BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EDWARD MURRAY, Claimant, vs. CITY OF MISSOURI VALLEY, Employer, and IMWCA, Insurance Carrier, Defendants.	File Nos. 1664884.03, 19700585.02 ARBITRATION DECISION Head Note Nos.: 1100, 1402, 1803

STATEMENT OF THE CASE

Claimant Edward Murray filed petitions in arbitration seeking workers' compensation benefits from defendants City of Missouri Valley, Iowa, employer, and Iowa Municipality Workers' Compensation Association (IMWCA), insurer. The hearing occurred before the undersigned on November 23, 2021, via CourtCall video conference.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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.

The evidentiary record consists of: Joint Exhibits 1 through 12; Claimant's Exhibits 13 through 28; and Defendants' Exhibits A through G. Claimant testified on his own behalf. No other witnesses testified. The evidentiary record was closed on November 23, 2021, and the case was considered fully submitted upon receipt of the parties' briefs on December 20, 2021.

ISSUES

The parties submitted the following disputed issues for resolution:

File No. 19700585.02

1. Whether claimant sustained an injury that arose out of and in the course of his employment on April 17, 2019.

2. If claimant sustained a work-related injury on April 17, 2019, whether claimant provided timely notice under Iowa Code section 85.23.

3. Whether claimant is entitled to temporary benefits, permanency benefits, or medical benefits.

4. Whether defendants are entitled to a credit for an overpayment of benefits.

File No. 1664884.03

1. Whether claimant is permanently and totally disabled.

2. If claimant is not permanently and totally disabled, the extent of claimant's entitlement to permanent partial disability (PPD) benefits.

3. Whether claimant is entitled to reimbursement for medical expenses.

4. Whether defendants are entitled to a credit for an overpayment of benefits.

FINDINGS OF FACT

Claimant, the chief of police for the city of Missouri Valley, testified he was involved in a physical altercation with a suspect on April 17, 2019. (Hearing Transcript, pp. 20-21) He experienced neck and upper back pain after he lifted the suspect off the ground. (Tr., p. 21) The pain, however, did not prevent him from continuing his normal duties as a police officer. He did not seek medical treatment from the incident, nor did he report the injury. (Tr., pp. 21-22)

Several days later, on April 30, 2019, claimant was involved in another physical altercation when a suspect resisted arrest. (Tr., p. 22) Claimant felt immediate right shoulder pain. (Tr., p. 22) Once the suspect was detained, claimant reported his injury to the company nurse. (Tr., p. 22) He was evaluated in the emergency room, given a sling, and instructed to follow up with an orthopedist. (Joint Exhibit 7, p. 211; Tr., p. 27) Later that evening, while at home, claimant also developed pain on the right side of the base of his neck. (Tr., p. 22)

As instructed, claimant pursued treatment with orthopedist Charles E. Rosipal, M.D. Dr. Rosipal ordered an MRI, which revealed a full-thickness rotator cuff tear. (JE 6, p. 139) Dr. Rosipal performed surgery to repair the tear on June 7, 2019. (JE 6, p. 141)

Claimant was eventually referred for a neurosurgical consultation with Guy Music, M.D., after he developed numbness in his arms after surgery. (JE 6, p. 152) Dr. Music ordered a cervical MRI, which revealed a herniation at C6-C7. (JE 6, p. 154) When conservative treatment provided only minimal relief, Dr. Music recommended surgery for claimant's neck and upper extremity symptoms. (JE 6, p. 158) That surgery, a discectomy, was performed by Dr. Music on March 5, 2020. (JE 6, pp. 159-60)

Claimant continued treating with Dr. Rosipal and Dr. Music for right shoulder and neck complaints through April of 2020. (See JE 6, pp. 164-190) On April 9, 2020, Dr. Music opined that claimant's neck "appeared to be fused" and that claimant's symptoms appeared to be "fairly stable." (JE 6, p. 191) As a result, Dr. Music placed claimant at maximum medical improvement (MMI) and indicated a functional capacity evaluation (FCE) would be appropriate. (JE 6, p. 191)

Claimant's right shoulder symptoms likewise plateaued. Dr. Rosipal placed claimant at MMI as of April 30, 2021, assigned a 12 percent upper extremity (seven percent body as a whole) impairment rating, and adopted permanent restrictions of claimant's FCE, which placed him in the light to medium work category. (JE 6, p. 192; JE 11)

Dr. Music also subsequently adopted the FCE as claimant's permanent restrictions and assigned a nine percent whole body impairment rating for claimant's neck. (JE 6, p. 197)

Claimant was evaluated by Charles Wenzel, D.O., for purposes of an independent medical examination (IME). Dr. Wenzel assigned a 26 percent whole person impairment rating for claimant's neck condition and a 3 percent whole person impairment for claimant's right shoulder condition. (Claimant's Ex. 13, p. 265) Like Drs. Rosipal and Music, Dr. Wenzel also recommended permanent restrictions consistent with the light to medium physical demand level. (Cl. Ex. 13, p. 265)

Defendants terminated claimant's employment as police chief on July 1, 2021, due to his inability to perform his duties in light of his permanent restrictions. (Cl. Ex. 20, p. 288)

During his tenure as police chief, claimant had a second job as an online adjunct instructor at a community college. (Tr., p. 41) He was able to maintain this position after his April 30, 2019 work injury. Notably, he does not have to appear via video to his

students, so he is able to complete the work on his own schedule at his own pace. (Tr., pp. 42-43) He was teaching six three-credit courses at the time of the hearing at the rate of $2,490 per class. (Tr., pp. 41-42) The job is not physically demanding. (Tr., p. 42)

At hearing, claimant testified he now only has 30 to 40 percent use of his right shoulder and 30 percent use of his neck. (Tr., pp. 28-29, 35) He also has ongoing neck pain, shoulder pain, and headaches. (Tr., p. 32) He testified these limitations, along with his permanent restrictions, would prevent him from returning to most of his past employment. (Tr., p. 47)

Claimant has applied for several positions but had not been hired at the time of the hearing. (Tr., pp. 49-52; Cl. Ex. 23) Claimant, however, has limited his job search to positions with salaries or pay that exceed $10.00 an hour. (Tr., p. 107) He testified he was interviewed for a dispatching position the day before the hearing and believed he was physically capable of performing that job. (Tr. pp. 96-97)

I am not persuaded that claimant is wholly disabled from performing work that his past experience, abilities, and education permit him to perform. He was continuing to perform his job as an adjunct professor at the time of the hearing—a job he had been performing for several years—and he had just been interviewed to do dispatching work—a job he believed he was physically capable of performing. Claimant likewise admitted he had limited his job search to a certain pay threshold.

That being said, I find claimant's earning capacity was severely impacted by his April 30, 2019 injury. His permanent restrictions prevent him from returning to his job as a police officer or chief of police. While claimant could physically perform the administrative aspects of being an officer, he is physically incapable of doing any active duty work—as is evidenced by defendants' termination of claimant. Regardless of which permanent impairment ratings are adopted, claimant's physical limitations are substantial. Thus, I find claimant has sustained an 80 percent reduction in earning capacity as a result of the April 30, 2019 injury.

With respect to claimant's alleged April 17, 2019 date of injury, I believe claimant's testimony that he was involved in a physical altercation with a suspect. However, there are no causation opinions tying the incident to any of claimant's disability, temporary or permanent, and claimant sought no medical treatment after this incident. As a result, I find there is insufficient evidence to causally relate any of claimant's disability or medical treatment to the April 17, 2019 date of injury.

CONCLUSIONS OF LAW

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 also 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).

Regarding the April 17, 2019 date of injury (File No. 19700585.02), I found claimant's testimony credible and therefore conclude claimant sustained an injury that arose out of his employment when he was involved in a physical altercation with a suspect. However, I found insufficient evidence to causally relate the incident to any of claimant's temporary or permanent disability or medical treatment. As such, I conclude claimant failed to satisfy his burden to prove his entitlement to any temporary disability benefits, permanent disability benefits, or medical benefits.

Regarding the April 30, 2019 date of injury (File No. 1664884.03), defendants admitted claimant sustained injuries to his right shoulder and neck resulting in permanent disability, though the extent of claimant's industrial disability, including whether claimant is permanently and totally disabled, is in dispute.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (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, however. 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).

I found claimant is not wholly disabled from performing work that he is otherwise equipped to perform. I therefore conclude claimant failed to prove his entitlement to permanent total disability benefits.

Claimant, however, is entitled to permanent partial disability (PPD) benefits for his industrial disability. 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 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). A determination of the reduction in an employee's earning capacity must additionally consider the employee's permanent partial disability and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. Iowa Code § 85.34(2)(v) (post-July 2, 2017).

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 § 85.34.

In this case, I found claimant's permanent restrictions prevent him from returning to police work and caused a significant negative impact to his earning capacity. Considering these factors and all factors relevant to the industrial disability analysis, I conclude claimant sustained an 80 percent industrial disability.

Defendants are seeking apportionment against claimant's industrial disability award based on the 2017 revisions to Iowa Code section 85.34(7). More specifically, defendants argue they are not liable for at least eight percent of claimant's industrial disability in light of the eight percent whole person impairment rating assigned to claimant after a non-work-related 2015 motor vehicle accident.

The amended version of Iowa Code section 85.34(7) states:

> An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. . . . An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

In Wilke v. Kelly Services, File No. 5064366 (Arb. Oct. 28, 2019), which was affirmed by the Commissioner on appeal, I concluded the legislature's 2017 amendments did not modify or abolish the fresh-start rule for successive injuries sustained with different employers or from causes unrelated to employment. The difference between the facts in this case and in Wilke, however, is that the claimant in Wilke had preexisting disability that arose out of and in the course of employment with a different employer but then had his earning capacity refreshed by market forces when he was hired by the defendant-employer. In this case, on the other hand, claimant's

preexisting disability was from causes unrelated to employment while claimant was employed by defendant-employer.

Because claimant's preexisting disability in this case was not effectively apportioned by the competitive labor market through a fresh start with a new employer, the apportionment calculation adopted by the Iowa Supreme Court in Warren Properties v. Stewart applies. 864 N.W.2d 307, 319 (Iowa 2015), as corrected (July 1, 2015) ("To accomplish this statutory requirement, the preexisting disability must be apportioned from the formula when it has not been effectively apportioned by the competitive labor market through a fresh start with a new employer. In other words, without a market adjustment through a change in employment, any preexisting disability must be apportioned so that only the new disability resulting from a successive injury is determined . . .")

Per Warren Properties, the reduction in earning capacity caused by the April 30, 2019 injury was 72 percent (80 percent minus 8 percent), and the earning capacity possessed when the injury occurred was 92 percent (100 percent minus 8 percent). To determine the compensable change in earning capacity, the reduction in earning capacity (72 percent) is divided by the earning capacity possessed when the April 30, 2019 injury occurred (92 percent). This equals 78.26 percent, and 78.26 percent of 500 weeks equals 391.3 weeks. 864 N.W.2d at 319 n. 6. Claimant, therefore, is entitled to 391.3 weeks of PPD benefits from defendants.

Defendants overpaid claimant's rate. Per Iowa Code section 85.34, defendants are entitled to a credit against their liability for PPD benefits. Iowa Code § 85.34(4), (5) (stating "the excess paid by the employer shall be credited against the liability for any future weekly benefits due pursuant to subsection (2)").

Lastly, claimant is seeking reimbursement for out-of-pocket medical expenses related to treatment for his neck condition, as set forth in Claimant's Exhibit 28. Defendants accepted claimant's neck condition as a compensable injury, and defendants do not dispute claimant's entitlement to reimbursement in their post-hearing brief. As such, I find defendants are responsible for any causally related medical expenses set forth in Claimant's Exhibit 28. See Iowa Code § 85.27.

ORDER

THEREFORE, IT IS ORDERED:

File No. 19700585.02

Claimant shall take nothing.

File No. 1664884.03

Defendants shall pay claimant three hundred ninety-one point three (391.3) weeks of permanent partial disability benefits commencing as stipulated on May 7, 2021, at the stipulated rate of eight hundred six dollars and 46/100 ($806.46) per week.

Defendants are entitled to a credit for their overpayment of claimant's rate against their liability for PPD benefits.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall reimburse claimant for causally related medical expenses as set forth in Claimant's Exhibit 28.

Both files:

Pursuant to rule 876 IAC 4.33, each party shall pay their own costs.

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

Signed and filed this 10th day of January, 2022.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Corey Walker (via WCES)

Jane Lorentzen (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.