

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAN BLINKS,

Claimant,

vs.

OGDEN AND ADAMS LUMBER,

Employer,

and

SECURA INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 5067729

ARBITRATION DECISION

Head Note Nos.: 1400, 1402.40,
1800, 1803, 3000,
3002**STATEMENT OF THE CASE**

The claimant, Dan Blinks, filed a petition for arbitration and seeks workers' compensation benefits from Ogden and Adams Lumber, as the employer, and Secura Insurance Companies, as the insurance carrier. The claimant was represented by Casey Steadman. The defendants were represented by M. Anne McAtee.

The matter came on for hearing on April 15, 2020, before Deputy Workers' Compensation Commissioner Heather Palmer remotely via CourtCall due to an order of the Commissioner. The evidentiary record closed upon receipt of post-hearing briefs on May 22, 2020. The hearing transcript was filed with the Iowa Division of Workers' Compensation on May 7, 2020. Post-hearing briefs were filed on May 22, 2020. The case was deemed fully submitted to Deputy Palmer on that date.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibits 1-8, and Defendants' Exhibits A-G. Testimony under oath was also taken from the claimant, Dan Blinks. Cheyanna Lambert was appointed the official reporter and custodian of the notes of the proceeding. The exhibits were accepted without objection.

Deputy Commissioner Palmer was unavailable to the agency. Pursuant to Iowa Code 17A.15(2), Commissioner Cortese delegated this file to the undersigned for preparation and filing of an arbitration decision.

Pursuant to Iowa Code 17A.15(2), the undersigned inquired of the parties whether they believed demeanor of a witness is a substantial factor in the case. The undersigned offered to hear those portions of the testimony again for which demeanor was considered a substantial factor. The undersigned inquired via e-mail, and requested that the parties reply via e-mail if additional follow-up was necessary. The undersigned has received no response from the parties indicating any objection to the undersigned proceeding to write this arbitration decision without rehearing all or portions of the testimony to assess witness demeanor. Therefore, pursuant to Iowa Code 17A.15(2) and the Commissioner's Order of Delegation filed on May 13, 2020, the undersigned performs a review of the evidentiary record in this case and issues this arbitration decision at the direction of the Commissioner.

STIPULATIONS

Through the hearing report, the parties stipulated and/or established the following:

1. There was an existence of an employer-employee relationship at the time of the alleged injury.
2. The claimant sustained an injury, which arose out of and in the course of employment on December 19, 2016.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. If the injury is found to be a cause of permanent disability, the disability is an industrial disability, and the commencement date for permanent partial disability benefits, if any are awarded, is February 12, 2017.
5. The claimant is single and entitled to one exemption.
6. Medical benefits are no longer in dispute and the defendants will pay the IME expenses.
7. Prior to the hearing, the claimant was paid \$1,775.17 in temporary total disability, and \$1,123.51 in temporary partial disability benefits at the rate of \$414.17 per week from December 23, 2016 through February 11, 2017.
8. No permanent partial disability has been paid.
9. If the back and left leg claims are found to be causally connected to the December 19, 2016, work injury, Iowa Code section 85.27 medical benefits will continue with authorized treating physicians.
10. Costs listed in claimant's exhibit 8 have been paid.

Additionally, there was no dispute as to the entitlement for temporary disability and/or healing period benefits. Defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. The alleged injury is a cause of permanent disability.
2. The extent of permanent disability.
3. The appropriate rate of weekly workers' compensation benefits.
4. Whether the claimant is entitled to the difference between the rate paid and the rate alleged to be appropriate by the claimant.
5. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Dan Blinks is a 62-year old male who currently lives in Center Point, Iowa. At the time of the incident, Mr. Adams was single. He later married on September 8, 2018. At the time of the alleged injury, Mr. Blinks was an employee of Ogden & Adams Lumber. Mr. Blinks graduated from high school in 1976. (Cl. Ex. 5). He attended the University of Wisconsin-Platteville and the University of Wisconsin-River Falls, but did not earn a degree. In 2010, he returned to Kirkwood Community College, where he took a class in beginning electrical. (Cl. Ex. 5). The beginning electrical class was required by the City of Cedar Rapids for homeowners who wished to make electrical modifications to their homes. (Testimony).

Mr. Blinks worked for a concrete injection company, and various dairy farms in Wisconsin prior to moving to Iowa and working on receiving/loading trucks. (Cl. Ex. 5; Testimony). He then moved to Ogden & Adams Lumber. (Cl. Ex. 5). He worked in the lumber yard. On December 19, 2016, Mr. Blinks was making a delivery when halfway through unloading a boom truck, he felt acute pain in his lower left side. (Cl. Ex. 2:19). Mr. Blinks reported this incident to his employer and their insurer. There was no mention of any injury or pain to his back or foot in these reports. (Cl. Ex. 2). Ogden & Adams Lumber was sold on February 28, 2019. (Defendants' Exhibit C:17). At the time of the sale, all employees, including Mr. Blinks, were terminated. (Def. Ex. C:17). Employees could reapply for their jobs, but the new owner was not comfortable rehiring Mr. Blinks due to his active search for alternative, non-heavy lifting jobs. (Testimony).

At the time of the hearing, Mr. Blinks worked for USDA NASDA as a part-time contractor. (Cl. Ex. 5). In 2019, Mr. Blinks made \$5,000.00. (Testimony). Mr. Blinks opined that he could not perform a number of his previous jobs, due to their physical nature, but also due to the fact that they were “young man’s jobs.” (Testimony).

Mr. Blinks’ job description involved delivering material on a boom truck. (Cl. Ex. 3). The boom truck was a flatbed truck on which lumber or other building materials were loaded. (Cl. Ex. 3). The driver would transport the materials to a job site, unstrap them, and begin the unloading process. (Cl. Ex. 3). The unloading process included climbing a truck mounted ladder about eight feet to twelve feet to the top of a seat mounted platform and then operate the controls of the boom to remove the materials from the flatbed. (Cl. Ex. 3; Testimony). While working around the lumber yard, Mr. Blinks would also break apart bunks of two-by-four lumber and restack them. (Testimony). This involved lifting, and moving large pieces of wood including large sheets of plywood weighing upwards of 80-pounds. (Testimony).

On July 22, 2013, Mr. Blinks was at work when he lifted some lumber. When he lifted the lumber, he reported feeling something pop in the left lower side of his back. On that same day, he reported to Mercy Medical Center in Cedar Rapids, Iowa, where he was seen by Katie C. Wilcox, A.R.N.P. (Joint Exhibit 1:1-2). He reported severe pain aggravated by bending and standing. (JE 1:1). Mr. Blinks also complained of leg pain. (JE 1:1). He noted never having back problems in the past. (JE 1:1). Ms. Wilcox diagnosed Mr. Blinks with back pain and muscle strain. (JE 1:2). He was prescribed cyclobenzaprine, and told to have plenty of fluids with rest. (JE 1:2). Ms. Wilcox noted that Mr. Blinks was not to return to work until a secondary evaluation on the subsequent Thursday. (JE 1:2). Mr. Blinks testified that this injury occurred during a busy time of year at the lumber yard. (Testimony). He further testified that he recovered from this incident and when he came back, he was “back full force doing exactly the same thing” he was doing prior to that with no pain. (Testimony). Mr. Blinks continued this until his alleged 2016 injury. (Testimony).

Mr. Blinks followed-up on July 25, 2013, with Rebecca Lynn White, PA-C, at Mercy Medical Center. (JE 1:4-6). The record noted a history of acute back strain after lifting and twisting a heavy plank at work. (JE 1:4). Mr. Blinks reported feeling better, but was not prepared to return to work due to the physical nature of his job. (JE 1:4). Mr. Blinks was diagnosed with back pain, told to continue on home rest and add in slow stretches. (JE 1:6). It was noted that he could return to work on July 29, 2013 with no restrictions after a recheck in the clinic. (JE 1:6).

On December 11, 2013, Jeffrey Jones, M.D., examined Mr. Blinks at Mercy Medical Center. (JE 1:7-8). Mr. Blinks reported pain in the sacro-iliac joint that radiates to his left foot. (JE 1:7). Dr. Jones’ record indicated that Mr. Blinks was to be off of work through December 16, 2013, at which point it was noted he could return to work without restrictions. (JE 1:8). If he was not 100 percent better by that time, he was told to return to care. (JE 1:8).

Mr. Blinks returned to Mercy Medical Center on December 16, 2013, to visit Dr. Jones. (JE 1:9-11). Mr. Blinks had no improvement from the prior week. (JE 1:9). His pain medications were helping. (JE 1:9). His pain remained on the left side of the sacro-iliac, and radiated to the left buttocks and leg. (JE 1:9). The pain was moderate. (JE 1:9). Dr. Jones' diagnosis was back pain, but more of an SI joint strain. (JE 1:10). Dr. Jones noted he would set up physical therapy and continue Nabumetone. (JE 1:10). Dr. Jones issued a work restriction through December 20, 2013. (JE 1:11).

On December 20, 2013, Dr. Jones examined Mr. Blinks for a follow-up visit. (JE 1:12-13). Mr. Blinks' problem was rapidly improving. (JE 1:12). Mr. Blinks continued to have radiation into his left leg, including pins and needles feelings. (JE 1:12). The claimant was to return to work without restrictions effective December 23, 2013. (JE 1:13).

Paul Thomas, D.O., examined Mr. Blinks on October 27, 2014, for an annual physical examination. (JE 2:15-18). Mr. Blinks had left lower quadrant/inguinal pain with coughing over the last month or so. (JE 2:15). This reminded Mr. Blinks of the hernia previously repaired on the right-hand side. (JE 2:15). Mr. Blinks reported one severe flare-up of lower back pain, but no recent complaints. (JE 2:15). Dr. Thomas could not recreate the left inguinal pain. (JE 2:16). The visit diagnoses included groin pain to the left lower quadrant, but it was noted that Dr. Thomas could not feel a hernia. (JE 2:18).

Dr. Jones examined Mr. Blinks again on January 23, 2015 at Mercy Medical Center. (JE 1:14). Dr. Jones's diagnosis was a left inguinal hernia. (JE 1:14). Mr. Blinks noted acute left groin pain after lifting at work. (JE 1:14). Mr. Blinks had a history of a right inguinal hernia repair 14 years prior. (JE 1:14). Dr. Jones referred Mr. Blinks to a surgeon and kept him off work until the surgical appointment. (JE 1:14).

Mr. Blinks returned to Mercy Medical Center to visit Dr. Thomas again on December 15, 2016. (JE 2:19-20). It was noted that Mr. Blinks lost 11 pounds from his previous visit, but was also having impaired fasting glucose. (JE 2:20). There was no mention of hernias or low back pain.

On December 19, 2016, Mr. Blinks was unloading a truck at a delivery site. (Testimony). Mr. Blinks testified it was ten-degrees below zero for a temperature. (Testimony). He climbed the ladder multiple times to warm up the hydraulic systems. (Testimony). As he was unloading the truck, he began to get "real serious pain in" his lower stomach. (Testimony). Mr. Blinks finished unloading the flatbed since the hydraulic system was warm. (Testimony). Upon his return to Ogden and Adams, Mr. Blinks could no longer walk. (Testimony).

Subsequently, Mr. Blinks reported to the Work Well Clinic at UnityPoint Health St. Luke's Hospital, where Ann C. McKinstry, M.D., examined him. (JE 3:47-53). As a new patient, he filled out a questionnaire indicating he had acute pain that he first noticed on the same day. (JE 3:47). He noted it felt like muscle cramps that were worsening. (JE

3:47). On the same report, Mr. Blinks noted that he had back spasms and low back pain for about one month. (JE 3:48). He reported acute left-sided abdominal pain after sitting in the chair on top of his work truck. (JE 3:51). Mr. Blinks denied back pain or groin pain. (JE 3:51). His previous workers' compensation claim facts were noted including an episode of low back pain; however, it was noted that there was no impairment rating or permanent restrictions stemming from that incident. (JE 3:51). During his examination, Mr. Blinks appeared "very uncomfortable" and in significant pain when standing up or lying down. (JE 3:52). Dr. McKinstry noted her impression was that he had acute abdominal pain and unlikely to be work related. (JE 3:52). His coworker was to take him to the emergency room for further evaluation and treatment. (JE 3:52). Dr. McKinstry indicated if there is a work injury, Mr. Blinks could be seen by her clinic. (JE 3:52).

Pursuant to Dr. McKinstry's recommendation, Mr. Blinks reported to the emergency room. (JE 4:73-78). Mr. Blinks complained of pain developing in the left flank after landing into his truck. (JE 4:73). A CT scan of the abdomen and pelvis was done, which showed a fusiform ovoid intramuscular mass in the lower left rectus abdominis muscle. (JE 4:78). The diagnosis was a traumatic rectus hematoma, which the emergency room doctor indicated was consistent with the CT scan results. (JE 4:76).

Mr. Blinks returned to the Work Well Clinic at UnityPoint Health St. Luke's Hospital on December 22, 2016. (JE 3:54-55). Shirley Pospisil, M.D., M.P.H. examined Mr. Blinks. (JE 3:54-55). Dr. Pospisil noted Mr. Blinks past visit, and his subsequent ER examination. (JE 3:54). Mr. Blinks had an intramuscular mass in the lower left rectus abdominis muscle, which the radiologist believed was an intramuscular hematoma. (JE 3:54). Standing too long continued to be a bother for Mr. Blinks. (JE 3:54). His pain was worse below the belt line. (JE 3:54). Dr. Pospisil limited his lifting and carrying to 10 pounds, and indicated he could only do a sitting job with alternating sitting, standing, and walking as tolerated for comfort. (JE 3:54). Dr. Pospisil ordered him to return in one-week. (JE 3:55).

On December 29, 2016, Mr. Blinks returned to the Work Well Clinic at UnityPoint Health St. Luke's Hospital. (JE 3:56-57). Mr. Blinks reported experiencing continued pain, but noted that he was feeling better. (JE 3:56). He tried not to "push it," and if he felt pain he would "back off." (JE 3:56). He took Norco to sleep. (JE 3:56). He received a refill on Norco, and his work restrictions remained unchanged. (JE 3:56).

Mr. Blinks returned to the Work Well Clinic at UnityPoint Health St. Luke's Hospital to see Dr. Pospisil on January 19, 2017. (JE 3:59-60). Mr. Blinks reported his pain was resolving, but has moved to the lower part of his abdomen rather than the whole left side. (JE 3:59). He experienced pain while attempting to stretch, but had not attended physical therapy. (JE 3:59). The plan from Dr. Pospisil was to commence physical therapy, and change his work restrictions to: lifting up to 15 pounds, no climbing ladders, alternate walking/standing/sitting as tolerated for comfort, increase weight tolerance as able. (JE 3:59-60).

Mr. Blinks reported to CRS Therapy Plus Downtown PT for physical therapy on January 20, 2017, pursuant to the recommendation of Dr. Pospisil. (JE 5:79-80). The diagnosis noted was an abdominal muscle tear with abdominal weakness, pain and a hematoma. (JE 5:79). He was given restrictive duty with a 15 pound weight limit and no climbing. (JE 5:79). Mr. Blinks noted pain to the left lower abdomen. (JE 5:80).

CRS Therapy Plus Downtown PT provided a follow-up progress examination and note on February 6, 2017. (JE 5:81-82). Mr. Blinks had six sessions of therapy since January 20, 2017. (JE 5:81). His therapy consisted of therapeutic exercise, manual therapy, home exercise program, and patient education. (JE 5:81). Mr. Blinks reported stiffness after previous therapy sessions, but noted that his pain was not increased. (JE 5:82). His abdominal muscles did not feel poorly. (JE 5:82). Mr. Blinks was near 100 percent improved since his initial evaluation. (JE 5:82). Due to symptom improvement, discharge was considered. (JE 5:82).

On February 9, 2017, Mr. Blinks followed-up with Dr. Pospisil at the Work Well Clinic at UnityPoint Health St. Luke's Hospital. (JE 3:61). The abdominal muscle tear was resolving, and the doctor noted it was only aching in a small area. (JE 3:61). Mr. Blinks indicated he wanted to start working more than he previously was. (JE 3:61). Dr. Pospisil discharged Mr. Blinks with the following restrictions: lifting up to 30 pounds, alternate walking/standing/sitting as tolerated for comfort until February 13, 2017 when he was to return to regular duty. (JE 3:61). Dr. Pospisil ordered Mr. Blinks discharged from physical therapy, as well. (JE 3:61).

On March 30, 2017, Mr. Blinks visited Dr. Thomas for a follow-up of an abdominal muscle tear. (JE 2:21-23). His left lower quadrant pain began to occur suddenly after landing into his truck. (JE 2:22). A CT scan showed a hematoma and rectus abdominal muscle wall tear. (JE 2:22). He was off of work for some time, but at home was performing home exercises. (JE 2:22). He returned to work, but started to get some muscle soreness in the right low back area late into the week. (JE 2:22). Rest relieved the pain. (JE 2:22). Dr. Thomas assessed Mr. Blinks with hemorrhoids, rectal bleeding, acute right-sided low back pain without sciatica, and abdominal wall pain. (JE 2:23). Dr. Thomas noted that it sounded like the original abdominal wall injury resolved. (JE 2:23).

Mr. Blinks followed-up with Dr. Thomas again on June 22, 2017. (JE 2:24-27). Dr. Thomas noted deep muscle tearing on the left side of the abdomen that occurred in December above the hernia repair in 2015. (JE 2:24). His physical therapy ended in February, and Mr. Blinks took ibuprofen in order to sleep. (JE 2:24). His back hurt after four days of work, and he complained about being sore every day. (JE 2:24). Dr. Thomas's diagnoses were chronic pain of both knees, elevated blood pressure, and hyperlipidemia. (JE 2:25). X-rays of the knees showed moderate bilateral tricompartmental osteoarthritis, and moderate joint effusion. (JE 2:27). Sometime during the summer of 2017, Mr. Blinks's toe drag and foot drop worsened. (Testimony). He would take personal days on Fridays or Mondays in order to give himself three days of rest. (Testimony).

Dr. Thomas examined Mr. Blinks again on October 4, 2017. (JE 2:28-33). Mr. Blinks reported chronic pain to his left shoulder. (JE 2:29). This pain occurred for several years, but was out of control for the last few months prior to this examination. (JE 2:29). The left shoulder showed no appreciable effusion, but did have a soft tissue deformity from a previous biceps tear. (JE 2:30). X-rays of the left shoulder showed no acute fracture or dislocation, but showed arthritic changes to the left acromioclavicular joint. (JE 2:30). Dr. Thomas diagnosed Mr. Blinks with chronic left shoulder pain. (JE 2:31). Dr. Thomas prescribed Tramadol for pain relief, and ordered a follow-up in two months. (JE 2:31).

On December 6, 2017, Dr. Thomas performed another examination on Mr. Blinks. (JE 2:34-36). Mr. Blinks' previous examination showed severe arthritis in the acromioclavicular joint. (JE 2:34). He took some of the Tramadol, but he noted not needing it very often. (JE 2:34). Mr. Blinks reported continued back spasms if he exerts himself and "overdoes things." (JE 2:34).

Mr. Blinks commenced treatment with Wickwire Chiropractic and Wellness on January 16, 2018. (JE 6:84-85). Mr. Blinks found the chiropractor's office while walking through an agricultural show. (Testimony). He was given an exam at the agricultural show, and then a follow-up was scheduled. (Testimony). The notes from his initial visit discussed his torn abdominal muscle, and back spasms which began over the summer. (JE 6:83). Mr. Blinks noted that the pain "gets unbearable" and caused him to drop to his knees. (JE 6:83). The chiropractor diagnosed Mr. Blinks with segmental and somatic dysfunction of the cervical region, cervicalgia, segmental and somatic dysfunction of the lumbar region, and low back pain. (JE 6:84).

Mr. Blinks returned to Mercy Medical Center for another examination by Dr. Thomas on May 8, 2018. (JE 2:37-39). Mr. Blinks noted a persistent cough during this visit. (JE 2:37). He complained of low back spasms starting after an injury 14-months prior. (JE 2:37). Mr. Blinks reported being pain free upon waking, but that by the end of the day he has intense back spasms. (JE 2:37).

Dr. Thomas re-examined Mr. Blinks on June 13, 2018. (JE 2:40-42). The visit was for hypertension follow-up. (JE 2:40). Mr. Blinks noted that when his back started hurting, his blood pressure was better. (JE 2:40). His back hurt on a "frequent if not daily basis from work," and that he relaxed at home. (JE 2:40). He would feel better by the next morning. (JE 2:40). Mr. Blinks was actively looking for different work since his current work aggravated his low back pain. (JE 2:42). Dr. Thomas noted that Mr. Blinks was carrying a lot of extra weight, and that losing that weight may help with his back pain. (JE 2:42).

On July 30, 2018, Mr. Blinks requested a reduction from full-time work to part-time work due to his back pain. (Cl. Ex. 6:36). This was at the behest of Mr. Blinks, and not on the orders of a medical provider. (Testimony).

Dr. Pospisil re-examined Mr. Blinks on October 2, 2018. (JE 3:62). Mr. Blinks continued to have a hard mass where the hematoma was located. (JE 3:62). The mass causes him to walk in an awkward manner and lean towards the right as the day goes on. (JE 3:62). He reported seeing a chiropractor two times per week due to his pain and abnormal gait. (JE 3:62). He also worked half days rather than full days. (JE 3:62). Dr. Pospisil could not feel the hard area left following the hematoma. (JE 3:62). Dr. Pospisil could not state that Mr. Blinks's low back pain was due to the abdominal wall tear. (JE 3:62). Dr. Pospisil noted that Mr. Blinks was overweight, which could be a cause of back pain. (JE 3:62). Dr. Pospisil could not make a causal connection between Mr. Blinks' current complaints and the work incident. (JE 3:62).

Dr. Pospisil followed this appointment with a letter to "Kaylee G., RN Workers Comp (sic) Representative." (JE 3:63-64). Dr. Pospisil diagnosed Mr. Blinks with low back pain and an abdominal rectus tear. (JE 3:63). Mr. Blinks complained of back pain at his initial examination and that it started one month prior to his injury on the initial report. (JE 3:63). Dr. Pospisil stated, "[d]ue to the duration since his injury it cannot be stated with the degree of medical certainty that the clinical symptoms are causally related to the injury of 12/19/2016." (JE 3:63). Dr. Pospisil noted that it was plausible that, due to consistent pain complaints, that the back pain was exacerbated by the incident. (JE 3:63). Since he had significant back pain prior to the injury, permanent partial disability was not applicable. (JE 3:63). However, Dr. Pospisil closed her letter indicating that if Mr. Blinks' pain increased since the injury, then he would not be at MMI, and he should seek another short course of physical therapy. (JE 3:63-64).

Mr. Blinks returned to Dr. Pospisil's office on October 23, 2018, for re-evaluation of his back pain. (JE 3:65). Mr. Blinks attended physical therapy. During his physical therapy, it was noted that he experienced foot drop, which concerned the therapist. (JE 3:65). Mr. Blinks self-reduced his working hours to four hours per day, but indicated his desire to work an eight hour day. (JE 3:65). Dr. Pospisil noted, "Mr. Blinks clearly has a conundrum of issues. We were going to continue physical therapy initially however he then started talking about his foot drop and has a difficult time thinking that he may be okay." (JE 3:65). Dr. Pospisil ordered an MRI of the lumbar spine, and gave work restrictions of lifting and carrying up to 50 pounds. (JE 3:65). The MRI did not occur due to a BB in Mr. Blinks' tongue. (JE 3:66). Due to the impossibility of an MRI, Dr. Pospisil referred the claimant to a neurosurgeon. (JE 3:66).

On October 23, 2018, Mr. Blinks began physical therapy with Ability Physical Therapy. (JE 7:85). Mr. Blinks reported needing 20 minutes of stretching in the morning in order to be able to function. (JE 7:85). He denied increased lower back pain. (JE 7:85). He continued to claim intermittent foot drop and right sided lower back pain and spasms. (JE 7:85). Mr. Blinks had follow-up physical therapy sessions on October 25, 2018, October 30, 2018, and November 1, 2018. (JE 7:85). During these sessions, he noted that lifting at work was exacerbating his chronic low back pain. (JE 7:85).

Mr. Blinks was discharged from Ability Physical Therapy on November 6, 2018. (JE 7:86). The discharge notes indicated that Mr. Blinks was unsure of the specific incident underlying his current pain, but that he had significant left sided abdominal pain during the day while at work. (JE 7:86). Mr. Blinks was only working half-days due to increased lower back pain over the past month. (JE 7:86). He continued working normal job duties during his half-days, which included driving a truck and lifting heavy lumber. (JE 7:86). He was discharged due to lack of progress with pain reports. (JE 7:88). The therapist instructed him to continue with his home exercise plan on an independent basis. (JE 7:88).

On orders from Dr. Pospisil, Mr. Blinks visited Chad D. Abernathy, M.D., on December 3, 2018. (JE 8:89). Dr. Abernathy recounted Mr. Blinks' history of chronic low back pain and an abdominal wall tear. (JE 8:89). Mr. Blinks attributed the low back pain to his work activities. (JE 8:89). Due to the presence of a BB in Mr. Blinks' tongue, he could not have an MRI, which Dr. Abernathy recommended. (JE 8:89). Mr. Blinks noted that Dr. Abernathy only examined him for five-minutes, and never laid his hands on him to examine him. (Testimony).

Dr. Abernathy followed-up the December 3, 2018, examination with a letter to Secura Insurance dated January 14, 2019. (JE 8:90). Dr. Abernathy opined that Mr. Blinks' subjective complaints were related to low back pain, which was present prior to December 19, 2016. (JE 8:90). There was no connection between subjective complaints and objective clinical findings. (JE 8:90). Dr. Abernathy did not believe that further medical management would benefit the claimant, nor would the claimant need any restrictions or an impairment rating. (JE 8:90). Dr. Abernathy considered Mr. Blinks at maximum medical improvement (MMI) six months from date of injury, which was June 19, 2017. (JE 8:90).

On January 16, 2019, Mr. Blinks returned to Dr. Pospisil's office for re-evaluation of his back strain. (JE 3:67). Mr. Blinks continued to complain of dragging his left toe, along with low back pain that radiates down into his right leg. (JE 3:67). Mr. Blinks was going to have the BB removed from his tongue so that the MRI could proceed. (JE 3:67). His work restrictions were modified to lifting and carrying up to 30 pounds. (JE 3:67). He also should avoid prolonged walking, mostly sit, and alternate sitting/standing/walking as tolerated. (JE 3:67). Dr. Pospisil gave Mr. Blinks an off of work note for the remainder of the day due to complaints of pain. (JE 3:67).

Effective January 17, 2019, Ogden & Adams through their insurer, Secura Insurance, denied Mr. Blinks's workers' compensation claim. (Def. Ex. C:13).

Mr. Blinks followed-up in an emergency room visit on February 11, 2019, with Dr. Thomas on February 13, 2019. (JE 2:43-46). Mr. Blinks slipped on ice and landed straight on his bent elbow. (JE 2:43). Mr. Blinks had pain around his right shoulder, aggravated by any shoulder motion. (JE 2:43). He was unable to do his job with a limitation of range of shoulder motion. (JE 2:43). X-rays were negative. (JE 2:43). Dr.

Thomas offered an orthopedic referral, but Mr. Blinks indicated he would like to wait a week to see how it progresses. (JE 2:45).

Mr. Blinks returned to the Work Well Clinic at St. Luke's Hospital on November 8, 2019. (JE 3:69-70). Ignatius Brady, M.D., M.P.H., examined Mr. Blinks noting complaints of improved back pain and continued back pain. (JE 3:69). Dr. Brady noted that a letter from Secura ANA instructed him to examine Mr. Blinks for left-sided abdominal wall complaints, but not the back issues. (JE 3:69). Mr. Blinks complained of a "sense of a foreign presence" in the left upper abdominal area. (JE 3:69). There was a noticeable defect when Mr. Blinks was in a seated position. (JE 3:69-70). Dr. Brady diagnosed him with an abdominal wall injury with rectus abdominis defect. (JE 3:70). The best way to think of Mr. Blinks' injury, according to Dr. Brady is as an abdominal wall hernia. (JE 3:70). Dr. Brady recommended a CT scan of the abdomen. (JE 3:70).

Mr. Blinks had an MRI of his pelvis performed on December 10, 2019, at Corridor Radiology. (JE 9:91). The MRI was normal with no evidence of residual tearing, hematoma or mass. (JE 9:91).

On December 20, 2019, Mr. Blinks followed up with Dr. Brady for a recheck of his abdominal wall injury. (JE 3:71). Dr. Brady reviewed the MRI and CT results and noted that no hematoma, mass, or abdominal wall defect was noted that would correlate with any abdominal consult. (JE 3:71). Dr. Brady reassured Mr. Blinks that there was nothing wrong with his abdomen that needed to be fixed. (JE 3:71). Mr. Blinks asked again about his low back pain and left leg weakness that have persisted for several years. (JE 3:71). Back pain limited his activities. (JE 3:71). Dr. Brady concluded his examination note by stating that Mr. Blinks required no additional care for his abdominal wall injury. (JE 3:71). Dr. Brady drafted a letter to Secura Insurance suggesting that they authorize an MRI in order to address Mr. Blinks' back and left leg complaints. (JE 3:72).

Farid Manshadi, M.D., FAAPM&R, examined Mr. Blinks for an independent medical examination (IME) on March 3, 2020. (Claimant Exhibit 1:1-6). Dr. Manshadi noted the claimant's history of back pain dating to July of 2013, which was noted to have resolved by December of 2013. (Cl. Ex. 1:1). Mr. Blinks reported to Dr. Manshadi that his job was physical in nature, required lifting of several hundred pounds, and that he usually lifted 100 to 150 pounds by himself. (Cl. Ex. 1:1-2). Mr. Blinks reported to Dr. Manshadi that on December 19, 2016, he was unloading a boom truck when he had a sudden onset of abdominal pain. (Cl. Ex. 1:2). Dr. Manshadi noted that Mr. Blinks complained of intermittent abdominal pain and discomfort along with a defect in the left lower ribcage and abdominal region. (Cl. Ex. 1:4). Mr. Blinks continued to report right low back spasms and left foot drop, but denied numbness and tingling. (Cl. Ex. 1:4). Dr. Manshadi noted in a gait evaluation that Mr. Blinks' left leg dropped during the mid-stance phase. (Cl. Ex. 1:5).

Dr. Manshadi opined that Mr. Blinks sustained a tear of the left rectus abdominis muscle, and a back injury with right sacroiliac joint strain with left ankle plantar flexion contraction. (Cl. Ex. 1:5). Dr. Manshadi further noted that the sacroiliac joint strain, as well as the left foot plantar flexion contraction are a result of Mr. Blinks' abnormal gait while suffering from the abdominal muscle tear and hematoma. (Cl. Ex. 1:5). Dr. Manshadi cited to Dr. Pospisil's October 2, 2018, note that Mr. Blinks was leaned to the right as the day progressed and walked "funny." (Cl. Ex. 1:5). Mr. Blinks also reported abnormal wearing of his shoes. (Cl. Ex. 1:5). Based on the foregoing, Dr. Manshadi opined that the low back issues and the left ankle plantar flexion contraction are a result of the December 19, 2016 work injury. (Cl. Ex. 1:5). Dr. Manshadi noted that Mr. Blinks achieved MMI for the abdominal injury, but not for the low back injury and left foot drop. (Cl. Ex. 1:5). Dr. Manshadi recommended a lumbar MRI. (Cl. Ex. 1:5). If the MRI does not show any irregularities, then Dr. Manshadi recommended physical therapy to stretch the plantar flexors on the left side along with strengthening the muscles, and an injection to the right SI joint. (Cl. Ex. 1:5). If no further treatment is provided for the claimant's back, Dr. Manshadi provided a 5 percent impairment of the whole person based on the American Medical Association's Guides to the Evaluation of Impairment, Fifth Edition. (Cl. Ex. 1:5). Based on the abdominal wall tear, Dr. Manshadi provided a 3 percent impairment of the whole person. (Cl. Ex. 1:5). For the left foot drop, Dr. Manshadi provided a 7 percent impairment of the left lower extremity or 3 percent impairment of the whole person. (Cl. Ex. 1:5). For permanent restrictions related to the abdominal wall tear, Dr. Manshadi indicated no lifting of more than 50 pounds. (Cl. Ex. 1:5). For lower back injuries, Dr. Manshadi provided a temporary restriction of no lifting more than 30 pounds and avoidance of any activity requiring excessive bending or twisting at the waist. (Cl. Ex. 1:5). For the left foot drop, Dr. Manshadi recommended avoiding activity requiring balancing, ladders, and uneven surfaces. (Cl. Ex. 1:6).

Mr. Blinks testified that he currently drags his left foot and toe. (Testimony). He also gets pain in his right leg due to compensating for the left foot and toe dragging. (Testimony). He claims that he can only work a half day before needing to rest. (Testimony). Before leaving the employer, Mr. Blinks worked half days based on his own self-imposed restrictions. (Testimony). Mr. Blinks testified that he had no permanent restrictions from any doctors. (Testimony).

The pain also causes him to walk in a crooked pattern. (Testimony). His back spasms prevent him from lifting much. (Testimony). Mr. Blinks stretches every morning until his pain dissipates. (Testimony). If he walks a lot during the day, his pain intensifies in his right lower back, causing him to stop and rest. (Testimony). Generally, the pain reaches its peak intensity requiring rest around mid-afternoon. (Testimony).

Mr. Blinks worked for the USDA, but sought no other employment in 2019, due to suffering a non-work-related shoulder injury when he slipped and fell on his own property. (Def. Ex. D:22-23). Additionally, Mr. Blinks was not looking for employment due to his wife's pending hip surgery. (Def. Ex. D:24). He also testified in his deposition that he was looking for a job that would allow him to have less physical wear and tear on his body as he aged. (Def. Ex. D:23).

CONCLUSIONS OF LAW

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

Permanency

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 medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

When an injury occurs in the course of employment, the employer is liable for all of the consequences that “naturally and proximately flow from the accident.” Iowa Workers’ Compensation Law and Practice, Lawyer and Higgs, Section 4-4. The Supreme Court has stated, “[i]f the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable.” Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W.480, 481 (1936). The court in Oldham opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury. Id.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: “[i]t 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 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.S.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand May 23, 2018); Rus v. Bradley Puhmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007); Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989)(no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

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. Iowa Code section 85.34.

Mr. Blinks sustained a work related abdominal injury on December 19, 2016. He continued to complain of pain and some deformity to his abdomen through 2019. Mr. Blinks' pain complaints evolved to include his lower back during the summer of 2017, about six months after the date of injury. Around this time, Mr. Blinks also began to report left foot drop while walking. Dr. Manshadi performed an IME of Mr. Blinks and opined that the left rectus abdominal tear sustained by Mr. Blinks caused him to have an abnormal gait. This abnormal gait caused a sacroiliac strain and a left foot drop. It was noted by Dr. Pospisil that Mr. Blinks had significant, abnormal wearing on his shoes in 2018.

Dr. Abernathey could not opine as to Mr. Blinks' back complaints without reviewing an MRI. The MRI could not be completed due to a pre-existing piece of metal in Mr. Blinks' tongue. Additionally, Dr. Pospisil, a treating physician, noted that it was plausible that, due to consistent pain complaints, that the back pain was exacerbated by the incident. Finally, Dr. Brady, in his December 20, 2019, record noted that Mr. Blinks would benefit from an MRI of his lower back in order to help diagnose his lower back

complaints. However, Dr. Brady noted that he was not allowed to request one from the defendants. Dr. Manshadi recommended the same MRI.

Without the MRI or a reasonable differing opinion, I find the opinions offered by Dr. Manshadi to be the most persuasive. Even the opinions that may seem to favor the defendants, those of Dr. Abernathey and Dr. Pospisil, are unpersuasive. For example, Dr. Pospisil says that it is plausible that the incident exacerbated Mr. Blinks' back pain. Dr. Abernathey's opinions are unpersuasive because he required an MRI, which was not completed.

Therefore, the undersigned finds that the claimant has satisfied their burden of proof that the abdominal injury, lower back injury, and foot drop, are causally connected to the December 19, 2016, work injury, and are a cause of permanent disability for Mr. Blinks.

Mr. Blinks is a 62-year old man. He earned a high school diploma, and attended some college courses in the University of Wisconsin system. He also attended a subsequent community college class on electrical repairs, in order to perform repairs at his own home. Prior to his employment with Ogden & Adams, he worked for a concrete injection company, several dairy farms, and in receiving and unloading of trucks. Mr. Blinks opined that he could no longer work any of his previous jobs due to them being "young man's jobs." The last permanent restrictions imposed by Dr. Manshadi were no lifting more than 50-pounds for his abdominal injury, and no lifting more than 30-pounds for his back injury. He was also to avoid any activity requiring excessive bending or twisting at the waist. Due to his left foot drop, Dr. Manshadi recommended avoiding activity requiring balancing, ladders, and uneven surfaces.

The only impairment ratings provided were from Dr. Manshadi, which correlated to 5 percent body as a whole for the low back injury, 3 percent body as a whole for the abdominal injury, and a 7 percent left lower extremity or 3 percent body as a whole injury for the left foot drop. When using the combined values chart found in the American Medical Association's Guides to the Evaluation of Impairment, Fifth Edition, the combined body as a whole impairment ratings equate to 11 percent body as a whole. Mr. Blinks reported self-limiting at Ogden & Adams by taking half days. These were not prescribed or recommended by any provider. Mr. Blinks complains of pain that progresses throughout the day, peaking at about midday and requiring him to only work half days. Mr. Blinks was looking for alternate work when Ogden & Adams was sold. This work was to include less heavy lifting. Eventually, Mr. Blinks found part time work with the USDA performing interviews. This work provided a significant drop in income when compared to his pre-injury status. However, Mr. Blinks testified that he was holding off on finding additional employment due to his wife needing hip surgery. He also noted self-limiting due to a non-work-related shoulder injury that he suffered after slipping and falling on his own driveway.

I am concerned about Mr. Blinks' motivation to find or return to work based on the foregoing evidence. Additionally, there is little medical support for a significant

industrial disability rating. Mr. Blinks' stated goals of finding a job that presents him with less wear and tear and waiting to find a job until his wife has hip surgery are significant self-limiting factors. I find that the claimant has sustained a 15 percent disability.

Rate / Underpayment of Temporary Benefits

Iowa Code 85.36 states that the bases of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly scheduled for the work or employment. The various subsections of 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis, or by output, the weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded.

The parties stipulated to the claimant being single and entitled to one exemption at the outset of the hearing. I find the documentation provided by the claimant to be a more credible representation of the claimant's wages. The documentation produced by the defendants appeared to have been produced solely in anticipation of litigation, while the documentation produced by the claimant included detailed information concerning taxes and withheld wages. Therefore, I find the claimant's average weekly wage to be \$723.64, which translates to a rate of \$444.75.

The parties stipulated that the claimant was paid temporary total disability and temporary partial disability from December 23, 2016, through February 11, 2017. The claimant was paid at a rate of \$414.17 per week during this span. The parties stipulated that the claimant was paid \$1,775.17 in temporary total disability benefits and \$1,123.51 in temporary partial disability benefits.

Based upon the above decision that the claimant's average weekly wage is properly \$723.64, with a rate of \$444.75, there is an underpayment of \$30.58 per week from December 23, 2016, through February 11, 2017.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 8. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2)

transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows taxation of costs for transcriptions, the costs of service, and the costs of filing fees.

Pursuant to the holding in Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (nothing additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition").

The undersigned held that the claimant suffered some permanent disability. Therefore, it is appropriate to award some costs based upon my discretion. I award the claimant the requested fees for deposition transactions, service charges, and filing fees, amounting to \$169.80. Pursuant to the holding in Young, I award the claimant \$1,600.00 for Dr. Manshadi's record review and report. The total costs awarded to the claimant are \$1,769.80 in costs as represented in Claimant's Exhibit 8.

ORDER

IT IS THEREFORE ORDERED:

That defendants are to pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of four hundred forty-four and 75/100 dollars (\$444.75) per week from the stipulated commencement date of February 12, 2017.

That defendants are to pay unto claimant the underpayment of temporary partial disability and temporary total disability benefits of thirty and 58/100 dollars (\$30.58) per week from December 23, 2016, through February 11, 2017.

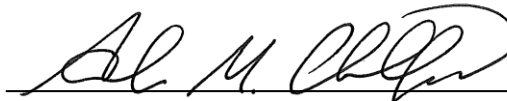
That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants shall be given credit for benefits previously paid.

That defendants shall reimburse claimant for costs totaling one thousand seven-hundred and sixty-nine and 80/100 dollars (\$1,769.80).

That defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 10th day of August, 2020.


ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Casey Steadman (via WCES)

Nate Willems (via WCES)

M. Anne McAtee (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.