BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRUCE BAKER,

Claimant,

vs.

BRIDGESTONE/FIRESTONE,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 5040732, 5040733

REMAND

DECISION

Head Note Nos.: 1800, 1803, 2402

STATEMENT OF THE CASE

This matter has been remanded back to this agency for further proceedings consistent with the Supreme Court's ruling that the discovery rule applies in determining whether a claim for a single traumatic injury or a cumulative injury has been filed within two years after the occurrence of the injury under Iowa Code section 85.26(1).

The finding that clamant did not suffer a cumulative trauma on June 19, 2012, was not raised on judicial review before the district court or the Supreme Court. Consequently, this remand decision will not address that claim.

The parties stipulated to the following matters in a written hearing report submitted at the evidentiary hearing on September 10, 2013:

1. An employee-employer relationship existed between claimant Bruce Baker and defendant-employer Bridgestone/Firestone at the time of the alleged injury.

2. On May 23, 2013, claimant sustained an injury arising out of and in the course of his employment with defendant-employer.

3. If defendants are found liable for the stipulated injury, claimant is entitled to temporary total or healing period benefits from April 1, 2011, through April 5, 2011, and for a single day on September 1, 2011.

4. If the stipulated injury is found compensable and is found to have caused permanent disability, the disability is an industrial disability.

5. At the time of the May 23, 2010, injury, claimant's average gross weekly earnings were $1,277.35, he was married and entitled to two exemptions. Therefore, claimant's weekly rate of compensation is $823.97 according to this agency's published rate booklet for the May 23, 2010, date of injury.

6. The fees and charges by the providers of the medical expenses itemized in Exhibit 22, for which claimant requests payment, are fair and reasonable. The parties also stipulated that the providers of the medical care which generated those expenses would testify as to the reasonableness of their treatment and defendants are not offering contrary evidence.

8. Defendants paid permanent partial disability benefits to claimant for 35 percent industrial disability, 175 weeks of permanent partial disability benefits, pursuant to an award by this agency for a prior work injury to claimant's right shoulder in 2002.

ISSUES ON REMAND

At hearing, the parties submitted the following issues for determination:

I. Whether the claim for weekly and medical benefits based on the work injury of May 23, 2010, is barred by Iowa Code section 85.26(1) for failure to timely file an original notice and petition with this agency.

II. The extent of claimant's entitlement to weekly temporary total or healing period benefits and permanent disability benefits, and the extent of defendants' entitlement to a credit pursuant to Iowa Code section 85.34(7)(b).

III. The extent of claimant's entitlement to medical benefits;

IV. The extent of claimant's entitlement to reimbursement for an independent medical evaluation (IME).

V. The extent of claimant's entitlement to costs.

It should be noted that although a defense of an untimely-filed petition was asserted, a lack of notice defense was not raised by defendants at hearing.

FINDINGS OF FACT

Many of the following findings are similar as those in the arbitration decision of November 5, 2013:

At the time of hearing, claimant Bruce Baker was a 56-year-old resident of Runnells, Iowa. He was born on October 31, 1956. He graduated from Valley Falls High School in Kansas in 1974. He described himself as an average student. Although claimant took some post-high school courses at a community college, he did not receive any degrees or certificates as a result of that education.

At hearing, claimant described his work history as primarily consisting of two types. First, he worked in quarries and cement plants, beginning in 1974, and the second type was when he worked at defendant-employer Bridgestone/Firestone, which he has done since November 1994. Claimant indicated that at the quarries and cement plants, he performed many different types of work, including shoveling, operating heavy equipment, clean-up of the plants, and maintenance on vehicles in the plants. He indicated that when he worked for the cement plants, he did not have lapses between various jobs, and generally moved from one job to another. Claimant also performed supervisory duties both while he was working in his family business and for subsequent aggregate businesses. However, he did not hire or fire workers and he simply directed work activity as needed, similar to that of a lead worker position. Claimant's work history is found at Exhibit 19, pages 70-72.

Claimant has worked for defendant-employer since 1994 and he continued to do so at the time of hearing. He has not had any supervisory duties while working for defendant-employer. He initially worked as a size changer, where he adjusted and set up different drum sizes for the tires. He testified that the tires weighed approximately 50-70 pounds, and the job required constant pushing and pulling. He performed this job for approximately six months. Following this, claimant became a maintenance mechanic, and he has remained in that position since that time. (Transcript pp. 19-20)

At the time of hearing, claimant was continuing to work as a maintenance mechanic in the hoist department. He worked in the hoist department for nine years prior to his injury. He described this job as very physical, particularly in terms of the types of situations in which he had to repair machines at the plant. He described his work on a scissor lift, which extended to 26 feet above the ground. He indicated that on many occasions, as a part of his employment, he was required to work in awkward positions, with his back flexed. He also indicated that the machines at the plant were made such that they were not easy to get to, and he would have to fit himself into an awkward position so that he was able to perform his work. He uses impact wrenches, regular wrenches, and various power tools on this job. He continues to perform this job, despite injuries to his right shoulder and back. (Hearing Transcript, pp. 21-24)

Claimant is currently working 13 hours per day. (Tr. p. 54) His work schedule rotates biweekly. During one week, he works Monday and Tuesday, he is off work on Wednesday and Thursday, and he works Friday, Saturday, and Sunday. The following week he is off Monday and Tuesday, he works on Wednesday and Thursday, and he is off work on Friday, Saturday and Sunday. He then repeats this schedule. (Tr. pp. 55-

56) Consequently, he works five days one week, two days the next week, and then he works five days and so on. This averages out to 45.5 hours per week. Claimant said he likes this work schedule. (Tr. p. 56)

On November 22, 2002, claimant suffered a work-related injury to his right shoulder. As a result of that injury, claimant was awarded 35 percent permanent industrial disability in a final agency decision filed on November 14, 2007. (Ex. F, pp.1-7) Claimant acknowledged that the award indicated he could not perform his work at 100 percent level, but he indicated he returned to his prior work, and he was able to perform that work, although he sometimes needed assistance from a co-worker. (Ex. F, p. 2) Although claimant was released by the treating physician to return to work without restrictions, it was noted in the appeal decision that John Kuhnlein, D.O, an occupational medicine physician, recommended permanent restrictions of no lifting greater than 20 pounds above shoulder level and restricted crawling, climbing ladders and restricted use of the right arm above shoulder height.

The stipulated injury on May 23, 2010, involved claimant's low back. He fell to the ground when he became entangled in a safety lanyard when he exited a scissor lift in an attempt to retrieve a part that had fallen from the lift. Claimant stated he experienced immediate back pain after the fall, but he continued working.

After reporting the injury, claimant was sent by defendant-employer to the company physician, Todd Troll, M.D., physical medicine and rehabilitation specialist, who evaluated claimant on Monday, May 25, 2010. Dr. Troll's impression was muscular back pain and claimant was allowed to return to work at his own pace. Claimant was instructed to use ice and acetaminophen for pain and he was sent to physical therapy. (Ex. 2, p. 3) Claimant saw another doctor at the plant, Dr. Luft, on July 30, 2010. Dr. Luft noted clamant said he was about 60 percent improved, and claimant reported he continued to have low back pain radiating up to the scapular area with a dull ache in the lower right side of the back. Dr. Luft prescribed Ibuprofen and he directed claimant to continue working at this own pace. (Ex. 2, p. 4)

Claimant saw Dr. Troll again on September 2, 2010, and reported continued pain, but no radicular symptoms. Dr. Troll continued physical therapy and prescribed Tramadol for claimant's pain. (Ex. 2, p. 4) At a visit on December 2, 2010, Dr. Troll noted claimant complained of low back pain which radiated into the buttocks with numbness in his thighs. Dr. Troll ordered x-rays. (Ex. 2, p. 5) On December 7, 2010, Dr. Troll reported that the x-rays revealed spondylosis changes and disc space narrowing at L4-5. Dr. Troll placed clamant on steroid medications. (Ex. 2, p. 5) On December 16, 2010, Dr. Troll's assessment was chronic low back pain and he ordered an MRI. (Ex. 2, p. 5) On December 23, 2010, Dr. Troll reported that the MRI demonstrated mild spondylosis but no evidence of stenosis in the central spinal canal. He directed claimant to return to physical therapy and he referred claimant to Thomas Hansen, M.D., a pain management specialist. (Ex. 2, p. 6)

Claimant testified that at first, he did not think the injury was a "big deal" and expected his back to return to normal after two or three weeks. However, the pain worsened, making it difficult for claimant to perform his work. (Tr. p. 31-32) Claimant stated that by the time he saw Dr. Hansen, he realized the injury was going to affect his job. (Tr. p. 34)

Given claimant's continued symptoms despite initial treatment, given Dr. Troll's decision in December 2010 to order more testing due to chronic pain, and given claimant's testimony that by the time he was evaluated by Dr. Hansen, he realized the injury would impact his job. I find claimant did not realize the seriousness of his injury until late December 2010 and early January 2011. The significance of this finding will be explained in the Conclusions of Law section of this remand decision.

Dr. Hansen began treating claimant on January 10, 2011. Upon an assessment of lumbar facet arthritis, Dr. Hansen placed claimant on hydrocodone, tizanidine, and Celebrex. Dr. Hansen also provided a TENS electronic stimulation device. (Ex. 5, p. 11) Claimant underwent a radiofrequency denervation on April 1, 2011, by Dr. Hansen, and claimant missed work from April 1 through April 5, 2011. (Ex. 5, p. 16) As stipulated by the parties, claimant was also off work on September 1, 2011, for this injury. Claimant did not receive weekly benefits from defendants for this time off work. Defendants did, however, pay for claimant's medical treatment with Dr. Hansen.

Dr. Troll re-evaluated claimant on July 1, 2011. At that time, Dr. Troll again returned claimant to work at his own pace and he was to return for another evaluation after two weeks. (Ex. 2, p. 8) There are no further treatment records from Dr. Troll in evidence. Consequently, July 1, 2011, was Dr. Troll's last visit with claimant concerning claimant's work injury. Claimant testified he considers the "work at your own pace" directive from Dr. Troll to be a permanent work restriction because Dr. Troll never lifted that restriction. (Tr. pp. 36-37) In response to an inquiry from defense counsel, Dr. Troll stated in a letter dated August 22, 2013, that claimant was released to full duty without any permanent functional impairment, but Dr. Troll also stated claimant continued to have chronic low back pain. (Ex. C, p. 18)

Claimant continued to treat with Dr. Hansen until April 19, 2012. At the April 19, 2012, visit, Dr. Hansen prescribed the following medications for claimant's back injury: Celebrex, Tizanidine, Baclofen, Lyrica and Nucynta. (Ex. 5, p. 21)

On May 23, 2012, defendants' claims examiner sent claimant a letter indicating defendants were no longer responsible for the work injury because the two-year statute of limitations had run on any further claim for benefits for that injury. (Ex. G, p. 1) Claimant testified that prior to that time, defendants had never told him they were not responsible for his care, and they never told him they were denying his injury. (Tr. p. 38)

After defendants ended medical care, claimant received care from Mercy Clinics, where he saw his primary care provider, Stacy Davis, PA-C. At his first visit with Ms. Davis on September 28, 2012, for his work injury, Ms. Davis noted that claimant was still taking the following medications for his continued low back and lower extremity symptoms: Baclofen, Lyrica, Meloxicam, Nucynta, and Tizanidine. Ms. Davis added Cymbalta and continued the other medications. (Ex. 12 , pp. 33-34) Claimant continued to see Ms. Davis periodically until March 20, 2013. At that time, Ms. Davis noted that claimant stated to her that he is at the end of his line and wanted to see a specialist. Ms. Davis then referred claimant to Jeffrey Pederson, D.O., a specialist in physical medicine and rehabilitation. (Ex. 12, pp. 38-40)

Claimant's first visit with Dr. Pederson occurred on May 23, 2013. Upon his assessment of lower and mid-back pain, lumbar radiculopathy, joint pain in the hip, and tingling, Dr. Pederson ordered additional imaging and testing. After this testing, Dr. Pederson referred claimant to Jeffery Spellman, D.O., a pain management specialist, for consideration of lumbar medical branch blocks and possible additional radiofrequency ablation. (Ex. H, p. 1) On July 24, 2013, Dr. Spellman, performed a bilateral lumbar medial branch block. (Ex. H, pp. 4-5) Claimant testified at hearing that he was scheduled to have another branch block within a few weeks after the hearing. (Tr. pp. 45-49) Claimant stated that Dr. Spellman had not yet determined whether another radiofrequency procedure should be performed. Dr. Spellman noted that claimant continued to take Baclofen, Lyrica, Cymbalta, Nucynta, and Tizanidine. (Ex. H, p. 2)

At the hearing on September 10, 2013, claimant talked about the current condition of his back. He continued to have pain in his low back, hips and knees which began with the May 23, 2010, injury. He assessed his average pain level as 4-5 on a scale where 10 is the highest. However, he stated at times, with activity, his pain can spike to 9-10/10, such as when he works on his lift in an unstable position, or when he bends over to tie his shoes. (Tr. pp. 41, 50-52) Claimant described the pain in his knees as like someone stabbing a needle into the knees. (Id) He stated he has difficulty walking more than 200-300 feet. (Id) Despite his restriction to work at his own pace, claimant stated he has difficulties performing some of the work he must do. (Id). Claimant stated he has learned to do his work differently to avoid pain. (Id) He testified that after a few days at work, he is exhausted. (Tr. p. 54) He indicated he sleeps when he is not at work, but he stated his sleep is not sound and he often wakes from sleep. (Tr. p. 55) He also indicated that overtime was available, but he stated he does not accept much in overtime because of his back condition. (Tr. p. 57)

Claimant testified he has difficulty doing projects at home which he used to do. He stated his wife does most of the work in cleaning around the house. He stated projects he wished to do , for the most part, had been left undone because of his back pain. Claimant stated he is not able to shovel snow. He stated although he is able to ride on a riding mower, he does not do this for long periods of time. Claimant described

doing much less at home than he had done previously, even after his shoulder surgery for his prior 2002 work injury. (Tr. p. 53)

At the request of his attorney, claimant was evaluated in April 2013 by Robin Sassman, M.D., occupational medicine specialist. In her report dated May 20, 2013, Dr. Sassman opined that as a result of the May 23, 2010, injury, claimant has low back pain with radiculopathy and thoracic level back pain due to an aggravation of underlying degenerative changes in the spine. (Ex. 14, p. 51) Dr. Sassman noted that claimant's job requires repetitive stooping, bending, kneeling, standing and walking and use of vibratory tools. Dr. Sassman opined that claimant has suffered a 15 percent permanent partial impairment of the body as a whole due to the condition of his lumbar and thoracic spine caused by the work injury. (Ex. 14, p. 52-53) Dr. Sassman explained that normally she would assign permanent restrictions for a person with claimant's history, but she indicated she did not do so because of claimant's concern about keeping his job. Dr. Sassman added that if she were to place permanent work restrictions, those restrictions would limit lifting, pushing, pulling and carrying to 30 pounds occasionally from floor to waist, 50 pounds occasionally from waist to shoulder and 30 pounds rarely over the shoulder.

Dr. Sassman stated she also would restrict claimant to rarely using vibratory or power tools, sit, stand and walk on an occasional basis, and rarely stoop, bend, crawl, kneel, or walk on uneven surfaces. (Ex. 14, p. 53) However, Dr. Sassman recommended additional treatment including pain management, an evaluation by a physical medicine rehabilitation specialist and participation in a two-week spine rehabilitation program at the University of Iowa Hospitals and Clinics. Dr. Sassman stated clamant is not at maximum medical improvement (MMI) until after such additional treatment is received, but she added if that treatment is not pursued, claimant is at MMI. (Ex. 14, p. 52) Dr. Sassman's views on MMI were developed before claimant's assessment and treatment by Dr. Pederson and by Dr. Spellman.

I find claimant achieved MMI on July 1, 2011, when Dr. Troll finally released claimant to work at his own pace. I find the "work at your own pace" directive is a permanent restriction in that Dr. Troll never lifted that restriction, despite what he reported to defense counsel in August 2013. All treatment since July 1, 2011, has been to manage claimant's chronic pain in an effort to reduce his reliance on medications, which treatment so far has been only partially successful. Such treatment would not be expected to reduce claimant's permanent disability. I find the pain management treatment to be reasonable and necessary treatment for the work injury and I find claimant has a continuing need for that treatment.

I find the work injury of May 23, 2011, to be the cause of 15 percent permanent partial impairment to claimant's body as a whole, as opined by Dr. Sassman. Dr. Troll's views are not convincing because he failed to account for claimant's lumbar

radiculopathy and muscle guarding at the thoracic level as Dr. Sassman did. I find Dr. Sassman's fee for her IME in the amount of $2,555.00 to be reasonable.

I can assess industrial loss only as it was at the time of the arbitration hearing in September 2013. What has transpired since that time obviously is not contained in this record. As will be explained in the Conclusions of Law section of this decision, due to disability from the 2002 right shoulder injury at defendant-employer, I am to assess the combined disability or loss of earning capacity from both the May 23, 2010, work injury and the prior work injury which occurred on November 22, 2002, and then provide a credit to defendants against their liability for the combined disability. The prior industrial disability was set by a final agency decision at 35 percent.

At the time of the arbitration hearing in September 2013, claimant was 56 years of age. He is a high school graduate. Although his past work experience in aggregate and cement businesses includes some supervisory duties, he still was required to perform heavy work which he would have difficulty performing today. His work at defendant-employer continued to be heavy work. As noted in the agency decision for the 2002 injury, claimant had to modify his work, although he had no formal restrictions. He now has to further modify his work due to the back injury as recognized by Dr. Troll, the company doctor.

At the time of the hearing in this case, claimant had a single restriction to work at his own pace. However, Dr. Sassman recommends much more severe restrictions if claimant were to leave defendant-employer. Those restrictions clearly would prevent claimant from continuing in the type of work he is performing today.

There are apparent accommodations by defendant-employer to allow claimant to work at his own pace and claimant continues to work at his job without loss of earnings. He was making more income at the time of hearing than he did at the time of his injury due to periodic union pay increases. Claimant now has additional permanent impairment due to his back injury.

I find the work injuries of November 22, 2002, and May 23, 2010, together are the cause of a combined 45 percent loss of earning capacity. The finding of lost earning capacity would be substantially more if claimant were unable to continue in his job at defendant-employer or a similar job due to his work-related back condition.

I find that the medical expenses set forth in Exhibit 22 constitute reasonable and necessary medical treatment for the May 23, 2010, work injury.

Although Dr. Troll did not formally opine on the issue of claimant's permanent impairment until August 2013, Dr. Sassman's evaluation in May 2013 came after Dr. Troll released claimant on July 1, 2011, back to work at his own pace.

CONCLUSIONS OF LAW

I. Claimant's original notice and petition seeking benefits in this case was not filed until June 20, 2012, which was more than two years after the May 23, 2010, date of injury. Iowa Code section 85.26(1) requires an employee to bring an original proceeding for benefits within two years from the date of the occurrence of the injury if the employer has paid the employee no weekly indemnity benefits for the claimed injury. However, the time period both for giving notice and filing a claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. This is the so-called discovery rule. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is work connected and serious. Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

The Supreme Court has remanded this case back to this agency stating that a determination of the seriousness of an injury for the purpose of applying the discovery rule is governed by the holding in Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001). In Herrera, the Court stated that the limitations period does not begin to run until the claimant knows that a work injury will have a permanent adverse impact on employment or employability. Id. at 288. As pointed out in the Findings of Fact, I find from claimant's testimony and from Dr. Troll's treatment notes that it was not until December 2010 or January 2011 that claimant knew the work injury of May 23, 2010, would have a permanent adverse impact on his employment or employability. Consequently, the petition was filed in a timely manner when it was filed on June 20, 2012.

II. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

The parties agreed in the hearing report that if the work injury is found to be compensable, and if the injury is found to have caused permanent disability, claimant's disability is industrial. Because I find the injury to be a cause of permanent partial impairment to the body as a whole, this agency must measure claimant's industrial disability as a result of this impairment.

A showing that claimant had no loss of his job or actual loss of earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995).

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

In this case, because of a prior work injury, the provisions of Iowa Code section 85.34(7)(b) are invoked. Subsection (1) of section 85.34(7)(b) is applicable as there is no showing claimant's earnings were less at the time of the May 23, 2010, injury than they would have been without the prior injury. According to this subsection (1), this agency is to determine the combined permanent disability that is caused by the present and prior injuries and then provide a credit to the employer against their liability for the combined disability consisting of the percentage of disability for which the claimant was previously compensated.

I find the combined loss of earning capacity to be 45 percent. The parties stipulated that claimant was previously paid for the prior disability of 35 percent for the 2002 work injury. Therefore, defendants are liable only for an additional 10 percent industrial disability for the May 23, 2010, work injury. This entitles claimant to 50 additional weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u).

Claimant argued in his post-hearing brief that we should not consider his current accommodated work in assessing industrial loss and he argues he should be compensated for the possibility that he might leave defendant-employer. Claimant is apparently relying on U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997). In that case, a review-reopening was denied because the claimant failed to establish that the loss of her employment was due to a discontinuance of an accommodation and the claimant also failed to establish that the prior agreement for settlement was lower due to her accommodated employment. However, the court in Overholser cited favorably their opinion in Gallardo v. Firestone Tire & Rubber Co., 482 N.W.2d 393, 396 (Iowa 1992), which allowed a review-reopening proceeding and an increase in compensation when the prior agency decision specifically stated that the award was adjusted downward due to continued accommodated employment. Overholser, 566 N.W.2d at 876-877. In this case, a specific adjustment downward is set forth in this decision. See Norton v. Hy-Vee, Inc., File No. 5041551 (App. December 16, 2015) If claimant has not been able to maintain his job or a similar job since the September 10, 2013, hearing, such would constitute a change of condition and this agency can reassess claimant's disability upon a timely-filed petition for review-reopening.

It was stipulated that claimant was off work due to the May 23, 2010, injury from April 1 through April 5, 2011, and healing period benefits will be awarded accordingly. Also, claimant was off work for one day on September 1, 2011. This occurred after he achieved MMI on July 1, 2011. Therefore, claimant is entitled to regular pay for this time off pursuant to Iowa Code section 85.27(7). Although claimant's normal day is 13 hours, section 85.27(7) limits the regular pay to 8 hours for one day off work. The record does not show what claimant's hourly rate was on September 1, 2011, so I will issue a non-specific award for this time off.

III. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider or hold claimant harmless from the remaining expenses. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988)

In this case, I find that all of the medical expenses requested by claimant in Exhibit 22 constituted reasonable and necessary treatment of the work injury. Claimant paid $2,060.47 of these expenses out-of-pocket and he is entitled to reimbursement for that amount. Defendants will be directed to pay any unpaid bills and hold claimant harmless for the remaining expenses.

I also find claimant requires continued pain management treatment. The best provider for this is claimant's current provider, Dr. Spellman, given Dr. Spellman's past experience with claimant. This will be awarded.

IV. Claimant seeks reimbursement for the cost of Dr. Sassman's medical examination in May 2013. This occurred before Dr. Troll provided an opinion in August 2013 on the permanent partial impairment from the injury. However, Dr. Troll last saw claimant on July 1, 2011, for this injury and released claimant to return to work with the only restriction of working at his own pace. Such a release constitutes a disability evaluation by an employer-retained physician qualifying claimant for a disability evaluation by a physician of his own choice pursuant to Iowa Code section 85.39. Pella Corporation v. Marshall, No. 14-2121 (Iowa Ct. App. Apr. 6, 2016)

V. Claimant seeks costs listed in an attachment to the hearing report. Claimant improperly included Dr. Sassman's bill in this list which is awarded above under Iowa Code section 85.39, not as a cost. The remaining costs are appropriate under our administrative rule 876 IAC 4.22, namely the filing fee, service fee and transcription charges for deposition in evidence. Therefore, total costs awarded are $184.50.

ORDER

IT IS THEREFORE ORDERED as follows:

File No. 5040732:

Claimant shall take nothing.

File No. 5040733:

1. Defendants shall pay to claimant 50 weeks of permanent partial disability benefits at the stipulated rate of $823.97 per week from July 2, 2011.

2. Defendants shall pay claimant healing period benefits from April 1, 2011, through April 5, 2011, at the stipulated rate of $823.97 per week.

3. Defendants shall pay claimant eight hours of regular pay at his hourly rate for September 1, 2011.

4. Defendants shall pay the medical expenses listed in Exhibit 22. Defendants shall reimburse claimant in the amount of $2,060.47 for his out-of-pocket medical expenses and shall hold claimant harmless from the remainder of those expenses.

5. Defendants shall authorize and pay for continued pain management treatment for claimant by Jeffery Spellman, D.O., including any treatment modalities and medications recommended by Dr. Spellman. Defendants shall also authorize and pay for any medication management for the back condition that is done by claimant's primary care provider, Stacy Davis, PA-C.

6. Defendants shall reimburse claimant in the amount of $2,555.00 for Dr. Sassman's IME fee.

7. Defendants shall pay accrued weekly benefits in a lump sum and shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

8. Defendants shall pay claimant costs of this action pursuant to administrative rule 876 IAC 4.33 in the amount of $184.50.

9. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 13th day of April, 2016.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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