BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERRY GALVAN, JR.,	:	
Claimant,	:	File No. 5063402
vs.	:	ARBITRATION
CITY OF DES MOINES,	:	DECISION
Employer, Self-Insured, Defendant.	:	Head Note No.: 1803

FILED
JUL 09 2019
WORKERS COMPENSATION

STATEMENT OF THE CASE

Claimant Jerry Bernie Galvan, Jr. filed a petition in arbitration seeking workers' compensation benefits from his employer, the City of Des Moines, as a result of an injury he sustained on August 3, 2015, that arose out of and in the court of his employment. The undersigned presided over an in-person hearing in Des Moines, Iowa, on April 5, 2019.

The parties in this case jointly submitted a hearing report that stipulates:

1) An employer-employee relationship existed between the City and Galvan at the time of the alleged injury.

2) Galvan sustained an injury on August 3, 2015, which arose out of and in the course of his employment with the City.

3) The stipulated injury is a cause of temporary disability during a period of recovery.

4) The stipulated injury is a cause of permanent disability.

5) If the stipulated injury is found to be the cause of permanent disability, the disability is an industrial disability.

6) At the time of the stipulated injury, Galvan was single and entitled to two exemptions.

7) The commencement date for permanent partial disability benefits, if any are awarded, is May 5, 2018.

8) Galvan's gross earnings at the time of injury were $923.23 per week.

9) Prior to hearing, the City paid Galvan 50 weeks of compensation at the rate of $571.01.

10) Prior to hearing, the City agreed to pay the cost of the independent medical examination (IME) performed by Robin Sassman, M.D.

All of the above stipulations were accepted via the order and are incorporated into this decision. The parties are bound by their stipulations. This decision will not address any factual or legal issues relating to them.

In addition to the hearing report, the record consists of:

1) Joint Exhibits 1 through 6;

2) Defendant's Exhibit A; and

3) Testimony at hearing by Galvan.

ISSUE

The parties submitted one disputed issue for resolution: What is the extent of Galvan's permanent disability?

FINDINGS OF FACT

Galvan was 47 years old at the time of hearing. (Transcript, page 6) Galvan obtained his GED one or two years after dropping out of high school. (*Id.* at 7) Galvan attended some classes in business and business law at Des Moines Area Community College and Cambridge College, but did not obtain a certificate or degree from either institution. (*Id.*)

Before the City hired Galvan, he worked as a manual laborer, framing houses, pouring concrete, forming and pouring footings for buildings and homes, and roofing. (*Id.* at 8) In approximately 2007, he joined the Laborers Union Local 177. (*Id.* at 8–9) Galvan was hired out of the union hall to perform labor for other entities. (*Id.* at 9) He performed construction-related work such as pouring concrete, operating a jackhammer, digging trenches, sweeping, climbing ladders, helping carpenters put hurricane ties on buildings, and other similar construction-related tasks. (*Id.*)

In 2012, the City hired Galvan in the Streets Department to fill the part-time job of laborer. (*Id.* at 8) He worked patching potholes and paving streets. (*Id.*) In 2015, the City hired Galvan to fill the full-time job of truck driver in the Streets Department. (*Id.* at 12)

Defendant's Exhibit A is the job description for the City's truck driver position. The City requires individuals in the position to have at least a tenth-grade education and

two years of experience in the operation of heavy trucks. (Def. Ex. A) A valid Iowa Class A commercial driver's license, allowing the operation of vehicles with airbrakes, is also required and some assignments "may require a tank endorsement." (*Id.*)

The City's truck drivers work "[u]nder general supervision, to operate heavy trucks and related equipment; to assist in loading and unloading trucks; to perform related construction and maintenance work; and to do related work as required." (*Id.*) The job description does not identify being able to lift a minimum amount of weight as an essential job function for a truck driver. (*See id.*) Nor does it identify any other physical task as essential. (*See id.*)

Galvan's work as a laborer was more strenuous than his duties as a truck driver. (*See* Trans. at 14–15) He stated that the laborer job "asks more of your body" in the form of repetitive tasks such as lifting, shoveling, digging, swinging a shovel, and lifting. (*Id.* at 14) Galvan spends the bulk of his time as a truck driver operating a truck and only on occasion will he help with laborer-like work such as lifting items. (*Id.* at 15)

On August 3, 2015, Galvan was driving a truck when its kettle popped off and was damaged. (*Id.* at 15–17) A pin had popped out of the truck's tailgate. (*Id.* at 17) Galvan's boss asked Galvan to put the dislodged pin back in the tailgate. (*Id.*)

Galvan fell while attempting to climb the side of the truck to replace the pin. (*Id.*) Galvan caught himself on the side of the truck's box, which brought his fall to a sudden stop. (*Id.*) He was dangling off the side of the truck box, so he pushed himself back up which made his pain worse. (*Id.*) Galvan felt severe pain in the right side of his body, including his right pectoral muscle, right shoulder, and neck. (*Id.* at 18)

Galvan reported his injury to his boss. (*Id.*) The City directed him to undergo care with Richard Bratkiewicz, M.D. (*Id.* at 20; Joint Ex. 1, p. 1) Dr. Bratkiewicz noted localized pain in the area of Galvan's right pectoral muscle, right posterior shoulder pain, and shooting pain down his right arm in a nondermatomal pattern. (Jt. Ex. 1, p. 1) He also noted that Galvan denied neck pain. (*Id.*)

Dr. Bratkiewicz referred Galvan to Christopher B. Vincent, M.D., for a possible torn pectoral muscle. (*Id.* at 2) Dr. Vincent diagnosed a "[c]omplete rupture of pectoralis major tendon, right shoulder." (Jt. Ex. 2, p. 1) Before Galvan underwent his first surgery, he was experiencing pain most prominently in his chest, but also in his neck and shoulder. (Tr., pp. 22–23)

On September 16, 2015, Dr. Vincent performed a right open pectoralis major tendon repair and extensive scar and adhesion release. (Jt. Ex. 2, p. 1) Because the injury occurred about seven weeks before the surgery, Galvan "had developed significant scarring and fibrosis" that required "[a]pproximately 40 minutes of additional operative time was spent, performing extensive dissection, release of adhesions, and scar tissue excision, in order to mobilize the significantly retracted and scarred tendon." (*Id.*) Dr. Vincent was able to repair the rupture of the pectoralis major tendon. (*Id.* at 1-2)

After the surgery, Galvan started feeling numbness, tingling, and burning in his neck and in his right arm from the forearm down. (Tr., p. 23; Jt. Ex. 3, p. 1) On November 3, 2015, Dr. Vincent saw Galvan for a follow-up examination. (Jt. Ex. 3, p. 1) Galvan was "having some nerve symptoms which could indicate a nerve injury, or possible radiculopathy, or compressive neuropathy of the elbow or wrist." (*Id.*)

Dr. Vincent recommended an electromyography (EMG) and nerve conduction velocity study. (*Id.*) Kurt Smith, D.O., performed the EMG and nerve conduction study on Galvan. (*Id.* at 3–4) Dr. Smith diagnosed Galvan with "[r]ight brachial plexopathy" and "[r]ight ulnar neuropathy; localizing to the level of the elbow." (*Id.* at 4)

On December 7, 2015, Galvan saw Todd J. Harbach, M.D., whose notes state that Galvan's right arm went numb two weeks after Dr. Vincent's surgery. (*Id.* at 5) Dr. Harbach also noted that Galvan was then experiencing headaches, neck pain, tingling in his face, and pain in his right upper arm, right forearm, and right hand. (*Id.*) Dr. Harbach diagnosed cervical kyphosis and cervical degenerative changes at C5-C6 predominantly and recommended physical therapy and medication as opposed to surgery. (*Id.* at 7) Dr. Harbach concluded that Galvan did not require cervical surgery and recommended physical therapy, aerobic condition, and medications. (*Id.*)

Galvan saw Dr. Vincent for a follow-up exam on March 8, 2016. (*Id.* at 8) Dr. Vincent reviewed the repeat EMG, which showed improvement of the brachial plexus injury. (*Id.*) This indicated nerve recovery. (*Id.*)

Galvan's shoulder felt good at the time, and he informed Dr. Vincent that he felt he could return to his job without restrictions. (*Id.*) Dr. Vincent agreed. (*Id.*) He encouraged Galvan to discuss the debilitating hand numbness he was experiencing with Zi-Hui Han, M.D., at their next appointment. (*Id.*)

Galvan saw Dr. Han on March 28, 2016, "complaining of right thumb and lateral forearm numbness and tingling." (*Id.* at 10) Galvan described discomfort with external rotation and extension of his right shoulder, "especially with an electric shooting sensation from the shoulder down to the fingertip." (*Id.*) Nonetheless, Dr. Han noted that Galvan's grip strength with his right hand had significantly improved. (*Id.*) Dr. Han decided to close Galvan's case because he was at maximum medical improvement (MMI) even though he was still experiencing discomfort from the brachial plexus residual symptoms. (*Id.*) Dr. Han supported Galvan getting another opinion on these symptoms from a brachial plexus specialist. (*Id.*)

Galvan saw Dr. Vincent again on April 8, 2016. (*Id.* at 11–13) Dr. Vincent concluded that he could do nothing more to treat Galvan's symptoms. (*Id.* at p. 12) He recommended a referral to a brachial plexus specialist because Galvan's post-surgery EMG showed brachial plexopathy and he was experiencing tingling and nerve-related pain in the forearm and hand. (*Id.*)

On April 25, 2016, Dr. Vincent issued a letter assigning to Galvan a three percent whole person impairment rating. (*Id.* at p. 14) He noted that he had referred Galvan to a specialist because of his ongoing complaints. (*Id.* at p. 15) Dr. Vincent prescribed Galvan no work restrictions. (*Id.*)

Galvan went to the University of Iowa Hospitals and Clinics to see Chandan Reddy, M.D., for treatment of his brachial plexus injury on May 11, 2016. (Ex. 5, p. 1) Dr. Reddy noted that Galvan's first EMG "suggests pan brachial plexus injury involving the median, musculocutaneous, radial, axillary and ulnar nerves" and the more recent EMG in February "suggests marked improvement with residual possible carpal tunnel syndrome." (*Id.*)

Dr. Reddy opined that retraction of the pectoralis tendon due to the length of time from the injury itself to repair may have contributed to the likely brachial plexus strength injury. (*Id.* at p. 2) He also stated that the sensory symptoms will likely take longer to recover and that Galvan may be left with residual neuropathic pain. (*Id.*) Dr. Reddy prescribed additional tests. (*See id.*)

Lud Gutmann, M.D. performed an EMG on Galvan on May 27, 2016. (*Id.* at pp. 4–5) Dr. Gutmann found that the "major abnormality" was "the small sensory potentials in the right median, ulnar, radial, and lateral antebrachial nerves without any definite abnormalities in the motor nerves of the right arm." (*Id.* at p. 5) Dr. Gutmann opined that "[t]hese findings are best explained by a mild right brachial plexus lesion (sensory) involving upper roots more than lower." (*Id.*)

Galvan was diagnosed with a combination of a neurogenic and arterial thoracic outlet syndrome. (*Id.* at pp. 7, 9) Luigi Pascarella, M.D., saw Galvan on August 4, 2016. (*Id.* at p. 7) After consultation regarding the risks and benefits of surgery, Galvan was unsure that he wanted thoracic outlet decompression surgery. (*Id.* at p. 9)

Dr. Reddy referred Galvan to the Department of Surgery and pain clinic at the University of Iowa Hospitals and Clinics. (*Id.* at p. 6) Dr. Reddy felt that Galvan's brachial plexus was compressed and needed to be neurolysed. (*Id.*) He also referred Galvan to orthopedic surgeon James Nepola, M.D. (*Id.*)

Dr. Nepola examined Galvan on September 20, 2016. (*Id.* at p. 12) Galvan reported numbness, tingling, and burning that radiates into the neck and down through the thumb and index finger. (*Id.*) Dr. Nepola found that his exam of Galvan was consistent with brachial plexus compression. (*Id.* at 14) The nerves underneath the pectoralis major muscle were likely scarred down by Galvan's surgery. (*Id.*) Dr. Nepola recommended revision pectoralis major tendon repair with brachial plexus decompression. (*Id.* at pp. 14–15)

Galvan returned to Dr. Pascarella on March 11, 2017. (*Id.* at p. 16) He was experiencing right-arm paresthesias upon abduction and facial paresthesias with feeling of facial droop. (*Id.*) Dr. Pascarella felt that Galvan's symptoms might be due to

neurogenic thoracic outlet syndrome. (*Id.*) Dr. Pascarella decided to wait until after Galvan's surgery with Drs. Nepola and Reddy to decide on surgery. (*Id.*)

Drs. Nepola and Reddy performed surgery on Galvan on May 5, 2017. (*Id.* at pp. 19–23) Galvan reported tingling and numbness in his right thumb and fingers on May 19, 2017. (*Id.* at p. 24) On July 11, 2017, Dr. Nepola examined Galvan. (*Id.* at 25) He opined that "[i]t may take a year for the nerve to recover as much as it will" and that Galvan "should not expect rapid changes in his sensation." (*Id.* at p. 27) On October 3, 2017, Dr. Nepola revised the timeline, informing Galvan that "his nerve injury may take upwards of 16–18 months to fully resolve." (*Id.* at 35)

Dr. Nepola found Galvan to have reached MMI on November 14, 2017. (*Id.* at 38) He released Galvan to return to work without restrictions. (*Id.*) Dr. Nepola did not provide a permanent impairment rating.

On December 22, 2017, using the *AMA Guides to the Evaluation of Permanent Impairment Fifth Edition* (*AMA Guides*), Joseph Chen, M.D., gave Galvan a 20 percent impairment rating of his right upper extremity due to his injury. (*Id.* at 39)

In March of 2018, Galvan presented to Maen Aboul Hosn, M.D., at the University of Iowa Hospitals and Clinics with complaints of numbness in fingers and a stretching sensation in his neck. (*Id.* at 40) Dr. Hosn prescribed physical therapy because the symptoms were not clearly indicative of thoracic outlet syndrome. (*Id.*) On October 4, 2018, Galvan saw Dr. Hosn. (*Id.*) Galvan reported that his symptoms had not improved or worsened, that he was experiencing pain in his neck and occasional shooting pain down his arm. (*Id.*)

Dr. Hosn opined that Galvan's symptoms and medical history meant they could not confirm thoracic outlet syndrome was the cause of his symptoms. (*Id.* at p. 42) Dr. Hosn offered surgical decompression, with the caveat that Galvan's symptoms may not improve. (*Id.*) Galvan was hesitant because of the number of surgeries he has had and his fear that his symptoms may worsen after surgery. (*Id.*) He was scared that more health issues might further limit him physically and cause him to lose his job. (*Id.*; *see also* Tr. at p. 35) Galvan explained at hearing that he would reconsider the decision to have surgery if his pain increases to a level he can no longer bear. (Tr. at 47)

On June 25, 2018, Galvan saw Dr. Sassman for an IME. (Ex. 6, p. 1) Dr. Sassman issued a report on September 20, 2018. (*Id.*) Dr. Sassman recites Galvan's symptoms at the time of the evaluation as including:

- Constant pain from the mid-arm to the middle and index fingers and thumb;
- Pain, tightness, and sensitivity to touch in the neck and shoulder;
- Pain in the right pectoral area;

- Right pectoral area easily fatigues;
- Numbness in his entire right arm, including an inability to distinguish between hot and cold;
- Pain in the back of his neck that radiates to his arm;
- Pain in right side of his neck if he moves his head from side to side;
- Pain in right side of his neck if he looks to his left;
- Arching in elbow area of right arm;
- Pins and needles sensation in the area of his right elbow; and
- Numbness in the thumb, index and middle fingers. (*Id.* at p. 11)

Dr. Sassman diagnosed Galvan with:

- Right pectoralis major tendon avulsion injury with retraction;
- Right brachial plexopathy and thoracic outlet syndrome as a result of the repair for his right pectoralis major tendon avulsion injury with retraction;
- Right shoulder range of motion limitation secondary to the surgical repairs for his right pectoralis major tendon avulsion injury with retraction; and
- Cervical pain with radicular symptoms. (*Id.* at 13)

Dr. Sassman recommended additional care in the form of continued physical therapy, which Galvan was participating in at the time, and an evaluation by a pain management specialist to determine if he would benefit from an epidural steroid injection in the cervical spine. (*Id.* at p. 14) Dr. Sassman opined that Galvan was not at MMI, pending the recommended care. (*Id.* at 14) But if he chose not to pursue this care, then he reached MMI one year from his most recent surgery, on May 5, 2018. (*Id.*)

Using the *AMA Guides*, Dr. Sassman found Galvan has sustained:

- Nine percent whole person impairment for the brachial plexus injury. (*Id.* at 14)
- 15 percent whole person impairment for the cervical spine. (*Id.*)
- Six percent whole person impairment for the right shoulder, which takes into account the sequelae for the pectoralis rupture. (*Id.* at 14–15)

Dr. Sassman then used the Combined Values Chart on page 604 of the *AMA Guides* to reach a total of 28 percent whole person impairment rating. (*Id.* at 15)

Galvan's treatment history and ongoing symptoms must be taken into account when determining which impairment rating is most compelling. Dr. Vincent's impairment rating came before Galvan underwent his second surgery relating to his work injury. Because that surgery was effectively two surgeries, one of which a second repair of the pectoralis major tendon, I give Dr. Vincent's impairment rating no weight.

This makes it a question of whether Dr. Chen's impairment rating to the right upper extremity or Dr. Sassman's of the body as a whole, which included an assessment of the right upper extremity, should be given more weight.

It is notable that Dr. Chen's right upper extremity rating is dated December 22, 2017, about two and a half months after Dr. Nepola opined that it could take upwards of 16 to 18 months for Galvan's nerves to fully heal. Dr. Sassman examined Galvan on June 25, 2018, nine and a half months after Dr. Nepola's timeline of up to 16 to 18 months for Galvan's nerves to heal. Dr. Sassman's examination and rating occurred later in time, which places them closer to the timeline given by Dr. Nepola for the full healing of Galvan's nerves.

Further, Dr. Sassman's impairment rating includes the parts of Galvan's body that experienced symptoms relating to the injury. The timing and scope of Dr. Sassman's report, combined with the detailed reasoning in support of its whole body impairment rating and its component parts, cause me to find Dr. Sassman's impairment rating more credible. I therefore conclude Galvan sustained a 28 percent impairment to the whole body that is the result of the stipulated injury.

With respect to work restrictions, Dr. Sassman opines:

> Mr. Galvan states that he is able to do his current job without restrictions. Therefore, I will not assign any formal restrictions at this time; however, if he changes jobs at some point in the future, I would recommend the following restrictions: He should limit lifting, pushing, pulling and carrying to 30 pounds occasionally from floor to wait level. He should not lift, push, pull or carry above shoulder height. He should limit the use of vibratory or power tools to a rare basis as these would aggravate his symptoms.

(*Id.* at p. 15)

At hearing, Galvan testified credibly with respect to his physical limitations. (Tr. at pp. 37–40) He explained that most of his workday as a truck driver is spent driving. (*Id.* at p. 37) The work he performs other than driving is not strenuous. (*See id.*) He credibly described how repetitive functions and lifting 35 or 45 pounds cause him pain. (*Id.* at 37–38) Galvan believes that Dr. Sassman's work restrictions accurately reflect the physical limitations he has due to his injury. (*Id.* at 42)

Galvan does not need these work restrictions to perform his job as a truck driver for the City, though he does sometimes need accommodation. But if Galvan ceases his

employment with the City as a truck driver, Galvan would need to find work within the restrictions prescribed by Dr. Sassman.

There is no evidence that the work injury has impacted Galvan's earnings. He worked as a truck driver for the City at the time of injury. After transferring to the Streets Department and back, Galvan was again working as a truck driver at the time of hearing. (*Id.* at p. 33) Galvan likes his job. (*Id.* at 52) He is motivated to continue working. (*See id.*)

CONCLUSIONS OF LAW

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). Galvan is claiming an unscheduled loss, which means that his industrial disability, if any, must be determined. *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596, 605 (Iowa 2005) (citing *Sherman v. Pella Corp.*, 576 N.W.2d 312, 320–21 (Iowa 1998)); *see also Diederich v. Tri-City R. Co.*, 219 Iowa 587, 258 N.W.2d 899 (1935)). The factors that are considered when determining industrial disability are "functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining to the extent that any factor affects the employee's prospects for relocation in the job market." *Id.* (citing *Sherman*, 576 N.W.2d at 321, and *Luke's Hosp. v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000)).

"Industrial disability measures an employee's lost earning capacity." *Id.* (citing *Sherman*, 576 N.W.2d at 321. "'The focus is not solely on what the worker can or cannot do; industrial disability rests on the ability of the worker to be gainfully employed.'" *Id.* (quoting *Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 356 (Iowa 1999)). "Showing that the employee's actual earnings have decreased is not always necessary 'to determine an injury-caused reduction in earning capacity.'" *Id.* (quoting *Gray*, 604 N.W.2d at 653).

Galvan was 47 years old at the time of hearing. Galvan is a high-school dropout who obtained his high-school equivalency. Galvan also attended some postsecondary classes, but did not obtain a certificate, credential, or diploma.

Galvan's work history consists largely of work as a laborer. Most of this work was in construction. The job duties were physically demanding. Galvan's current job as a truck driver is the least physically demanding job he has held.

The injury has not negatively impacted Galvan's earnings. Galvan was working for the City as a truck driver at the time of the injury. And he is still working in that job today. Galvan can perform the functions of this job without restrictions, though it appears he requires occasional accommodation.

The work restrictions Dr. Sassman prescribed Galvan, if he leaves his current job, must also be taken into consideration. They do not prevent Galvan from continuing

to work as a truck driver for the City. He could therefore also obtain another driver position with similar job functions.

That being said, Galvan is unable to work in the future in a job that is similar to the physically demanding duties he performed as a laborer, which makes up the majority of his work history. This reduces his qualifications, which in turn negatively impacts the number of positions he might be able to be hired to fill in the future.

Galvan's 28 percent whole body functional impairment must also be considered.

The evidence relating to the factors used to measure industrial disability establishes that Galvan has a 35 percent industrial disability.

ORDER

It is therefore ordered:

1) The City shall pay Galvan one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on the stipulated commencement date of May 5, 2018.

2) The City shall pay all weekly benefits at the rate of five hundred seventy-one and 01/100 dollars ($571.01) per week.

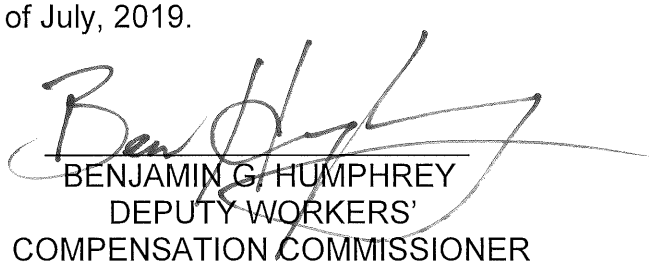
3) The City shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the Federal Reserve in the most recent H15 report settled as of the date of injury, plus two percent. *See Gamble v. AG Leader Technology*, File No. 5054686 (App. Apr. 24, 2018).

4) The City shall be entitled to the stipulated credit for fifty (50) weeks of compensation at the rate of five hundred seventy-one and 01/100 dollars ($571.01).

5) The City shall pay costs.

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

Signed and filed this 9th day of July, 2019.



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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.