BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TONY A. AUGE,

Claimant,

vs.

LAGO CONSTRUCTION, LLC,

Employer,

and

INTEGRITY MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5062048

ARBITRATION

DECISION

Head Notes: 1402.30, 1803, 2501, 2502

STATEMENT OF THE CASE

Claimant, Tony Auge, filed a petition in arbitration seeking workers' compensation benefits from Lago Construction, LLC, (Lago), employer, and Integrity Mutual Insurance Company, insurer, both as defendants. This case was heard in Waterloo, Iowa on October 26, 2017 with a final submission date of November 22, 2017.

The record in this case consists of Joint Exhibit 2, Claimant's Exhibits 1 through 18, Defendants' Exhibits A through C, and the testimony of claimant, Morgan Rahm, Tyler Green, and Marlo Dawson.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration 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.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether the injury is a cause of permanent disability; and if so

3. The extent of claimant's entitlement to permanent partial disability benefits.

4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

5. Whether there is a causal connection between the injury and the claimed medical expenses, including medical mileage.

FINDINGS OF FACT

Claimant was 46 years old at the time of hearing. Claimant graduated from high school. Claimant served in the Marines from 1991 through 1995. Claimant has an associate's degree in liberal arts from a community college. Claimant also took two semesters of college at the University of Northern Iowa.

Claimant has worked in warehouses, done construction, and worked in concrete construction. Claimant worked driving commercial vehicles and operated heavy equipment. Claimant has also worked in maintenance.

Claimant was hired by Lago in November of 2014. Claimant worked in two apartment complexes for Lago in Waterloo. They are Hawkeye Towers and Hidden Valley. Claimant's job duties included, but were not limited to, basic maintenance; replacing doors, drywall and flooring; repair of furnaces and air conditioners; painting; maintenance of laundry equipment; and cleaning of apartment premises. Claimant also did part-time maintenance work for his brother.

Claimant testified that on February 23, 2016 he was in the parking lot at Hawkeye Towers. While in the lot he said he spoke with a supervisor, Mike Langreck. Claimant said Mr. Langreck told him there was garbage that needed to be picked up by a dumpster in the southwest corner of Hawkeye Towers.

Claimant said he drove his truck to the southwest dumpster. He said he parked next to a snow bank by the dumpster. Claimant said he put on rubber gloves, grabbed a bag and walked up the snow bank to pick up the garbage by the southwest dumpster. Claimant said he remembered walking down the snow bank and recalled snow crunching under his feet. Claimant said his last memory is walking toward the dumpster with a bag of garbage. Claimant said his next memory was waking up at the University of Iowa Hospitals and Clinics (UIHC). (Transcript pages 46-50)

A Google map picture of the Hawkeye Towers is found at Exhibit 18. A square and a red rectangle are the dumpsters where claimant was working. Photos of the area where claimant was found are found at Claimant's Exhibits 6, 7 and 8.

Morgan Rahm testified she was a student at Hawkeye Community College in February of 2016 and lived at the Hawkeye Towers Apartments. Ms. Rahm testified she drove her car to morning classes and back to her apartment at Hawkeye Towers. She said when she drove her car into the parking lot at Hawkeye Towers, she did not

see any activity at the dumpster located at the southwest corner of Donegal Circle. (Exhibit 18) Ms. Rahm said she went to her apartment, which is circled in blue ink on Exhibit 18. She said when it was time to return to class, she left her apartment and drove down Donegal Circle.

Ms. Rahm said when she went by the southwest dumpsters she saw claimant lying on the ground.

Ms. Rahm said she went to claimant and said, "sir" several times. She said claimant opened his eyes. Ms. Rahm said claimant had rubber gloves on, his glasses were broken, and he had blood on the side of his face. Claimant was lying on his side. Ms. Rahm said she did not see anyone around claimant. She said she saw no evidence that anyone had been in the area, other than claimant.

Ms. Rahm said a complex manager, "Anita" (no last name given) came out to help. Ms. Rahm asked Anita to call 9-1-1.

Ms. Rahm testified the photos shown in Exhibits 6, 7 and 8 were the dumpster where claimant fell. Ms. Rahm made markings on the photos to show approximately where claimant was lying when she found claimant.

Claimant was transported to Covenant Medical Center by the Waterloo Fire Rescue. Records indicate claimant was confused. Claimant indicated he was in an apartment fixing a furnace and had no recollection of falling. (Joint Ex. 2, p. 127)

Claimant was taken to Covenant Medical Center. Claimant was unable to communicate what happened and did not recall what happened to him. Notes indicate it was unclear if claimant fell or suffered an assault. Claimant did not have a history of seizures. (Jt. Ex. 2, pp. 128-129, 136) Notes indicate there were reports an assault may have occurred and there may have been a marital dispute. (Jt. Ex. 2, p. 139) Possible mechanisms of injury were described as a fall on ice or an attack. (Jt. Ex. 2, p. 141)

Claimant was assessed as having an acute subdural hematoma over the left frontal-parietal area with a change in mental condition. Records indicate after the first few days, claimant became hypoxic and had episodes of agitation. Bilateral pulmonary emboli were found. Claimant was eventually intubated due to low oxygen levels. (Jt. Ex. 2, pp. 144-146) Claimant was transferred to UIHC due to his difficulty with breathing. (Jt. Ex. 2, p. 175) Discharge diagnosis from Covenant Medical Center included hematoma, fractures seen on CT scan, and acute respiratory failure. (Jt. Ex. 2, p. 167)

Claimant was hospitalized at the UIHC from March 1, 2016 through March 7, 2016. Claimant had CT scans of the head at this time confirming the hematoma and orbital fractures. Records from the UIHC indicate claimant recalls walking towards dumpsters and minimally recalls having tubes taken out of his throat. (Jt. Ex. 2, p. 208)

At one point claimant wanted to see security videos. Claimant indicated it was not out of the realm of possibility he was attacked. (Jt. Ex. 2, p. 208)

Claimant was discharged from the UIHC on March 7, 2016. (Jt. Ex. 2, pp. 187-189)

Records indicate claimant was returned to light duty work on March 16, 2016 with a 20-pound lifting restriction. Claimant was restricted to four hours of working during the first week and was ultimately returned to full-time work on April 7, 2016. (Claimant's Ex. 1, p. 2; Jt. Ex. 2, pp. 216, 220)

On April 14, 2016 claimant was evaluated at UIHC. Claimant indicated he was back to baseline. A CT scan of the brain showed resolution of the subdural hematoma. (Jt. Ex. 2, pp. 190-191)

Claimant returned to UIHC on June 8, 2016. He was assessed as having a resolved subdural hematoma secondary to a trauma. Claimant's pulmonary embolisms were believed to have been caused by the hospitalization for the head injury. (Jt. Ex. 2, pp. 194-195)

On October 10, 2016 claimant was taken to Covenant Hospital following a grand mal seizure at home. (Jt. Ex. 2, p. 221)

On October 21, 2016 claimant was taken by ambulance to Allen Hospital after a second grand mal seizure. (Jt. Ex. 2, pp. 229-234)

Claimant underwent an independent medical evaluation (IME) with Marc Hines, M.D. Claimant indicated he recalled driving and parking his truck. He recalled going up a snow bank to get some garbage to put in a dumpster. Claimant's last memory was going on the snow bank. Dr. Hines opined it was most likely claimant had some retrograde amnesia for the period he fell or slid down the icy area to the dumpster. Claimant noted difficulty with finding words and processing information. Dr. Hines recommended neuropsychological testing. (Claimant's Ex. 3A, pp. 21-22)

Claimant was taken by ambulance to Allen Hospital for a third seizure on April 18, 2017. (Jt. Ex. 2, pp. 238-240, 290-294)

On May 30, 2017 claimant had a fourth seizure at home. (Jt. Ex. 2, pp. 250-251, 300)

Claimant testified he was taking three anti-seizure medications at the time of hearing.

In an August 9, 2017 report Frank Gersh, Ph.D. gave his opinions of claimant's condition following neuropsychological evaluation. Claimant was driven to testing by his mother, as claimant was restricted from driving due to seizures. Claimant's mother indicated claimant was forgetful and easily frustrated. She described claimant as

worried and easily stressed. Claimant had poor memory and difficulty with word finding. (Claimant's Ex. 1, pp. 1-4)

Testing showed impairment for verbal ability consistent with a left hemisphere dysfunction. Claimant's performance on the controlled oral word association was consistent with frontal lobe damage. Claimant was found to have impaired processing speed and concentration. (Claimant's Ex. 1, p. 6)

Claimant was assessed as having a neurocognitive disorder due to a traumatic brain injury and depressive disorder due to a traumatic brain injury. Dr. Gersh recommended claimant receive treatment for anxiety and cognitive behavioral therapy for depression and anxiety. (Claimant's Ex. 1, p. 7)

On August 26, 2017 claimant saw Dr. Hines for a second IME. Dr. Hines found claimant had a 14 percent body as a whole impairment using Table 13-8 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Table 13-8 relates to impairment due to emotional or behavioral disorders. He found claimant had a 15 percent permanent impairment to his body as a whole using Table 13-6 of the Guides. Table 13-6 relates to a rating impairment related to mental status. He gave claimant a 10 percent permanent impairment to the body as a whole for headaches using Table 13-11. Table 13-11 relates to any impairments for trigeminal neuralgia. He found claimant had a 25 percent body as a whole impairment based upon Example 13-33 of the Guides. Example 13-33 relates to impairment due to sixth nerve palsy. (Claimant's Ex. 3B, p. 34)

Dr. Hines found claimant had a 5 percent permanent impairment for thoracic impairment using Table 15-4 of the Guides. He found claimant had a 5 percent permanent impairment for a lumbar impairment using Table 15-3 of the Guides. He also noted claimant had a 15 percent permanent impairment to the body as a whole related to claimant's seizures using Table 13-3 of the Guides. (Claimant's Ex. 3B, p. 35)

When combined, Dr. Hines found claimant had a 64 percent permanent impairment to the body as a whole. He restricted claimant from working at heights. (Claimant's Ex. 3B, pp. 33-34)

Records indicate claimant divorced his wife, Nicole Auge. Claimant was awarded primary custody of the couple's two children. Claimant testified in deposition his ex-wife had hit him in the face on several occasions. He testified Nicole Auge was only allowed two hours of supervised visitations per week with the children due to her unstable behavior. (Ex. C; Deposition pp. 5, 10-11)

Records indicate claimant lives with his mother, Marlo Dawson, step-father, Rod Dawson, and his two minor children. Between 2011 and 2016, Nicole Auge contacted police on approximately 15 occasions requesting welfare checks on the children at Auge's home. (Ex. A) On February 19, 2016 Nicole Auge reported to police that Rod

Dawson assaulted her. The record suggests charges were never brought against Mr. Dawson. (Ex. A, pp. 50-53)

After claimant was discharged from the hospital, Nicole Auge called police to his home four times in March of 2016. (Ex. A, pp. 59-62)

In a March 24, 2016 emergency court hearing, Ms. Auge filed an emergency action to obtain custody of her children. Ms. Auge alleged claimant was not competent to care for children due to his head trauma. The court ruled custody should remain with claimant. (Ex. B; Ex. C, 14-18)

Claimant testified he is unable to drive at the time of hearing due to seizures. He testified he is restricted from driving for six months after each seizure. Claimant testified he is restricted from working on ladders or working off the ground. He said his employer has accommodated his restrictions.

Claimant said he has problems with double vision. He said he believes he is easily confused. Claimant testified if he lost his job at Lago he did not believe he could find another position.

At the time of hearing claimant testified he was recently told by his employer they were taking him off work to allow him to get better.

Claimant testified he did not believe his accident was the result of an assault. This belief is based, in part, on the fact that the accident happened in a wide open area in the middle of the day. Mr. Auge also said that on the date of the accident, his wife was out of state in Florida. (Ex. A, p. 49)

Tyler Green testified he is claimant's older half-brother. Mr. Green said he helped claimant get his job with Lago.

Mr. Green said since the accident, claimant has difficulty with time management skills. He said since the accident claimant has less patience. Mr. Green said he drives claimant when they do work together. He said claimant still does some maintenance work for him. Mr. Green testified that Lago has accommodated claimant to allow him to continue to work.

Marlo Dawson testified she is claimant's mother. She said on the date of the accident she was contacted by claimant's supervisors, Matt Good and Mike Langreck. She testified that neither Mr. Good nor Mr. Langreck said claimant was assaulted. She testified that both Mr. Good and Mr. Langreck told her workers' compensation would take care of her son's injury. She said no doctor told her claimant was assaulted. (Tr. pp. 118, 120-121)

Ms. Dawson testified she has to drive that claimant to and from work. She said Lago accommodates claimant's limitations. Ms. Dawson estimated she has had police come to her house approximately 26 times because of Nicole Auge.

CONCLUSIONS OF LAW

The first issue to be determined is did claimant's injury arise out of and in the course of employment.

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).

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

The 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).

In order for an injury to be compensable in Iowa, there must be "a connection between the injury and the work." Meyer v. IBP, 710 N.W.2d 213, 221 (Iowa 2006). That connection is established by showing the injury arose out of and in the course of the worker's employment. Iowa Code § 85.31(1) (2001); Meyer, 710 N.W.2d at 220.

As the Iowa Supreme Court has noted, "[i]njuries that occur in the course of employment or on the employer's premises do not necessarily arise out of that employment." Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). "The two tests are separate and distinct and both must be satisfied in order for an injury to be deemed compensable." *Id.*

The element of "in the course of" refers "to the time, place, and circumstances of the injury." *Id.* To satisfy this requirement, the injury must take place " 'within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.' " Meyer, 710 N.W.2d at 222 (quoting 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* ch. 12, scope, at 12-1 (2005)).1

The element of "arising out of" requires proof "that a causal connection exists between the conditions of [the] employment and the injury." *Miedema*, 551 N.W.2d at 311. "In other words, the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of [the] employment." *Id.*; *accord* McIlravy v. N. River Ins. Co., 653 N.W.2d 323, 331 (Iowa 2002) (stating injury "must be related to the working environment or the conditions of employment"); *Griffith v. Norwood White Coal Co.*, 229 Iowa 496, 502, 294 N.W. 741, 744 (1940) (stating "injury arises out of the employment if it can reasonably be said to result from a hazard of the employment").

In Hanson v. Reichelt, *452 N.W.2d, 164, 168 (Iowa 1990)*, the Iowa Supreme Court adopted the actual-risk rule. That is, if the nature of the employment exposes the employee to the risk of such an injury, the employee suffers an accidental injury arising out of and during the course of the employment. And it makes no difference that the risk was common to the general public on the day of the injury. See Lakeside Casino v. Blue, 743 N.W.2d 169, 173-174 (Iowa 2007).

In Lakeside Casino, the Iowa Supreme Court discussed two different doctrines utilized by courts in determining whether an injury arises out of employment: the actual-risk doctrine and the positional-risk doctrine. 743 N.W.2d at 174-76. Under the actual-risk doctrine, an injury is compensable "'as long as the employment subjected [the] claimant to the actual risk that caused the injury.'" *Id.* at 176 (quoting 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 3.04, at 3-5 (2007) [hereinafter Larson]). This doctrine was adopted by the court in Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990).

The positional-risk doctrine, on the other hand, provides that "'[a]n injury arises out of the employment if it would not have occurred *but for* the fact that the conditions

and obligations of the employment placed claimant in the position where he would be injured.'" *Lakeside Casino*, 743 N.W.2d at 176 (quoting Larson § 3.05, at 3-6). This doctrine supports compensation in situations where "the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time" when the employee "was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment." 1 Larson § 3.05, at 3-6.

The Iowa Supreme Court declined to adopt the positional-risk doctrine in Lakeside Casino, 743 N.W.2d at 177. See Ottumwa Regional Health Center v. Mitchell, No. 07-1496, filed April 9, 2008 (Iowa Ct. App.) Unpublished, 752 N.W.2d 35 (Table); Mercy Medical Center v. Plumb, No. 08-1688, filed September 17, 2009, (Iowa Ct. App.) Unpublished, 776 N.W.2d 301 (Table).

Claimant meets the "in the course" element in this case. Claimant was injured at Hawkeye Towers during work hours. The record indicates claimant was in the process of picking up garbage by a dumpster when he was injured.

Claimant needs to prove the "arising out of" element. This requirement is the difficult part of the case. No one saw claimant get injured. Claimant has little recollection of the injury immediately following the injury. There are some remarks in the record suggesting the injury may have been due to an assault.

Claimant credibly testified that his supervisors asked him to pick up garbage in the southwest corner of Hawkeye Towers by a dumpster. (Tr. pp. 43-46; Claimant's Ex. C, Depo. p. 55)

Claimant credibly testified that he recalls the snow crunching under his feet. He credibly testified that he recalls walking on snow as his last memory. (Tr. pp. 46-49; Ex. C; Depo. pp. 56, 58, 61-63, 66)

Ms. Rahm drove by the southwest dumpster and found claimant lying on the ground. (Tr. pp. 15-16) She said claimant had torn rubber gloves in his hand. (Tr. p. 17) Ms. Rahm did not see anyone else around when she found claimant. (Tr. pp. 18, 24) Ms. Rahm reviewed photos of the accident and a Google map of Hawkeye Towers. She testified photos of the area found at Exhibits 6, 7 and 8 were the area where she found claimant lying next to the snow and the dumpster. (Tr. pp. 18-19)

There is no evidence in the record claimant had an idiopathic injury.

Defendants contend claimant may have been assaulted by claimant's ex-wife or someone hired by his ex-wife. This theory of claimant's accident is based upon a few medical records referring to an assault as a possible cause of claimant's head injury and fall. This theory is also based on claimant's ex-wife's harassment of claimant and claimant's family since 2011. (Ex. A; Jt. Ex. 2, pp. 140, 144, 208; Tr. p. 73)

Records indicate claimant's wife was out of state at the time of his accident. (Ex. A, p. 49)

There is no evidence in the record that law enforcement investigated, or even considered, claimant's injury as an assault.

As noted above, shortly after claimant was released from medical care, claimant's ex-wife filed an emergency court action to obtain custody of the children. A transcript of that hearing is found at Exhibit B. At hearing, claimant was defending his right to retain custody of his two children. There is no reference, or even a suggestion, in the custody hearing that claimant was assaulted. (Ex. B)

Claimant testified he does not believe he was assaulted, as the accident occurred during the day in an open area and because Nicole Auge was out of the state.

Ms. Dawson is claimant's mother. She testified that at the time of the injury claimant's supervisors never mentioned to her that the accident was an assault. She testified claimant's supervisors believed the accident would be covered under workers' compensation. She testified no physician has told her claimant was assaulted. (Tr. pp. 118, 120-121)

In his IME evaluation with Dr. Hines, claimant indicated he parked his car and was going up a snow bank to get garbage. Claimant's last memory was going up a snow bank. Dr. Hines opined it was most likely claimant had some retrograde amnesia for the period he slid or fell down the icy area to the dumpster. (Claimant's Ex. 3A, pp. 21-22)

Other than a few offhand remarks in medical records, there is no evidence that claimant was assaulted at the dumpster by Hawkeye Towers. There is no evidence law enforcement considered claimant was assaulted. There is no evidence law enforcement investigated claimant's accident as an assault. The record indicates claimant was told by a supervisor to pick up garbage by a dumpster in the southwest corner of Hawkeye Towers. There was a snow bank by the dumpster. The record indicates claimant recalls walking on snow. Claimant was found by Ms. Rahm lying next to the dumpster in a snow bank with blood coming out of his head. She saw his glasses were broken and that he had torn rubber gloves on his hands. Given this record, the presumption is claimant slipped or fell on ice or snow while picking up garbage and sustained an injury that included, but was not limited to, a closed head injury. Claimant's injury was caused by his employment. Claimant was engaged in picking up garbage on a snow bank, which subjected claimant to the actual risk that caused an injury. Given these facts, and the others detailed above, claimant has carried his burden of proof his injury both occurred in the course of and arose out of employment.

I recognize there are some records indicating that immediately following the injury claimant had little recollection of how the injury occurred. However, I found

claimant's testimony regarding being instructed by his supervisor to pick up garbage at the southwest dumpster at Hawkeye Towers, and walking on snow, credible. His testimony was consistent with his testimony in deposition. It is also consistent with records found in the IMEs with Dr. Hines and Dr. Gersh.

The next issue to be determined is whether claimant's injury resulted in permanent disability.

Claimant had a closed head injury that arose out of and in the course of his employment with Lago. His injury included, but was not limited to, a subdural hematoma. Claimant was hospitalized for approximately two weeks. He was intubated while hospitalized. Two experts have opined that claimant has a permanent impairment. Given this record, claimant has carried his burden of proof that his injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Claimant was 46 years old at the time of hearing. Claimant graduated from high school. He has an associate's degree in liberal arts from a community college. Claimant served in the Marines. Claimant has worked in warehouses, and done construction. He has driven commercial vehicles and operated heavy equipment. Claimant has worked in maintenance.

Claimant has undergone two IMEs. Dr. Gersh found claimant had neurocognitive disorders due to a traumatic brain injury and a depressive disorder due to a traumatic brain injury. (Ex. 1)

Dr. Hines opined claimant had a 64 percent permanent impairment to the body as a whole.

Dr. Hines' opinions regarding permanency are problematic for several reasons. Dr. Hines' first IME report is essentially 11 pages, one paragraph, single spaced recitation of claimant's medical history. It is extremely difficult to read.

Dr. Hines' second IME is approximately 11 pages. It is also essentially one paragraph, single spaced. It is also difficult to read. Dr. Hines finds claimant has a permanent impairment for both a thoracic and lumbar spine disorder. There is little evidence in the record claimant has any permanent impairment from his fall to his spine. (Ex. 3B, p. 35) Dr. Hines found claimant had a permanent impairment based upon a sixth nerve palsy, based, it appears on claimant's double vision. The record does indicate claimant has double vision. There is no evidence in the record of what causes his double vision. Dr. Hines gave claimant a permanent impairment based upon the impairment of the trigeminal nerve. This appears to be, in part, due to claimant's headaches. There is no evidence in the record that claimant has a trigeminal nerve impairment or disorder. For the reasons detailed above, Dr. Hines' opinions regarding permanent impairment, and only permanent impairment, are found not convincing.

The record indicates claimant has a permanent impairment regarding verbal ability, visual abilities, mental processing speed, and concentration. (Ex. 1, p. 6)

Claimant is restricted from working on ladders or working at heights. Claimant still works for Lago. However, the record indicates that at the time of the hearing claimant was going to be taken off of work by Lago. (Tr. p. 61) Claimant has been accommodated by Lago. Claimant has had four seizures since his work accident. Because of his seizures claimant has not been able to drive and relies upon his mother and others to take him and pick him up for work. Because of his inability to drive, claimant no longer works at Hawkeye Towers and is restricted to working at the Hidden Valley complex.

Claimant's unrebutted testimony is that if he was fired from Lago, he does not believe he could find any other work. (Tr. p. 60)

When all factors are considered, it is found claimant has a 50 percent loss of earning capacity or industrial disability.

The next issue to be determined is whether claimant is due reimbursement for three IMEs. Claimant seeks approximately $10,160.00 for the expenses related to the three IMEs. (Claimant's Ex. 16) Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an

employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

In a 2015 opinion, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 ". . . only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer." Des Moines Area Regional Transit v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician

The only IMEs in evidence are the reports from Dr. Hines and Dr. Gersh. There is no evidence an employer-retained physician made a finding of impairment prior to the reports issued by Dr. Hines and Dr. Gersh. Given this record, claimant has failed to prove he is due reimbursement for the IMEs from Dr. Hines and Dr. Gersh.

The final issue to be determined is whether claimant is due medical mileage. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant seeks reimbursement for medical mileage as detailed in Exhibit 17. As claimant has carried his burden of proof his injury arose out of and in the course of employment, defendants are liable for medical mileage associated with care and treatment for claimant's work-related injury. Defendants are not liable for mileage incurred with the IMEs with Dr. Hines or Dr. Gersh.

ORDER

Therefore it is ordered:

That defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of four hundred twenty-two and 73/100 dollars ($422.73) per week commencing on April 4, 2016.

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

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall pay claimant's medical mileage as detailed above.

That defendants shall pay costs as detailed above.

That defendants shall not be liable for costs associated with the three IMEs.

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

Signed and filed this 2nd day of February, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFC/sam

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.