BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDALL SEYMOUR,

Claimant,

vs.

SHERWIN WILLIAMS,

Employer,

and

SAFETY NATIONAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5043307

APPEAL

DECISION

Head Note No.: 1804; 4000.2

Defendants, Sherwin Williams and its insurer, Safety National Ins. Co., appeal from an arbitration decision filed on June 24, 2014, as modified in a ruling filed on July 15, 2014. Responding to the appeal is claimant, Randall Seymour.

In the arbitration decision, claimant was awarded permanent total disability and medical benefits, along with penalty benefits of 50 percent of unpaid and accrued weekly benefits at the time of the hearing for an unreasonable denial of this claim.

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal.

Those portions of the proposed agency decision pertaining to issues not raised on appeal or cross appeal are adopted as a part of this appeal decision.

ISSUES ON APPEAL

I. The extent of claimant's entitlement, if any, to permanent, industrial disability benefits; and,

II. The extent of claimant's entitlement to penalty benefits, if any, for an unreasonable denial of weekly benefits pursuant to Iowa Code section 86.13.

At hearing the issues of whether claimant suffered an injury arising out of and in the course of employment and claimant's entitlement to medical benefits were disputed and were addressed in the arbitration decision. The defendants in their appeal brief did not raise these issues on appeal.

FINDINGS OF FACT

Claimant, Randall Seymour, was 53 years old at the time of hearing. He is married. He did not have any children living at home at the time of the injury. He resides in Des Moines, Iowa, and has for 35 years. He graduated from high school in 1979. He states he completed an apprenticeship for house painting after high school and obtained journeyman status while working for a local hospital. However, this was not through the painter's union. (Transcript, pp. 7-9)

At the time of the work injury in this case, claimant was employed part-time by two employers: namely, UPS and Sherwin Williams. In this proceeding he is only claiming disability from a back injury on January 27, 2012, while employed by Sherwin Williams. Claimant admits to prior low back problems, but he asserts the low back injury permanently aggravated his prior condition.

Claimant had surgery on his left shoulder in 1986, surgery in 1997 for a right ankle fracture, and surgery for a torn cartilage in his right knee in 2004. (Ex. O, p. 3) There is nothing in the record showing claimant suffered any permanent disability following these surgeries.

Claimant had some emotional problems along with substance abuse in 1997 and lost his first period of employment with UPS at that time. Claimant was homeless for two years, but then ended his drug abuse. He returned to work, became involved in his church, and turned his life around. (Ex. B, p. 1 & Ex. O, p.2)

Claimant had a significant history of prior neck, mid-back, low back and left hip problems. His left hip problem stems from a fall from a ladder in 2001. He received a total hip replacement in October 2012, for his chronic hip pain during his treatment of the work injury in this case. Given claimant's petition and briefs filed in this case, he is only seeking workers' compensation benefits in this preceding for a low back injury. The treating physician for the hip problems released claimant to return to work from the standpoint of the hip on January 28, 2013, following his hip surgery. (Ex. G, p. 5) This return to work was not conditioned on any activity restrictions.

Claimant received medical treatment for low back complaints three times before the work injury in this case. Claimant states his back "went out" in 1987 after moving a desk at Iowa Methodist Hospital. He states his back similarly went out in 1999 when moving shingles out of the back of a truck. In 2007, he was given a temporary restriction against lifting over 20 pounds after moving a package greater than 150 pounds at UPS. (Tr. p. 45) There is no evidence in this case that shows he suffered any permanent activity restrictions from these injuries. He generally had on-and-off

back pain prior to the work injury, but this pain did not prevent him from performing his work and he had no permanent work restrictions at the time of the back injury on January 27, 2012. (Ex. O, p. 3)

Claimant had two prior workers' compensation settlements. One with UPS for a hand injury in February 2012, about the same time he alleges he hurt his back at Sherwin Williams. He also settled a prior injury claim at this time against the Second Injury Fund of Iowa for an ankle injury. The medical records attached to those settlements in this record do not show that these injuries resulted in any permanent work restrictions. (Ex. L & M)

The record shows that claimant received extensive chiropractic adjustments for neck, mid-back, left hip and low back complaints, both before and after his alleged injury in this case beginning in 2009. Prior to the work injury in this case, 15 out of a total of 64 chiropractic visits involved treatment for low back complaints in addition to his other complaints. However, the vast majority of these prior office visits involved treatment for complaints of neck, mid-back and left hip pain. (Ex. C, pp. 11-33) The back pain complaints were intermittent and typically did not last more than two visits. (Id.)

Claimant returned to UPS in October 2000. His job was as a freeloader, which meant he loaded the brown package cars. For four years he worked in the irregular department, which required him to lift from 75 to 150 pounds. He also worked as a sorter, where he would stand at a conveyor belt and pull packages and sort them to go to different parts of the package trucks. The packages were generally 70 pounds or less. He also did overhead work in that he had to put packages up onto the top shelves in the trucks, as well as lifting from floor to waist five to six times per day in the irregular job. His job at UPS was also part-time, and he worked 20 to 22 hours per week for $19.01 per hour, plus full benefits. He stated losing the UPS job would be more financially adverse for him, as that was his main job from which he planned to retire. (Tr. pp. 15-19)

While still employed by UPS, claimant began working for defendant employer, Sherwin Williams, in August 2006. He was hired as a delivery driver and warehouse worker. His duties included pulling orders, mixing paint, and gathering supplies for delivery. He was required to lift one gallon to five gallon buckets of paint, one gallon cans of body putty, and sometimes cases of four cans of paint. The weights he would be required to lift would vary from 50 to 75 pounds. On occasion he would have to lift 95 pounds. In a typical work day, he would have to lift these weights more or less continuously. He estimates that about 70 percent of the time he was lifting the heavier weights. His work day was six hours. He would have to carry these weights about 150 feet across the warehouse, often up stairs. He also had to lift cans and put them on a shelf by reaching overhead. About 30 percent of his work was lifting floor to waist. He was earning $10.15 per hour when he left there in 2012. He was paid bi-weekly. He was considered a part-time employee, working about 30 hours per week. He received paid vacation and holidays, but no other benefits. (Tr. pp. 9-14)

Claimant's dual employment ended at the time of the back injury on January 27, 2012. He has not returned to work in any capacity since the injury. On that date, while working at Sherwin Williams, claimant raised an overhead door to load a truck. He bent over to pick up an empty pallet, when he felt a "corkscrew" or "snake" feeling going up his back. When he stood up straight, he felt a sensation like an electric shock in both legs, and he was sweating profusely. It felt like something was inside his shirt at first, but the pain was in his legs. He states he immediately reported the incident to his supervisor, Mark Landers, and asked if he could go to an emergency room at a local hospital "on his dollar." Claimant said that the supervisor told him he could go to the emergency room at his own expense, but was told he had to go to Concentra for any care. Claimant instead returned to work and he testified he was fine the rest of the day. Once or twice per week he had to help a co-worker move the dock plate into position, which weighed 180 pounds. Claimant returned to work and with help, was able to move the dock plate. (Tr. pp. 20-21)

Supervisor Landers essentially confirmed claimant's testimony during his own testimony concerning the report of the injury and admitted that claimant told him he thought he was hurt at work, although he states that he "specifically" was unaware that claimant would be pursuing a workers' compensation claim until receipt of a letter from Iowa Workforce Development. Neither this letter, nor its date is contained in the record. Possibly, Landers was referring to the original notice by certified mail. (Tr. p. 66) The evidence contains a hand written notation in Landers' notes that claimant thought he sustained a re-injury of his injury from a fall 11 years earlier when he tried to lift a pallet and injured his left hip. (Ex. K, p. 2)

Claimant's statements as to when his back or leg pain developed after the incident is somewhat confusing. He testified after the incident occurred on Friday, January 27, 2012, he had no back pain, but had leg pain. (Tr. p. 22) Claimant testified he had no back pain initially after the January 27, 2012, incident. (Tr. p. 50) As stated above, claimant received chiropractic care for low back and neck/upper back pain on the same day as the injury, January 27, 2012. The chiropractic notation indicates a complaint of "lower back pain if bend over and lifting." (Ex. C, p. 34) Claimant testified that symptoms did not start until two days later on Sunday while attending services at church (Tr. p. 50)

Supervisor Landers' notes indicate that on Monday, January 30, 2012, he was told about claimant's back pain and that claimant was going to see his chiropractor. (Ex. K, p. 2) On Tuesday, January 31, 2012, claimant returned to his chiropractor complaining of low back pain after lifting and feeling a "pop" with "pain down leg" which has "gotten worse." (Ex. C, p. 34) Landers was aware claimant sought medical care from a local hospital emergency room for left leg and hip pain. Claimant reported to ER physicians that his chronic hip pain was from a fall from a ladder in 2001. (Ex. D, p. 2) Claimant reported to the ER doctors that his pain started while bending over Friday. (Id.) He was given an injection for pain and was discharged in the early morning of February 1, 2012. Claimant testified that the ER physicians thought he suffered a herniated disc. (Tr. p. 23)

After the ER visit, claimant did not return to work although the ER doctor stated he was capable of returning to work after three days. (Ex. D, p. 5) Claimant sought medical care from his family doctor, who ordered an MRI. Claimant was later informed by the family doctor's nurse that the MRI indicated a herniated disc. Claimant testified he then delivered a work release to supervisor Landers and told him of the herniated disc. Claimant told Landers he didn't think it was fair for Sherwin to pay for that injury if it was his hip. (Tr. p. 24).

The family doctor referred claimant to a pain specialist, Dana Simon, M.D. Claimant testified that he then discussed the MRI with Dr. Simon. Claimant testified that his statement to his supervisor that Sherwin should not have to pay for his treatment was based on a belief that his left leg and left-sided back pain was due his prior hip injury. Claimant testified that after Dr. Simon told him the problem was in the low back and not the hip and that the back condition required surgery, claimant then contacted supervisor Landers and told him that he was wrong about the cause of his pain and that it was due to a back problem and not a hip problem. Claimant said he then asked Landers to go to a company doctor and Landers told him that too much time had gone by before he requested treatment and company policy requires reporting within five to seven days and he was on his own. Claimant said that he then inquired about using FMLA leave. (Tr. pp. 25-27) Landers testified that claimant asked him about taking FMLA leave, but he told claimant he would have to check with HR about the paperwork and procedures. (Tr. p. 65) The supervisor did not discuss what precipitated claimant's FMLA inquiry.

The record does not show any written request for treatment or a written claim for benefits by claimant or his attorney with Sherwin Williams prior to litigation. It is unclear when clamant orally requested care. Landers' notes do not discuss any company policy on workers' compensation claims. (Ex. K) Landers testified that at the time claimant requested FMLA, he had to check with HR about company policies for sending people to medical centers. He stated that after learning of the policy, he informed claimant about the policy. (Tr. p. 65) Landers did not discuss the specific policy, but he attended the hearing and did not challenge claimant's testimony that the company policy was to deny medical care for work injuries if not reported within five to seven days.

Claimant had only two visits with Dr. Simon. The doctor's report of the first visit on February 6, 2012, indicates he reviewed the MRI results and claimant was given low back injections. At the second visit on February 16, 2012, Dr. Simon referred claimant to Robert Herschl, M.D, a neurosurgeon, for treatment of a herniated disc at L4-5 and L5-S1 vertebral levels in the lower spine. Dr. Herschl then began treating claimant which ultimately led to surgery on February 17, 2012, to fuse the L4-5 and L5-S1 levels. (Ex. D, p. 10)

On July 30, 2012, claimant was terminated from Sherwin Williams for failure to return to work after 12 weeks of FMLA leave. (Ex. K, p. 5)

Dr. Herschl and his staff continued to follow claimant's progress after the fusion surgery for persistent back pain with some leg symptoms. Claimant was provided a regimen of physical therapy and strong pain medications. On January 29, 2013, Dr. Herschl released claimant from care and returned him to work with a 20-pound lifting restriction. The office notes of that visit indicate continued moderate low back pain, but that claimant was to progress with daily physical therapy and core strengthening exercises. (Ex. F, p. 17)

At the request of his attorney, claimant was evaluated by Daniel McGuire, M.D., an orthopedist. In his report dated May 10, 2013, Dr. McGuire opines that the work incident in January, 2012, directly resulted in the disc herniation necessitating surgery. This is based on a history of minimal back complaints in 2010 and 2011, but documented spondylolisthesis at L5-S1. Dr. McGuire found Dr. Herschl's notes to indicate a "little bit more problem" with back aches and pains, and so it may have been logical to do the spinal fusion. Dr. McGuire found no need for further surgery. The doctor found a 39 percent permanent partial impairment of the body as a whole related to the work incident at Sherwin Williams. Dr. McGuire believed that there are "many, many, many, many restrictions" and recommended a functional capacity evaluation (FCE) to determine claimant's physical limitations. Dr. McGuire also found that claimant's hip problems may also have been aggravated by his work activities. (Ex. I, p. 1)

After a follow-up visit in June 2013, Dr. McGuire submitted a second report in which he indicated claimant could not work an 8-hour day and can only stand about one hour and then must change positions because of leg and back pain. He can sit maybe for a while, but then has to get up and move around. Dr. McGuire added that there is almost no chance of returning to either of his jobs at UPS or Sherwin Williams. Dr. McGuire stated, "he had the acute problem of the disk herniation and then had longstanding issues with his spondylolisthesis, and I am sure that is probably what precipitated the spinal fusion." He continued to recommend an FCE. (Ex. I, pp. 3-4)

At the request of defendants, claimant was evaluated by Robert Rondinelli, M.D., a board certified specialist in physical medicine and rehabilitation. Dr. Rondinelli submitted a written report dated September 19, 2013. Although he was provided 3 volumes of medical records, he apparently only reviewed the summary prepared by defense counsel. Dr. Rondinelli noted prior back problems for at least 15 years and 2-3 back injuries, but no prior back surgery. He noted that claimant's back pain problems were currently being addressed by a primary care physician, who was prescribing, 800 mg up to 4 times daily, 1000 mgs of Tylenol 3-4 times daily; Lyrica 150 mg twice a day; and Hydrocondone on a p.r.n. basis. Claimant reported to the doctor current symptoms of continuous sharp, burning pain, and aching and rated the severity at 8/10 in center of low back radiating into left buttocks, hip and thigh. Dr. Rondinelli noted provocation after prolonged walking. He noted that claimant was using a TENS unit to minimize his leg spasms. He stated as follows regarding causation:

> In terms of causality between his degenerative disk disease, lumbar laminectomy and fusion, and work-related activity for 01/27/12, there would appear to be probable cause as follows: claimant was working full-time with no restrictions prior to his event and subsequent to same, he developed recurrent and progressive complaints of low back pain and associated radicular complaints in his left lower extremity. His surgical laminectomy and fusion was helpful in decentralizing his pain. He has had subsequent inability to recapture his preinjury baseline with respect to work activity and has been out of work for an extended period of time as a result of his injury. (Ex. J, p. 4)

Dr. Rondinelli went on to opine that claimant sustained a 23 percent permanent partial impairment of the body as a whole pursuant to the AMA Guides, fifth edition, and will require his current medications and management of those medications by his family doctor indefinitely. Dr. Rondinelli also recommended an FCE to determine work restrictions. He noted that his opinions were preliminary and needed to be validated against a more thorough review of his medical records which time did not permit him to complete at the time of his report. (Ex. J pp. 1-5) There are no further reports from Dr. Rondinelli.

In response to written inquires by claimant's attorney, Dr. Herschl opined on May 31, 2013, that claimant's current diagnosis is lumbar spine disease at L4-5 and L5-S1 and status post L4-S1 decompression and fusion which he provided. He agreed that the Sherwin Williams incident accelerated, aggravated, lit-up or otherwise made claimant's underlying condition symptomatic. He added that claimant had reached maximum medical improvement, but stated he does not do impairment ratings. (Ex. P, pp. 1-2)

On January 22, 2014, claimant underwent an FCE. According to the evaluator, Todd Schemper, PT, DPT, claimant gave maximum effort and demonstrated consistent performance. Consequently, Schemper concluded the testing was valid. Schemper reported that claimant can only occasionally squat, crouch, lift, carry, push, forward bend, climb stairs or ladders, kneel and crawl. He can only rarely lift and carry 20-35 pounds, occasionally 15-20 pounds and frequently 10-15 pounds. However, those limitations were for a full 8-hour work day and a 40-hour work week. Schemper stated that claimant's capabilities are in the light physical demand category, lifting up to 20 pounds on an occasional basis. It is noteworthy that this evaluator found no limitations on standing or walking which was found by both Dr. McGuire and Dr. Rondinelli or an inability to work 8 hours a day as opined by Dr. McGuire. The record does not show that Dr. McGuire or Dr. Rondinelli were provided the results of this FCE and or asked to respond.

Claimant testified as to his current condition. He stated he cannot stand for more than 1 hour, especially on a concrete floor, and occasionally has problems sitting, depending on the chair. He has trouble sleeping. He stated he is okay lifting 10-15 pounds, but when he gets up to 40 or 50 pounds, he has no strength. He stated he

must be careful bending. (Tr. pp. 28-32, 34) Claimant testified that he could not return to work at Sherwin Williams or UPS due to the physical requirement of the jobs. (Tr. pp. 31-32) He stated he cannot return to work as a self-employed painter which he had done for six years prior to his employment at Sherwin Williams due to inability to stoop, crawl and climb ladders for a sufficient amount of time and an inability to perform the required lifting of paint containers and buckets. (Tr. pp. 32-33) He stated he cannot return to a previous job doing construction cleanup at Paul's construction, although he could if he was a foreman who was not required to perform the physical work. He was a foreman at the end of that job for a period of time, but was required to fill in as needed. He also would not be able to go back to a prior job of roofing or dry walling due to the lifting and climbing requirements. (Tr. pp. 35-36)

Claimant also described problems performing physical activities of daily living. He stated he cannot golf anymore. He stated he cannot hunt as before. He stated he can only mow his lawn for about 30 minutes and the work must be completed by either his wife or stepson. He stated he cannot remove snow from his driveway. (Ex. pp. 36-38)

Claimant stated he has applied for several jobs, including stocking jobs at Home Depot and Dahl's grocery stores. He also applied to Hope Ministries for a part-time job in their thrift shop. However, he has had only one interview and when asked why he left UPS, he had to admit to the work injury and he was not called back. (Tr. pp. 38-39) He stated he and his wife have exhausted their savings and the IRA he had at UPS. He stated they are currently living on her income alone and help from food pantries at two churches. (Tr. p. 40)

At the request of his attorney, claimant's vocational status was evaluated by Carma Mitchell, M.S., a vocational expert. In her report, Ms. Mitchell stated that given the lifting restrictions, claimant would not be able to return to his past jobs as a material handler, warehouse driver, construction worker/laborer, and self-employed painter. Ms. Mitchell opined that if claimant is restricted to a full range of light-duty work, claimant would have suffered a 30 percent loss of labor market access. If he is also restricted in sitting, standing and walking, the loss would 64 percent. If he is restricted to only sedentary work, the loss of access is 89 percent. Ms. Mitchell provided examples of light and sedentary jobs consisting of parking lot attendant, cashier II, cafeteria attendant, housekeeper, cleaner, sales attendant, mail clerk, office helper, document preparer and surveillance systems, monitor. She states that entry level wages for these jobs is $8.53 per hour. Claimant was earning $1,262.00 per month at Sherwin Williams and $1,600.00 per month at UPS. Ms. Mitchell stated that if claimant obtained any of the jobs she suggested, his loss of earning would be 52 percent. However, Mitchell did not provide the actually availability of such work to claimant in his area of residence which would not require claimant to exceed his limitations. Ms. Mitchell adds that given the views of Dr. McGuire, it is uncertain if claimant can sustain full-time employment. (Ex. O, p. 5)

Defendants assert on appeal that there is no evidence showing that the January 27, 2012, injury at Sherwin Williams was a cause of lost earning capacity. Defendants in their appeal arguments apparently concede claimant has lifting restrictions and is limited in his work activity according to the FCE. Defendants assert that Ms. Mitchell's assumptions that claimant is limited to sedentary jobs and her uncertainly whether claimant could work full time are inconsistent with the valid FCE which only limits claimant to light work. They point out that Ms. Mitchell identified a number of potential jobs and point out that claimant has not applied for any of those jobs. They assert clamant has the physical ability and transferable skills to remain employed, especially at Sherwin Williams, which claimant agreed was less demanding than his UPS jobs.

None of these arguments are convincing. Defendants overlook that none of the physicians in this case adopted or agreed with the FCE results. Absent such, the FCE is simply an opinion of a physical therapist which does not stand up to the views of medical specialists if there is any inconsistency between the FCE results and their opinions. It was correct to question claimant's ability to work full-time given the views of Dr. McGuire. I do not find inconsistent the results of the FCE regarding only occasionally squat, crouch, lift, carry, push, forward bend, climb stairs or ladders, kneel and crawl or that he can only rarely lift and carry 20-35 pounds, occasionally 15-20 pounds and frequently 10-15 pounds. I do not find inconsistent the conclusion that claimant is limited to the light physical demand level activity. However, the FCE results showing full ability to sit, stand and walk are inconsistent with the views of Drs. McGuire and Rondinelli and I find that claimant is unable to sit, stand or walk for prolonged periods of time. Such limitations are consistent with claimant's testimony which the presiding deputy apparently found credible.

Also, defendants overlook the portion of Dr. Rondinelli's report showing claimant's current reliance upon large doses of Ibuprofen, Tylenol and most notably his use of a narcotic, hydrocodone, when required. Such medication use shows that claimant suffers from significant chronic pain. His reliance upon such medications restricts his ability to return to work, part-time or full time.

Given claimant's uncontroverted testimony as to the physical requirements of his jobs at UPS and Sherwin Williams and the physical requirements of all of his past jobs, along with the views of the doctors in this case, and those results of the FCE which are not inconsistent with expert medical opinion, claimant is unable to return to the work for which he is best suited given his work history, his education and training. Given his inability to sit, stand and walk for prolonged periods of time, even sedentary work would be difficult for him to perform successfully.

Therefore, I agree with the deputy commissioner's determination that the work injury at Sherwin Williams on January 27, 2012, has caused a total loss of earning capacity.

In defendants' appeal arguments on the penalty issue, they rely heavily on claimant's record of past low back problems to show a reasonable issue as to the

validity of the medical opinions in this case. However, at the time of his work injury, claimant had not received medical treatment for his low back since an injury in 2007. Again, he had no work restrictions from any medical condition at the time of his injury in this case.

Defendants also point to claimant's chiropractic care for low back complaints since 2009, which also continued after the injury. As discussed above, claimant received 15 chiropractic treatments for low back pain between 2009 and January 27, 2012, the date of claimant's injury at Sherwin Williams. Also, this care was intermittent and did not last more than two visits at a time. The records for chiropractic care after January 27, 2012, show a significant increase in low back complaints. Beginning on January 28, 2012, and through July 24, 2013, the date of the last record of chiropractic care in evidence, claimant received 22 chiropractic treatments. All of these treatments show low back complaints. There is one page in the exhibit package which appears with the records of claimant's post injury chiropractic care showing two visits for only neck and upper back pain. (Ex. C, p. 38) This page appears after a previous page showing chiropractic for low back complaints in January 2013. (Ex. C, p. 37) The next page after page 38 shows care for the low back in March 2013. The visits shown on page 39 have dates of "1-13" and "1-20-12." (Ex. C, p. 39) As they are inconsistent with a continuous pattern of low back treatments after the work injury, page 39 has been likely misplaced and represents treatment prior to the work injury in 2012.

Finally, there is no evidence contained in the record of any additional notice, oral or written, to claimant as to the grounds for defendant's denial of this claim at any time in early February, 2012, other than what was told to claimant by supervisor Landers when claimant requested medical care from defendants in early February, 2012.

Defendants did not pay any weekly benefits to claimant for the January 27, 2012 work injury prior to the arbitration hearing. It is unknown what has happened since that hearing.

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).

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 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, 258 N.W.2d 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 workers' 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).

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 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).

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. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Functional capacity evaluation results that are not adopted by a physician or are inconsistent with the views of a physician have little weight. Allen v. Annett Holdings, File No. 5024900 (App. July 28, 2011)

For the reasons set forth in the Findings of Fact, the work injury of January 27, 2012, is found to be a cause of a total loss of earning capacity. Such a finding entitles claimant to permanent total disability benefits as a matter of law under Iowa Code section 85.34(3). Pursuant to that Code subsection, weekly benefits at the stipulated weekly rate in this case commence on the date of injury and continued for an indefinite period thereafter. Absence a change of condition, such benefits last a lifetime.

II. Claimant seeks penalty weekly benefits under Iowa Code section 86.13(4). This Code section provides that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b) A reasonable or probable cause or excuse must satisfy the following requirements:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier

contemporaneously relied to deny, delay payment of, or terminate benefits;

(3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c))

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996)

A denial of weekly benefits occurred in this case. Consequently, defendants have the burden to show by a preponderance of the evidence that their denial had a reasonable basis. In their appeal brief, defendants based their defense against a penalty on 1) inconsistency of claimant's initial statements as to the nature and cause of his complaints; 2) the lack of credibility of the expert medical opinions which causally relate claimant's current disability to the incident on January 27, 2012: and, 3) claimant's delay in pursuing his claim.

I agree with defendants that claimant's testimony was confusing and inconsistent initially. He did not specifically describe the work incident when he saw his chiropractor on the day of his injury. Claimant's explanation why he did not seek treatment immediately after the injury because he had no pain conflicts with other medical records. He testified that the pain did not start until he attended church on the following Sunday. At the ER visit Sunday evening, he attributed his pain to the hip injury from a fall in 2001. The MRI history six days after the January 27, 2012, incident reports the onset of pain three days earlier. When he informed his supervisor of the ER visit, he stated that Sherwin Williams should not have to pay for his treatment.

I do not find these inconsistences a reasonable basis for denial of the claim. Much of the early confusion stems from claimant's mistaken belief that the pain he was having after the January 27, 2012, incident was caused by his prior hip problems. Claimant is no medical expert and one can easily mistake left-sided radicular or leg pain from a disc herniation with prior left-sided hip problems. Once claimant was told of the new disc herniation, claimant timely requested care from Sherwin Williams. He testified that although he had no immediate low back pain, he did have left leg pain after the incident which he initially attributed to his prior left hip injury and the back pain developed while at church after doing nothing strenuous in the interim. Claimant testified that he did not seek FMLA leave until he was told by Landers his workers' compensation claim was denied. I see no direct conflict with that statement and supervisor Landers' testimony.

I agree with defendant's assertion that medical opinions based in an inaccurate history are entitled to little or no weight. I agree that Dr. McGuire's report stating he had minimal complaints before the injury largely depends on what he feels is "minimal" and he did not define that term in his reports. It is unknown whether any opining doctor in this case was aware of claimant's chiropractic history. Dr. Rondinelli reported a 15-year history in his report, but noted he had not yet reviewed all of the records and his initial views may change upon a more thorough review of the those records. Whether Dr. Rondinelli went on to review those records and whether the lack of a subsequent report from him shows such a review did not change his opinion are questions unanswered in this record. However, a reasonable investigation of this claim would have sought answers to these questions and obtained greater clarity in the views of these physicians. A reasonable investigation of claimant's medical records would have shown no medical treatment for his back since 2007, and a significant change in claimant's complaints to his chiropractor after the work injury. A reasonable investigation would have shown that clamant had no activity restrictions at the time of his work injury and now, not only does claimant have significant restrictions, he now relies on large doses of medications, including narcotics, to address chronic pain from the injury. Claimant had no such problems before the work injury. Defendants either failed to perform such a reasonable investigation as required in under Iowa Code section 86.13(4), or they failed to show they performed such an investigation.

The apparent reason for failing to investigate these problems initially was supervisor Landers' application of a Sherwin Williams' policy to deny claims if they are not pursued within 5-7 days after an injury. Apart from the issue that such a policy violates the provisions of the Iowa Workers' Compensation Act, defendants have not shown that as claimant's claim progressed in litigation that they re-evaluated their initial denial after obtaining more information. Defendants are under a continuing duty to evaluate their actions at all stages of the claim proceedings after receiving more information. To avoid penalty, defendants must show that they re-evaluated the case promptly after they had reason to know that the initial denial was unreasonable. Rice v. Wilian Holding Const. Products, Inc., File No. 5005096, (App. March 7, 2008); Simonson v. Snap-On Tools, File No. 851960 (Remand Dec., August 25, 2003).

Admittedly, claimant did not immediately pursue his workers' compensation claim and did not file a petition with this agency until a year after the injury. However, the record shows that claimant's supervisor was immediately aware of the January 27, 2012, injury and claimant's belief that the injury was caused by his work. A delay in claimant's filing a claim with this agency is not a reasonable basis to deny a claim for an injury timely reported.

However, the issue of whether clamant is entitled to permanent total disability benefits as opposed to a lesser industrial award is fairly debatable. The question then is whether a penalty of 50 percent of the weekly benefits accrued at the time of hearing is excessive. There are 107.714 weeks between the date of injury and the date of hearing on February 18, 2014. Therefore, the penalty issued in the arbitration decision was 53.857 weeks of benefits. One hundred and eight weeks of benefits is equivalent

to an industrial award for a 21.5 percent loss of earning capacity. Under the facts of this case, which show the loss of his jobs at the time of injury and a restriction to light duty work, defendants acted unreasonably in failing to pay weekly benefits equivalent to at least a 21.5 percent industrial disability. Therefore, I find the penalty award in the arbitration decision appropriate given the multiple violations of Iowa Code section 86.13(4). Also, it is noted that the agency file in this case shows that this employer previously ignored workers' compensation statutes when it was assessed a fine of $1,000.00 for failing to file a first report of injury after this agency demanded that one be filed.

ORDER

The arbitration decision filed on June 24, 2014, as modified in a ruling filed on July 15, 2014, is affirmed and the following is ordered:

Defendants shall pay unto claimant permanent total disability benefits at the rate of four hundred thirty-three and 50/100 dollars ($433.50) per week from January 29, 2013, and during the time claimant remains permanently and totally disabled.

As a penalty for an unreasonable denial of this claim pursuant to Iowa Code section 86.13, defendants shall pay an additional fifty (50) percent of weekly benefits awarded that were accrued as of the date of hearing, February 18, 2014. Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing.

Defendants shall pay the future medical expenses of claimant necessitated by the work injury.

Defendants shall pay the costs of this appeal and the costs of the arbitration proceeding pursuant to our administrative rule, 876 IAC 4.33

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

Signed and filed this 9th day of July, 2015.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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