

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHARD BYERS,

Claimant,

vs.

CITY OF DES MOINES,

Self-Insured Employer,
Defendant.:
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File No. 20000957.01

ARBITRATION DECISION

Headnote: 1803

I. STATEMENT OF THE CASE.

Claimant Richard Byers filed a petition seeking workers' compensation benefits from the defendants, self-insured employer City of Des Moines (City) and the Second Injury Fund of Iowa (Fund). After Byers and the Fund reached an agreement to settle their dispute, the undersigned presided over an arbitration hearing involving Byers and the City on June 27, 2022. Byers participated personally and through attorney John Lawyer. The City participated by and through attorney Molly Tracy.

II. ISSUES.

Under rule 876 IAC 4.19(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the agency for determination. The undersigned issued an order approving the hearing report and entering it into the record because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) What is the nature and extent of permanent disability caused by the alleged injury?
- 2) Is Byers entitled to taxation of the costs against the City?

III. STIPULATIONS.

In the hearing report, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Byers and the City at the time of the alleged injury.
- 2) Byers sustained an injury on October 21, 2019, which arose out of and in the course of his employment with the City.

- 3) The alleged injury is a cause of temporary disability during a period of recovery, but Byers's entitlement to temporary or healing period benefits is no longer in dispute.
- 4) The alleged injury is a cause of permanent disability to the left arm.
- 5) The commencement date for permanent partial disability (PPD) benefits, if any are awarded, is June 22, 2021.
- 6) At the time of the stipulated injury:
 - a) Byers's gross earnings were one thousand three hundred three and 59/100 dollars (\$1,303.59) per week.
 - b) Byers was married.
 - c) Byers was entitled to two exemptions.
- 7) Prior to hearing, the City paid to Byers 77.571 weeks of compensation at the rate of eight hundred thirty and 50/100 dollars (\$830.50) per week.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

IV. FINDINGS OF FACT.

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 4;
- Claimant's Exhibits (Cl. Ex.) 1 through 2;
- Defendants' Exhibits (Def. Ex.) A through B; and
- Hearing testimony by Byers.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Byers served in the United States Army, where he trained as a track vehicle mechanic. (Hrg. Tr. p. 26) After Byers left the Army, he was unemployed for about a month. (Hrg. Tr. p. 25) Byers worked for various car dealerships as a mechanic, each job change motivated by earning higher pay. (Hrg. Tr. pp. 25–26) Byers was employed as a mechanic for forty years, with the City being his final employer. (Hrg. Tr. pp. 25–26, 31) A mechanic working for the City such as Byers was required to occasionally lift up to sixty-five pounds and possess "[s]ufficient manual dexterity with or without reasonable

accommodation, which permits the employee to use all tools associated with vehicle and equipment maintenance and repair.” (Def. Ex. A, p. 3)

On October 21, 2019, Byers was working on a Ford pickup truck, using a wrench to loosen lug nuts. (Hrg. Tr. p. 12; Jt. Ex. 1, p. 1) His hands were sore at the end of the workday. (Hrg. Tr. p. 12) The next day, the soreness had worsened, so Byers reported bilateral soreness to the City. (Hrg. Tr. p. 12) His pain was worse in his left hand than his right. (Jt. Ex. 1, p. 1)

The City directed care for Byers’s injured hands under Iowa Code section 85.27. (Hrg. Tr. pp. 12–13; Jt. Ex. 1) He underwent conservative care, including physical therapy, massages, and medication. (Hrg. Tr. p. 13; Jt. Ex. 1, p. 3) After conservative care did not resolve his symptoms, Byers underwent an electromyography (EMG), which showed bilateral cubital tunnel syndrome caused by frequent job activities as a mechanic that require pinching, supination, and grip throughout the workday. (Jt. Ex. 1, pp. 3–4)

Byers was referred to orthopedic surgeon Shane Cook, M.D. (Hrg. Tr. pp. 13–14; Jt. Ex. 1, pp. 4; Jt. Ex. 2) Dr. Cook performed cubital tunnel release surgery on both arms. (Hrg. Tr. p. 14; Jt. Ex. 1, p. 5) The surgeries helped reduce, but did not eliminate, the symptoms Byers was experiencing in his right arm, and he continued to experience symptoms on his left side that were comparatively worse. (Hrg. Tr. p. 14) Dr. Cook prescribed work restrictions and physical therapy. (Hrg. Tr. p. 14)

On May 20, 2020, Byers followed up with Dr. Cook regarding his bilateral cubital release. (Jt. Ex. 2, p. 5) Dr. Cook noted on physical exam:

Well-appearing and in no apparent distress. Alert and oriented. Non-labored breathing. Brisk capillary refill of bilateral upper extremities. Nails without signs of discoloration. Normal muscle tone bilaterally. Focused examination of bilateral upper extremities does show he has 5 out of 5 strength with finger abduction. He has a negative Wartenberg’s. Negative Froment’s. His elbow range of motion and [*sic*] is full in flexion and extension on the bilateral sides. His incisions are well-healed. He has sensation intact throughout his hand to light touch.

(Jt. Ex. 2, p. 5) Based on the exam, Dr. Cook opined Byers was at maximum medical improvement (MMI), released him to work without restrictions, and assigned a zero percent impairment rating for both upper extremities. (Jt. Ex. 2, p. 5)

Byers returned to working without any restrictions for a time. (Jt. Ex. 2, p. 5) However, he continued to experience symptoms on his left side. (Jt. Ex. 2, pp. 6, 8) Dr. Cook ordered a nerve conduction study, which showed “continued left cubital tunnel syndrome with no improvement since previous surgery” on the left side. (Jt. Ex. 2, p. 8) Dr. Cook performed a second surgery to revise the cubital tunnel release in the left arm. (Hrg. Tr. p. 15; Jt. Ex. 2, p. 8)

Byers described the second surgery on his left arm as “the tipping point” that caused his symptoms to worsen. (Hrg. Tr. p. 15) After the second surgery, he felt cramping and stinging in the fingers of his left hand. (Hrg. Tr. p. 15) Byers analogized the sensation in his left hand as feeling “like my fingers are in a vice and there’s needles on the inside of the vice.” (Hrg. Tr. p. 16) Gabapentin toned down his pain to the point that he could function. (Hrg. Tr. p. 16; Jt. Ex. 4, p. 4)

Byers continued to experience these symptoms in his left arm and hand. (Hrg. Tr. p. 17) Dr. Cook ultimately performed a third surgery, this one on his right wrist. (Hrg. Tr. p. 17) The procedure had no effect on Byers’s ongoing symptoms. (Hrg. Tr. p. 17) On February 11, 2021, Dr. Cook informed Byers he did not believe he had any other treatment to offer him for his ongoing symptoms. (Jt. Ex. 2, pp. 11–13)

At a follow-up exam on June 22, 2021, Dr. Cook found Byers to have reached maximum medical improvement (MMI) with moderate ulnar neuropathy in his left arm. (Jt. Ex. 2, p. 14) He assigned Byers permanent work restrictions of:

- No lifting more than forty pounds with both hands together;
- No use of vibratory tools with the left hand;
- Work duties should be performed at a temperature of at least fifty degrees; and
- No repetitive twisting, grasping, pinching, or heavy repetitive tasks with the left hand. (Jt. Ex. 2, p. 14)

On physical exam of Byers’s left arm, Dr. Cook noted negative Wartenberg’s, two-point discrimination ulnar nerve distribution of 8 millimeters, and median nerve distribution of 5 millimeters. (Jt. Ex. 2, p. 14) Dr. Cook recorded repetitive grip strength with good effort and consistency, maximum grip with his right hand of 30 kilograms and with his left hand 42 kilograms, and key pinch measurements of 7 kilograms on the left and 10 kilograms on the right. (Jt. Ex. 2, p. 14) Dr. Cook also opined on the question of permanent functional impairment utilizing the American Medical Association’s Fifth Edition of the *Guides to the Evaluation of Permanent Impairment* (Guides) thusly:

The patient does continue to have ulnar neuropathy at the elbow with both sensory and motor deficits. According to table 16-11 patient does have grade 4 out of 5 strength with active strength testing of the ulnar nerve innervated muscles which does equilibrate to a 25% motor deficit. According to table 16-10 the patient does have grade 2 sensory deficit and pain which does equilibrate to a 75% sensory deficit. According to table 16-5 a 75% sensory deficit of the ulnar nerve above the mid forearm does equilibrate to a 6% impairment rating of the upper extremity (75% x 7%). According to table 16-15 a motor deficit of 25% of the ulnar nerve above the mid forearm does equilibrate to a 12% impairment rating of the upper extremity (25% x 46%). According to the combined values chart on page

604, 6% impairment rating combined with a 25% impairment rating of the upper extremity does equilibrate to a 30% impairment rating of the upper extremity.

(Jt. Ex. 2, p. 14)

Dr. Cook also followed up with a letter dated July 28, 2021, regarding Byers's right upper extremity. (Jt. Ex. 2, p. 17) He opined that Byers had reached MMI for his right upper extremity on May 20, 2020, and that he had a permanent functional impairment of zero percent. (Jt. Ex. 2, p. 17) Dr. Cook reiterated his opinion from May that Byers had sustained no permanent functional impairment to his right arm. (Jt. Ex. 2, p. 17)

Dr. Cook referred Byers to Daniel Moyse, M.D. for pain management. (Hrg. Tr. p. 23) Dr. Moyse attempted to address Byers's ongoing symptoms by changing medications, but the approach did not work. (Hrg. Tr. p. 23) Dr. Moyse ultimately released Byers from care. (Hrg. Tr. p. 23)

Byers believed his condition could improve with additional care, so he requested referral to another physician. (Hrg. Tr. p. 23) The City arranged care with Andrzej Szczepanek, M.D. (Jt. Ex. 3, p. 2; Jt. Ex. 4, pp. 1–5) He recommended a spinal cord stimulator to reduce Byers's symptoms. (Hrg. Tr. p. 23; Jt. Ex. 4, pp. 4–5) Byers passed the psychological test but Dr. Szczepanek was not sure that Byers had enough room in his spine to insert an electrode. (Hrg. Tr. p. 24; Jt. Ex. 4, pp. 4–5) The risk of worsening his symptoms led Byers to decide not to have the spinal cord stimulator implanted. (Hrg. Tr. p. 24; Jt. Ex. 4, p. 5)

Claimant's counsel arranged for Byers to undergo an IME with Sunil Bansal, M.D., on August 25, 2021. (Cl. Ex. 1) Dr. Bansal performed a records review and physical examination of Byers and then authored a report that summarized the findings of such and addressed questions posed by claimant's counsel. (Cl. Ex. 1) Dr. Bansal signed and dated the IME report on December 20, 2021. (Cl. Ex. 1, p. 23)

During Dr. Bansal's physical examination of Byers's right arm, he noted full range of motion, mild tenderness to palpation of the medial epicondylar region, positive Tinel's sign at the elbow, and negative elbow flexion test. (Cl. Ex. 1, p. 19) He also recorded mild weakness with the fifth digit adduction/abduction and two-point sensory discrimination over the ring and small fingers (8 mm). (Cl. Ex. 1, p. 19) He performed grip strength measurements with a dynamometer with the right hand that showed 42 kg, 44 kg, and 40 kg. (Cl. Ex. 1, p. 20) Based on the findings during the physical examination, Dr. Bansal utilized the Guides to assign the following permanent functional impairment rating:

Severity of sensory deficit is 10%.

Severity of motor deficit is 10%

Upper extremity impairment due to sensory deficit of the median nerve above the mid forearm involving the ulnar nerve is 7%.

Upper extremity impairment due to the ulnar nerve above the mid forearm involving the motor nerve is 46%.

Multiplied together: $(10\% \times 7\%) + (10\% \times 46\%) = 0.7\% + 4.6\% = 5\%$
upper extremity impairment = 3% whole person impairment.

(Cl. Ex. 1, p. 22) (emphasis in original)

Dr. Bansal documented the following during his examination of Byers's left arm:

- Mild tenderness to palpation of the volar aspect of the wrist;
- Positive Tinel's sign at Guyon's canal;
- Negative Phalen's sign;
- Negative Finkelstein's test;
- Full range of motion of the wrist; and
- A loss of two-point sensory discrimination over the ring and small fingers (12 mm). (Cl. Ex. 1, p. 19)

Dr. Bansal diagnosed Byers with left cubital tunnel syndrome, recurrent left cubital tunnel syndrome, and left Guyon's canal syndrome based on his review of the medical records and physical examination. (Cl. Ex. 1, p. 20) He then used the Guides to assign the following permanent functional impairment rating to Byers's left arm:

Severity of sensory deficit is 20%.

Severity of motor deficit is 75%.

Upper extremity impairment due to sensory deficit of the median nerve above the mid forearm involving the ulnar nerve is 7%.

Upper extremity impairment due to the ulnar nerve above the mid forearm involving the motor nerve is 46%.

Multiplied together: $(20\% \times 7\%) + (75\% \times 46\%) = 1.4\% + 34.5\% = 36\%$
upper extremity impairment

(Cl. Ex. 1, pp. 22–23) (emphasis in original)

Dr. Bansal also addressed the question of permanent work restrictions in his report. (Cl. Ex. 1, p. 23) He agreed with Dr. Cook's restrictions of no lifting more than forty pounds with both arms, avoiding work in temperatures below fifty degrees, and no repetitive twisting, grasping, pinching, or heavy repetitive tasks with the left hand. (Cl. Ex. 1, p. 23) Dr. Bansal assigned the additional permanent work restriction of no lifting weights more than ten pounds with the left arm. (Cl. Ex. 1, p. 23)

The City, through its administrator, provided Dr. Cook with a copy of Dr. Bansal's report and asked for his response to the opinions in it. (Jt. Ex. 2, p. 18) Dr. Cook responded in a letter dated June 13, 2022. (Jt. Ex. 2, pp. 18–19) With respect to Dr. Bansal's assessment of Byers's right-arm impairment, Dr. Cook discussed his zero percent rating to Dr. Bansal's five percent rating:

In regards to the impairment rating of the right upper extremity from date of service 5/20/2020 I did give him a 0% impairment rating. At that time the patient stated he was doing well. He was back to his baseline neurologic status on examination. He did have a history of peripheral neuropathy and at that time it was within a medical degree of certainty that any residual symptoms were not due to the cubital tunnel syndrome but likely related to his peripheral neuropathy as he stated he was doing well. This was reiterated on 7/28/2021 as I did confirm a 0% impairment rating of the upper extremity on the right side as this side was not addressed since his MMI placement on 5/20/2020.

(Jt. Ex. 2, p. 18)

In the records from Dr. Cook's May 20, 2020 examination of Byers, he found no impairment in either arm. Whereas the records document Dr. Cook measured sensory and motor deficits in Byers's left arm after the additional surgeries to it, it is unclear based on the documentation in evidence whether he did so with Byers's arms on May 20, 2020. While the June 13, 2022 letter states Byers returned to his neurological baseline, the May 20, 2020 medical records do not state as much or that Byers has a permanent functional impairment at all, let alone attributable to a preexisting condition. The evidentiary record thus makes it unclear what forms the basis of this part of Dr. Cook's opinion. For these reasons, there is an insufficient basis in the evidence from which to conclude it is more likely than not that Byers's right-arm impairment is related to a neurological condition that predated the stipulated work injury at the center of this case.

Dr. Bansal's IME report documents he measured Byers's right arm sensory and motor deficits, then determined the impairment rating to the right arm based on those determinations, as the Guides instruct. Dr. Bansal's permanent functional impairment rating of Byers's right arm also came closer in time to the hearing, the point in time when the determination of permanent disability is made. The evidence as a whole shows it is more likely than not Byers sustained a permanent five percent functional impairment to his arm as a result of the stipulated work injury.

With respect to their different impairment ratings of Byers's other arm, Dr. Cook responded in the June 13, 2022 letter thusly:

In regards to the left upper extremity, table 16-10 was used to determine impairment of the upper extremity due to sensory deficits or pain resulting from the peripheral nerve disorders. I did grade him at a level 2 classification which is consistent with decreased superficial cutaneous

pain and tactile sensibility with abnormal sensations or moderate pain that may present [with] some activities. I do believe within a degree of medical certainty that the patient had a more severe sensory deficit and pain than Dr. Sunil Bansal's Grade (75% vs. 20%, respectively). In regards to motor strength, table 16-11 does determine the impairment of the upper extremity due to motor or loss of power deficits resulting from peripheral nerve disorders based on individual muscle rating. I did grade the patient out as a grade 4 (25% deficit) with complete active range of motion against gravity with some resistance which was consistent with my examination. According to Dr. Sunil Bansal's impairment rating of 75% motor deficit is consistent with a grade 2 classification according to table 16-1 which is defined as complete active range of motion with gravity eliminated. The patient clearly has strength with resisted strength testing[;] therefore I do disagree with his motor assessment.

(Jt. Ex. 2, p. 18)

Claimant's counsel provided Dr. Bansal a copy of Dr. Cook's June 13, 2022 letter and requested a response, which Dr. Bansal provided in the form of a letter dated June 23, 2022. (Cl. Ex. 1, pp. 24–25) He opined that he respectfully disagreed with Dr. Cook's analysis in the letter and stated in support of his position:

In reference to the motor finding for the left upper extremity, he states that a 75% motor strength loss equates to complete active range of motion with gravity eliminated. While the statement is a bit confusing, it should be noted that the percentage loss is not to the upper extremity as a whole, rather strictly to the ulnar nerve. There are other nerves in the upper extremity that contribute to overall upper extremity strength. His examination and complaints are consistent with his motor loss strictly to the ulnar nerve[.]

(Cl. Ex. 1, pp. 24–25)

In Section 15.b, under the header "Grading Motor Deficits and Loss of Power," the Guides state:

Upper extremity impairments due to motor deficits and loss of power resulting from peripheral nerve disorders are determined according to the grade of severity of loss of function and the relative maximum upper extremity impairment value of the nerve structure involved, as shown in the classification (a) and procedural (b) steps described in Table 16-11 and the impairment determination method detailed in Section 16.5b.

(Guides, p. 484) They further provide, "It is important to ascertain that weakness is due to loss of nerve function before these tables. Weakness may be due to many causes, including pain, and Table 16-11 is not to be used for rating weakness that is not due to a diagnosed injury of a specific nerve or nerves." Id.

Here, both doctors agree that Byers sustained an injury to his ulnar nerve in the stipulated work injury. They disagree with respect to the resulting motor deficit. The exhibits document that during Dr. Cook's physical examination, Byers demonstrated "strength with resisted strength testing." However, Dr. Bansal's IME report does not memorialize a lack of strength with resisted testing under Grade 4 in Table 16-11(a) or a lack of complete active range of motion against gravity only, without resistance, under Grade 3 of the table. For that matter, the report also does not document complete active range of motion with gravity eliminated. It only contains a percentage assessment of 75 percent within the range for Grade 2. Dr. Bansal's report does not contain documentation of the observations or testing that led grading Byers as a 4, which undermines its credibility with respect to the impairment rating of Byers's left arm. In contrast, Dr. Cook's opinions demonstrate his examination showed muscle function appropriate for a Grade 4 rating. Consequently, Dr. Cook's impairment rating of 31 percent is adopted.

As found above, the evidence shows it is more likely than not Byers sustained a five percent impairment to his right upper extremity. Under Table 16-3, this equates to a three percent impairment to the whole person. The weight of the evidence also establishes Byers sustained a thirty-one percent impairment to his left upper extremity; or, nineteen percent to the whole person using Table 16-3. Using the combined values table on pages 604 and 605 of the Guides, Byers sustained a twenty-one percent functional impairment to his bilateral arms resulting from the stipulated work injury.

Dr. Cook further noted his agreement with Dr. Bansal on the permanent work restrictions Byers required due to the stipulated work injury. (Jt. Ex. 2, p. 18) He also addressed the addition of no lifting with the left arm weights of more than ten pounds by Dr. Bansal, stating it "is a reasonable work restriction." (Jt. Ex. 2, p. 18) Thus, Dr. Cook did not dispute its necessity. Therefore, the weight of the evidence establishes that Dr. Bansal's permanent work restrictions are an accurate reflection of Byers's current ability to perform job duties and are adopted.

Byers returned to work with the City under permanent work restrictions. (Hrg. Tr. p. 21) The City provided Byers with anti-vibration gloves, which had padding to help mitigate the effect of vibrating tools he used on his hands, but they were ineffective. (Hrg. Tr. pp. 18–19, 21) The City directed him to ask for help with any job duty he could not perform under the work restrictions necessitated by the stipulated work injury.

At hearing, Byers credibly testified how his permanent work restrictions impacted his performance of job duties as a City mechanic:

- Q. Did your job as a mechanic at the City require more lifting than 40 pounds?
- A. Oh, year. Just a simple tire on a police car is unbelievably heavy. You wouldn't think it would be [but] they are, and . . .

- Q. Did your job at the City require, I'd imagine, use of vibratory tools on a regular basis?
- A. Oh, yes. Yes.
- Q. How would you perform your job duties under those restrictions?
- A. Well, first, I tried -- went ahead and tried using a vibratory tool with those anti-vibration gloves that they gave me, but that didn't work. So I ended up having to use a breaker bar and loosen the lug nuts that way or just doing it any way I could. I can't hardly ask -- I couldn't hardly ask for somebody to help me do every single thing I did.
- Q. Do you think the restrictions in reality would have required you to ask for help for every single job activity?
- A. Yeah, it would have been a two-man job, everything I did, if I followed the rules to the letter.
- Q. And why didn't you ask for help for every single, little job activity?
- A. I -- I'm not that kind of person and [there] always -- there normally wasn't somebody around me to help.

(Hrg. Tr. pp. 20–21)

Byers attempted to perform his job duties, but they caused him pain after his work injury. (Hrg. Tr. p. 21) Work exacerbated his symptoms, which led to him using more paid time off than he used prior to the work injury. (Hrg. Tr. p. 36) Ultimately, Byers tendered his resignation to the City and communicated to management and human resources employees that he was voluntarily ending his employment because of the pain that performing work duties caused him. (Hrg. Tr. p. 24; Def. Ex. B, p. 1) No doctor advised Byers to resign his position; he made the decision himself based on his experience trying to work as a mechanic within his restrictions. (Hrg. Tr. p. 34)

Byers made inquiries about approximately twenty-five jobs but did not secure an interview for any of them. (Hrg. Tr. pp. 29–30) Because Byers was unsuccessful finding work, he applied with the federal Social Security Administration (SSA) for disability benefits. (Hrg. Tr. p. 31) The SSA found Byers eligible for benefits. (Hrg. Tr. p. 31)

Byers used his right arm more than his left arm because of the high pain level in his left arm that was his baseline. (Hrg. Tr. pp. 22–23) Byers had no plans to retire and wanted to continue working for the City. (Hrg. Tr. pp. 24–25) But ultimately, the pain was too much to endure while working. (Hrg. Tr. p. 24) Byers informed the City he was resigning because of the pain in his left hand caused by the stipulated work injury. (Hrg. Tr. p. 24)

Byers credibly testified he was experiencing ongoing symptoms at the time of hearing. (Hrg. Tr. p. 27) The symptoms on the left side are worse than those on the right. (Hrg. Tr. p. 27) Because the symptoms in his left hand are worse than in his right, he uses his right arm for nearly every function he performs. (Hrg. Tr. p. 27) This has caused Byers's symptoms in his right hand to worsen over time. (Hrg. Tr. p. 28) At the time of hearing, his symptoms were worse than they were at the time Dr. Cook released him from care, assigned work restrictions, and opined on permanent disability. (Hrg. Tr. p. 28)

At the time of hearing, Byers experienced a constant ache in his right hand and loss in grip strength. (Hrg. Tr. p. 27) The symptoms in his right hand cause him to occasionally pick something up with his right hand and then drop the item. (Hrg. Tr. p. 27) His right hand's function did not return to its pre-injury baseline after surgery and was worse than it was before the stipulated work injury. (Hrg. Tr. p. 28)

On the left side, Byers continued to experience cramping in his hand with his ring and pinky fingers. (Hrg. Tr. pp. 28–29) Byers credibly analogized the sensation during his hearing testimony as “feel[ing] like those two fingers are in a vice and the vice is cramping on my hand with needles on it.” (Hrg. Tr. pp. 28–29)

V. CONCLUSIONS OF LAW.

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

A. Permanent Disability.

The parties dispute the nature and extent of disability Byers has sustained from the stipulated work injury. Byers contends the injury has left him permanently and totally disabled. The City argues his disability is less and therefore limited to the functional impairment resulting from the injury.

Under Iowa Code section 85.34(2)(f), a bilateral injury such as the one to which the parties have stipulated here is compensated based on five hundred weeks unless it caused permanent total disability. Under this provision, permanent disability is “a scheduled disability subject to functional evaluation.” Simbro v. Delong's Sportswear, 332 N.W.2d 886, 889 (Iowa 1983). However, the statutory text provides that if the bilateral injury caused permanent total disability, it must be compensated under section 85.34(3).

Iowa Code section 85.34(3) is entitled, “Permanent total disability,” but does not define the term or contain a framework for determining whether an injured employee is permanently and totally disabled due to a work injury. The Iowa Supreme Court has

held the factors used to evaluate industrial disability under section 85.34(2) are also used to determine whether a work injury has caused permanent total disability under section 85.34(3). See *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 495 (Iowa 2003) (quoting *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985)). The extent of an injured employee's industrial disability is based on consideration of the following factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics, and the employer's inability to accommodate the injured employee's functional limitations. See *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 526 (Iowa 2012); *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632–33 (Iowa 2000); *E.N.T. Assoc. v. Collentine*, 525 N.W.2d 827, 830 (Iowa 1994); *Ehlinger v. State*, 237 N.W.2d 784, 792 (Iowa 1976). "When the combination of factors precludes the worker from obtaining regular employment to earn a living, the worker with only a partial functional disability has a total industrial disability." *Guyton*, 373 N.W.2d at 103–04 (citing *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980)).

The Iowa Supreme Court has quoted the Commissioner with approval for the principle that under the Iowa Workers' Compensation Act, "[t]otal disability does not mean a state of absolute helplessness." *Caselman*, 657 N.W.2d at 501 (quoting *Al-Gharib*, 604 N.W.2d at 633). "Such disability occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." *Al-Gharib*, 604 N.W.2d at 633 (citing *Diederich v. Tri-City Ry.*, 219 Iowa 587, 593–94, 258 N.W. 899, 902 (1935)). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. See *Chamberlin v. Ralston Purina*, File No. 661698 (App. October 1987); *Eastman v. Westway Trading Corp.*, II Iowa Industrial Commissioner Report 134 (App. May 1982). "Simply put, the question is this: Are there jobs in the community that the employee can do for which the employee can realistically compete?" *Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808, 815 (Iowa 1994) (citing *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103, 104 (Iowa 1985)).

Byers joined the U.S. Army out of high school and received training as a mechanic. This training is the only postsecondary training Byers has completed. There is an insufficient basis in the record from which to conclude he is likely successfully to complete another postsecondary training or education program that would allow him to pursue a career in another field.

After leaving the Army, every job Byers held was a mechanic. He changed mechanic jobs when he was able to get higher pay. Ultimately, the City hired him to work as a mechanic, which is the last job he held before the date of hearing. Byers's entire work history is as a mechanic.

The experts in this case agree regarding the permanent work restrictions Byers requires because of the stipulated work injury. Dr. Cook, Byers's treating surgeon, assigned permanent work restrictions consisting of:

- No lifting more than forty pounds with both hands;
- No use of vibratory tools with his left hand;
- No working in temperatures less than fifty degrees; and
- No repetitive vigorous grasping, pinching, pushing, pulling, or twisting.

Dr. Bansal, the IME doctor who examined Byers, agreed with these restrictions. He also assigned an additional restriction of no lifting more than ten pounds with his left arm. Dr. Cook reviewed this restriction and found it reasonable.

The City attempted to accommodate Byers's permanent work restrictions by instructing him to ask for assistance in the performance of any job duty that was outside the scope of his work restrictions. This effectively placed the burden on Byers to navigate the performance of his job and work restrictions. Instead of asking for help as often as he believed necessary given his work restrictions and job duties, Byers attempted to perform his job but the physical demands caused him pain, which ultimately led to him retiring earlier than he had wanted as he had no concrete retirement plans prior to the injury or permanent disability it caused.

Byers argues the City created a make-work job for him that is not available in the labor market when it put in place the accommodation of asking for a coworker to help perform any job duty outside his work restrictions. He further contends the City has failed to prove the job he was performing is one found in the labor market and he is therefore permanently and totally disabled under Iowa law. In support of this position, Byers cites the Iowa Supreme Court opinions of Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996), and Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997). Each of these cases dealt with judicial review of an agency determination of industrial disability, not permanent total disability. Because the same factors are used to determine industrial disability as permanent total disability, they are instructive.

In Ciha, the claimant sustained a work injury that left him a quadriplegic. 552 N.W.2d at 147. The employer accommodated the claimant by assigning multiple workers to help transport him around the jobsite as needed and change his catheter bags. Id. at 148, n. 4. It also provided an accessible work station and door. Id. at 148. The Commissioner considered the accommodations and concluded the claimant's job was not a make-work position even if it was not available on the open labor market and that his disability would be permanent and total without the accommodated job. Id. The Commissioner then found the claimant to have sustained an eighty percent industrial disability, which the court affirmed. Id.

The Iowa Supreme Court revisited Ciha and its holding in Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995), in Murillo, concluding:

Neither *Thilges* nor *Ciha* reached the same factual situation here however. They stand only for the proposition that the industrial commissioner should not be influenced by the mere fact that an employer has found a place to employ an injured worker. What *Thilges* and *Ciha* did not decide is whether the industrial commissioner could consider whether the newly-

furnished job—and the injured worker's ability to function in it—cast light on the injured worker's ability to earn a living in the market place. The worker's ability to function in some new jobs might cast light on that question. The ability to function in other jobs might not cast new light on that question. The transferability of the worker's skills is a factual question to be decided by the commissioner, but it must be based on evidence of wages available from those skills in the open market. We think the proper rule should be that an employer's special accommodation for an injured worker can be factored into the 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, it must appear that the new job is not just “make work” provided by the employer, but is also available to the injured worker in the competitive market.

571 N.W.2d at 18. The court then remanded the case for further development of the record given its articulation of a new rule. Id. at 18–19.

Thus, Ciha and Murillo do not create a bright-line rule regarding an employer's creation of a position for an injured employee that is within the employee's permanent work restrictions. In Ciha, the court affirmed the agency's determination that the extent of the claimant's permanent disability was lessened by the created job with extensive accommodations that rendered it of the type not found in the labor market. 552 N.W.2d at 147. In Murillo, the court made clear that the weight to be given to the creation of a position might or might not “cast light on the injured worker's ability to earn a living in the market place.” 571 N.W.2d at 18. The question of what a created position for an injured worker shows is one of fact to be determined on a case-by-case basis. See id.

Here, even if the City created what was in reality a make-work job for Byers in the form of the accommodated mechanic position, the evidence is insufficient to find the work injury caused permanent and total disability. There is no vocational report in the record. There is no expert assessment regarding his transferable skills.

The evidence of how Byers's permanent work restrictions have impacted his employability is thus limited to his testimony about looking for a job. It is unclear based on the evidence how far-reaching Byers's job search was. However, he ballparked the number of jobs into which he looked at twenty-five and conceded he did not apply for them all. Thus, the evidence of Byers's lack of success searching for a job is that he did not receive an interview after applying for fewer than twenty-five jobs in the Des Moines metro area. This is insufficient to establish by a preponderance of the evidence that Byers sustained a permanent total disability from the work injury.

For these reasons, Byers has failed to meet his burden of proof on permanent total disability. There is an insufficient basis in the evidence from which to conclude there are no jobs in the community that he is capable of performing due to the permanent physical limitations he has because of the stipulated work injury. Byers's permanent disability for the bilateral injury is limited to his permanent functional impairment under section 85.34(f).

As found above, the weight of the evidence establishes Byers has sustained a twenty-one percent permanent functional impairment caused by the stipulated work injury. Under section 85.34(t), the permanent partial disability is calculated out of five hundred weeks. Five hundred multiplied by twenty-one percent equals one hundred five. Byers is therefore entitled to one hundred five weeks of permanent partial disability benefits.

B. Rate.

The parties stipulated Byers's gross earnings on the stipulated injury date were one thousand three hundred three and 59/100 dollars (\$1,303.59) per week. They also stipulated he was married and entitled to two exemptions at the time. Based on the parties' stipulations, Byers's workers' compensation rate is eight hundred thirty and 50/100 dollars (\$830.50) per week.

C. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting City of Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Because Byers has proven a greater permanent partial disability, the following costs are taxed against the City:

- Thirteen and 92/100 dollars (\$13.92) for the costs of service of the original notice under 876 IAC 4.33(3); and
- One hundred three dollars (\$103.00) for the cost of the filing fee and convenience fee for using the payment gateway on the Workers' Compensation Electronic System (WCES) under rule 876 IAC 4.33(7).

VI. ORDER.

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) The City shall pay to Byers one hundred five weeks of permanent partial disability benefits at the rate of eight hundred thirty and 50/100 dollars (\$830.50) per week from the stipulated commencement date of June 22, 2021.
- 2) The City shall pay accrued weekly benefits in a lump sum.

- 3) The City shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
- 4) The City is to be given the credit for benefits previously paid for the stipulated amount of 77.571 weeks of compensation at the rate of eight hundred thirty and 50/100 dollars (\$830.50) per week.
- 5) The City shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 6) The City shall pay to Byers the following amounts for the following costs:
 - a) Thirteen and 92/100 dollars (\$13.92) for the costs of service of the original notice; and
 - b) One hundred three dollars (\$103.00) for the filing fee and WCES convenience fee.

Signed and filed this 6th day of January 2023.



BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

John Lawyer (via WCES)

Molly Tracy (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.