BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID RAMIREZ,		
Claimant,	FILED	File Nos. 5047938, 5055132
vs.	JAN 06 2017	ARBITRATION
CITY OF DES MOINES,	WORKERS COMPENSATION	DECISION
Employer, Self-Insured, Defendant.		Head Note No.: 1803

STATEMENT OF THE CASE

David Ramirez, the claimant, seeks workers' compensation benefits from defendant, the City of Des Moines, a self-insured employer for workers' compensation liability, as a result of stipulated work injuries on December 5, 2012 and December 20, 2012. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on November 15, 2016 and this matter was fully submitted at the close of that hearing. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Only one set of joint exhibits, marked numerically, were offered and received at hearing. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex. 1-2:4."

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On December 5, 2012 and December 20, 2012, claimant received injuries arising out of and in the course of employment with the City of Des Moines.

2. Claimant is not seeking additional healing period benefits.

3. The work injuries are a cause of some degree of permanent, industrial disability to the body as a whole.

4. Permanent partial disability benefits shall commence on June 16, 2015.

5. At the time of the injuries, claimant's gross rate of weekly compensation was $1,020.20. Also, at that time, he was married and entitled to 2 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $658.84 according to the workers' compensation commissioner's published rate booklet for this injury.

6. The only disputed medical expenses are the first four listed in Exhibit 8 incurred by claimant on or before December 28, 2012. Defendants agreed to assume responsibility for the remaining expenses listed in that exhibit. The parties stipulated that the providers of the disputed medical expenses would testify as to their reasonableness and defendants are not offering contrary evidence. The parties also agreed that the disputed medical expenses submitted by claimant at the hearing are fair and reasonable and causally connected to the work injuries. The parties agreed that the disputed expenses were not authorized by defendants.

7. Prior to hearing, defendants voluntarily paid 55 weeks of permanent disability benefits for this work injury.

Also prior to hearing, defendants agreed to pay for the independent medical evaluation by John Kuhnlein, D.O. in the amount of $2,912.95.

ISSUES

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

I. The extent of claimant's entitlement to permanent disability benefits; and,

II. The extent of claimant's entitlement to medical benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, David, and to the defendant employer as the City.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found David credible.

David, age 63, has worked for the City on a full-time basis since 2001 in the sewer department and he continued to do so at the time of hearing. He previously worked for the City in various summer-only jobs repairing and/or constructing sidewalks, streets and sewers. He was initially assigned on a full-time basis to sewer construction. During the 10 years before his injury, was assigned to a sewer cleaning (Vacu) truck. This job involved riding with the driver/operator of the truck and getting in and out of the truck cab to open manhole covers using a lifting device and guiding the truck over the manhole to insert the cleaning nozzle. He did not operate the cleaning or truck equipment, but assisted the driver/operator when necessary. Also, he operated city

snow plows when needed in the wintertime. The two work injuries occurred while performing this job.

There is no dispute that David had multiple health problems before the work injuries in this case. He has been and continues to be obese. He suffers from Type II diabetes which was reported as uncontrolled in many doctor notes and reports in evidence; although David testified it is now under control. He previously was diagnosed with arthritis, coronary artery disease, esophageal reflux, sleep apnea, tendonitis, and peripheral neuropathy due to diabetes. (Ex. 6)

Both work injuries in this case involve an injury to the low back resulting in chronic low back and right leg/foot pain. The first injury on December 5, 2012 occurred when the manhole lifting device failed and the manhole cover, weighing over 100 pounds, dropped; straining David's lower back. David refused medical treatment when he reported the injury to his superiors thinking it to be just a temporary muscle injury. He subsequently went on a two week vacation. While on vacation he received chiropractic treatments, but they only slightly improved his condition. (Exhibit 1:1:3, Ex. 7-3) David testified that he returned to his job after his vacation and was then assigned to operate a snow plow on December 20, 2012. While plowing snow, his truck became stuck in the snow and he was unable to throw sand under the wheels to free the truck due to back pain. He contacted his supervisor and was replaced by another worker on the snow plow. He then sought care from his family doctor on December 28, 2012 and was prescribed hydrocodone for his back and leg symptoms. (Ex. 7-3) David testified that this medication helped alleviate his pain. His family doctor wanted an MRI, but this was refused by his group carrier and he was told to seek treatment from the City's workers' compensation physicians. One of his chiropractors provided a note to the City recommending immediately medical evaluation. (Ex. 1-3)

After requesting treatment from the City, David was seen by Richard McCaughey, D.O., an occupational medicine specialist, on January 15, 2013. (Ex. 2-1) A subsequent MRI indicated spondylosis and spinal stenosis with impingement at L4 and L5. Dr. McCaughey treated David with medication and work restrictions and then referred David to a pain specialist for an epidural steroid injection (ESI). (Ex. 2-2) This was done by a Mohammad S. Iqbal, M.D., a pain management specialist. When David's pain continued after this ESI, Dr. McCaughey referred David to an orthopedist, Lynn Nelson, M.D. Dr. Nelson evaluated David on February 19, 2014. His assessment was right lumbar radiculopathy, L3-5 spinal stenosis, L5-S1 disk protrusion, and multi-level lumbar spondylosis along with insulin dependent diabetes mellitus and morbid obesity. He specifically stated that David suffered a material aggravation of his prior existing, but asymptomatic spinal stenosis. Both Dr. McCaughey and Dr. Nelson continued medications and restrictions, but recommended a second ESI. (Ex. 4-1:3) Dr. Iqbal then performed a second ESI. (Ex. 7-4) David returned to Dr. McCaughey on March 7, 2013 and reported no back pain, but continued tingling in the right foot. The doctor returned David to full duty and discharged him from his care.

In a letter to the insurer on April 9, 2013, Dr. Nelson opined that David achieved maximum medical improvement (MMI) as of March 7, 2013 and he did not anticipate

any need for further treatment. The City then denied further treatment. David, on his own, continued treatment during the balance of 2013 with his family doctor and other providers for continued low back pain and leg symptoms. (Ex. 7-4:6) This treatment included prescriptions for hydrocodone and gabapentin along with other medications for continued low back and leg pain and other health problems. (Id.) David returned to Dr. McCaughey a couple of times in 2013, but was told that the back condition was not related to the work injuries and care was refused. (Ex. 7-5:6)

In 2014, David, again on his own, sought pain management from another pain specialist, Dana Simon, M.D. Dr. Simon provided another, more specific, ESI in May 2014, but this was not beneficial. The doctor referred David back to Dr. Nelson. (Ex. 6)

Dr. Nelson re-evaluated David on July 24, 2014 and the doctor recommended surgery and another MRI. (Ex. 4-4:5) This was apparently refused by the City. David's attorney then sought a causation opinion from Dr. Nelson. After further reflection and a review of medical records showing that David received continuous treatment for ongoing complaints of low back and leg pain since he was last seen by Dr. Nelson, Dr. Nelson opined on November 11, 2014 that David's current low back and leg conditions were causally connected to the two work injuries on December 5 and December 20, 2012, restating that there were material aggravations of the underlying asymptomatic spinal stenosis. (Ex. 4-6) He also opined that the need for surgery was also the result of the two work injuries. (4-8) The surgery was then authorized and Dr. Nelson performed a surgical L3-5 central and lateral decompression with foraminotomies on January 9, 2015. (Ex. 4-9) Follow-up care indicated improvement in David's leg symptoms, except for foot numbness. (Ex. 4-12)

On June 30, 2015, Dr. Nelson opined that David reached MMI following his surgery on June 16, 2015; that no permanent work restrictions are indicated; and, that as a result of his work injuries, David suffers from an 11 percent permanent impairment to the body as a whole utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 4-13)

On July 15, 2015, David was evaluated by John Kuhnlein, D.O., an occupational medicine specialist. As did Dr. Nelson, Dr. Kuhnlein causally relates the back and leg condition to aggravation work injuries on December 5 and December 20, 2013 which lighted up previously asymptomatic degenerative disk disease. The doctor, however, explains that the work injuries are only one component of the overall lower extremity condition. The other components are non-work related peripheral vascular disease, his obesity and his diabetes. (Ex. 7-11) Dr. Kuhnlein provided a permanent impairment rating using the AMA Guides, Fifth Edition, of 13 percent to the body as a whole. (Ex. 7-12) The doctor states that David was able to adapt in his current work for the City and restrictions are not necessary, but that he is not able to perform all jobs. Should he change jobs, the doctor recommends permanent restrictions of no lifting more than 40 pounds occasionally from floor to shoulder and 30 pounds, occasionally, over the shoulder. If lifting more than an elbow's distance from the body, the restriction is no more than 30 pounds occasionally from waist to shoulder. He also should not

work above ground level while taking his gabapentin or hydrocodone and should only bend, crawl or squat occasionally. David is also restricted from operating foot controlled machines, but this is not due to the work injuries, but due to his non-work related peripheral neuropathy. (Id.)

I find that the work injuries of December 5, 2012 and December 20, 2012 are a cause of an 11-13 percent permanent loss of use of his body as a whole. As a result of these work injuries, he is permanently restricted as opined by Dr. Kuhnlein should he find it necessary to seek other employment. Dr. Kuhnlein's views were more consistent with David's testimony as to the change in his physical limitations after the work injuries.

Claimant testified that before his surgery, he was able to transfer to a new job at the City in which he was assigned to a "night complaint" sewer cleaning truck. Although the tasks are the same as the previous job, the task of getting in and out of the cab, which causes most of his back and leg pain, is reduced and he no longer is assigned to operate snow plows. He stated that his back continues to bother him and his pain increases when there is a lot of complaint truck work. He does not express a desire to leave this employment. There is no evidence that his job is in jeopardy. The work injuries only impact on his pay is that he no longer receives the overtime pay he received when driving the City snow plows.

Although he has a lot of personal health problems, there is no evidence that he is limited in his job from these complaints other than the foot limitations referred to by Dr. Kuhnlein.

His most significant prior work experience before his full-time work with the City was his 26 years of employment with Armstrong/Titan Tire. He described several jobs he performed at the tire manufacturing facility in Des Moines which involved lifting and carrying very heavy tire components. All of these jobs required a physical demand level beyond David's current physical abilities. David likely would be unable to physically perform the construction work he did for the City. He likely would not be able perform a brief job he held at UPS loading trucks. The only past job he would be able to perform today outside of City employment would be a job taking cash and checks from envelopes while working briefly for an entity that collected donations to an animal rescue facility. He was paid $7.75 per hour in that job.

David is not a high school graduate, but he does have a GED. He obtained a certificate of completion for auto repair training shortly after high school. However, he has never been employed as an auto mechanic.

Although he continues to work in a suitable job without significant loss of pay, his work restrictions have resulted in a significant loss of access to the labor market. They would prevent a return to most of the work he had before obtaining his current City job. He can no longer perform the job that he was doing at the time of his injuries.

From examination of all of the factors of industrial disability, it is found that the work injuries of December 5, 2012 and December 20, 2012 are a cause of a 35 percent loss of earning capacity.

The parties agreed that none of the four medical expenses set forth in Exhibit 8 were authorized by the City. David refused treatment by the City when it was initially offered. He chose to seek treatment on his own. The first disputed expense is for the prescription drug called "Pennsaid" dispensed on December 5, 2012, an NSAID. There was no evidence presented to show this drug was prescribed by any physician for his back complaints subsequent to the injuries. The second expense was for another prescription drug "hydrocodone-acetaminophen" dispensed on December 21, 2012. There is no evidence to show that this drug was prescribed by any physician for his back complaints subsequent to the injuries.

The third medical expense was for services by a provider at Mercy Campus Medical on December 28, 2012. This was apparently the time he sought care from his family doctor for his back and other health problems after his work injuries. The fourth expense was for "oxycodone HCL-acetaminophen" prescribed by the family doctor for his back and other complaints. David testified that this treatment and medication helped his pain until he got to the company doctor. Such testimony was uncontroverted.

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 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 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 Iowa 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, 593; 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. However, consideration must also be given to the injured worker's 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).

I found in this case that the work injury is a cause of permanent impairment to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earning capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons start with a 100 percent earning capacity regardless of any prior health or disability conditions. The

rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

A showing that claimant had no loss of his job or actual 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 Community School District, 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). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

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 worker's 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.

Assessments of industrial disability involve viewing a loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the

work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

In the case sub judice, I found that claimant suffered a 35 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 175 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 35 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. 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/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In the case at bar, I found that two of the disputed medical expenses, the office visit at a Mercy Clinic and a resulting prescription, were helpful to the claimant. Even unauthorized expenses are reimbursable if they are found to have benefited the injured worker. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). These expenses shall be awarded.

ORDER

1. Defendant shall pay to claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the stipulated a rate of six hundred fifty-eight and 84/100 dollars ($658.84) per week commencing on the stipulated date of June 16, 2015. Defendant shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for the fifty-five (55) weeks of benefits previously paid.

2. Defendants shall pay the medical expenses for the visit at the Mercy Campus Medical Clinic on December 28, 2015 and the cost of the prescription drug oxycodone HCL-acetaminophen. Defendants shall reimburse claimant for any of his out-of-pocket costs for these services and shall hold claimant harmless from the remainder of those expenses.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for the one hundred and 00/100 dollar ($100.00) filing fee and the two reports from HealthPort and Des Moines Orthopaedic Surgeons (DMOS) in the total amount of two hundred seventy-seven and 95/100 dollars ($277.95).

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

Signed and filed this 6th day of January, 2017.

LARRY WALSHIRE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.