BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

IVAN LINN, Claimant, vs. SIGNATURE REAL ESTATE d/b/a RAMADA WORLDWIDE, Employer, and TRAVELERS INSURANCE CO., Insurance Carrier, Defendants.	File No. 1661463.02 REVIEW-REOPENING DECISION Head Note Nos.: 1400, 1803, 4100, 2905, 2907

STATEMENT OF THE CASE

The claimant, Ivan Linn, filed a petition for review-reopening seeking workers' compensation benefits from Signature Real Estate d/b/a Ramada Worldwide, and its insurer, Travelers Insurance Company. Greg Egbers appeared on behalf of the claimant. Julie Burger appeared on behalf of the defendants.

The matter came for hearing on July 31, 2023, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred electronically. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 7, and Defendants' Exhibit A. The claimant testified on his own behalf. Roxann Zuniga was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted after briefing by the parties on August 14, 2023.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. The claimant sustained an injury arising out of, and in the course of employment on February 12, 2019.

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

4. The alleged injury is a cause of permanent disability.

5. That the injury is an industrial disability.

6. That the commencement date for permanent partial disability benefits, if any are awarded, is June 24, 2022.

7. The claimant's gross earnings were five hundred fifty-two and 00/100 dollars ($552.00) per week. At the time of the alleged injury, the claimant was single and entitled to two exemptions. The result is a weekly compensation rate of three hundred sixty-four and 77/100 dollars ($364.77).

8. Prior to the hearing, the claimant was paid 125 weeks of compensation at the above stipulated rate.

9. That the costs in claimant's exhibit 1 have been paid.

The defendants waived their affirmative defenses. Temporary disability benefits are no longer in dispute. Medical benefits are no longer in dispute.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant has proven the prerequisites to demonstrate he is entitled to review-reopening benefits under Iowa Code section 86.14.

2. The extent of permanent disability benefits, should any be awarded.

3. Whether the claimant is entitled to a taxation of costs.

FINDINGS OF FACT

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

Ivan Linn, the claimant, was 91 years old at the time of the hearing. (Testimony). He resided in Iowa and Tennessee. (Testimony). Since returning to Iowa for the review-reopening hearing, Mr. Linn was living in a hotel. (Testimony). Mr. Linn periodically

returned to Tennessee, as he was attempting to settle the estate of his late son. (Testimony).

This case dates back to an injury sustained by the claimant on February 12, 2019, while he was working as a bellman for the defendant-employer. (Joint Exhibit 1). As a bellman, Mr. Linn transported hotel guests and their luggage from the hotel to the Des Moines International Airport. (JE 1:3). As part of this duty, he loaded and unloaded guest luggage. (JE 1:3). He also had other day-to-day duties, such as greeting guests, checking schedules, monitoring flight crew arrivals, logging pool chemical readings, promoting hotel functions, documenting shuttle runs, picking up trash in public areas, keeping sidewalks free of ice and snow, and setting up morning coffee services. (JE 1:3-4).

On February 12, 2019, Mr. Linn returned from a trip to the airport, and began to shovel a walk. (JE 1:4). As he shoveled, the shovel broke, and Mr. Linn fell on his left hip. (JE 1:4). He filled out an incident report and eventually sought medical care. (JE 1:4).

Mr. Linn developed pain in his left thigh and began seeking treatment for left leg issues. (JE 1). He eventually also developed swelling. (JE 1). During his course of treatment, Mr. Linn displayed a cantankerous attitude with various providers. (JE 1). Mr. Linn was diagnosed with lower back issues by several providers. (JE 1). On October 9, 2019, Trevor Schmitz, M.D., diagnosed Mr. Linn with intervertebral disc disorders with myelopathy of the lumbar region, and recommended a surgical intervention. (JE 1). At that time, Mr. Linn declined the surgery, so he was returned to work at maximum medical improvement with no restrictions. (JE 1). Dr. Schmitz provided Mr. Linn with a 5 percent whole person impairment. (JE 1).

An IME with Sunil Bansal, M.D., as arranged by claimant's counsel, found Mr. Linn to have suffered a left L5-S1 disc herniation, and left hip impingement. (JE 1). Dr. Bansal provided Mr. Linn with a 5 percent whole person impairment. (JE 1). By October of 2020, Mr. Linn reported left hip pain with radiation into his left thigh. (JE 1). He also had "a number of falls for unknown reasons." (JE 1). A physician opined that Mr. Linn's left leg issues came from his back issues. (JE 1).

An arbitration hearing was held on May 24, 2021. (JE 1). During the hearing, Mr. Linn testified that he experienced no low back injury, and that any medical records indicating the same were inaccurate. (JE 1). Mr. Linn testified further that Dr. Schmitz's IME results were a lie, and that he disagreed with any impairment rating based upon an alleged back injury. (JE 1). He also claimed in his testimony to have fallen almost 30 times since his initial work injury. (JE 1). He was asked if he had looked for work since his injury, and testified that he was unable to do any jobs so he did not seek any employment. (JE 1). Mr. Linn also testified that only wished to work through 2025. (JE 1).

An arbitration decision was issued by the undersigned on August 17, 2021. (JE 1). The claimant was awarded a 15 percent industrial disability, with compensation to be paid at three hundred sixty-four and 77/100 dollars ($364.77) per week. (JE 1). The

defendants were also ordered to satisfy certain outstanding medical bills and reimburse the claimant for costs totaling one hundred ninety and 00/100 dollars ($190.00). (JE 1). In the decision, I expressed serious concerns about Mr. Linn's motivation to work. (JE 1).

On December 16, 2021, Mr. Linn attended a medical visit at Concentra. (Testimony; JE 2:1-4). Nicholas Ford, P.A., examined him for complaints of pain in his left leg following a fall while shoveling on February 12, 2019. (JE 2:1). Mr. Linn indicated that the shovel hit his left upper thigh. (JE 2:1). Mr. Linn walked with a cane and had not been working. (JE 2:1). At the time of the appointment, he had pain to his left mid-thigh, swelling down the left leg, and numbness from his left hip to his left toe. (JE 2:2). Upon physical examination, Mr. Ford observed that Mr. Linn had full range of motion without pain in his left hip. (JE 2:2). He displayed minimal tenderness at the mid-thigh, and minimal swelling over the lower leg. (JE 2:2). Mr. Ford diagnosed the claimant with a left leg injury, dependent edema, and an accidental fall. (JE 2:2). He provided Mr. Linn with an orthopedic referral. (JE 2:3).

Based upon the referral of Mr. Ford, the claimant saw Todd Harbach, M.D., on January 26, 2022. (JE 4:1-4). Mr. Linn complained of aching and sharp pain, along with numbness into the left leg. (JE 4:1). His pain increased at night, but occurred constantly. (JE 4:1). He rated his pain 4 out of 10. (JE 4:1). Dr. Harbach noted the MRI and EMG which showed a pinched left S1 nerve root and S1 radiculopathy. (JE 4:1). Mr. Linn expressed disbelief to Dr. Harbach as to why his back caused his leg pain because "he does not hurt in his back at all." (JE 4:1). Mr. Linn told Dr. Harbach that he fell 20 times over the previous year. (JE 4:2). Upon examination, Dr. Harbach noted that Mr. Linn had a normal gait, and no tenderness to palpation in the lumbar spine. (JE 4:2). Mr. Linn also had normal sensation in his lower extremities. (JE 4:2). Dr. Harbach diagnosed Mr. Linn with lumbar radiculopathy, a herniated lumbar disc, and stenosis of the lateral recess of the lumbar spine. (JE 4:3). The doctor concluded his note indicating that he spent most of the visit "trying to convince the patient that it is his lumbar spine causing his left leg pain and weakness" and that surgery could completely relieve Mr. Linn's symptoms. (JE 4:3). Dr. Harbach provided temporary work restrictions limiting Mr. Linn to lifting less than 10 pounds and avoiding certain repetitive activities. (JE 4:4).

On March 2, 2022, Dr. Schmitz met with Mr. Linn again. (JE 4:5-7). Mr. Linn rated his pain 0 out of 10, but still indicated weakness in the left leg. (JE 4:5). He complained that his left leg would give out on him, resulting in 30 to 40 falls. (JE 4:5). After one of these falls, Mr. Linn required stitches in his head. (JE 4:5). Dr. Schmitz observed that Mr. Linn did not have any significant change, but that he was having trouble walking. (JE 4:6). Dr. Schmitz ordered an updated MRI and EMG. (JE 4:6). He also prescribed gabapentin at night to treat the claimant's pain. (JE 4:6). Dr. Schmitz allowed the claimant to return to work without restrictions. (JE 4:7).

An EMG was performed on March 17, 2022, at Iowa Ortho. (JE 4:8-9). The left peroneal nerve and left tibial nerve were normal. (JE 4:9). The left sural nerve was "unobtainable" and was "likely age related." (JE 4:9). Finally, there was abnormality

noted at the S1 innervated muscles. (JE 4:9). The administrator of the EMG opined that this was an abnormal study, and that it showed acute and chronic left S1 radiculopathy. (JE 4:9).

Mr. Linn had an MRI of his lumbar spine on April 4, 2022, due to back pain which radiated into his leg. (JE 3:1-2). The MRI showed moderate multilevel degenerative disc disease at L4-5. (JE 3:2). It also showed "[n]o more than mild spinal canal stenosis" throughout the lumbar spine along with multilevel neural foraminal narrowing. (JE 3:2). The results of the MRI were compared to the August 26, 2019, MRI, and showed minimal-to-no changes. (JE 3:1-2).

On April 20, 2022, Mr. Linn returned to visit Dr. Schmitz. (JE 4:14-17). Mr. Linn indicated that his symptoms remained the same. (JE 4:14). Dr. Schmitz reviewed the results of the updated MRI and EMG, and discussed them with Mr. Linn. (JE 4:14-15). Dr. Schmitz recommended a left L5-S1 posterior lumbar decompression and discectomy. (JE 4:15). Mr. Linn wished to proceed with the recommended surgery. (JE 4:15). Dr. Schmitz continued to allow Mr. Linn to work with no restrictions. (JE 4:17).

Dr. Schmitz performed a left-sided hemilaminotomy and partial facetectomy at L5-S1 along with a left-sided L5-S1 partial diskectomy on Mr. Linn on May 5, 2022. (JE 4:18-20). Dr. Schmitz noted preoperative and postoperative diagnoses of:

1. Lumbar spinal stenosis, left-sided subarticular L5-S1.

2. Left-sided herniated nucleus pulposus, L5-S1.

3. Severe back and left leg radicular pain along with numbness, tingling, and associated weakness.

(JE 4:18). The surgery was completed with no complications. (JE 4:20).

Mr. Linn testified that he continued to have leg pain in May of 2022. (Testimony).

On May 20, 2022, Mr. Linn had a post-operative visit with Dr. Schmitz at Iowa Ortho. (JE 4:21-23). Mr. Linn reported unchanged symptoms since his surgery. (JE 4:21). He continued to feel as though his left leg gave out on him while walking barefoot. (JE 4:21). Occasionally, Mr. Linn would have a "zinger" in his left calf. (JE 4:21). Dr. Schmitz felt that Mr. Linn was "doing reasonably well after his lumbar decompression and discectomy." (JE 4:22). He opined that the "zinger" and pain in the claimant's left foot was consistent with plantar fasciitis. (JE 4:22). Dr. Schmitz provided the claimant with certain restrictions for modified work. (JE 4:23).

Dr. Schmitz examined Mr. Linn again on June 24, 2022, for continued post-surgical monitoring. (JE 4:24-26). Mr. Linn complained that he was not doing well, and that he was having difficulty with his recovery and performing his job as a bellman. (JE 4:24). He continued to have numbness along the bottom of his left foot along with a fall

due to his left leg giving out. (JE 4:24). He also had residual low back pain. (JE 4:25). Dr. Schmitz found the claimant to have 5 out of 5 motor strength in his lower extremities upon examination. (JE 4:25). Mr. Linn noted that he was driving to Tennessee after his visit, and Dr. Schmitz noted Mr. Linn was "adamant he cannot go back to his job as a bellman lifting heavy suitcases." (JE 4:25). Dr. Schmitz noted the claimant's age and wondered whether it would be a good idea for him to return to the job regardless of his physical issues. (JE 4:25). He opined further that he did not think Mr. Linn could return to lifting heavy suitcases as a bellman, but that this was "somewhat more age limited than surgery limited." (JE 4:25). Dr. Schmitz felt that performing any heavy lifting task at age 90 was "a good idea anyway," especially after Mr. Linn described an incident where he fell in a barn in Tennessee while doing heavy lifting. (JE 4:25). Dr. Schmitz provided a modified work restriction with a lifting restriction of 10 pounds. (JE 4:26).

In June of 2022, Mr. Linn went to Tennessee, as his son died. (Testimony). He set about settling his son's estate, which included emptying and selling his son's house. (Testimony). He had other sons who helped him with these tasks. (Testimony). He testified that he drove back and forth from Tennessee to Iowa on four separate occasions. (Testimony).

Dr. Schmitz responded to a letter from the defendant-insurer on June 27, 2022, placing Mr. Linn in the DRE Lumbar category III using table 15-3 of the AMA Guides to the Evaluation of Permanent Impairment. (JE 4:27). He did not indicate which edition of the Guides he used, but this rating matches up with the Fifth Edition. Dr. Schmitz provided Mr. Linn with a 10 percent whole person impairment rating, and placed him at maximum medical improvement ("MMI") on June 27, 2022. (JE 4:27). He concluded by reiterating a permanent restriction of no lifting over 10 pounds "[b]ased on combination of lumbar spine and age." (JE 4:27).

On October 5, 2022, Dr. Schmitz examined Mr. Linn again. (JE 4:28-30). Mr. Linn continued to complain of lower back pain, which was aggravated by getting out of bed. (JE 4:28). The pain entered the left leg and included weakness that extended to the foot. (JE 4:28). Mr. Linn recounted to Dr. Schmitz that he recently fell while redoing a house in Tennessee. (JE 4:29). Mr. Linn felt that the fall was due to his left lower extremity and needed stitches in his finger, and that "he thought he was going to die." (JE 4:28). Dr. Schmitz examined Mr. Linn and again noted lower extremity motor strength of 5 out of 5. (JE 4:29). X-rays were "[o]verall uncomplicated." (JE 4:29). Dr. Schmitz opined that "a significant amount of his [Mr. Linn's] overall complaints are related to his overall age." (JE 4:29). Mr. Linn responded to this concern by noting that he used to tap dance and play catcher on a baseball team, to which the doctor responded that "he was now 90 years old and some of these things he may not be able to do." (JE 4:29). Dr. Schmitz also told Mr. Linn that he was "now 90 years old and most 90-year-olds do have pain. In fact it is not rare, and I am not sure if I have ever met a 90-year-old who did not have pain throughout the body…" (JE 4:29). Dr. Schmitz discharged the claimant and provided a lifting restriction of 10 pounds. (JE 4:30).

Dr. Bansal completed another IME of the claimant on July 12, 2022. (Claimant's Exhibit 2:1-8). Following that examination, Dr. Bansal issued a report documenting his findings on October 6, 2022. (CE 2:1-8). Dr. Bansal is board certified in occupational medicine. (CE 2:1). Dr. Bansal opened his report by reviewing medical records and his previous IME report. (CE 2:2-5). Dr. Bansal then outlined his interactions with Mr. Linn. (CE 2:5-6). Mr. Linn reported displeasure with having surgery, as he felt worse than prior to the surgery. (CE 2:6). He was especially displeased with being "unable to lift even 10 pounds." (CE 2:6). He also complained of pain with bending over and issues using stairs due to his left leg giving way. (CE 2:6). Mr. Linn could not sit or stand comfortably at all. (CE 2:6). Dr. Bansal then outlined Mr. Linn's job duties as a bellman at Ramada. (CE 2:6).

Dr. Bansal undertook a physical examination, and found Mr. Linn to have a loss of sensory discrimination over the lower left leg. (CE 2:7). He also had reduced strength with left plantar flexion. (CE 2:7).

In response to several questions from claimant's counsel, Dr. Bansal opined that he agreed with Dr. Schmitz that Mr. Linn achieved MMI on June 24, 2022. (CE 2:7). He also recommended that Mr. Linn be provided interventional and medication pain management. (CE 2:7). Dr. Bansal recommended that Mr. Linn not lift greater than 10 pounds, and avoid frequent bending, twisting, climbing, multiple stairs, prolonged sitting, or standing for more than 30 minutes at a time. (CE 2:7-8). Dr. Bansal also used Table 15-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to classify Mr. Linn as a DRE lumbar category III impairment, and assign a 13 percent whole person impairment. (CE 2:8).

Mr. Linn saw Benjamin Beecher, M.D., at Iowa Ortho on November 3, 2022. (JE 4:31-32). He complained of constant aching and dull left knee pain, which he rated 3 out of 10. (JE 4:31). Bending and walking aggravated his pain, while rest relieved it. (JE 4:31). Mr. Linn recounted his work injury, and alleged that "nobody has ever looked at his knee since his injury." (JE 4:31). He further told Dr. Beecher that his whole leg bothered him along with experiencing "a lot of numbness in his foot." (JE 4:31). He counted 50 falls "because of his leg," because sometimes his knee gave out on him. (JE 4:31). Dr. Beecher observed that Mr. Linn ambulated with a slow gait, but had good range of motion in his knee. (JE 4:32). An x-ray was done, which showed no significant degenerative changes. (JE 4:32). Dr. Beecher diagnosed Mr. Linn with left leg pain and subjective weakness with multiple falls. (JE 4:32). Dr. Beecher offered Mr. Linn a brace and recommended an MRI. (JE 4:32).

Dr. Beecher responded to a check-box letter from defendants' counsel indicating that the left knee MRI was causally related to the work injury "[b]ased on the patient's complaints." (JE 4:33).

On November 22, 2022, Dr. Beecher examined Mr. Linn following a left knee MRI. (JE 4:35-39). Mr. Linn continued to complain of left leg pain, which he rated 7 out of 10. (JE 4:35). During this visit, he told Dr. Beecher that he had no left knee pain. (JE

4:35). Dr. Beecher reviewed the MRI, which showed an oblique tear, an injury to the medial meniscus, and grade III chondromalacia. (JE 4:35). Mr. Linn went "on and on about how he wants to get back to work but he cannot find a job." (JE 4:35). Dr. Beecher opined that the MRI showed a medial meniscus tear and some patellofemoral degeneration. (JE 4:35-36). Dr. Beecher found that the meniscal tear was asymptomatic, while the arthritis was symptomatic. (JE 4:36). Dr. Beecher did not think Mr. Linn had any hip issues, nor was intervention necessary for the knee. (JE 4:36). He further opined that "some of his pain and issues may be related to his age and/or his previous nerve compression related to his back." (JE 4:36). Dr. Beecher discharged the claimant from care. (JE 4:36).

Mr. Linn had x-rays done to his left hip on May 23, 2023, which were compared to x-rays from June 1, 2020. (JE 5:1). The x-ray showed "a tiny spur on the left and right acetabulum," as well as spurs on the greater trochanter. (JE 5:1). The radiologist also observed degenerative changes in the lower lumbosacral spine. (JE 5:1). The impression was: "[e]arly degenerative changes both hips. No specific acute abnormality." (JE 5:1).

Mohan Akella, M.D., a doctor at the Central Iowa Health Care System for the Department of Veterans Affairs, issued a letter on July 3, 2023. (CE 7:1). The letter indicated that Mr. Linn was a patient that the doctor treated for "chronic medical conditions" on a regular basis. (CE 7:1). Dr. Akella opined, "[i]t is my understanding that he remains unemployable at this time due to [c]hronic medical conditions [and] I do not anticipate any improvement … in the foreseeable future." (CE 7:1).

Since May of 2022, Mr. Linn felt that his condition worsened. (Testimony). During the hearing, he lifted his pant leg and showed swelling, which he attributed to the work injury. (Testimony). He had bruising and redness in his left leg, as well. (Testimony). Finally, with regard to the left leg, Mr. Linn testified that he had numbness in his left foot. (Testimony). He testified that he now has back pain since undergoing surgery. (Testimony). He was unsure what was causing his issues, but felt that his continued falls proved he was worsening. (Testimony).

Mr. Linn felt that he could no longer do his job at Ramada with the restrictions provided by Dr. Schmitz. (Testimony). He felt that he could no longer lift 10 pounds, could not climb stairs, could not sleep at night, could not sit for 10 minutes, and could not stand comfortably at all. (Testimony). Mr. Linn testified that he could not return to any work. (Testimony). However, he acknowledged under cross-examination that doctors have told him that his pain is age related. (Testimony). Despite this, Mr. Linn has not even looked for work because he was unsure what kind of work he would even seek. (Testimony). At the time of the hearing, he had no plans to look for work. (Testimony).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code section 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal. Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury*." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (emphasis in original).

Before considering any other disputed issue in this case, I must first determine whether Mr. Linn has established a change in condition following the previous arbitration and appeal decision.

Following the initial arbitration decision, Mr. Linn continued to have left leg pain. He again sought additional medical care. He initially saw Mr. Ford, who referred him to an orthopedic physician, Dr. Harbach. Dr. Harbach concluded that Mr. Linn's issues were caused by his lumbar spine, and recommended a surgery to alleviate the issues. Mr. Linn eventually returned to treat with Dr. Schmitz. Dr. Schmitz again recommended that the claimant undergo a spinal surgery in an effort to alleviate his left leg issues. Dr. Schmitz ordered an MRI and EMG, which confirmed the need for surgery. On May 5, 2022, Dr. Schmitz performed a hemilaminotomy, partial facetectomy, and a left-sided L5-S1 partial diskectomy.

Following the surgery, Mr. Linn continued to have left leg pain. Dr. Schmitz discharged him from care on June 24, 2022. He sought some treatment with another orthopedic physician, but ultimately the physician determined that the issues were related to the claimant's age.

Dr. Schmitz declared the claimant to have reached MMI on June 27, 2022. He provided the claimant with a 10 percent whole person impairment using DRE lumbar category III from Table 15-3 of the Guides. He also provided the claimant with a permanent restriction of no lifting over 10 pounds based upon the combination of the claimant's lumbar spine issues and his advanced age.

Dr. Bansal performed an IME on behalf of the claimant in July of 2022. He opined that the claimant achieved MMI on June 24, 2022, and provided the claimant with a 13 percent whole person impairment rating pursuant to DRE lumbar category III and Table 15-3 of the Guides. He also provided the claimant with permanent restrictions of no lifting greater than 10 pounds, avoiding frequent bending, twisting, climbing, multiple stairs, prolonged sitting, and standing for more than 30 minutes at a time.

The previous arbitration decision adopted the opinions of Dr. Schmitz, which assigned the claimant a 5 percent whole person impairment due to his work injury in February of 2019. The claimant also was provided no work restrictions. Subsequent to the previous arbitration decision, the claimant had a surgery on his lumbar spine. At the conclusion of his treatment with Dr. Schmitz, the claimant was assigned a 10 percent whole person impairment rating pursuant to DRE lumbar category III of Table 15-3 of the Guides. Dr. Schmitz also provided the claimant with a 10-pound lifting restriction based upon both the claimant's lumbar condition and his age. Dr. Bansal opined that the claimant had a 13 percent whole person impairment rating pursuant to DRE lumbar category III of Table 15-3 of the Guides. He also provided restrictions as noted above.

The defendants concede in their posthearing brief that the claimant has sustained a change in condition based upon the foregoing. They also agreed to pay the additional impairment rating based upon the opinions of Dr. Schmitz. Even if the defendants had not conceded the issue in their posthearing brief, the evidence, including Dr. Schmitz's and Dr. Bansal's opinions, and the fact that the claimant underwent a subsequent surgery, prove by a preponderance of the evidence that the claimant suffered an impairment and a review-reopening of the matter is appropriate.

Permanent Disability

The claimant argues that he is permanently and totally disabled as a result of the work injury. The defendants argue that the claimant is only entitled to a small increase in his industrial disability award based upon his continued complaints and the increase in permanent impairment rating from Dr. Schmitz.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of aftereffects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. MacIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.1d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. V. Curtin, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish that they are totally and permanently disabled if the claimant's medical impairment, taken together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633. However, finding that the claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Guyton v. Irving Jensen, Co., the Iowa Supreme Court formally adopted the "odd-lot doctrine." 373 N.W.2d 101 (Iowa 1985). 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 provide evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, then 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.

The claimant did not prove permanent and total disability based upon the statutory definition. At the most, his functional disability is 13 percent to the body as a whole based upon the opinions of Dr. Bansal. The nonmedical factors considered do not make the claimant's disability rise to 100 percent based upon the evidence in the record.

I next consider whether the claimant was permanently and totally disabled based upon the odd-lot doctrine. At the time of the hearing in this matter, Mr. Linn was 91 years old. He is of average intelligence. He previously worked in the grocery industry, retired for a time, and then returned to work at O'Reilly Auto Parts. He then worked for the defendant-employer as a bellman. The claimant was assigned a 10 percent whole person impairment based upon the opinions of Dr. Schmitz following his surgery. Dr. Bansal provided the claimant with a 13 percent whole person impairment.

Dr. Schmitz assigned a restriction of lifting no more than 10 pounds. Dr. Bansal also restricted the claimant from lifting no more than 10 pounds. He added restrictions of no frequent bending, twisting, climbing, using multiple stairs, prolonged sitting, or standing for more than 30 minutes at a time. These are relatively severe restrictions. However, as Dr. Schmitz and Dr. Beecher note, the claimant is in his early 90s, and the restrictions provided by Dr. Schmitz were due to both the claimant's lumbar spine and his age. Dr. Schmitz also emphasized that he did not think it was reasonable or safe for the claimant to be lifting luggage even prior to his work injury due to his age. Dr. Beecher noted that the claimant's left leg issues were likely due to his age.

The claimant alleges that he is permanently and totally disabled based upon his own perceived inability to work. He offered no vocational expert evidence to support his position. He can point to his own testimony and the requirements of his job, but this alone does not prove permanent and total disability. Additionally, and more concerning, Mr. Linn has made no effort to pursue any employment since leaving the defendant-employer. He testified that this was because he did not know what he could do, or who would hire him. However, he has made no effort whatsoever to find a job.

As noted in the initial arbitration decision, the claimant is of an advanced age. Not only is he beyond the generally accepted life expectancy for a man, he is also well beyond the generally accepted work-life of a person. He admitted in the initial arbitration proceeding that he intended to retire in 2025. Taking all of the evidence as noted above into consideration, I find that the claimant has not proven by a preponderance of the evidence that he is permanently and totally disabled based upon the odd-lot doctrine.

I turn then to whether the claimant sustained an additional industrial disability. Industrial disability was defined Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "[i]t 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 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.S.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007); Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997); See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989)(no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Mr. Linn is currently 91 years old. He worked in the grocery industry for most of his life, including owning a grocery store for a time. At the end of his career in the grocery industry, he retired. He then began working for O'Reilly Auto Parts later in life. After leaving O'Reilly, he took a job with the defendant-employer. He served as a bellman, performing various tasks including transporting hotel guests to and from the Des Moines International Airport. He also performed tasks like setting up morning coffee service, inspected rooms, shoveled walks for snow, logged pool chemical readings, and generally assisted guests as needed. At the time of his initial work injury, Mr. Linn earned fourteen and 25/100 dollars ($14.25) per hour. His income consisted of Social Security Retirement benefits at the time of the first hearing, and there is no evidence that this has changed. It appears that Mr. Linn could potentially be a good candidate for grocery operations, but his age and time out of the industry likely precludes him from most forms of employment. This will be discussed further herein.

Since injuring himself at work, Mr. Linn undertook a course of conservative care. This eventually failed to mitigate his issue. He testified at the initial arbitration hearing that he did not believe that he injured his back, and that he had a left leg injury. It appears that several physicians were able to convince him that operating on his back would help alleviate his leg symptoms, so he eventually had a spinal surgery in 2022. Since that time, Mr. Linn felt that his left leg had not improved.

Dr. Schmitz provided the claimant with a 10 percent whole person impairment rating based upon Table 15-3 and the DRE lumbar category III of the Guides. Dr. Bansal provided Mr. Linn with a 13 percent whole person impairment based upon the same section of the Guides relied upon by Dr. Schmitz.

Dr. Schmitz opined that Mr. Linn was restricted from lifting anything over 10 pounds, but made sure to note that this was not simply due to his lumbar condition and that his advanced age also played a role in this restriction. Dr. Bansal provided a 10-

pound lifting restriction, as well, but made no mention of the claimant's age. He also provided the claimant with permanent restrictions of no lifting greater than 10 pounds, avoiding frequent bending, twisting, climbing, multiple stairs, prolonged sitting, and standing for more than 30 minutes at a time. The restrictions are significant, but in my analysis, I find other relevant factors significantly outweigh the restrictions provided by the physicians.

Dr. Schmitz, who operated on Mr. Linn, and Dr. Beecher, who examined Mr. Linn's left leg, opined that some of the claimant's issues were due to his advanced age. Mr. Linn argues that he was capable of performing a number of tasks immediately prior to his work incident; however, the medical professionals, and simple logic indicates that some of these tasks were well out of the ordinary for what one might expect a nonagenarian to perform. Dr. Schmitz even explained that Mr. Linn was "now 90 years old and most 90-year-olds do have pain. In fact it is not rare, and I am not sure if I have ever met a 90-year-old who did not have pain throughout the body…" (JE 4:29). As noted elsewhere, Mr. Linn previously testified that he intended to retire in 2025.

As I noted in my initial arbitration decision:

> Iowa Code section 85.34(2)(v) notes that a reduction in earning capacity shall take into account the numbers of years that it was reasonably anticipated that the employee would work at the time of the injury. Mr. Linn was 89 at the time of the hearing in May of 2021. He was injured in February of 2019. At the time of his injury, he would have been 87 years old. Based upon Social Security Administration figures, Mr. Linn's remaining life expectancy at 87 was 5.08 years. See ssa.gov/oact/STATS/table4c6.html (last viewed June 8, 2021). Mr. Linn was already beyond average retirement age, and retired for a period of time before working at O'Reilly and Ramada. It is possible that he would have worked until 2025, as he claimed; however, it is not reasonable to anticipate that Mr. Linn would work until he was 93 years old.

(JE 1). The same logic applies to this review-reopening proceeding. Mr. Linn is now 91. His age alone makes it very difficult for him to find additional employment. Mr. Linn is likely at the end, if not, nearing the end of his working life. Mr. Linn testified that he intended to work until 2025. That is less than two years from the date of this decision.

I am most concerned by Mr. Linn's claim that he has suffered a significant industrial disability when his lack of motivation is considered. Mr. Linn testified that he has not even looked for another job. This is deeply concerning, as Mr. Linn claims to desire to work. His actions speak louder than his words in this case, as even at the time of the review-reopening proceeding Mr. Linn had yet to seek employment.

I previously found that Mr. Linn had a 15 percent industrial disability. Since that time, his condition worsened. Based upon the factors of industrial disability considered herein, I find that Mr. Linn sustained a 25 percent industrial disability. Industrial disability benefits are awarded based upon 500 weeks. See Iowa Code section 85.34. This results in 125 weeks of benefits (0.25 x 500 weeks = 125 weeks).

Compensation for permanent partial disability begins at the termination of the healing period. See Iowa Code section 85.34. The parties stipulated that the commencement date for benefits is June 24, 2022.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 1. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

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

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. September 27, 2019).

The claimant requests reimbursement of the filing fee of one hundred and 30/100 dollars ($100.30). In my discretion, I award the claimant the filing fee.

ORDER

THEREFORE, IT IS ORDERED:

Claimant has proven an entitlement to review-reopening benefits pursuant to Iowa Code section 86.14.

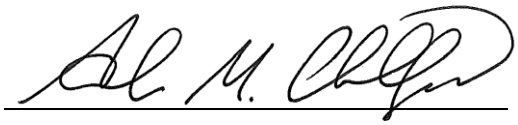
That the defendants shall pay the claimant 125 weeks of permanent partial disability benefits at the stipulated rate of three hundred sixty-four and 77/100 dollars ($364.77) per week, commencing on June 24, 2022.

That the defendants are entitled to a credit for 125 weeks of benefits already paid, and that because of this credit, claimant shall take nothing by way of permanent partial disability benefits.

Defendants shall reimburse the claimant one hundred and 30/100 dollars ($100.30) for costs.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this ___6th____ day of October, 2023.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Greg Egbers (via WCES)

Julie Burger (via WCES)

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, 10A) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.