BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT EALY, Claimant, vs. WEITZ INDUSTRIAL, LLC, Employer, and ILLINOIS NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JAN 25 2017 WORKERS COMPENSATION	File No. 5054511 ARBITRATION DECISION Head Note Nos.: 1801, 1803, 4100, 4000

STATEMENT OF THE CASE

Scott Ealy, claimant, filed a petition in arbitration seeking workers' compensation benefits against Weitz Industrial, LLC employer, and Illinois National, insurer, for a work injury date of July 25, 2014.

This case was heard on September 15, 2016, in Des Moines, Iowa. The case was considered fully submitted on October 13, 2016, upon the simultaneous filing of briefs.

The record consists of claimant's exhibits 1-11, defendants exhibits A-I, and testimony from the claimant and Ms. Kelly Ealy.

ISSUES

Whether the alleged injury is a cause of temporary disability and , if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so,;

The appropriate commencement date of permanent disability benefits;

The extent of claimant's industrial disability;

Whether claimant is considered permanently disabled under the odd-lot doctrine;

Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

Whether defendants are entitled to credit under Iowa Code section 85.38(2) for payment of sick pay/disability;

Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much;

Whether claimant sustained a mental injury; and

Whether claimant is entitled to mileage.

STIPULATIONS

The parties agree claimant sustained a work-related injury on or about July 25, 2014. They agree that the injury was the cause of some temporary and permanent disability but disagree as to the extent of both periods. The injury is industrial in nature.

At the time of the injury, claimant's gross earnings were $1,394.31. He was married and entitled to 5 exemptions. Based on those foregoing numbers, the weekly benefit rate is $881.14. The defendants waive any affirmative defenses. During the hearing the defendants agreed that they would pay the independent medical evaluation (IME).

Prior to the hearing the claimant has been paid benefits from September 15, 2014 to the present time although some of those benefits were paid at a lower rate.

FINDINGS OF FACT

Claimant was a 51-year-old male at the time of the hearing. At all relevant times, claimant was married with 3 children. All 3 were minors at the time of the injury.

He graduated in 1983 from high school but felt that he was not a particularly strong student. He recalls being diagnosed with a reading disability and has no postsecondary education. He joined the Job Corps and took an 18-month apprenticeship in carpentry. Following the completion of this apprenticeship, claimant entered the workforce as a carpenter and has continued to work as a carpenter all of his working life. (Exhibit 5, pages 5 – 6) As a carpenter for defendant employer, claimant was required, among other things, to climb ladders and stairs, build and repair various objects, lift and/or move up to 50 pounds. (Ex. 6, p. 1)

Prior to his injury, claimant was able to do all of the tasks required of him without restrictions. (Ex. 6, p. 3)

In July 24, 2014, claimant was employed by the defendant employer performing various carpentry jobs. He was assigned to work at a fertilizer facility. While there, he slipped and a 100 pound concrete form fell and struck his right hip. He went to the emergency department at Keokuk County Health Center on July 25, 2014. (Ex. A1) On examination, his back revealed tenderness on the right lower lumbar region and the

muscles were inflamed. He was given a prescription and told to follow up with his regular provider. (Ex. A1)

Claimant continued to have pain on and off in his hip along with instability, frequently causing him to fall. He was seen by Brian Murphy, a nurse practitioner, on September 15, 2014, for the hip pain. Claimant described the pain as well as the instability. Mr. Murphy recommended claimant seek an orthopedic opinion. (Ex. 2, p. 1)

Claimant asserts that he has never had back pain prior to the fall. However there are medical records showing radiographs ordered by Mr. Murphy on September 7, 2012, following a fall at work. (Ex. C1) The claimant does not remember this. The radiographs showed a mild loss of disc space at L4 and L5 as well as calcific tendinitis in the right greater trochanter. (Ex. C1, C3)

On September 16, 2014, claimant was seen at Steindler Orthopedic Clinic by Scott Frisbie, a physician's assistant. (Ex. 2, p. 3) The examination was largely negative with some tenderness and lack of range of motion on the right. (Ex. 2, p. 4) Radiographs showed only modest degenerative changes within the disc spaces of the lumbar spine. (Ex. 2, p. 4) However, there was noticeable atrophy in the lower extremity and an absence of patellar reflex. (Ex. 2, p. 5) Claimant was kept off work and ordered to undergo an MRI. (Ex. 2, p. 5) Radiograph testing of the right knee showed no fracture, dislocation or significant capsular distention. (Ex. C6)

He returned on September 26, 2014, on crutches, requesting surgery. (Ex. 2, p. 6) The MRI revealed L3-4 disc disease and right L3-4 far lateral extraforaminal disc herniation and stenosis hitting his L3 nerve root. (Ex. 2, p. 7) Benjamin MacLennan, M.D., agreed that decompression surgery was a reasonable course of action. (Ex. 2, p. 8)

Claimant was sent to James Milani, D.O., for an IME. (Ex. B1) Dr. Milani concluded claimant had sustained a low back injury at work and that continued treatment of the L3-L4 herniation was appropriate. (Ex. B3) Dr. Milani also recommended claimant have sedentary work restrictions. Sergio Mendoza, M.D., saw claimant on November 7, 2014, and confirmed that an L3-L4 direct lateral interlay fusion and a right-sided facetectomy to remove the herniated disc would be appropriate. (Ex. C7)

Surgery took place in November 2014, but appeared to have little success.

On December 23, 2014, claimant was seen at the Keokuk County Health Center by Dr. Mendoza. (Ex. 2, p. 9) He complained of hip pain, multiple falls over long distances, back spasms, and leg pain. Dr. Mendoza noted that while claimant used a crutch to enter the facility, he moved around the room without the use of a crutch. (Ex. 2, p. 9) Both passive and active range of motion tests were limited on the right side and he had "exquisite tenderness to the anterior lateral thigh." Dr. Mendoza noted "Patient literally twitches and draws back quickly secondary to pain with palpation pressure that is not even heavy enough to change the nail bed coloration on my

fingers." (Ex. 2, p. 10) Dr. Mendoza recommended physical therapy for strengthening, pain reduction techniques, therapeutic exercises and balance training. (Ex. 2, p. 10)

Claimant was then referred to Joseph J. Chen, M.D., at the University of Iowa Hospitals and Clinics. Dr. Chen became claimant's primary treating physician. (Ex. 2, p. 14) Dr. Chen felt claimant's right gluteal pain was the result of a combination of trochanteric bursitis as well as gluteus medius weakness. (Ex. 2, p. 17) Dr. Chen recommended an injection, which claimant refused. (Ex. 2, p. 17)

Claimant continued with physical therapy. The therapist noted that the claimant improved. "The patient is able to flex his hip to an appropriate range of motion now." (Ex. 2, p. 20) At this point, claimant had been off work since September 2014. (Ex. 2, p. 23) Despite occasional improvements, claimant continued to complain of pain and discomfort. The therapist noted that claimant exhibited "extreme guardedness and apprehension." (Ex. 2, p. 26)

Claimant worked hard during therapy but exhibited pain behaviors, particularly facial expressions. (Ex. 2, p. 29)

During the February 9, 2015, visit with Dr. Chen, claimant reported improvement in therapy. He was able to sleep without a back brace, but felt the right thigh pain was problematic. (Ex. 2, p. 30) His straight leg raise, hip, and knee provocative maneuvers were negative but he had reduced range of motion in the lumbar spine in all directions due to pain. (Ex. 2, p. 32) Dr. Chen continued claimant with sedentary work restrictions. (Ex. 2, p. 33) In a follow-up visit on March 9, 2015, with Dr. Chen, claimant reported very little change despite a therapy note of February 18, 2015, where claimant reported a 30-35 percent improvement and the ability to ambulate without an assistive device. (Ex. 2, p. 38) Dr. Chen continued the prescription for Neurontin and urged claimant to attend more physical therapy. (Ex. 2, p. 45)

Ultimately claimant entered the Spine Rehabilitation Program. During the initial evaluation, claimant reported being separated from his second wife and living alone. (Ex. C12-C14) On day #7, Dr. Chen wrote that claimant would likely have trouble returning to work due to his leg atrophy and the need to climb ladders or stairs. (Ex. 2, p. 27) As part of the Spine Rehabilitation Program, claimant underwent psychological therapy sessions with Valeria Keffala. (Ex. C17) Additionally he met with Gillian J. Fox, a vocational specialist who attempted to help claimant find suitable work. (Ex. C18)

Claimant was not responsive to Ms. Fox's assistance.

Claimant completed the course on July 24, 2015. (Ex. C31) Dr. Chen recommended physical restrictions of no lifting more than 15 pounds 4 times per hour and repetitive lifts limited to 7.5 pounds. (Ex. C32) In the summary, Dr. Chen wrote,

> We have discussed that despite your pain, there is no permanent structural damage to your spine that explains your ongoing pain. These recommendations are not specifically a result of damage to your spine.

> We have discussed if you feels [*sic*] that you can no longer perform your essential job duties because of ongoing pain complaints that you should consider alternative work options.

(Ex. C32) Dr. Chen determined claimant was at maximum medical improvement (MMI) as of August 31, 2015 and assigned the following permanent restrictions. (Ex. C35)

> He is able to lift 15 pounds on an occasional basis (defined as up to 1/3 of a workday).
> He is able to lift 7 pounds on a repetitive basis (defined as 1/3 to 2/3 of a workday).
> He is able to push or pull 30 pounds of force.
> He is limited to occasional twisting, bending, reaching, stooping (defined as up to 1/3 of a workday).
> He is to avoid squatting or kneeling.
> He requires a 5 minute break every 60 minutes in order to change positions and do specific stretches for pain management.
>
> Because of his ongoing right leg atrophy and radiculopathy following his lumbar fusion, he can be rated as having a **28% impairment of the whole person** based on Lumbar DRE Category V Table 15-3 page 384 of the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.*

(Ex. C35) (Emphasis in original.)

He was then discharged with a nerve stimulator and a thigh brace. His Pain Catastrophizing Score increased from 23 before the program to 35 at the end. (Ex C36) During his treatment in the spine program, claimant declared that he planned to obtain his commercial driver's license (CDL) and had at least two job leads. It is not clear whether claimant pursued these job leads, but he did not have a CDL at the time of the hearing.

Claimant began receiving counseling with Jan Walker on January 21, 2016. (Ex. 2, p. 61) Ms. Walker observed claimant ambulating normally and with normal posture although he had a brace on the right leg. (Ex. 2, pp. 62, 68) Emotionally and mentally, he reported anxiety and depression. (Ex. 2, p. 62) Ms. Walker found claimant to have average intellectual functioning, good judgment and insight. (Ex. 2, p. 68)

Ms. Walker diagnosed claimant with major depressive disorder. (Ex. 2, p. 66) She recommended contact with family members and followup counseling sessions. (Ex. 2, p. 69)

On February 25, 2016, claimant was seen at Keokuk County Medical Clinic for right knee pain. (Ex. 2, p. 71) He was not tender to palpation but there was mild swelling. (Ex. 2, p. 71) The MRI showed trochlear dysplasia. (Ex. 2, p. 73, C45) A follow up x-ray showed bilateral minimal osteophyte formation, consistent with Grade I

osteoarthritis. On May 11, 2016, he was seen by Dr. Chen for the pain and weakness in the right knee. During the examination, he exhibited normal gait, gross motor function, and balance. Coordination and reflexes in the lower extremity were normal as well. He had reduced strength in the right quad. Dr. Chen refilled claimant's prescription for Neurontin and amitriptyline and referred claimant to John P. Albright, M.D. (Ex. C49)

Dr. Albright diagnosed claimant with trochlear bruise, cartilage fissuring, and synovium. (Ex. C55) Dr. Albright explained that the claimant was suffering small flakes of cartilage irritating the joint lining as a result of arthritis. (Ex. C55) When asked his opinion on causation and permanency, Dr. Albright opined claimant's condition was not related to the work injury or the ongoing leg complaints and that the diagnosis of synovitis should not be permanent. (Ex. C61) A mobilizer was ordered and Dr. Albright recommended an injection, which claimant refused.

During a follow up visit, the injection was revisited, but the claimant again refused. (Ex. 2, p. 80)

Dr. Albright saw the claimant on June 6, 2016. During that visit, they again discussed possible injection therapy, but the claimant preferred not to go through with it. When asked at the hearing why he did not get it done, the claimant said that it was just an option. He went back recently to get an adjustment of the knee brace.

In January 2016, claimant started to see a counselor. He began to see her every other week, relating issues of helplessness and frustration with change. (See e.g. Ex. E1)

Claimant is not convinced that the spinal surgery was helpful. He wears a brace and he still has instability issues. He always has pain of some kind. He currently takes amitriptyline.

Claimant was dismissed from his position. He does not believe his dismissal had anything to do with his restrictions. He does not believe he is physically able to do any of his prior work. His prior hobbies included some travel, climbing and hiking, golfing, bowling and slow pitch softball.

He has looked for work outside the union as well as applying online to various places. His resume is not designed to attract employers. The first line indicates that he is injured from a back surgery and had a bad leg. (Ex. 7, p. 1) At hearing, he acknowledged that it was not helpful to have the injury be the first qualification made known to employers. The vocational advisor he consulted with during his treatment in the Spine Clinic suggested he revise the resume to make it more attractive to employers. He refused, arguing that it felt like she was trying to get him to lie. However, when asked why he applied for particular positions, he testified that he was hopeful that if he could get his foot in the door, he could convince someone to take a chance on him. This line of reasoning is at odds with the contents of his resume and the way that he held himself out to prospective employers.

It is found that the claimant exaggerated his job search attempts. His resume is designed to deter employers rather than attract them.

Claimant seems content with his medical condition and his current state of unemployment.

Claimant's wife, Kelly Ealy, is an artist who has a European art exhibition scheduled. Claimant is currently planning on traveling with his wife and daughter, but Ms. Ealy is reluctant, believing that claimant's injury will inhibit her excursion.

She works frequently, but when she is around claimant, he does stumble and fall.

He can no longer wrestle with his sons. At tournaments, he is relegated to standing and watching. He does travel to see his children's wrestling, volleyball or cheer matches but cannot do long trips. Sitting on bleachers is painful. Ms. Ealy testified that claimant is sad and uncommunicative, which she attributes to his pain.

She does believe the therapy is helping. On the days he has therapy, she notices a difference.

Janet Walker, LSW, opined that claimant cannot work because of his mental and physical injuries. (Ex. 2, p. 84) Her diagnosis is primarily based on claimant's verbal complaints.

> Mr. Ealy reported his depression began after the work injury of July 25, 2014. The work injury has caused his depressive condition for the following reasons.
> As a construction worker, he took pride in what he could build and not being able to build any longer has left him feeling worthless. Because he no longer works with friends, he has also suffered loss of friendships from work.
> Mr. Ealy was very athletic personally and was actively involved with his children in their sports. Now he physically becomes exhausted and is no longer able to perform at his previous levels personally and with his children. Even just simply walking is a struggle at times. He cannot lift or assist with anything. He reports yard work is even a struggle; what used to take him an hour to complete now takes all day if he can even complete the task at all.

(Ex. 2, p. 84)

On March 28, 2016, claimant underwent an IME with Robin L. Sassman, M.D. Claimant reported constant back pain, atrophy in the right leg, radiation of pain into the right leg, and pain in the right knee. His current restrictions are no lifting more than 15 pounds on an occasional basis and no more than 7 pounds on a repetitive basis. He can push/pull up to 30 pounds and should limit his twisting, bending, reaching and stooping to only occasional use. (Ex. 1, p. 8)

He exhibited a limp on ambulation, could not heel and toe walk, but was able to squat and recover with the help of a table. (Ex. 1, p. 9) He was tender to palpation over the lumbar spinous process. He had approximately two cm reduction of the right calf in comparison to the left. (Ex 1, p. 9) He had reduced reflexes on the right side and a positive straight leg test on the right.

Dr. Sassman concluded that the right knee pain, right hip pain, and low back pain were associated with the work injury and that the mechanism of being struck by a 100 pound concrete form was consistent with the injury itself. Additionally, claimant reported no prior back complaints. (Ex. 1, p. 10)

Dr. Sassman recommended further evaluation by an orthopedic specialist and a pain management specialist. (Ex. 1, pp. 10-11)

For restrictions, Dr. Sassman opined:

> Mr. Ealy should limit lifting, pushing, pulling and carrying to 10 pounds occasionally from floor to waist, waist to shoulder and above shoulder height. He should limit standing and walking to a rare basis and will need to wear his leg brace with ambulation. He should limit sitting to an occasional basis and will need to change positions frequently due to his symptoms. He should not walk on uneven surfaces or use ladders. He should rarely use stairs and should always employ the use of a handrail. He should not work at heights due to the fall risk.

(Ex. 1, p. 12) Dr. Sassman further assigned claimant a 31 percent whole person impairment as a result of the injury with the majority of the impairment attributable to claimant's lumbar spine complications. (Ex. 1, p. 11) In a follow up letter, responding to an inquiry from claimant's counsel about the synovitis causation, Dr. Sassman concluded that the right knee pain was likely related to the synovitis but that the synovitis was the result of a significant gait change caused by the back injury. (Ex. 1, pp. 17-18)

On August 15, 2016, claimant's counsel wrote to defendants requesting further authorization with Dr. Chen. (Ex. 3, p. 1) On August 19 2016, counsel for the defendants conveyed defendants' denial of liability. (Ex. 3, p. 2)

On September 25, 2015, claimant's counsel wrote requesting information regarding a late paid benefit. (Ex. 8, p. 1) While claimant had been released by Dr. Chen, defendant employer did not return claimant to work. (Ex. 8, p. 1) A repeat of the letter was sent on October 12, 2015. (Ex. 8, p. 2) On October 22, 2015, claimant's counsel sent an email acknowledging a fax indicating that indemnity benefits would be continuing. At that time, the weekly benefit check still had not been sent since September 4, 2015. (Ex. 8, p. 3)

On October 20, 2015, a check for six weeks of permanent partial disability was cut. (Ex. 8, p. 9)

Claimant seeks reimbursement of $1,090.43 in mileage as well as underpayment of benefits of $7,385.92 for underpayment of rate and non-payment of benefits from September 16, 2014-September 28, 2014, as well as underpayment of rate for all time periods during which weekly benefits were issued. (Ex. 5, p. 8; Ex. 9, p. 1)

Outstanding medical bills total $3,358.25, $69.13 for medication expenses, and a $1,107.67 reimbursement to Medicaid. (Ex 10)

The parties stipulated to the claimant's average weekly wage of $1,394.31. (Ex. H1) This is based on the 13 weeks preceding the injury excluding the week of July 10, 2014, for being non-representative as it was shorter than all others. (Ex. H1) Claimant's first supplemental answers to interrogatories claimed that the applicable rate was $969.70 based on the wages earned in the 13 weeks prior to the injury. (Ex. G5) This was later revised on August 12, 2016, to be $968.03. (Ex. F22)

Claimant seeks reimbursement of costs including a report by Jan Walker and an IME report by Dr. Sassman. (Ex. 11, p. 1) Only one IME is permitted and pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (2015), only the examination costs are permitted. Claimant is entitled to a reimbursement of $1,325.00 for Dr. Sassman's IME. (Ex. 11, p. 6)

The filing fee, service of process fee, and report of Jan Walker, are assessed as costs.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The claimant must prove that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the

employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

Claimant has an accepted back injury but the parties dispute whether claimant's knee pain and depression arise out of the work-related injury of July 25, 2014. Both Dr. Sassman and Dr. Albright attribute claimant's knee pain to synovitis. Dr. Albright explained that as a result of arthritis small flakes of cartilage were irritating the joint lining. Dr. Sassman felt that the gait change was at least a substantial factor in the development of the synovitis symptoms.

Claimant argues in his brief that Dr. Albright's conclusion had "no explanation" and that "this opinion simply doesn't make any sense." However, even Dr. Sassman wrote that the gait change was only a substantial factor in bringing about the synovitis symptoms. She did not address the explanation that Dr. Albright did provide—that small flakes of cartilage were irritating the joint lining.

Dr. Albright, who treated claimant, provided an opinion consistent with the radiographs and claimant's physical condition and therefore Dr. Albright's opinion that the synovitis is not work-related is adopted. It is determined that claimant's synovitis is not work-related. Medical bills associated with the right knee synovitis are not work-related and therefore, not the responsibility of the defendants.

However, claimant does have right hip, low back pain, atrophy in the right lower extremity, right thigh numbness, and pain radiating down the right extremity that is work related. While the pain is mechanical in nature, as explained by Dr. Chen, it still exists even if it is exaggerated as Dr. Mendoza indicated.

The other issue of causation goes to the mental injury. Claimant was treated for depression as part of the Spine Rehabilitation Program, although, it should be noted that there were other issues affecting claimant's mental state such as his separation from his wife. Dr. Chen prescribed amitriptyline, in part, because of claimant's depression. (Ex. C10) Dr. Keffala included claimant's adjustment to his life "and perceived changes in his identity since his injury" as part of the overall constellation of mental health issues for which she was treating him. She recommended individual counseling to help manage stress related life changes secondary to his pain. (Ex. C14) Claimant was also seen by Jan Walker who opined claimant's depression was caused, at least in part, due to his work-related injury.

Therefore, it is determined claimant's work injury and the subsequent pain associated with said injury was a substantial factor in bringing about claimant's depression. As a result of this finding, claimant is entitled to medical care in the future related to his depression and reimbursement for past medical expenses related to the depression.

The next issue is the extent of claimant's injury to his back, right lower extremity, and his depression.

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.

Work restrictions from Dr. Chen, an authorized treating physician, included no lifting over 15 pounds and no work with ladders and stairs. Dr. Chen assigned claimant a 28 percent body as a whole impairment rating. Dr. Sassman's conclusion was similar, assessing claimant's functional loss at 31 percent.

Claimant testified that he has a learning disability, although his counselor, Ms. Walker, found claimant to have average intellectual functioning, good judgment and insight. While It is not likely claimant could return to his previous employment as a carpenter, there are no restrictions on claimant's standing or sitting.

He once showed interest in obtaining a CDL, but has not pursued that. While Ms. Walker opined that claimant cannot return to work because of both his physical and mental injuries, much of her opinion relies on claimant's subjective history and complaints. Claimant's physical condition has varied a great deal from examination to examination. In his March 28, 2016 visit with Dr. Sassman, claimant walked with a limp and could not perform a heel and toe walk. But in his visit with Dr. Chen two months later, claimant exhibited normal gait, normal gross motor function and normal balance. His coordination and reflexes were normal as well. The only problem he exhibited was reduced strength in the right quad. Ms. Walker's opinions regarding claimant's employability are given lower weight. She did not identify the reasons for which claimant's depression reduced his employability (which is the argument advanced by claimant regarding Dr. Albright's conclusions of the right knee). She also provided no work restrictions associated with his depression.

Dr. Mendoza's examination of claimant resulted in such exaggerated pain responses that he noted "Patient literally twitches and draws back quickly secondary to pain with palpation pressure that is not even heavy enough to change the nail bed coloration on my fingers."

Claimant's search for new work has been lackluster. Claimant argues in his brief that he did not engage in self-sabotage but instead had a naive assessment of an employer's willingness to accommodate claimant's injury. Claimant is not an unintelligent person and he seemed well aware that structuring his resume in such a way would turn away employers. Even his own counselor said that he was of average intelligence and exhibited good judgment and insight.

He cannot return to any of the work he had done prior to his injury, but based on his age, his average intelligence, the lack of restrictions on standing and sitting, there is work available to the claimant. He could obtain his CDL. He could work a factory production job which does not require heavy lifting. He could do telemarketing or other desk work with some amount of retraining. He currently assists his photographer wife on various shoots. While the labor market is greatly reduced for claimant, it is not entirely closed.

Based on Dr. Chen's restrictions and for the foregoing reasons, it is found that claimant has sustained an 85 percent industrial loss. Further, the claim of odd-lot is specifically denied. Claimant did not show that that the only services that he could perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985).

The odd-lot doctrine is an alternative theory of recovery implicit in the industrial disability standard. Michael Eberhart Const. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004); Guyton v. Irving Jensen Co., 373 N.W.2d 101, 104–05 (Iowa 1985). When an injury makes the worker incapable of obtaining employment in any well-known sector of the labor market, an injured employee is an odd-lot employee entitled to permanent total disability. Michael Eberhart Const., 674 N.W.2d at 125.

Under the odd-lot doctrine, the injured employee carries the burden of production to demonstrate his inability to obtain gainful employment. Guyton, 373 N.W.2d at 105. Once a claimant makes a prima facie case of odd-lot status, the burden of proof shifts to the employer to show evidence of the existence of reasonable, steady employment. Michael Eberhart Const., 674 N.W.2d at 125–26.

To determine whether the injured employee established a prima facie case of odd-lot status, it is "normally incumbent on the claimant to demonstrate a reasonable effort to secure employment." Nelson, 544 N.W.2d 258, 267 (Iowa 1996) (internal quotations omitted) ("Clearly, in the typical case the employee will want to demonstrate a good faith, unsuccessful effort to find steady employment."). Proof of reasonable efforts to secure employment is not, however, an absolute prerequisite for odd-lot status. Id. The claimant need not show proof of reasonable efforts to obtain employment if the claimant presents "substantial evidence that he has no reasonable prospect of steady employment." Id. In other words, in order to avoid the reasonable efforts requirement, the claimant must show that any effort to search for a new job would be futile. Id. at 267–68. It is within the agency's province to determine the weight and credibility of expert testimony. Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995). Despite the practical effect of the burden shifting rule, "the ultimate burden of persuasion on the issue of industrial disability always remains on the employee." Nelson, 544 N.W.2d at 267.

Claimant did not make a prima facie case of total disability, in part because claimant's work search was deemed to be half-hearted rather than reasonable. His resume was designed to put off employers, rather than attract them. He rejected assistance from a vocational assistant. He has made no attempts at retraining. There is potential for retraining given claimant's age and background. He was capable of learning a trade despite any professed learning disability. Carpentry requires the ability to measure and do some calculations which he was able to perform over the many years of employment. He is of average intelligence and has the ability to sit and stand, reach, handle materials, do sedentary work.

Permanent benefits begin at the end of the healing period. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant did not return to work nor is he medically capable of returning to substantially similar employment. Therefore the MMI date must be ascertained. Claimant sets the MMI date as of June 6, 2016. Defendants argue that claimant either reached MMI on March 31, 2015, or earlier, or, in the alternative, has not yet reached MMI.

Claimant has had no treatment to his low back since his discharge from the spine program in 2015. His post spine treatment has primarily been for his mental state and the synovitis in his knee. While claimant might need ongoing treatment for his depression, it was not found that his depression was adversely affecting his employability. Further, the counseling appears to be palliative in nature. There is no evidence that further care will improve claimant's condition.

Therefore, the appropriate MMI date would be August 31, 2015, as designated by Dr. Chen.

Defendants are entitled to a credit against the award of industrial disability for any benefits paid after August 31, 2015.

The final issue is one of penalty. Claimant seeks penalty benefits for the underpayment of weekly benefits and for the late payment of benefits pursuant to Iowa Code section 86.13(4). This particular provision requires that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award additional weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied. Iowa Code section 85.13(4)(b). A reasonable or probable cause or excuse must satisfy the following requirements:

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee;
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits;

(3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c)).

If there is delay or termination of benefits, defendants have the burden to show compliance with this statutory provision in order to avoid the mandatory assessment of a penalty.

Defendants paid a weekly benefit at a rate of $853.69 from September 29, 2014, until the rate was corrected on August 22, 2015. There is no explanation for why the rate was undercalculated. On the other hand, claimant overcalculated the benefit rate, showing some uncertainty about the representative weeks. However, it is the defendants' burden to show compliance and no explanation was provided. The underpayment is in the amount of $2,721.58. The defendants shall pay a 25 percent penalty based on underpayment.

The second penalty argument arises from late benefits. Claimant was not paid benefits until October 10, 2014. However, defendants are allowed a reasonable time to investigate the claim. Claimant initially sought treatment with Brian Murphy on September 15, 2014. Claimant was then referred for an orthopaedic opinion which took place on September 16, 2014. An MRI was ordered revealing the need for surgery. The IME by Dr. Milani was conducted on September 29, 2014. A second opinion was obtained from Dr. MacLellan. An October 10, 2014, commencement date for benefits was not untimely.

Claimant also argues that he is entitled to penalty benefits when his benefits stopped on September 7, 2015. They were restarted on October 20, 2015, and the missed benefit periods were caught up but no explanation was provided at the time. No explanation was provided at the time of the hearing either.

Therefore, a penalty benefit of 5 percent is awarded against the late paid benefits of $4,268.45 for the interruption of benefits without explanation.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant four hundred twenty-five (425) weeks of permanent partial disability benefits at the rate of eight hundred eighty-one and 14/100 dollars ($881.14) per week from September 1, 2015.

That defendants are to pay and/or reimburse claimant for medical expenses associated with his depression including any mileage costs incurred in attending his counseling or therapy visits.

That claimant is entitled to ongoing care for his depression.

That claimant is entitled to penalty benefits in the following amounts: six hundred eighty and 40/100 dollars ($680.40) and two hundred thirteen and 42/100 dollars ($213.42).

That defendants shall pay accrued weekly benefits in a lump sum.

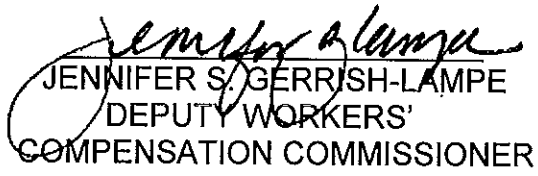
That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants are to be given credit for permanent benefits previously paid after August 31, 2015.

That defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 25th day of January, 2016.



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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.