BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHARD L. DRAPER,

Claimant,

vs.

MENARD, INC.,

Employer,

and

XL INSURANCE AMERICA, INC.,

Insurance Carrier,
Defendants.

File No. 5061657

ARBITRATION DECISION

Head Note Nos.: 2905, 3303.20

STATEMENT OF THE CASE

This is a petition in arbitration. The contested case was initiated when claimant, Richard L. Draper, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on March 13, 2018. Claimant alleged he sustained a work-related injury on December 13, 2017. Claimant alleged the work injury affected his back, neck, shoulder and his body as a whole. (Original notice and petition)

For purposes of workers' compensation, Menard, Inc., is insured by XL Insurance America, Inc. Defendants filed their answer on March 30, 2018. Defendants accepted the claim for the neck injury. A first report of injury was filed on December 28, 2017.

The hearing administrator scheduled the case for hearing on March 20, 2019. The hearing took place at 150 Des Moines Street in Des Moines, Iowa. The undersigned appointed Ms. Janice Doud as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant was the sole witness to testify at hearing. The parties offered Joint Exhibits 1 through 7. Claimant offered Exhibits 1 through 3. Defendants offered Exhibits A through P. The exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on April 12, 2019. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

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

2. Claimant sustained an injury on December 13, 2017 which arose out of and in the course of her employment;

3. The injury resulted in a permanent disability;

4. Temporary benefits are no longer an issue;

5. The disability is an industrial disability;

6. The commencement date for permanent partial disability benefits if any are awarded, is September 21, 2018;

7. The parties agree, the weekly benefit rate is $408.83;

8. Defendants have withdrawn any affirmative defenses they may have had available to them;

9. Medical benefits are no longer at issue;

10. Prior to the date of this hearing, defendants paid claimant 35.4 weeks of permanent partial disability benefits at the rate of $421.43 per week;

11. The independent medical examination will be paid by defendants; and

12. The parties agree certain costs that are detailed were paid by claimant.

ISSUE

The issue presented is:

1. What is the extent of claimant's permanent partial disability?

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, the transcript, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

At the present time, claimant is 50 years old. He is a high school graduate and served honorably in the United States Navy for 4 years. Claimant was assigned to be a parachute rigger. After his discharge from the military, claimant worked as a civilian on the base. He managed one of the military clubs for the soldiers. His duties included overseeing the bartenders and the bar stock, managing the slot machines, maintaining a safe environment, and ensuring the customers were treated in a respectful manner. Claimant stayed in Sicily until 2010 when he returned to the United States.

Claimant worked as a team member at the Menard's distribution center in Shelby, Iowa. He commenced his employment in April of 2017. (Transcript, page 15) Claimant was primarily responsible for unloading semi-trucks with merchandise and placing the merchandise in an appropriate location in the warehouse where it could be shipped to various stores. Often claimant operated a forklift truck. The driving required claimant to turn his head from side to side. At other times, claimant would be in a piece of equipment called an "auto unloader." Claimant testified, he would be in the back of a truck and unloading boxes by hand. (Tr., p. 18) Claimant testified he was able to perform all of his job duties up until the date of his work injury.

During direct examination, claimant described how he was injured on December 13, 2017. He testified:

> Q. (By Richard Schmidt) Tell us what happened and kind of the progression of your condition.
>
> A. I was unloading a truckload of hand sledgehammers, weighing approximately 30 to 40 pounds each. And they were stacked about 8 feet high, so to be able to reach the top boxes to get them off, I had to kind of tip them off with my fingers and catch them as they fell.
>
> And somehow, I don't know, I guess I moved wrong and ended up, it felt like, straining my neck; and as the day went on, that got a lot worse. By the end of the day, I couldn't move my right arm.
>
> Q. And did you report it?
>
> A. Yes. I told one of my immediate supervisors, which informed our department manager.

(Tr., p. 20)

Claimant presented to the emergency room at Myrtue Medical Center in Harlan, Iowa. Claimant also engaged in unsuccessful chiropractic care at Pitts Family & Sports Chiropractic Center, P.C. The chiropractor opined claimant needed a referral for a cervical disk issue. (Joint Exhibit 2, p. 1)

Magnetic resonance imaging (MRI) results showed:

> Degenerative changes are present in the cervical spine with a component of spinal stenosis and neuroforaminal narrowing C5-C6. Possible disc protrusion or extrusion in the right neural foramen at C6-C7. Additional report will be generated if patient is able to return to complete the examination.

(Jt. Ex. 4, p. 1)

Claimant next saw Timothy A. Burd, M.D., an orthopedic surgeon at Nebraska Spine and Pain Center. (Jt. Ex. 5, p. 1) The initial appointment occurred on or about January 9, 2018. On April 9, 2018, Dr. Burd performed an anterior cervical decompression of the spinal cord with placement of Mobi-C artificial disk replacements at C5-6 and C6-7. (Jt. Ex. 6) Claimant was allowed to return to restricted duty work on May 24, 2018. Dr. Burd imposed the following restrictions:

> Restricted to light duty. No lifting over 20 lbs. No excessive or repetitive bending. Ability to change positions as needed for comfort. No overhead work. No overhead lifting. No pushing or pulling more than 50 lbs.

(Jt. Ex. 5, p. 23)

When claimant returned to light duty work, he was assigned to a different area of work than what he had been assigned to work previously. Claimant testified:

> Q. (By Mr. Schmidt) And when you returned back to Menard's on light duty, what did they have you doing?
>
> A. Sometimes they had me in a different - - I don't even know how to say it, a different area at work, which was considered pack to tote. That's where you're just grabbing small items and separating them into different areas they're supposed to go to. Other times they'd have me back on the forklift.
>
> Q. Either one of those positions did you have difficulty performing? Did it cause you pain or discomfort?
>
> A. Yes, the forklift was.
>
> Q. And did you ever convey to them that you were having difficulty or talk to Dr. Burd about that?
>
> A. Yes.
>
> Q. Which? Both or - -
>
> A. Well, I explained to them that it was a little difficult for me to drive a forklift. And I did tell Dr. Burd they had me back on a forklift, and he updated restrictions to no forklift.

Q. At some point in time did Dr. Burd release you?

A. Yes.

Q. And before that had you returned back to - - you had been back to work at Menard's still on light duty; correct?

A. Yes.

Q. Now, did you miss some days of work at Menard's in approximately September?

A. Yes, I did.

Q. After your surgery?

A. Yes, I did.

Q. And your surgery was in April of 2018?

A. Yes.

Q. And so sometime in September of 2018 you missed some time from work?

A. Yes.

Q. And was that in any way related to your work injury?

A. I was supposed to go down to Dr. Burd for a follow-up on my - - for my surgery, but my vehicle broke down. I ended up getting caught in the rain and fell ill and missed a few days of work because of that.

Q. And did you call in or report that?

A. A couple of days I did not.

Q. And so then did you contact Dr. Burd's office about missing those appointments and kind of what you were going to do?

A. Yes. I called and said I'm having difficulty because it's an hour drive from where I live, and he ended up just putting me back on full duty over the telephone.

Q. Now how far is the distribution center from where you were living at that time?

A. 1 mile.

Q. So prior to him releasing you, had you been back to work at Menard's?

A. Yes.

Q. Tell us about that.

A. I was back doing my - - Well, from the day I was released, actually, by telephone was the day I went back to work after being ill, and I worked half the day, and then they called me in and terminated me.

Q. So you reported to work, you worked half a day, and then you were terminated?

A. They said it was policy that after being a no-call/no-show, it's policy that they terminate.

Q. Now, one thing I want to make sure we understand, had you been fully released on that date prior to going in to work, or what was the chronology of that or how did that occur?

A. Well, the day before, actually, is when I called Dr. Burd and he released me, but I hadn't had any paperwork in hand yet. So I went back to work and told them he released me, and that's the day I was fired.

Q. When you went in, they let you work half a day, and then they called you in?

A. Yes.

(Tr., pp. 28-32)

Claimant testified during cross-examination why he was terminated from Menard, Inc. He missed work due to the flu on September 6, 7, 8, 9, and 10. Claimant testified:

Q. (By Mr. Blades) . . . . And then you had the situation where you got the flu, and you missed work, and that led to the termination of your employment; correct?

A. Yes.

Q. And it wasn't a couple of days. You actually missed five days of work consecutively; correct?

A. Something like that, yeah.

Q. And over the course of those five days, you didn't call in to tell them that you wouldn't be coming to work?

A. I called maybe twice. There was a couple of days I didn't call in.

Q. And then you went - - You had been released. You got the word from Dr. Burd that you had been released, and you went back to work the next day, and you actually worked a half day without any restrictions; correct?

A. Yes.

Q. And it was at that point they called you into the office, and your supervisor there said because you had missed so many days of work without calling in, that subject to their policy you had to be terminated?

A. Correct.

Q. And so, as far as you know, had you abided by their policy regarding calling in and absenteeism, you could still be working there at the Shelby distribution plant working full time and making $13.75 per hour. Would that be fair to say?

A. It's possible.

(Tr., pp. 47-48)

On September 21, 2018, Dr. Burd opined claimant had reached maximum medical improvement. Dr. Burd released clamant to return to work without restrictions. (Jt. Ex. 6, pp. 27-28) At the time claimant was released to return to work without restrictions, he still experienced numbness in his right hand. (Jt. Ex. 6, p. 27)

After management terminated claimant from Menard, Inc., claimant found employment in October of 2018 at Wings America. It is a truck stop in Avoca, Iowa. The truck stop is located approximately seven miles from claimant's home.

Claimant performs maintenance and custodial duties for the company. At the time of the arbitration hearing, claimant was earning $9.25 per hour. Claimant testified he works from 32 to 36 hours per week. His duties include: cleaning showers, maintaining bathrooms, emptying trash receptacles, fixing gas pumps, changing hoses and handles on the pumps, or repairing other broken pump parts. On occasion, claimant is required to ask for assistance with changing long and heavy hoses. (Tr., pp. 35-36)

Subsequent to claimant's termination from Menard, Inc., Dr. Burd provided a permanent impairment rating for claimant's cervical spine, pursuant to a request from defense counsel. (Ex. C, p. 14) Dr. Burd opined:

I hope this letter finds you well. This note is in response to your request for information regarding impairment on Richard Draper a client of yours and patient of mine. Regarding his level of impairment, this is difficult question to answer as the fifth edition of the American Medical

> Associations Guidelines to the Evaluation of Permanent Impairment was written in 2002. We really did not have the technology in place yet nor was it rated, that is artificial disc replacement was not part of the fifth edition and do not believe it is part of the sixth edition either (written in 2008). That being said, however, the closest approximation we could give for an impairment to his whole person would be that of a fusion from C5 to C7, this would place him at 25% impairment to his whole person.

(Ex. C, p. 14)

Pursuant to Iowa Code section 85.39, claimant exercised his right to an independent medical examination (IME). Counsel for claimant directed his client to see John D. Kuhnlein, D.O., MPH. The examination occurred on January 3, 2019. Dr. Kuhnlein issued his report on January 17, 2019. Dr. Kuhnlein rated claimant in the following manner:

> **Impairment Rating**
>
> Based on the reasonably demonstrable objective findings, and using the AMA G*uides to the Evaluation of Permanent Impairment*, *Fifth Edition*, I would assign impairment as follows:
>
> I would agree with Dr. Burd that the artificial disc replacements he performed are not addressed by The Guides to the Evaluation of Permanent Impairment, Fifth Edition, and the closest approximation would be to a cervical fusion, even though there would not be any loss of motion segment integrity. The disc replacements were significant procedures, and so it would be appropriate to rate this in a similar fashion to a fusion. The DRE method is indicated according to pages 379-380. Turning to Table15-5, page 392, I would place Mr. Draper into DRE Cervical Category IV and assign 28% whole person impairment. Even though Mr. Draper has some residual radicular findings on examination, I do not believe that he should be placed into DRE Cervical Category V because there was no fusion. I believe that the 3% additional whole person impairment over the base 25% whole person impairment would be appropriate to address this issue in this case.
>
> **Restrictions**
>
> Mr. Draper does not describe any significant material handling problems from floor to shoulder height, he describes problems at or above shoulder height, and that would be consistent with his physical examination. As a result, with respect to material handling, the material handling restrictions would be for activities at or above shoulder height or when reaching away from the axial plane of his body for the most part. He would require no material handling limitations from floor to waist or waist to shoulder height as long as what he is lifting is kept close to his axial plane. He should lift

> 50 pounds occasionally from floor to shoulder height if he is reaching more than an elbow's distance away from his body at this level. Because his problems are at or above shoulder height, he should lift 20 pounds occasionally at or above shoulder height. These restrictions would also apply to carrying, pushing and pulling.
>
> Nonmaterial handling restrictions would include sitting, standing, or walking on an unrestricted basis. Mr. Draper can stoop or squat without limitation. He can bend at the waist without restriction. He can occasionally crawl because of the residual right arm weakness. Mr. Draper can kneel without restriction. He can work on ladders or at height if he can maintain a three-point safety stance and keep work below shoulder height. He can climb stairs without restriction. He can work at or above shoulder height occasionally. When considering only the neck condition, he can grip or grasp without restrictions. As noted above, I am not able to explain the digital numbness he experiences. There are no lower extremity restrictions.
>
> There are no vision, hearing, or communication restrictions. Mr. Draper can travel for work. If driving a vehicle, he would benefit from a backup camera. Mr. Draper can use hand or power tools on an unrestricted basis within the material handling restrictions outlined above. There are no environmental restrictions. There are no personal protective equipment restrictions, other than caution if working in a hardhat environment. He can work on production lines. There are no shift work issues.

(Ex. 1, pp. 8-9)

Defendants decided to seek a third opinion regarding permanent impairment. They scheduled an appointment for claimant with Dean K. Wampler, M.D., the medical director of CompChoice, Occupational Health Services in Omaha, Nebraska. The examination occurred on February 11, 2019. Dr. Wampler was asked the following questions to address: "If MMI has been reached, what rating of permanent impairment do you assign for the identified injury of 12/13/17?" "If so, what is the date of MMI?"

Dr. Wampler did not agree with the methodology employed by both Dr. Burd and Dr. Kuhnlein in calculating claimant's permanent impairment. Dr. Wampler explained why he disagreed with the other two expert opinions. Dr. Wampler opined in his report:

> Both Dr. Kuhnlein and Dr. Burd did not use the correct method for impairment ratings as instructed by the Fifth Edition *AMA Guides*. Instructions from the spine section, page 374 state, "As in the Fourth Edition, the DRE [Diagnosis Related Estimate] method is the primary method used to evaluate individuals with an injury. Use the ROM [range of motion] method when the impairment is not caused by an injury or when an individual's condition is not well represented by a DRE category. The Range of Motion method is also now used to evaluate individuals with an

injury at more than one level in the same spinal region and certain individuals with a current pathology." (underline emphasis added)

These instructions specifically state that, even though cervical disk replacement is not a diagnosis considered by the Fifth Edition *AMA Guides,* the fact that two spinal segment levels were involved means that the Range of Motion model should have been used to calculate impairment.

Probably more importantly, use of the Range of Motion Method is medically rational and appropriate because use of artificial disks is intended to preserve spinal mobility, rather than prevent spinal segment movement, which is the criteria for the incorrect Cervical DRE Category IV.

The first step in assigning Range of Motion method is to use table 15-7 on page 404. This identifies intervertebral disk herniation, and "Surgically treated disk lesion without residual signs or symptoms." For the cervical spine, impairment is 7% whole person for one level and 8% for two levels. This value is then combined with any loss of motion.

Tables 15-2, 15-3, and 15-4 on pages 418 through 421 are used to identify impairments for my values of active range of motion obtained by inclinometer today. There is 1% whole person impairment for loss of flexion, 2% impairment for loss of extension, 1% loss of impairment for both right and lateral bending and 1% loss for mild loss of right rotation. These values add for a total of 6% contribution from loss in mobility.

The values of 8 and 6 are then combined utilizing the combined values chart in Appendix A to identify a total of 14% permanent partial impairment of the whole person due to cervical disk replacement and disk herniations.

I do not consider Mr. Draper's loss of shoulder rotational strength as causally connected to his cervical spine injury. This is because the C6 and C7 nerve roots affected by Mr. Draper's disc herniations do not have any motor actions proximal to the distal forearm. Rotator cuff muscles are enervated by much different nerves and are unrelated to the cervical spine.

Furthermore, instructions from the AMA Guides on page 508 state that, "Decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities, or absence of parts (e.g. amputation) and prevent application of maximal force in the region being evaluated."

> Based upon correct use of the *AMA Guides*, 5th Edition, Mr. Draper sustained 14% Permanent Partial Impairment to the Whole Person as a result of injury he sustained on 12/13/2017.

(Ex. A, pp. 4-6) Dr. Wampler saw no need for any work restrictions. (Ex. A, p. 6)

After Dr. Wampler had rendered his various opinions, his report was provided to Dr. Kuhnlein for comment. (Ex. 1, p. 12) Dr. Kuhnlein indicated Dr. Wampler's February 11, 2019 report did not change Dr. Kuhnlein's opinions on the methodology he used to calculate claimant's permanent impairment rating. (Ex. 1, p. 12)

Dr. Wampler's report was also provided to Dr. Burd. He stated the following about the two methods for calculating claimant's impairment rating:

> As we discussed, and after reviewing Dr. Wampler's methodology, I believe it is reasonable to use his measurements to determine the whole impairment to Mr. Draper. Again however as we have discussed, there is no impairment rating specific for artificial disc replacement yet, either in the fifth or sixth edition of the AMA guidelines to the evaluation of permanent impairment. This is unfortunate. Regardless, both Dr. Wampler and I have made assumptions based on how we would like to interpret the data and as I stated, I believe it is reasonable the way he uses methodology to determine impairment. My method essentially was based on the fact that the surgery that would produce clinical equipoise, that is, anterior cervical decompression fusion from C5-C7 would produce a rating of 25% to his whole person based on the fifth edition of the AMA guidelines. Again this is not truly accurate just as Dr. Wampler's is not entirely accurate. Still I believe, as stated, it is reasonable to except [*sic*] his guidelines if you so choose.

(Ex. C, p. 15)

The parties stipulated claimant sustained an industrial disability. The issue is the extent of the industrial disability. Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 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).

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.

There is no dispute among the three evaluating physicians; the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, does not address disk replacement surgery. That is because the surgical procedure was developed after the Fifth Edition was published. Dr. Burd and Dr. Kuhnlein explained why they rated claimant using the DRE method. Dr. Wampler stated why he used the ROM method.

Under the DRE method, Dr. Burd and Dr. Kuhnlein assessed a twenty-five percent (25%) impairment rating as a result of the nature of the disk replacement surgery. The two physicians found the disk replacement surgery to be analogous to a spinal fusion under DRE IV. Dr. Kuhnlein added an additional three percent (3%) impairment for the residual radicular symptoms found in claimant's right arm. Dr. Wampler opined the ROM method should be employed when an individual's condition is not well represented by a DRE category.

The Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, provides at page 379:

> Spinal impairment rating is performed using one of two methods: the diagnosis-related estimate (DRE) or range-of-motion (ROM) method.
>
> *The DRE method is the principal methodology used to evaluate an individual who has had a distinct injury.* When the cause of the impairment is not easily determined and if the impairment can be well characterized by the DRE method, the evaluator should use the DRE method.

Id.

> The Fifth Edition also states on page 380:
>
> In the small number of instances in which the ROM and DRE methods can both be used, evaluate the individual with both methods and award the higher rating.

Id.

Given the directions provided on page 380 of the Fifth Edition, it is clear to this deputy, claimant's functional rating is 25 percent. Dr. Kuhnlein awarded an additional 3 percent for the residual radicular symptoms in the right arm. Dr. Burd noted those symptoms when he released claimant to full duty. The undersigned agrees with the rating of Dr. Kuhnlein. Claimant should have an additional rating of 3 percent for the

right hand residual symptoms. Claimant's functional impairment is best represented by the 28 percent rating provided by Dr. Kuhnlein.

Defendant argues new Iowa Code section 85.34(2)(u) is applicable in the present case. The new code section provides in relevant portion:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings, than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. . . . if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

It is the determination of the undersigned deputy; defendants have complied with Iowa Code section 85.34(2)(u) (2017). Menard, Inc., offered claimant work at the same pay level or above the same level. Claimant returned to work. Initially, he returned to work earning the same wages after his work injury. Later, he received an increase to $14.75 per hour.

The 2017 amendment to 85.34(2)(u) provides claimant is entitled to his functional impairment. Claimant accepted the offer to return to work. He accepted the wage increase. Claimant was terminated but the termination was in no way related to claimant's work injury. Claimant was home with some type of flu. He neglected to telephone members of management at the warehouse to alert them he was home ill and would not be arriving for work. Claimant had five consecutive days of no-call/no-show. (Ex. H, p. 37) Claimant was in violation of General Regulation number 16 and Policy number 65. (Ex. H, p. 37) Claimant's testimony at his deposition and again at his arbitration hearing established Menard, Inc., did not terminate claimant for any reason related to the work injury on December 13, 2017.

In his deposition, claimant testified:

> Q. (By Mr. Blades) Just with your memory, and I'm not trying to - - I don't need a specific date. I'm just trying to sort of place it in a time frame so we can talk about it for the - -
>
> A. I believe it was about two weeks ago.

Q. And you got the flu, and then one day you just didn't go to work and you didn't call and tell them; is that correct?

A. Correct.

Q. And then after five days of that they just finally said you were terminated?

A. They said that's policy.

Q. Did you have a meeting or how did they communicate that to you?

A. They called me into the office, told me because it's policy, I missed five days, it's policy for termination.

Q. Had you gone in to report back to work that day that you had the meeting?

A. Yes.

Q. And who was it that you met with and who told you that it was policy for your termination?

A. Melissa.

Q. Was anybody else involved in the conversation?

A. There was a new supervisor; I don't know his name.

(Ex. E, pp. 12-13)

Claimant provided a somewhat different testimony at his hearing on March 20, 2019. Under cross-examination, claimant testified:

Q. (By Mr. Blades) . . . . And then you had the situation where you got the flu, and you missed work, and that led to the termination of your employment; correct?

A. Yes.

Q. And it wasn't a couple of days. You actually missed five days of work consecutively; correct?

A. Something like that, yeah.

Q. And over the course of those five days, you didn't call in to tell them that you wouldn't be coming to work?

A. I called maybe twice. There was a couple of days I didn't call in.

. . . .

Q. And when I took your deposition, I asked you about your termination, and I asked you whether you had any issue with Menard's terminating you, and you told me during the deposition that you did not have any issue. Do you remember that?

A. Yes. If that was policy, I don't have a problem with it. I just believe that they were going to look for any excuse possible to terminate me.

(Tr., pp. 47-49)

Therefore, in light of the above, claimant is entitled to have his injury calculated by the functional method specified in new Iowa Code section 85.34(2)(u) (2017). Five hundred (500) weeks X .28 percent equals 140 weeks of benefits due to claimant from defendants. Defendants shall pay unto claimant 140 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $408.83 and commencing from September 21, 2018. Defendants will take credit for 35.4 weeks of permanent partial disability benefits previously paid at the rate of $421.43 per week.

Defendants shall pay all accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable 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.

The final issue is costs to litigate. Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

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

> party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Filing fee	$100.00
Service Fee	
IME by Dr. Kuhnlein	Will be paid by defendants as indicated at hearing

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred forty weeks (140) weeks of permanent partial disability benefits commencing from September 21, 2018 and payable at the rate of four hundred eight and 83/100 dollars ($408.83).

Accrued benefits shall be paid in a lump sum together with interest as detailed in the body of the decision.

Defendants shall take credit for thirty-five point four (35.4) weeks of compensation at the rate of four hundred twenty-one and 43/100 dollars ($421.43) which were paid prior to the hearing.

Defendants shall pay the costs to litigate as detailed in the body of the decision.

The attorneys of record, if they have not already done so, shall register within seven (7) days of this order in Workers' Compensation e-Filing System (WCES) and as a participant in this case to receive future filings from this agency.

Defendants shall file all reports as required by law.

Signed and filed this 6th day of August, 2019.

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

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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.