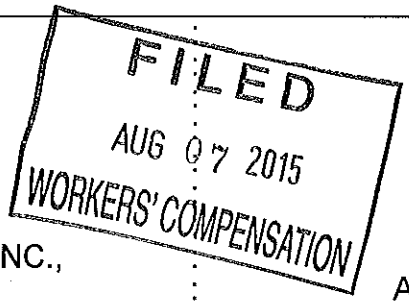
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MARK MITCHELL, Claimant, vs. LABOR WORLD OF IOWA INC., Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5048278 ARBITRATION DECISION Head Note Nos.: 1803, 1402.40, 3001

STATEMENT OF THE CASE

Mark Mitchell, claimant, filed a petition in arbitration seeking workers' compensation benefits from Labor World of Iowa, Inc., employer and Zurich American Insurance Company, insurance carrier, both as defendants. Deputy Workers' Compensation Commissioner Erin Pals presided at the hearing which was held on April 17, 2015 in Des Moines, Iowa.

Claimant was the only witness testifying live at trial. The evidentiary record also includes claimant's exhibits 1-11 and defendant's exhibits A-K. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties request the opportunity for post-hearing briefs which were submitted on May 22, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of permanent disability claimant sustained as the result of the injury that arose out of and in the course of his employment on August 15, 2011.
2. The appropriate weekly workers' compensation rate.

3. Whether claimant is entitled to payment of medical expenses.
4. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Mark Mitchell (hereinafter "Mitchell"), is alleging that he is permanently and totally disabled under the odd-lot doctrine as a result of the August 15, 2011 work injury. I find the preponderance of the evidence does not support his contention that he is permanently and totally disabled under the odd-lot doctrine. I further find that the preponderance of the evidence shows Mitchell sustained 40 percent industrial disability as a result of the work injury.

Mitchell was hired by Labor World of Iowa, Inc. (hereinafter "Labor World") in May of 2011. Labor World is a temporary employment agency. Through Labor World he was assigned a position as a flagger technician for Farner Asphalt Sealers. As a flagger Mitchell was required to travel to various work sites to assist with traffic control. Mitchell's work duties included placing traffic control signs, cones, and directing traffic. On August 15, 2011, Mitchell was working at a job site near Marquette, Michigan when he slipped off of a trailer, fell, and was injured. He testified at hearing that he had immediate pain and landed hard on his head, neck, and shoulders and that he had the wind knocked out of him. Mitchell worked using only one arm the rest of the day. He continued the one arm work for the remainder of the Michigan project which lasted another two to three weeks. Mitchell said he felt he had to continue working because the project was for a large client and if he could not work then the job site would be shut down. He did go to a chiropractor in Michigan a few days after the injury. He also went to the emergency room in Michigan to try to alleviate the pain. He took some pain pills that he had left over from a prior low back surgery. Mitchell was able to finish the Michigan work assignment in August and then returned to his home in Tama, Iowa. (Testimony)

On September 3, 2011, Mitchell was seen in the emergency room of the Marshalltown Medical and Surgical Center. He reported that he had tripped over the tongue of a trailer and landed on his left shoulder approximately three weeks ago. He reported experiencing left shoulder pain that radiated into the scapular/subscapular area down to his fingers. The diagnosis was left shoulder impingement or possible rotator cuff tear. According to the record he "did not hit his head." (Exhibit 7, page 1)

He was seen three days later at Mercy Care by Sherri L. Vesely, DNP/ARNP. He was given an injection into his left shoulder. (Ex. 10, p. 1) A second injection was provided on September 12, 2011. He was referred to an orthopedic surgeon for impingement of shoulder. (Ex. 10, pp. 4-6) Mitchell saw Dr. Pape at PCI who ordered an MRI.

An October 18, 2011, MRI of the left shoulder showed mild supraspinatus and infraspinatus tendinopathy with no evidence of a full-thickness or retracted rotator cuff tear, and mild osteoarthritis of the AC joint with no evidence of bony injury. The MRI of the cervical spine revealed disc space narrowing at C4-C5, left lateral disc herniation at C6-C7 producing moderate ventral thecal sac narrowing and mild to moderate left C6-C7 foraminal narrowing, which demonstrated possible compression on the left C7 nerve root, and also mild ventral thecal sac narrowing on the right C4-C5 due to posterior vertebral body spurring. (Ex. 6, p. 1) Dr. Pape reviewed the MRIs on October 25, 2011 and opined that Mitchell's left shoulder revealed no significant abnormalities except for some mild tendinopathy of the rotator cuff, but the Cervical MRI revealed a significant left-sided disc at the C6-C7 level.

Mitchell was referred to neurosurgeon Loren Mouw, M.D. Mitchell had previously treated with Dr. Mouw for a prior lumbar discectomy. (Testimony; Ex. 8, pp. 1-2) Mitchell saw Dr. Mouw on November 1, 2011. It was Dr. Mouw's impression that Mitchell had C7 radiculopathy secondary to herniated intervertebral disc at C6-7 with neurological deficit. He recommended surgical intervention urgently. Mitchell advised the doctor that he needed to attend to additional personal matters. Despite being admonished by the doctor about the risks of delay, the patient was adamant about attending to personal matters first. (Ex. 8, pp. 2-3) Therefore, surgery was not scheduled until November 10, 2011. Unfortunately, the surgery did not occur as planned because Mitchell developed Leukocytosis which needed to be cleared up prior to the surgery. (Ex. 8, p. 4)

Mitchell was discharged from physical therapy on November 11, 2011, after reporting that he was scheduled to have surgery on his neck. Between December 26, 2011 and April 6, 2012, Mitchell received medical treatment at Mercy Care Community Physicians for his recurrent bronchopulmonary infections. He was instructed to stop smoking and sleep separately from his wife. (Ex. 10, p. 15) On June 6, 2012, he had a pre-operative physical but his chronic bronchitis persisted.

On June 28, 2012, Mitchell went to the University of Iowa Hospitals and Clinics. It was noted that his surgery had been postponed due to his chronically elevated white blood count. (Ex. 9, p. 1) Daniel Diekama, M.D., observed that Mitchell's "[C]hronic leukocytosis [was] of unknown etiology." (Ex. 9, p. 2) He also stated that the "leukocytosis has been chronic now and unchanged. Therefore, I do not suspect an active bacterial infection as a cause, and do not consider his leukocytosis to be a contraindication to surgery . . . The likely cause of his leukocytosis is chronic inflammation from allergies. . . and a history of seasonal allergy and asthma." (Ex. 9, p. 3) He was instructed to quit smoking as soon as possible, and advised that his white blood count would be rechecked in 4-6 months after his discontinued smoking and when his asthma/allergy symptoms were well controlled. (Ex. 9, p. 3) He was cleared for surgery on August 28, 2012.

Dr. Mouw performed a C6-7 anterior cervical discectomy, osteophytectomy, instrumented allograft fusion on August 22, 2012. (Ex. 5, pp. 1-2) Mitchell underwent

physical therapy following surgery. The post-surgical care was eventually transferred to Joseph Chen, M.D., at the University of Iowa. (Ex. 9, p. 4) Mitchell's first appointment with Dr. Chen was on January 16, 2013. Mitchell described his work injury to Dr. Chen and reported that when he fell he had immediate neck pain with numbness down his left arm. (Ex. 9, p. 4) Mitchell also reported that he was doing well after the surgery but shortly after the surgery he was at home in his shower when he fell forward and hit his head. (Ex. 9, p. 5) Mitchell reported continued weakness and tingling in his left thumb, index, and middle finger, as well as occasional shooting tingling/numbness from his left AC down to his subscapular region. At that time Dr. Chen ordered an EMG/NCS and instructed Mitchell to continue his home exercises and physical therapy. (Ex. 9, p. 8)

On February 7, 2013, Mitchell underwent the EMG/NCS testing. The study was normal except for chronic residua from his old, inactive left C7 radiculopathy. There was no evidence of denervation. (Ex. 9, pp. 9-12)

Dr. Chen recommended that Mitchell undergo a "comprehensive interdisciplinary pain evaluation" by the University Spine Rehab Team. (Ex. 9, p. 11) Defendants approved the evaluation and the evaluation took place on March 7, 2013. (Ex. 9, p. 11) During the evaluation Mitchell told Dr. Chen that he was motivated to get better and desired to enter the Spine Rehab program. (Ex. 9, p. 13) Dr. Chen recommended that the defendants purchase a three month membership for Mitchell at the YMCA so he could swim for therapeutic purposes. (Ex. 9, p. 13)

The Spine Rehab evaluation was performed by several providers. Counseling Psychology Trainee Emily McCann, M.S., supervised by Valerie Keffala, Ph.D. did not believe Mitchell was an appropriate psychological candidate for the program because he did not appear receptive to interdisciplinary rehabilitation model for pain management. Evidently, he expressed no interest in the psychological interventions presented. Therefore, it was felt he was not an appropriate candidate for group participation in the two-week program. (Ex. 9, p. 16) Pamela Lee, P.T., noted that Mitchell did not self-limit, but did feel that he "would best be served by going to a gym for his rehabilitation." (Ex. 9, p. 17) Vocational evaluator Ann Vogel, CRC, LMHC felt Mitchell would "likely benefit from active participation in the two week Spine Rehab Program." (Ex. 9, p. 20) However, Dr. Chen ultimately determined that Mitchell was not a viable candidate for the program. (Ex. 9, p. 20) Instead Dr. Chen recommended Mitchell utilize a YMCA membership and cardio equipment. (Ex. 9, p. 20) He also recommend Mitchell reduce his caffeine consumption and perform at home breathing exercises. (Ex. 9, p. 20)

At the April 3, 2013, appointment Dr. Chen noted that Mitchell had not been able to obtain authorization from the defendants for the gym membership. (Ex. 9, p. 21) It was Dr. Chen's opinion that although Mitchell was not a candidate for the Spine Rehab program he could benefit just as much with a local therapist and going to the YMCA. (Ex. 9, p. 22)

By the time claimant returned to Dr. Chen on May 22, 2013, the YMCA membership had been authorized. Mitchell was going to the gym two to four hours at a time and working with a local therapist. (Ex. 9, pp. 24-25) At his August 7, 2013, appointment with Dr. Chen Mitchell reported that he was going to the YMCA six times a week for two to four hours at a time with at least an hour in the pool and an hour in the gym. (Ex. 9, p. 27) Dr. Chen felt that Mitchell's "outcome scores" had improved together with his ability to function. (Ex. 9, p. 29) An FCE was recommended. (Ex. 9, p. 29)

Mitchell underwent an FCE with John Kruzich, MS, OTR/L at E3. (Ex. C, p. 9) The FCE was valid; Mitchell gave a consistent effort and possessed good motivation with no overt pain behaviors or abnormal responses. (Ex. C, p. 9) According to the FCE, Mitchell is capable of the following:

Activities	Occasional	Frequent	Constant
Waist to Floor lift	40 lbs	20 lbs	10 lbs
Waist to crown lift	25 lbs	0 lbs., secondary to limitations with elevated work.	0 lbs., secondary to limitation with elevated work.
Waist to crown lift (referred hand position)	30 lbs	0 lbs., secondary to limitations with elevated work.	0 lbs., secondary to limitations with elevated work.
Bilateral carry	45 lbs.	22.50 lbs	11.25 lbs.
Right unilateral carry	45 lbs.	22.50 lbs	11.25 lbs.
Left unilateral	35 lbs.	17.50 lbs	8.25 lbs

(Ex. C, pp. 19-20)

On September 18, 2013, Dr. Chen placed Mitchell at maximum medical improvement (MMI). (Ex. 9, p. 32) He assigned claimant a rating of 28 percent whole person impairment. He adopted the FCE as Mitchell's permanent restrictions. He noted that these limitations placed Mitchell in the medium work category. (Ex. 9, p. 32)

Claimant testified that after reaching MMI, he saw Kurt Smith, D.O., at Iowa Ortho and his family practice provider, Sherrie Vesely, DNP for follow-up. Mitchell's medication at the time of hearing was being monitored and prescribed by Nurse Practitioner Vesely. He was also receiving chiropractic adjustments from Twin City Chiropractic. (Testimony)

At his attorney's request Mitchell underwent an IME with Sunil Bansal, M.D. on March 28, 2014. (Ex. 1, p. 1) Dr. Bansal assigned 28 percent impairment rating and adopted the restrictions from the FCE. (Ex. 1, p. 90)

Also at his attorney's request, Mitchell underwent a vocational evaluation with Kent Jayne, a vocational expert. Mr. Jayne interviewed claimant, reviewed records, and

performed some testing prior to rendering his opinions. On March 13, 2015, Mr. Jayne issued a written report. The report states that the purpose of the testing was "to compare an individual's current performance with their past performance. . ." (Ex. 2, p. 13) The purpose of the testing was not related to finding Mitchell employment. Mr. Jayne opined that Mr. Kurzich's statement that Mitchell met the material handling demand of medium work per the Dictionary of Occupational Titles was a "patently false statement." (Ex. 2, p. 14) Mr. Jayne noted that the U.S. Department of Labor definition for medium work requires a person to be able to exert a force of a least 50 pounds occasionally, 25 pounds frequently, and 10 pounds constantly. (Ex. 2, p. 14) These requirements were not met in the FCE testing for medium work. He also felt it was "unlikely that any feasible vocational rehabilitation plan would have a reasonable likelihood of success in returning Mr. Mitchell to competitive employability." (Ex. 2, p. 24) He further opined that the December job leads from defendants' expert, Tom Karrow all exceeded claimant's physical capabilities. He also felt the aptitudes required of the job leads exceeded those of Mitchell. (Ex. 2, p. 17) I do not find the opinions of Mr. Jayne to be helpful. Mr. Jayne has opined that Mitchell "would be precluded from full time competitive work in the labor market except at the sedentary level of physical demands. . .) (Ex. 2, p. 16) This opinion is contrary to every medical expert in this matter. Mr. Jayne's opinions are given no weight.

In December 2014 the defendants set up a meeting for Mitchell with a vocational expert, Tom Karrow, a vocational expert. Mitchell testified that the meeting only lasted approximately 15 minutes because Mr. Karrow was in a hurry. He said that the jobs Mr. Karrow did provide to him were minimum wage jobs and he would not be able to sit that long. Specifically, with regard to the position at the Casino, Mitchell did not think he would be able to stand for 8 to 10 hours. Likewise, he did not think he could perform the position at Shopko. He also did not think he could perform the QuickStar job because he could not do above shoulder height tasks. Additionally, he did not feel he could perform the U.S. Cellular/Verizon jobs because he cannot sit that long. (Testimony)

On March 11, 2015, Mr. Karrow issued a report. (Ex. D) It was his understanding that Mitchell was earning approximately $800.00 per week at the time of his injury. Based on a 40-hour week that would amount to $11.72 per hour. Mr. Karrow reviewed documents provided to him and interviewed Mitchell. Analyzing Mitchell's work history and transferable skills Mr. Karrow was able to identify alternate jobs or occupations within the claimant's geographical area that fit within Mitchell's physical restrictions. Mr. Karrow provided letters and specific job leads to Mitchell via his attorney. He also asked for Mitchell to sign and return a vocational consent which would allow Mr. Karrow to follow-up with the suggested potential employers and with Iowa Workforce Development. Additionally, Mr. Karrow provided job logs for Mitchell to complete on a weekly or biweekly basis. According to Mr. Karrow's report he did not receive any response.

Mr. Karrow provided approximately 30 job leads for Mitchell between December 17, 2014 and January 23, 2015. On January 23, 2015, Mr. Karrow was

informed by claimant's counsel that he could send the job leads directly to Mitchell. Between January 29, 2015 and February 26, 2015, he provided five letters and a total of 26 job leads to Mitchell via certified mail. He never received verification that the claimant received the letters however, he had sent copies of all correspondence to claimant's counsel. Mr. Karrow's report lists several actual job leads for Mitchell. The starting pay for these positions range from $8.25 per hour to $11.00 per hour.

Mr. Karrow also issued a second report dated March 27, 2015, in response to Mr. Jayne's report. Mr. Karrow points out what he believes are several inaccuracies in Mr. Jayne's report. Ultimately, Mr. Karrow concludes that his opinions from his first report remain unchanged. (Ex. D)

At the time of hearing Mitchell was 45 years of age. He still experiences symptoms which he attributes to the work injury. He cannot feel one half of his left arm, his thumb, a portion of his middle finger, up his forearm and through his shoulder and up into the neck. The outer portion of his arm is numb. Some days he wakes up and cannot feel his arm at all. In the mornings, his right arm starts to emulate his left arm. He also testified that left arm grip strength has been affected. He drops items because he cannot ascertain if he has a good grip on things. Prior to the injury, he was ambidextrous. According to Mitchell he cannot sit or stand very long. He testified that he had been seen once a month by the nurse practitioner for medication management. His dosages had not changed since he last saw Dr. Chen. At the time of hearing, he was still being prescribed Oxycodone and Baclofen. If he takes his medications his pain level is about a 2 or a 3; without his medications it is about a 5 or 6. (Testimony)

Mitchell graduated from high school in 1988. Following high school, he attended nine months of college in Des Moines for electrical tech school. In the early 90s he also took some classes for electronic repairs but he did not complete the program. Mitchell described himself as a B student. Mitchell's work history and testimony at hearing demonstrate that he has numerous skills in a variety of industries. His work history includes working as a property manager where his duties included general maintenance, mowing plumbing, collecting rent, and dealing with law enforcement. He was also self-employed in the computer repair industry for approximately 20 years. He has worked as a laborer, assembly line worker, heavy equipment operator, tree removal, yard care, computer sales, casino slot technician, telemarketing, and as a full-time handyman. He has done snow removal, roofing, basement refinishing. Although he is not a licensed electrician he can and has done electrical work. Mitchell testified that he has the knowledge to build a house. He also has the ability to be a general contractor. He cannot read blueprints.

In 2002 he helped a friend, Marsha, start the business, Extreme Computers in Marshalltown. He worked there full time for approximately 10 years. Mitchell helped Marsha learn how to troubleshoot computers, diagnosis problems, build computers, and fix broken computers. From 2002 to 2008 he earned approximately $1,000 to $1,500 per week. In 2008 he began to take a less active role in the computer business and his

earnings went down to around $800 to $1,200 per week. By 2010, he was only making a few hundred dollars here and there. The business closed in 2012.

Mitchell does not believe he could return to many of his former jobs. He does not believe he could perform labor work because he cannot sit or stand for very long. He does not believe he could perform factory work because he would not be able to keep pace. He believes he could do computer repair if he owned his own business and could work at his own pace and in his own chair.

Mitchell does not believe that he is capable of working eight hours per day on a full time basis. However, this belief is not supported by the medical evidence. Even the claimant's IME doctor, Dr. Bansal, does not support this contention. The only restrictions placed on Mitchell by any medical professionals are the ones outlined in the July 26, 2013 FCE. The restrictions include, "predominantly Medium demand work activities including waist to floor lifting of 40 lbs., right handed carry of 45 lbs., left handed carry of 35 lbs. and elevated work only to be performed on an occasional basis." (Ex. 9, p. 32) These restrictions were set forth in the FCE and adopted by both Dr. Bansal and Dr. Chen. I find that these are the permanent restrictions Mitchell has as a result of the August 15, 2011 work injury.

Furthermore, Mitchell's testimony about his physical capabilities in the workplace are not consistent with his testimony regarding what he is physically able to do at the gym. Mitchell testified that after his surgery he has been working out at the YMCA for up to four hours per day. His time at the YMCA is spent lifting weights and swimming. Sometimes Mitchell would work out two, three, or more days per week. He testified that he could work out "everything" on the machine weights. He also testified that he could swim laps continuously for 30 minutes. Mitchell testified at hearing that he would go to the YMCA more often, even every day, if he lived closer. (Testimony)

Mitchell's work history demonstrates that he is a talented individual with numerous transferable skills in a number of industries. Unfortunately, since Mitchell last worked for Labor World he has really made no attempt to return to the workforce. He made no attempt to cooperate with the job placement services offered by Mr. Karrow. Despite being provided with numerous job leads Mitchell has not applied for a single job. Considering the evidence as a whole, I find Mr. Mitchell lacks motivation to return to the workforce. Claimant has failed to show by a preponderance of the evidence that suitable work is not available to him. I find that Mitchell is not an odd-lot employee.

Mitchell has shown by a preponderance of the evidence that he has permanent work restrictions as a result of the work injury. I found those permanent restrictions are as set forth in the FCE and adopted by Dr. Chen and Dr. Bansal. At the time of the injury Mr. Mitchell was paid $10.00 per hour and worked some overtime. I find Mr. Mitchell's restrictions preclude him from a number of jobs. However, I find that the preponderance of the evidence does not show that he is permanently and totally disabled. I find Mr. Mitchell has demonstrated that he has a work history with varied employment and skills that would enable him to pursue alternate employment if he were

so motivated. I also find that Mr. Mitchell has sustained a loss of future earning capacity as a result of the work injury. Unfortunately, he has now been out of the labor market for quite some time and he has some physical restrictions. Considering Mr. Mitchell's age, educational background, employment history, ability to retrain, lack of motivation, length of healing period, permanent impairment and permanent restrictions, and the other industrial disability factors identified by the Iowa Supreme Court, I find that Mr. Mitchell has proven that he sustained a 40 percent loss of future earning capacity as a result of his work injury with Labor World.

The next issue is the correct weekly workers' compensation rate. The parties do not agree on which weeks should be included in the calculation of Mitchell's gross weekly earnings. The evidence shows that claimant was paid a base rate of $10.00 per hour. Claimant's rate calculation excludes any weeks prior to July 10, 2011. (Ex. 4, p. 1) His rate calculation is based on only six weeks of earnings. There is no explanation as to why those prior weeks were excluded, but it is presumed that the claimant believes the excluded weeks are not representative of his earnings. Defendants' rate calculation is as follows:

Week	Pay Date	Base Wages	Overtime	Total
1	5/23/2011	$107.50	$267.50	$375.00
2	5/31/2011	$360.00	$0.00	$360.00
3	6/3/2011	$425.00	$0.00	$425.00
	6/11/2011	$161.70	$0.00	$161.70
	6/14/2011	$100.00	$0.00	$100.00
	6/15/2011	$80.00	$0.00	$80.00
	6/20/2011	$0.00	$0.00	$0.00
4	6/20/2011	$220.00	$175.00	$395.00
5	6/24/2011	$140.00	$193.00	$333.05
6	6/30/2011	$335.00	$312.00	$647.00
	7/4/2011	$0.00	$0.00	$0.00
7	7/10/2011	$400.00	$43.30	$443.30
8	7/15/2011	$400.00	$80.00	$480.00
9	7/25/2011	$400.00	$225.00	$625.00
	7/30/2011	$0.00	$0.00	$0.00
10	8/1/2011	$400.00	$0.00	$400.00
11	8/8/2011	$400.00	$262.50	$662.50
12	8/15/2011	$400.00	$90.00	$490.00
TOTALS				$5,635.85
AWW				$469.65
RATE				$334.86

(Ex. H, p. 177)

Their calculation includes weeks from May 23, 2011 through August 15, 2011. During those weeks defendants did not include six weeks because they were abnormally low and not representative of claimant's earnings. (Ex. H, p. 177) The pay

history contained in the record demonstrates that claimant's hours and earnings fluctuated. The record is void of any evidence to show that the weeks used by defendants are not representative of Mitchell's earnings. I find that the weeks defendants used to calculate claimant's weekly rate fairly reflect his customary earnings. Therefore, I find claimant's gross weekly wages to be $470.00. The parties stipulated that claimant was married and entitled to three exemptions at the time of the injury. Thus, claimant's weekly workers' compensation rate is $334.86.

Claimant is seeking reimbursement for medical expenses. Defendants assert they are not liable for the charges because the care was not authorized and was not related to the work injury. According to claimant's post-hearing brief he seeks reimbursement for the following charges.

First, claimant is seeking payment of a surgery anesthesia bill which is dated August 22, 2012. (Ex. 3, p. 2) This is the date that Dr. Mouw performed the cervical procedure on Mitchell. (Ex. 5, p. 1) I find that this bill is the result of reasonable and necessary medical treatment causally connected to the work injury. There has been no indication that this procedure was not authorized by the defendants. Thus, I find defendants are responsible for the charges set forth in Exhibit 3, page 2.

Second, claimant is seeking payment of the August 7, 2012 and August 22, 2012 cervical neck MRI and x-rays. (Ex. 3, p. 6) Again, I find that the charges for the cervical spine portions of the bill are the result of reasonable and necessary medical treatment causally connected to the work injury. There has been no indication that the cervical MRI and/or x-rays were not authorized by the defendants. Thus, I find defendants are responsible for the charges for the cervical MRI and x-ray as set forth in Exhibit 3, page 6.

Third, claimant is seeking payment for MercyCare charges from October 25, 2011 through March 30, 2012 for care for his infection to clear for surgery. (Ex. 3, pp. 9-10). Exhibit 3 page 9 contains 21 entries. Eight of those entries are for "Mitchell, Thomasina" the remainder are for "Mitchell, Mark." The record is void of any evidence as to who Thomasina Mitchell is or how those charges could be related to the work injury in question. Therefore, I find claimant has failed to show entitlement to any charges for Thomasina Mitchell.

We now turn to the remaining charges for Mark Mitchell. Defendants assert they are not responsible for these charges because there is no evidence that any authorized physician referred Mitchell to his personal physician, Sherri Vesely. Defendants argue that claimant is attempting to obtain reimbursement for unauthorized medical treatment. At hearing claimant testified that Dr. Chen advised him to follow-up with Sherri Vesely, ARNP. However, a review of Dr. Chen's records does not support this assertion. Dr. Chen makes several recommendations throughout his treatment of Mitchell including home exercise program, reducing caffeine, local physical therapy, and a gym membership. There is no notation of a referral to Sherri Vesely. Dr. Chen also does not show that he sent a copy of any of his records to nurse practitioner Vesely.

Furthermore, in Dr. Chen's records there is no indication that he is even aware that Mitchell was being prescribed Baclofen or Oxycodone. (Ex. 9; Ex. G) Also, nurse practitioner Vesely's notes indicate the patient was referred to her by Jerry Wille. Therefore, I find the preponderance of the evidence does not support Mitchell's contention that he was referred to nurse practitioner Vesely by Dr. Chen.

Mitchell also testified that Dr. Smith advised him to either follow-up with him or nurse practitioner Vesely. Mitchell saw Dr. Smith on one occasion, May 1, 2014. At that time, Dr. Smith advised him to follow-up in three to four months for medication management. Dr. Smith copied Sherri Vesely, the case manager, and the adjuster in on his notes. However, this appointment was after all of the charges listed on pages 9 and 10 of Exhibit 3. Thus, I find that Mitchell has failed to show defendants are liable for these charges.

Fourth, claimant is seeking payment for Mercy Medical charges for "continuing pain management" with Sherrie Vesely. (Claimant post-hearing brief p. 7; Ex. 3, pp. 14-17) Based on these bills it appears Mitchell was seen for his cervical spine on July 29, 2014, June 24, 2014, March 19, 2014, and February 18, 2014. Because claimant has demonstrated that he was told by Dr. Smith that he could follow-up with nurse practitioner Vesely on May 1, 2014, I find the charges incurred after May 1, 2014, in Exhibit 3 pages 14-17 are defendants' responsibility. Therefore, defendants are responsible for the charges contained in Exhibit 3, pages 14-15.

CONCLUSIONS OF LAW

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).

Mitchell has asserted that he is entitled to permanent total disability under the odd-lot doctrine. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Mitchell failed to prove a prima facie case of total disability by producing substantial evidence that he is not employable in the competitive labor market. The preponderance of the evidence does not support Mitchell's contention is limited in the number of hours he can work or that he is limited in the amount of sitting or standing he can do. The restrictions placed on Mitchell by the medical experts in this matter do not support his contention that he is not employable in the competitive labor market. Furthermore, Mitchell has numerous transferable skills in a variety of occupational fields which would allow him to be employed if he were motivated to do so. This is demonstrated by the numerous job leads which were provided to Mitchell by Mr. Karrow. Thus, Mitchell has failed to prove entitlement to permanent total disability benefits under the odd-lot doctrine.

Although Mitchell has failed to show by a preponderance of the evidence that he is an odd-lot employee he has shown that he sustained industrial disability as a result of the August 15, 2011 work injury. Because 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, 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, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

I found. Mitchell sustained a loss of future earning capacity as a result of the work injury. Considering Mitchell's age, educational background, employment history, ability to retrain, lack of motivation, length of healing period, permanent impairment and permanent restrictions, and the other industrial disability factors identified by the Iowa Supreme Court, I found that Mitchell has proven that he sustained a 40 percent loss of future earning capacity as a result of his work injury with Labor World.

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34. The parties have stipulated that the commencement date in this matter shall be September 18, 2013. Therefore, defendants shall pay Mitchell 200 weeks of permanent partial disability benefits at the appropriate weekly workers' compensation rate beginning on September 18, 2013.

We now turn to the issue of the correct weekly workers' compensation rate. Under Iowa law, if the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6). Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6). In the present case, concluded that the defendants' rate calculation fairly reflected his customary earnings prior to the work injury. Determination of an employee's customary earnings is an effort to determine what earnings are usual, or typical, for that employee. Jacobson Transportation Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010). The rate statute is "meant to be applied, not mechanically nor technically, but flexibly, with a view always to

achieving the ultimate objective of reflecting fairly the claimant's probable future earning loss." Hanigan v. Hedstrom Concrete Products, Inc., 524 N.W.2d 158, 160 (Iowa 1994).

Therefore, I adopt the defendants' rate calculation, having done so, I found that claimant's average gross weekly wage prior to the August 15, 2011, date of injury was $470.00.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid to employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. See Iowa Code section 85.61(6); 876 IAC 8.8. The parties stipulated that claimant was married and entitled to three exemptions on the date of injury. Therefore, having found that claimant's gross average weekly wage was $470.00, and using the Iowa Workers' Compensation Manual (p. 47) with effective dates of July 1, 2011 through June 30, 2012, I determine that the applicable weekly rate is $334.86.

We now turn to the issue of medical expenses. 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). Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

Further, generally an employer is not responsible for the cost of medical care that is not authorized. R.R. Donnelly & Sons v. Barnett, 670 N.W2.d 190, 196 (Iowa 2003). For the reasons set forth above I conclude defendants are responsible for the charges set forth in exhibit 3 pages 2, 14, 15, and for the cervical spine charges on page 6. Claimant failed to show by a preponderance of the evidence that the remaining charges were authorized and/or related to the work injury.

Finally, claimant seeks an assessment of his costs associated with this case. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Because claimant was at least partially successful in his claim I conclude it reasonable to access appropriate costs.

First, claimant is seeking reimbursement of the filing fee in the amount of $100.00. This is an appropriate cost. Defendants shall reimburse claimant in the amount of $100.00. Second, claimant seeks reimbursement of the IME by Dr. Bansal. This is a moot issue because in the hearing report the parties stipulated that defendants would reimburse claimant for the cost of the IME. Third, claimant seeks reimbursement for the vocational report of Kent Jayne in the amount of $3,217.50. For the reasons set forth above I found that Mr. Jayne's report was not helpful and was given no weight. Therefore, I conclude it is not appropriate to assess the expense of his report as a cost. Thus, defendants shall reimburse claimant's costs in the amount of $100.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits at the weekly rate of three hundred thirty-four and 86/100 dollars ($334.86) commencing on September 18, 2013.

Defendants shall pay all accrued benefits in a lump sum.

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

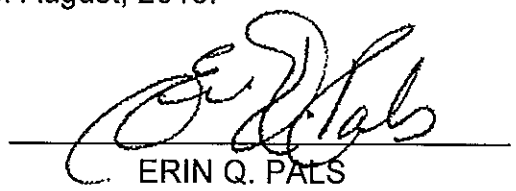
Defendants shall receive credit for the benefits paid to date.

Defendants are responsible for the medical bills as set forth above.

Defendants are taxed costs in the amount of one hundred and no/100 dollars ($100.00).

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 7th day of August, 2015.



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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.