in his low back. (Tr. pp. 20-21; Ex. 1, p. 8) He reported the injury to his crew leader. (Tr. p. 21; Ex. 1, pp. 8,9)

Post-Injury Medical Treatment

After the work injury claimant received medical treatment at Unity Point Health with Rhea Allen, M.D. from April 7, 2015 through July 20, 2015. (Ex. JE2)

On claimant's initial visit with Dr. Allen on April 7, 2015, he was diagnosed with a low back strain and placed on work restrictions, which included limiting lifting to 15 pounds. (Ex. JE2, pp. 37-38)

While under Dr. Allen's care, claimant received physical therapy. (Ex. JE 2, p. 24) However, claimant was allowed to do home exercises because "it stresses him out too much to try to go to PT after work (due to childcare conflicts)." (Ex. JE2, p. 21)

Claimant sought out chiropractic care on his own with Eduardo Marquez, D.C. of Core Chiropractic Wellness Center and received treatment from April 17, 2017 through May 29, 2015. (Ex. JE7) Prior to the work injury, claimant had not seen Dr. Marquez for any treatment since June or July, 2014. (Ex. JE7, pp. 17, 31) On April 17, 2015 claimant reported low back pain and after Dr. Marquez completed an exam he diagnosed him with a low back sprain/strain. (Ex. JE7, p. 1) After reviewing the MRI, Dr. Marquez opined that claimant sustained a moderate disk bulge at L3-4 and L4-5 from his work activity. He also stated that "[w]hile it is likely that he will be able to reach a symptom free state; in some cases the condition could necessitate further therapy ([p]hysical therapy, [c]hiropractic [t]herapy, and passive/active therapy care) to manage symptoms. If [his] condition continues to worsen it is possible that he will need to go to a [*sic*] orthopedic consultation and possible surgery." (Ex. JE7, p. 1)

There do not appear to be any complaints of radicular symptoms noted in the chiropractic records of Dr. Marquez. He noted on April 17, 2015 that claimant had back pain, which "does not radiate down his legs at all pain stays very local." (Ex. JE 7, p. 14)

Claimant testified that of all the doctors and therapists that he saw concerning this work injury, only Dr. Marquez spoke Spanish and there was not an interpreter provided when he spoke to the other medical providers, so he spoke to them in English and he felt that they understood "only the little that [he] was able to tell them." (Tr. pp. 28-29)

After learning that claimant had been seeing a chiropractor on his own, Dr. Allen, the authorized treating physician, stated that she was not opposed to claimant trying chiropractic treatment and authorized a short course of treatment. (Ex. JE2, pp. 17-18)

Claimant then saw Leo Elgatian, D.C. from May 20, 2015 through June 12, 2015. (Ex. JE6) Claimant's condition is reported as improving and on June 12, 2015, claimant was noted to be "doing much better with only intermittent mild pain." (Ex. JE6, p. 1) His pain level was described as 2/10. It is recorded that claimant identified no activities of daily living that were being affected by the injury. Claimant was released from Dr. Elgatian's care with home exercises. (Id.) I note that there is no record of claimant complaining of radicular symptoms in Dr. Elgatian's chiropractic records.

On June 15, 2015, claimant began transitioning back to his regular job from restricted duty, but was limited to two hours on/two hours off. However, it was later noted that this transition was "not working," due to some confusion about how to implement the restrictions. The restrictions were clarified. (Ex. JE2, pp. 12,15)

On June 29, 2015, Dr. Allen noted that claimant reported that his symptoms had not improved and he was still experiencing bilateral low back pain. He also had symptoms of tingling in his upper extremities and numbness over the back, which Dr. Allen found was not consistent with a back strain. An MRI was requested. (Ex. JE 2, p. 6) Claimant was released to return to work without restrictions. (Ex. JE2, p. 7)

Claimant testified that after he was released to return to work full duty, by Dr. Allen, he continued to have back pain and struggled with lifting, bending and walking for extended periods. (Tr. p. 25) He told his boss that he did not feel that Dr. Allen had helped him to improve. (Id.)

On July 6, 2015, claimant was seen at Unity Point Health by Ashley Weller, PA, with complaints of pain on the right side of his low back. He reported that x-rays had been normal, but he did not feel that his back was getting any better. He was not taking any medication at that time and was using Biofreeze occasionally. (Ex. JE3, p. 24) Claimant requested pain medication. Ms. Weller offered naproxen, which claimant declined stating that he had naproxen at home and it was not helpful. A discussion was had regarding narcotic pain medication and claimant was directed to his authorized workers' compensation provider for consultation. (Ex. JE3, p. 25)

On July 20, 2015, Dr. Allen noted that claimant's exam and the MRI results were benign, although he had some disk bulging, there was no stenosis and "[h]is subjective complaints are in excess of objective findings." (Ex. JE2, p. 3) It was noted that he had returned to full duty about a month earlier. (Ex. JE2, p. 1) Dr. Allen deemed claimant to be at maximum medical improvement (MMI) and released him from her care and confirmed his release to return to regular duty with no permanent impairment (0 percent). (Ex. JE2, p. 3)

I find that while claimant treated with Dr. Allen, he did not report any radicular symptoms involving his lower extremities. In fact, Dr. Allen repeatedly noted that claimant had no radicular symptoms, such as on April 9, 17, 24; May 8, 18; June 15, 22, 29; and July 20, 2015. (Ex. 2, pp. 5, 8, 14, 17, 20, 23, 26, 32, & 36)

On August 25, 2015, claimant was seen by Evan Nelson, PA-C at Unity Point Health describing a chronic back problem with a current episode that started more than 1 month ago in the lumbar spine. (Ex. JE3, p. 20) It is noted that the pain is severe, and "does not radiate." (Id.) Claimant was diagnosed with chronic low back pain and prescribed naproxen and Flexeril. (Ex. JE3, p. 22)

One year after the work injury, on April 10, 2016, claimant was seen at the Unity Point Health Emergency Department, with complaints of low back pain "that radiates to his right lower extremity." (Ex. JE3, p. 7) Claimant indicated that the pain had been occurring off and on for three or four months. (Id.) He was diagnosed with bilateral low back pain with right-sided sciatica. (Ex. JE3, p. 10) This appears to be the first complaint from claimant of radicular symptoms.

On May 23, 2016, claimant, at the request of his attorney, was seen by Robin Sassman, M.D. for the purpose of an independent medical examination (IME). (JE1, p. 1) At this exam, claimant was evaluated with the aid of an interpreter. (Id.) Claimant noted pain in his low back along with radicular symptoms of pain and numbness in the back of his right leg. He described his pain as constant. (JE1, p. 5) Dr. Sassman, after reviewing medical records and conducting an evaluation, diagnosed claimant with low back pain with radiculopathy. (Ex. JE1, p. 7) She opined that claimant's lack of prior symptoms for a period of about a year before this incident, along with the mechanism of injury "leads me to the opinion that this incident is directly and causally related to his low back pain *with radicular symptoms*." (Id.)(emphasis added)

Dr. Sassman recommended that claimant be seen by a pain management specialist to discuss possible epidural injections. If those injections are not helpful, she would then recommend a surgery consultation. She stated that these recommendations should be followed before determining MMI. However, if claimant does not follow through with these recommendations, then she is of the opinion that claimant's date of MMI would be April 10, 2016, the date of his visit to the Unity Point Health Emergency Department described above. Claimant testified that he has not obtained the recommended injection, but that he would like to do so, but lacks the money to do so. (Tr. p. 38) The parties do not argue that claimant has not reached MMI.

Dr. Sassman then assigned "10% impairment of the whole person due to signs of radiculopathy on examination," and based the rating on placement of claimant in DRE category III, Table 15-3, page 384 of the AMA Guides. (Ex. JE1, p. 8) She found in her examination that claimant's seated leg raise test was positive on the right side. (Ex. JE1, p. 7) Dr. Sassman assigned restrictions, which she noted "may change with further treatment," which included occasionally: lifting floor to waist – 30 pounds; waist to shoulder – 40 pounds; above shoulder height – 30 pounds; and, pushing/pulling at waist height – 50 pounds. Also, sitting and standing should be limited to an occasional basis with frequent changes in position. (Ex. JE1, p. 8)

On April 21, 2017, claimant returned to Unity Point Health complaining primarily of "pain in his right leg and into his foot. He has had the pain for about 2 days." (Ex. JE3, p. 1) He was diagnosed with tendonitis, pain in the right lower extremity. (Id.) Claimant reported that "he had been working out more than usual and then started to have pain in his lower leg," and had been wearing sandals a lot lately. (Ex. JE3, p. 4) He was instructed to use ice, rest and wear good supportive shoes and do gentle stretching exercises. (Ex. JE3, p. 5)

Current Condition

Claimant testified at hearing that he continues to have pain in his back, and pain and numbness in his leg, down to his foot. (Tr. p. 38) Claimant stated that he is not able to run, has difficulty going up and down stairs, and cannot work in the same way that he did before the injury. (Tr. pp. 39-40) He stated in his deposition that he does stretching exercises a few times a month. (Ex. E, p. 29)

Permanent Partial Disability

On June 29, 2015, Dr. Allen released claimant to return to full work duty without restrictions. (Ex. JE2, p. 7) On July 20, 2015, Dr. Allen confirmed that claimant had returned to full work duty. She stated that her exam of claimant and the MRI results were benign. She assigned zero (0) percent permanent impairment. (Ex. JE2, p. 3) At that time, claimant complained of ongoing symptoms including back pain, but did not report radicular symptoms. Claimant did not return to Dr. Allen after radicular symptoms were reported and she has offered no opinion on the causal connection between the work injury and the radicular symptoms.

On May 23, 2016, Dr. Sassman, evaluated claimant and issued a report dated August 2, 2016, and stated that if MMI was assumed, she would place claimant in DRE category III of the AMA Guides based on "signs of radiculopathy on examination" and assigned a permanent impairment rating of ten percent. (Ex. JE1, p. 8) When Dr. Sassman provided her opinion, she had reviewed claimant's medical history and she was aware that claimant had been employed doing manual labor, including lifting, with a different employer and yet found claimant's condition, including radicular symptoms, to be related to the April 7, 2015 work injury. (Ex. JE1, pp. 5, 7)

Although claimant's complaints of radicular symptoms seem to have arisen about a year after the work injury and about seven months after he was no longer working for the defendant employer and sometime after he had commenced physical labor employment with a different employer, based on the expert opinions provided, I am limited to only Dr. Sassman's evaluation concerning causation and permanency which include consideration of claimant's complaints of radicular symptoms. I cannot ignore her unrebutted opinion. I therefore rely on the opinion of Dr. Sassman and find that claimant has sustained a functional ten percent permanent impairment to the whole person.

I note that Dr. Sassman also provided permanent restrictions, however, claimant continued to work in physical labor positions without restrictions after his injury from June 29, 2015 onward and I find that claimant's actual work in these jobs is the best evidence of his physical capabilities. Although he indicated some difficulty in these jobs, he was able to perform them. I also noted that claimant had returned to work with the defendant employer after the injury and he worked without restrictions prior to his termination. Although claimant testified that his absences that led to his termination

were due to his work injury, the evidence presented in this regard is lacking and unconvincing. Claimant's overall job history, both before and after the work injury, is not consistent and indicates that claimant changes jobs frequently.

I find that claimant was earning about $13.00 per hour at the time of his work injury. (Ex. 8; Ex. B, p. 1) Claimant earned $14.00 per hour working at Iowa Bridge and Culvert, his most recent position. (Tr. p. 58)

I find that claimant remains motivated to obtain and remain employed as evidenced by the jobs that he has obtained post-injury. However, as stated above, claimant's tendency before and after the work injury is to move with some frequency between jobs.

Claimant testified that he has had pain since the date of the injury.

Based on claimant's functional impairment, continued symptoms, education, qualifications, age, work experience before and after the injury, his physical capabilities, and considering his motivation to remain employed along with all other appropriate factors for consideration of industrial disability, I find that claimant has sustained 15 percent industrial disability.

Temporary Disability

On the Hearing Report, claimant asserted a claim for temporary benefits from April 7, 2015 through April 10, 2016. (Hearing Report, p. 1) In his brief, claimant asserts that he is "likely owed temporary partial disability between his date of injury on April 7, 2015 and his date of termination in September, 2015." (Cl. Post-Hearing Brief, p. 9) In support thereof, claimant points to his answer to interrogatory in which he estimates that he missed between 60 and 80 hours from work due to this injury. (Ex. 1, p. 10) There are no payroll records or time cards or any correlation to any specific medical appointments contained in the record in support of claimant's assertion of lost time. Claimant was placed on work restrictions by the authorized medical provider, Dr. Allen on April 7, 2015 and was released to return to regular duty on June 29, 2015. I find that claimant's generalized statement is insufficient to prove beyond a preponderance of the evidence that claimant is owed temporary partial disability for the period of April 7, 2015 through June 29, 2015 (the date claimant was released to return to work full duty).

From the period of June 30, 2015 through April 10, 2016 (the end date asserted by claimant for temporary benefits) I find that claimant had no work restrictions assigned by any physician. I find that claimant was therefore medically capable of returning to substantially similar employment after being released to return to work full duty on June 29, 2015. I find that claimant has failed to carry his burden of proof regarding entitlement to temporary benefits from June 30, 2015 through April 10, 2016.

Rate

Claimant asserts that he is entitled to claim his two children as dependents. Defendants disagree, relying primarily on claimant's 2015 tax return in which he did not claim the girls as dependents. (Ex. C, pp. 1, 4, & 8)

Claimant provided unrebutted testimony that he resides with his girlfriend, Laura Romero, and their two minor children, ages two and five and significantly provides for their needs. Claimant interacts with his two daughters daily. He is involved in cooking for them, preparing bottles, bathing them, washing and brushing their hair, and generally caring for them. (Tr. pp. 12, 13, 14 & 40)

The date of injury in this file is April 7, 2015. Claimant previously lived in Michigan and lived apart from Laura Romero and financially contributed less to his daughters during that time. (Tr. pp. 44) However, claimant testified that he was back in Iowa since about June 11, 2012, when he started working for the defendant employer. (Tr. p. 50) The evidence favors a finding that claimant resided with Ms. Moreno and significantly contributed to his daughters support during 2015 as he testified, and I so find.

Claimant and defendant agree on the other matters affecting rate, including an average weekly wage of $570.68. (Ex. 8; Ex. B) I therefore accept claimant's rate calculation found at Exhibit 8, which applies the exemption status of single, with three dependents to the stipulated average weekly wage, producing a rate of $377.44.

Medical Benefits

Claimant asserts a claim for medical benefits which are included at Exhibit 3, page 17. (Hearing Report, p. 2) In his brief, claimant argues for payment of a medical bill in the amount of $295.00 concerning a date of service of April 10, 2016. (Cl. Post-Hearing Brief, p. 11) This is the emergency department visit discussed above in which claimant reported back pain with radicular symptoms. This record was reviewed and considered by Dr. Sassman when she opined that the radicular symptoms were related to the work injury. (Ex. JE1, pp. 5, 7) This is also the visit that Dr. Sassman relied upon to establish MMI. (Ex. JE1, p. 8) In addition, the parties use this date to stipulate to the commencement date of permanent partial disability benefits. (Hearing Report, p. 1; Tr. p. 6) I find that based on the opinion of Dr. Sassman this medical visit and subsequent bill are related to the work injury.

I find that there was no authorized provider available to claimant at the time that this bill was incurred. Defendants agree that there was no authorized treating medical provider after claimant was released from care by Dr. Allen on July 20, 2015. (Def. Post-Hearing Brief, p. 23) It was recommended that claimant seek an epidural steroid injection, which was later seconded by Dr. Sassman. Claimant states that he wants to

obtain the injection. I find that the appointment was helpful to claimant concerning the direction of recommended care.

In his post-hearing brief, claimant does not seek additional medical benefits beyond the amount of $295.00 related to the April 10, 2016 visit and no additional medical benefits are awarded concerning Exhibit 3, p. 17.

IME Reimbursement

Claimant seeks reimbursement of her IME with Dr. Sassman in the amount of $3,300.55, which includes $80.55 for the interpreter expenses. On July 20, 2015, Dr. Allen, the authorized treating physician, opined that claimant had zero percent (0%) permanent impairment and claimant. Claimant thereafter was entitled to an IME. I find the expense of the IME to be reasonable. In addition, although claimant has some ability to speak English, his English is limited and it is appropriate to involve an interpreter when dealing with complicated and important matters such as a medical examination.

CONCLUSIONS OF LAW

The first disputed issue in this case is the extent of industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 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 workers' qualifications intellectually, emotionally and physically; the worker's earning 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae

which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

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 (Iowa 1995).

As stated above and for the reasons there given, I have determined that claimant has sustained fifteen (15) percent industrial disability. Fifteen percent industrial disability equals seventy-five (75) weeks.

The next issue is temporary benefits.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to

temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Claimant seeks temporary partial disability from April 7, 2015 through September 30, 2015 and healing period benefits from October 1, 2015 through April 10, 2016. (Cl. Post-Hearing Brief, pp. 9-10)

Claimant's work restrictions during the period in question were only in place from April 7, 2015 through June 29, 2015 as discussed above. From June 30, 2015 through April 10, 2016, claimant was not under any work restrictions by any physician. I therefore conclude that any claim for temporary partial disability would only be potentially viable from April 7, 2015 through June 29, 2015. Claimant's claim for temporary partial disability benefits is not supported by anything other than his general statement that he missed about 60 to 80 hours between April 7, 2015 and September 30, 2015. This period goes beyond June 29, 2015 and is not sufficiently detailed or supported with information concerning the alleged days or hours missed or the hourly fee applicable during that time from which such benefits may be calculated. I conclude that claimant failed to carry his burden of proof that he is entitled to any temporary partial disability.

Likewise, I conclude that claimant failed to carry his burden of proof that he is entitled to any healing period benefits from June 29, 2015 through April 10, 2016, because claimant was not under any work restrictions, was medically capable of returning to substantially similar employment, and in fact returned to regular full-time, full-duty work with the defendant employer and he also worked for a substantial period of time during the period in question for other employers.

The next issue is rate.

Claimant asserts that he is entitled to claim his two children as dependents. Defendants disagree and rely primarily on claimant's 2015 tax return in which he did not claim the girls as dependents. Claimant provided unrebutted testimony that he resides with his daughters and their mother and significantly provides for their support and did so in 2015.

Normally, the exemptions used to determine the rate of compensation are the same as the person's exemptions for income tax. The exemptions actually claimed on the income tax return are inferred to be correct in the absence of evidence to the contrary. Webber v. West Side Transport, File No. 1278549, (App. December 20, 2002). The agency has long recognized that the actual exemptions properly claimed on the income tax return controls this issue. DeRaad v. Fred's Plumbing and Heating, File No. 1134532 (App. January 16, 2002), Rhoades v. Torgerson Construction Co., File No.

1012085 (App. January 31, 1995), Keeling v. Cedar Rapids Community Schools, File No. 891809 (App. February 26, 1993).

However, this is a rebuttable presumption. The number of exemptions used to determine rate is the number the worker could claim on their tax return, not necessarily the number they did. Iowa Code section 85.61(6)(a)(b).

In this case, claimant has shown that his two daughters are dependent upon him for support. Therefore, considering the calendar year during which the injury occurred, and claimant's unrebutted testimony of his regular physical care and significant financial support of his two daughters, with whom he resides, I find that claimant is entitled to claim his daughters as dependents for the purpose of calculating his applicable workers' compensation rate. He is therefore entitled to an exemption status of single with three (3) dependents. I therefore conclude that claimant has proposed the correct rate of $377.44. (Ex. 8)

The next issue is medical reimbursement.

Claimant asserts a claim for medical benefits of $295.00 relating to a date of service of April 10, 2016 at the Unity Point Health Emergency Department.

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).

I conclude that defendant no longer provided authorized care after claimant was released from care by Dr. Allen on July 20, 2015, and that they have denied liability related to radicular symptoms in this case. It was the radicular symptoms that led to the emergency department visit on April 10, 2016 by claimant and the recommended treatment of an epidural steroid injection. I have found based on Dr. Sassman's unrebutted opinion that the radicular aspect of claimant's symptoms are related to the work injury. I therefore conclude that the medical bill of $295.00 relating to a date of service of April 10, 2016 is also related to the work injury.

I have found above that it was recommended that claimant seek an epidural steroid injection, which was later seconded by Dr. Sassman. Claimant stated that he wants to obtain the injection and I found that the appointment was helpful to claimant concerning the direction of recommended care.

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995)

The Court in Bell Bros. stated:

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

In the case at bar, there was no authorized medical care available at the time of this appointment, and I conclude that the evaluation, treatment and recommendation for further treatment was more favorable than the lack of treatment offered by defendants.

Defendant is obligated to pay this medical expense of $295.00.

The next issue is IME reimbursement.

In this case, defendant does not object to claimant's timing or right to obtain an IME. Rather their argument is that in addition to the cost of the exam, claimant seeks reimbursement for the cost of the report and the cost of the interpreter. In addition, defendants argue that the cost of the exam is not reasonable.

Defendants rely improperly on Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) The question presented in this case was whether it was appropriate to include the cost of a physical examination under 876 IAC 4.33, "outside the process set forth in Iowa Code section 85.39 as 'costs incurred in the hearing.'" Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 at 844. This is not the question presented in the case at bar. Rather, claimant's request herein is within the process contained in Iowa Code section 85.39. However, I note that even if I only considered the medical exam as reimbursable under Iowa Code section 85.39 and the report as a cost under 876 IAC 4.33, I would grant both in this case as a reasonable IME exam and a reasonable cost for the report. However, it is unnecessary to step outside Iowa Code section 85.39 in the case at bar for claimant to

obtain reimbursement for both the exam and the report. In addition given claimant's difficulty with the English language, I conclude that the use of the interpreter was necessary to provide accuracy in the communication between doctor and patient to carry out a fully informed evaluation by the physician.

I conclude that claimant is entitled to reimbursement under Iowa Code section 85.39 of the amount claimed in Exhibit 5, pp. 26 through 28, of $3,220.00 for Dr. Sassman's IME exam and report and as well as the cost of $80.55 for the interpreter.

The final issue is a specific taxation of costs.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs allowable under commissioner rule are as follows:

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.
>
> 876 IAC 4.33.

Iowa Code section 622.69, provides for witness fees of ten dollars for each full days attendance, five dollars for a half days attendance, plus mileage for witnesses at trial.

Iowa Code Section 622.72, states that expert witnesses called to testify at trial shall receive additional compensation in an amount to be fixed by the court, not to exceed $150.00.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was generally successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter in the amount of $400.66, which is the amount claimed ($3,701.21) less the listed expense for the expert witness fee ($3,300.55), which is addressed above in the IME section.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant industrial disability benefits of seventy-five (75) weeks, beginning on the stipulated commencement date of April 11, 2016 until all benefits are paid in full.

Defendants shall be entitled to a credit for weekly benefits paid to date, if any.

All weekly benefits shall be paid at the rate of three hundred seventy-seven and 44/100 dollars ($377.44) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall pay, reimburse, and/or otherwise satisfy claimant the medical expenses set forth in Exhibit 3, limited to the sum of two hundred ninety-five and 00/100 dollars ($295.00).

Defendants shall pay, reimburse and/or otherwise satisfy claimant for the cost of the IME and translator fee in the total amount of three thousand three hundred and 55/100 dollars ($3,300.55).

Defendants 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 15th day of December, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/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.