BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS MAY, Claimant, vs. MENARDS, INC., Employer, and PRAETORIAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 5041559 REVIEW - REOPENING DECISION Head Notes: 1803, 4100

FILED
MAY 23 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Dennis May filed a review-reopening petition seeking workers' compensation benefits from Menards, Inc., employer, and Praetorian Insurance Co., insurer, arising out of an accepted work injury of January 20, 2012. This matter initially came for hearing before the agency in 2015. Following the hearing, Deputy Commissioner Grell issued a decision on June 2, 2015 finding that the work incident caused the conditions of claimant's right and left shoulder but that claimant was still in his healing period. Deputy Commissioner Grell issued a running order for healing period benefits. Defendants appealed the decision. A decision on behalf of the agency was issued on December 20, 2016, affirming the arbitration decision.

The claimant has filed the above-captioned matter to seek additional benefits. A hearing was held on April 2, 2018 in Des Moines, Iowa, and considered fully submitted on April 23, 2018, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 3-4, Claimant's Exhibits 101-103, Defendants' Exhibits CC, DD, GG, HH and MM.[1] Along with the documentary evidence, there was testimony from the claimant, Elizabeth Parillo, and Lana Sellner.

[1] The exhibits were initially numbered 1-3 and labeled C, D, G, H and M. However, given that these markings were duplicative of the exhibits of the underlying arbitration hearing, the review-reopening exhibits were remarked as identified.

ISSUES

1. The extent of claimant's industrial disability;
2. Whether claimant is considered permanently disabled under the odd-lot doctrine;
3. Costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

This is a review-reopening petition arising out of a work injury occurring on January 20, 2012. On June 2, 2015, Deputy Commissioner Grell issued an arbitration decision finding that claimant had sustained left and right shoulder injuries arising from the work injury of January 20, 2012. He determined that the claimant had achieved maximum medical improvement (MMI) for the right shoulder injury on September 11, 2012, but that claimant was still in his healing period for the left shoulder injury. Claimant was awarded a running healing period award, medical expenses and costs.

The parties agree that claimant has sustained an industrial disability and that the case is now ripe for a permanency determination. They further agree that the commencement date for PPD benefits, if any are awarded, is February 20, 2017.

At the time of the injury, claimant's gross earnings were $467.88 per week. He was single and entitled to one exemption. Based on the foregoing, claimant's weekly benefit rate is $303.74.

Prior to the hearing, claimant was paid 58 weeks of PPD at the rate of $303.74. The parties agree defendants are entitled to a credit of this amount against any PPD awarded herein.

FINDINGS OF FACT

Claimant was a 65-year-old person at the time of the hearing. He graduated from high school in 1970 and has no post-secondary education. His last job was working as a forklift driver for defendant employer. He has not worked since the date of his injury on January 20, 2012.

His medical background is significant for a total ankle arthroplasty on the right in 2011. He testified that he is not supposed to stand more than 15 minutes at a time, and if he exceeds that, his ankle gets sore.

While working for defendant employer at the concrete plant, he spent at least seven of his eight-hour shifts driving or operating the forklift. During the non-driving hours, he would restock concrete blocks onto a pallet.

Prior to working for defendant, he was a stand-up forklift driver, a parts holder for John Deere, a line worker and then a forklift driver at Omega Cabinets. In the more distant past, he worked on a commercial fishing boat packing and sorting fish, as a long-haul driver, and as a lighting supply delivery person. The position for the lighting company required the least amount of manual labor. He delivered electrical switches and light bulbs to casinos and estimated his lifting requirement as nothing over ten pounds. He had some supervisor experience in the remote past, overseeing roofers and on the cabinet pinning line at Omega Cabinets.

On or about January 20, 2012, claimant suffered bilateral shoulder injuries while trying to lift a large 20-foot by 20-foot overhead door. Claimant was attempting to maneuver the overhead door on its rollers so that he could move his forklift outside. The overhead door suddenly caught and stopped moving when claimant's arms were approximately eye level. He experienced immediate pain but did not report the injury immediately in hopes that the pain would resolve.

He eventually reported the injury and set out on a course of treatment. The last treatment date for the right shoulder was September 2012 with Dr. Naylor in Waterloo. (See Exhibit 10) Since the surgery and subsequent physical therapy, he has had some improvement, but the right shoulder is still weak. For the left shoulder, claimant was referred to Iowa City for treatment with Matthew Bollier, M.D. (Ex. 11:1) Claimant was seen by Dr. Bollier and underwent two surgeries to repair the rotator cuff. (Ex. 11) During the first surgery Dr. Bollier discovered a large supraspinatus rotator cuff tear that involved the anterior infraspinatus and a torn lateral pulley in the biceps tendon. (Ex. 4:3)

After the first surgery, claimant continued to complain of shoulder pain as well as pain from the left side of the neck down into his shoulder. He was informed that his muscles are deteriorating due to overcompensation and the weakness in the rotator cuff. According to claimant, the neck and trapezius pain were new symptoms that arose following the replacement surgery. Dr. Bollier ordered MRIs of the left shoulder and neck along with an EMG of the left upper extremity. (Ex. 11:27) The cervical spine MRI revealed mild degenerative joint and disk disease, but the left shoulder MRI showed a full-thickness, massive tear of the supraspinatus and infraspinatus. (Ex. 11:30) The EMG showed suprascapular nerve injury that was not radicular in nature. (JE 11:36)

Dr. Bollier referred claimant to Joseph Smucker, M.D. for evaluation of the neck pain. (Ex. 11:32) Dr. Smucker concluded that the left shoulder pain and weakness was due to a peripheral nerve injury to the suprascapular nerve, rather than a radiculopathy from the cervical spine. (Ex. 11:36) Both doctors concluded that the EMG nerve injury was related to the rotator cuff tear, and another surgery was performed by Dr. Bollier on

January 7, 2014. (Ex. 5:1) Because of the extent of the tearing, Dr. Bollier was not able to fully repair the rotator cuff. (Ex. 5:3)

On May 19, 2014, James Nepola, M.D., an orthopedic surgeon at the University of Iowa Hospitals and Clinics evaluated claimant's shoulder and recommended a shoulder replacement. (Ex. 11:62-64) On November 20, 2014, claimant underwent a shoulder replacement surgery on the left. (Ex. 6:2) His post-surgery recovery was complicated by an upper trunk brachial plexopathy that Dr. Nepola thought might be due to the nerve block claimant received for pain. (JE 3:53) However, March 2015, claimant was ready for physical therapy. Initially claimant was excited about the post-surgery results. He reported that he was able to bend at the elbow and that his pain was managed by gabapentin. (JE 3:53) After injections and physical therapy, claimant made small improvements, advancing from 30 degrees of forward flexion to 50 degrees. (JE 3:64) By August 2015, claimant was able to perform hygiene tasks with his left hand. (JE 3:65)

During his October 5, 2015, visit, claimant reported falling on the previous Friday and landing on his hands and knees. (JE 3:69) The fall resulted in claimant spraining his left wrist. He also complained of more neck pain, radiating down his trapezius over his shoulder and to his biceps. (JE 3:69) Imaging showed degenerative changes throughout the cervical spine along with posterior disc osteophytes at C4-C5 and C6-C7 causing moderate-to-severe central canal narrowing and mild flattening of the cord at those levels. (JE 3:70; 73) Claimant was treated with cervical epidural steroid injections (CESI) which appeared to have some good results with the patient reporting a post-procedure pain level of two on a ten scale. (JE 3:84)

His last treatment for the left shoulder injury took place with Dr. Nepola on February 17, 2017. (JE 3:88) While claimant testified at hearing that he does not feel that he is better today than before the surgeries, Dr. Nepola recorded claimant's condition on February 17, 2017, as follows: "He has progressed very well since the surgery with full regain of his left arm function and sensation other than some minor numbness in the tip of his left thumb." (JE 3:91)

Claimant expressed that "since his surgery he has continued to steadily improve and now the only residual symptom he has is a little numbness in the very tip of his left thumb. Otherwise, his left upper extremity sensation and function has returned in full. Overall, he is happy with how his surgery turned out." (JE 3:88) Claimant did report pain and stiffness in the middle joint of his right middle finger with loss of motion and use of that digit. (JE 3:88) Dr. Nepola also opined that the pain and symptoms in claimant's left trapezius and through the left side of his neck were caused by the way his body compensated to the left reversed total shoulder arthroplasty. (Ex. 1:1)

Claimant returned to UIHC on March 14, 2018, for bilateral cervical medial branch blocks. (JE 3:100) Claimant testified that this procedure can reduce his day-to-day pain to around a two on a ten scale. Otherwise, his pain is around eight on a ten scale. At hearing, he testified that he is due back for another injection.

He is constantly sore, with dull pain and headaches. The pain is constant. He has difficulty sleeping on one side. He does some activities of daily living around his home. He cleans his apartment, does his dishes, dresses and washes himself. However, he has very limited range of motion in his left arm. He can barely raise it to shoulder height and cannot rotate it backward past his hip. His right arm has more mobility, but it is weak.

There are two expert opinions in the record as it relates to claimant's ongoing disability. R.L. Broghammer, M.D., R.Ph., issued an opinion on May 24, 2017, two days after his examination of the claimant on May 22, 2017. (Ex. DD:1) Dr. Broghammer documented that claimant had "greatly decreased range of motion in all planes" of the left upper extremity. (Ex. DD:16) The range of motion measurements were completed by Brian Steffen, P.T., and "personally corroborated" by Dr. Broghammer during the May 22, 2017, examination. (Ex. DD:17) The range of motion deficits added up to 19 percent impairment of the upper extremity. Combined with the impairment for the shoulder arthroplasty, Dr. Broghammer assessed a total of 23 percent of the whole person for the left shoulder and 6 percent impairment of the whole person for the right shoulder, based on the reduced range of motion on the right. (Ex. DD:17-18) Dr. Broghammer recommended the following restrictions:

- No at or above shoulder level work with the left upper extremity.
- At and above shoulder level work with the right arm as tolerated.
- Lifting weight as tolerated with the right and left upper extremities.

(Ex. DD:18)

After a review of the medical records and the examination, Dr. Broghammer concluded that claimant reached MMI as of February 20, 2017, the last visit with Dr. Nepola. (Ex. DD:17)

The restrictions imposed by Dr. Nepola are as follows:

I. Occasional lifting with the left shoulder of 10 lbs, especially with outstretched arm and above head level;

II. 20 lbs pushing occasionally;

III. No repetitive heavy work;

IV. No use of significant vibratory tools such as an impact wrench, hammer, or jack hammer. Use of a small personal drill would be okay as long as such use was not for sustained periods.

(Ex. 11:2)

Claimant underwent an IME with Sunil Bansal, M.D. on August 10, 2017. (Ex. 33:1) Dr. Bansal recorded claimant's current symptomatology as weakness of the left arm and considerable pain (a 6-7 out of 10 on a 10 scale) with use. (Ex. 33:6) Claimant complained of numbness and tingling in all of the left digits and constant pain in the left upper extremity. He had cramping across the top of his left shoulder on occasion as well as periodic sharp pain in the right shoulder when reaching away from his body with the right arm. (Ex. 33:6) He was able to lift approximately 10 pounds with each arm, but not overhead with his left. (Ex. 33:6) His grip strength on the left was weak. Dr. Bansal recommended the following restrictions for each arm:

> LEFT UPPER EXTREMITY:
>
> I would place a restriction of no lifting greater than 10 pounds occasionally, or 5 pounds frequently with the left arm, along with no lifting above shoulder level or away from the body with the left arm. No frequent reaching with the left arm. Avoid pushing, pulling greater than 20 pounds with the left arm occasionally. No repetitive pushing, pulling. Avoid large vibratory tools that cause arm vibration such as jack hammering.
>
> RIGHT SHOULDER:
>
> I would place a restriction of no lifting greater than 10 pounds with the right arm, along with no lifting greater than 5 pounds above shoulder level with the right arm. Avoid frequent over shoulder work with the right arm. No repetitive reaching with the right arm. No pushing or pulling greater than 20 pounds with the right arm occasionally. Avoid large vibratory tools that cause arm vibration such as jack hammering.

(Ex. 33:9) For impairment, he assessed 22 percent of the body as a whole for the left and 7 percent of the body as a whole on the right. (Ex. 33:8) Claimant testified that these restrictions were within the limits he could tolerate.

Carma Mitchell, a vocational expert, issued a report regarding claimant's post-injury work prospects. (Ex. 22:1) Based on claimant's self-professed restrictions and those of Dr. Bansal, Ms. Mitchell determined that claimant would not be able to obtain or sustain full-time competitive employment. (Ex. 22:6) She opined that because of the restrictions regarding lifting and reaching with the right and left arm, claimant would not be able to return to work 99 percent of the jobs he had access to prior to his injury. (Ex. 2:6) Ms. Mitchell did not consider the lesser restrictions recommended by Dr. Nepola or Dr. Broghammer.

Lara Sellner, a vocational rehabilitation consultant, provided a report and testified at hearing. (Ex. GG, H) Her work includes helping people with disabilities find new jobs. She initially generated her report in February 2015, addressing Mr. May's transferable skill set. He had not completed his left shoulder treatment at the time. Following the left shoulder treatment and subsequent determination of MMI by Dr. Nepola and

Dr. Broghammer, Ms. Sellner issued an updated report. (Ex. HH) She identified a few positions she believed were within claimant's skill set and physical restrictions. Primarily those positions were cashiering, security, driving, and assembling/machine operator. She agreed during questioning that the only jobs she discovered that were within Dr. Bansal's restrictions were security officer and shuttle driver. Many of the job descriptions of the positions she recommended for claimant were over his restrictions.

For instance, the entry level light production opening required the ability to lift at least 35 pounds. (Ex. GG:28) The Scheels' position required extensive use of hands, arms and legs for lifting, transporting product and freight with the ability to lift 20 pounds or more. (Ex. GG:28) The cashier position for Gordmans required moving merchandise of up to 25 pounds a distance of two feet. (Ex. GG:32) The company store clerk at Nestle, pizza delivery, courier for Ricoh, and the pawn shop positions may have been within claimant's work restrictions. (Ex. GG:29, 30, 33)

Claimant has shown little motivation to return to work. He has not looked for work since his injury and does not plan to look for work. He testified that he believed the positions Ms. Sellner sent him to were not ones he could actually perform. For instance, the clerk positions would require more standing or walking than he could tolerate. He could not drive for long periods of time because his left arm gets tired and begins to hurt from gripping the wheel. He would not be able to perform the duties of a residential laborer for TruGreen due to snow removal or lawn care tasks. He is afraid of doing security work. He does admit that part of his lack of motivation to look for new employment is that he is unsure of whether he wants to remain in Iowa or relocate.

Ms. Sellner testified that she believed a security position did not expose people to assaults nor did the positions require physical strength. Cashiering positions can be accommodated to offer an employee the opportunity to sit and stand. She encouraged the claimant to apply for the position to see if the employers were willing to accommodate. She testified she offered assistance to claimant so that he could gain more confidence in computer skills, but he did not take her up on any of these offers. She testified that the claimant showed no interest in her services or was preoccupied with other matters.

Ms. Sellner maintained claimant was employable despite his shoulder restrictions. During cross-examination, she admitted that she is rarely successful in getting someone rehired but that her efforts are hampered by a client's unwillingness to meet with her.

Ms. Elizabeth Parillo testified on behalf of the defendants. She is the HR coordinator and has been for the past twelve months. Prior to her working in HR, she was the assistant manager in the Cabinets Department. She was aware of claimant's restrictions and believed those limited him to no more than five pounds above the shoulders. She testified that there were cashier positions he could perform with reasonable accommodations such as a stool. If there are items that need to be scanned that would be beyond his restrictions there are individuals such as a head cashier or

front-end manager who could assist. He could also be assigned to the receiving department to retrieve cardboard corral carts which are used to collect cardboard. Those carts would then be taken to the cart compactor and after emptied by another employee, returned to different divisions within the receiving department. Another task he could perform would be the stocking of the candy shelves, nails, screws, and light bulbs.

She believed that the company could find a position within claimant's work restrictions, and the company has accommodated individuals in the past including two that used a stool while cashiering.

The position Ms. Parillo described is one that would cobble together two or three light-duty jobs to fit within claimant's work restrictions. She did not testify that they were full-time positions held open to the public for any person to fulfill. When asked whether defendant employer offered the claimant a position in the past or intended to offer him a position, she replied she did not know.

At hearing, claimant testified that he does not feel he can work. He has regular pain and weakness on his left side and periodic pain on the right. He has severely restricted range of motion on the left. During a demonstration at hearing, he was unable to raise his left arm above shoulder height. Claimant lives by himself and performs most of his activities of daily living without assistance. Claimant is right handed.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Rather, claimant's condition must have worsened or deteriorated in a manner not contemplated at the time of the initial award or settlement before an award on review-reopening is appropriate. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

The underlying arbitration decision found claimant's right and left shoulder injuries and subsequent surgeries to be caused by an injury sustained at work. Claimant was awarded a running healing period award, as he was not at MMI for his left shoulder injury. Since that time, the parties agree that claimant has reached MMI and thus has

satisfied the elements of a review-reopening claim in that he has sustained a physical change in condition.

The primary dispute in this review-reopening is the extent of claimant's injury.

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.

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

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

There is not much variance between the medical experts. I disagree with Ms. Sellner's assessment that Dr. Broghammer's opinion placed claimant in the medium to heavy physical demand level. Dr. Broghammer's restrictions were for claimant to lift as tolerated. Dr. Bansal recorded this as 10 pounds. At hearing, claimant testified that Dr. Bansal's restrictions were in line with claimant's tolerance level. Dr. Nepola's restrictions were more lenient, allowing for occasional lifting of ten pounds or less above the left shoulder whereas both Dr. Bansal and Dr. Broghammer opined claimant should not do any work above the left shoulder. Dr. Broghammer's impairment rating was 28 percent of the whole person whereas Dr. Bansal's was 29 percent. Dr. Nepola did not offer an impairment rating.

Claimant maintains he has other health problems that limit his working abilities. In 2011 he underwent a total right ankle arthroplasty. Claimant maintained he would not be able to do any job that required standing for more than 15 minutes. There are no medical records to support this claim and there were no changes to his job to accommodate such an injury. Even his own IME doctor recorded no restrictions or disability for the right ankle. There is no medical evidence to support a finding that he is unable to stand or sit for extended periods of time.

Based on the restrictions of the three aforementioned doctors and taking into consideration claimant's self-professed tolerance levels, it is found that claimant's physical condition would allow him to perform sedentary work, if at all.

There are few positions available to claimant given his age, education and experience that fall within the sedentary work category. Of the positions that Ms. Sellner discovered, only a few fell within Dr. Bansal's restrictions: clerk, courier, delivery driver, host, security guard, sales associate. The security guard positions required the ability to lift a fire extinguisher that weighed in excess of ten pounds. Claimant testified that driving caused pain to his arms. It is possible that a short delivery position would be feasible for claimant or a sales clerk position that required no lifting or stocking.

Those positions are not plentiful, and the claimant has credibly testified that based on the job descriptions, he would have difficulty performing the essential duties of each one. It is found that claimant has presented a prima facie case of total disability.

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

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing

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

It is unfortunate that claimant has not attempted to look for work nor does he express any desire to work. On the other hand, the positions that Ms. Sellner identified often explicitly stated job requirements that were outside of claimant's restrictions. Ms. Parillo's testimony confirmed that any position claimant would be offered via defendant employer would be a make-work one, which would combine the duties of several light duty tasks into one position. Further, even though she believed that they could accommodate claimant, no offer of work has been made to claimant in the five plus years he has been off work due to his injury. Defendant employer has retail stores with clerking positions, but claimant would need assistance in performing the checkout duties, and in order for the position to be a full-time one, claimant would need to do other tasks.

Based on the testimony and reports of Ms. Sellner, I find that the types of services the claimant can perform are so limited in quality, dependability or quantity that a reasonably stable market for him does not exist.

It is found claimant is permanently and totally disabled under the odd-lot doctrine.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant permanent total disability benefits at a rate of three hundred three and 74/100 dollars ($303.74) commencing February 20, 2017, and continuing during the period of permanent total disability.

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

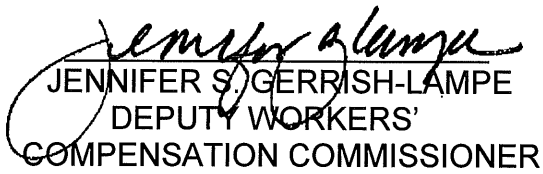
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall 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 (2) percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

That defendants are to be given credit for benefits previously paid.

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

Signed and filed this 23rd day of May, 2018.



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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.