BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PATRICK PATRIE, Claimant, vs. MARTINSON CONSTRUCTION CO., INC., Employer, and ATLANTIC STATES INS. CO., Insurance Carrier, Defendants.	File No. 5068408 ARBITRATION DECISION Head Note Nos.: 1803, 1804

STATEMENT OF THE CASE

Claimant, Patrick Patrie, has filed a petition for arbitration seeking workers' compensation benefits against Martinson Construction, employer, and Atlantic States Ins. Co., insurer carrier, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on August 28, 2020, via CourtCall. The case was considered fully submitted on September 18, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-2, Claimant's Exhibits 1-2, Defendants' Exhibits A-D, and the testimony of claimant, Gary Tangen, Rick Patrie and James Patrie.

ISSUES

Extent of claimant's disability;

Whether claimant is entitled to a finding of permanent and total disability according to the odd-lot doctrine;

And the assessment of costs.

The parties agree claimant sustained a work related injury on or about December 6, 2017. The injury was the cause of a temporary disability, entitlement to which is no longer in dispute. While the parties disagree as to the extent of claimant's permanent

disability, they agree it is industrial in nature and that the commencement date of benefits is September 30, 2018.

At the time of the hearing, the claimant's gross earnings were $1,012.42 per week. He was single and entitled to one exemption. Based on the foregoing, the weekly benefit rate is $597.06.

Defendants waive all affirmative defenses. While the hearing report indicates that the reimbursement of the independent medical evaluation (IME) is in dispute, the parties agreed at hearing that defendants would reimburse the IME and that no decision would need to be issued on that matter.

Prior to the hearing, the claimant was paid $37,943.84, and defendants are entitled to a credit of that amount against the award of permanent partial disability (PPD) benefits.

STIPULATIONS

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.

The parties agree claimant sustained an injury arising out of and in the course of employment on December 6, 2017. They further agree that the injury was the cause of temporary disability entitlement to which is no longer in dispute.

While the parties disagree as to the extent of claimant's disability, they agree that if the injury is found to be the cause of a permanent disability, it is industrial in nature and the commencement date for PPD benefits would be September 30, 2019.

At the time of the injury, claimant's gross earnings were $1,1012.42 per week. Claimant was single and entitled to one exemption. Based on the foregoing numbers, claimant's weekly benefit rate is $597.06. Claimant waives all affirmative defenses.

Defendants have agreed to pay the outstanding IME fee and that issue is no longer in dispute.

Prior to the hearing, claimant was paid 96.71 weeks of compensation at various rates itemized in Defendants' Exhibit A for a total of $37,974.48 and the defendants would be entitled to a credit of that amount against any award of permanent benefits.

FINDINGS OF FACT

Claimant, Patrick Patrie, was a 68-year-old person at the time of the hearing. He began working for the defendant employer on March 20, 1975, and has worked in the construction industry for 40 years. He did obtain a business degree in 1975, but has not

used it. He held a few supervisory roles but none with hiring or firing or managerial experience. He does not believe he can return to the construction business as a heavy duty laborer nor does he believe there is an alternative position for him within the construction field.

On December 6, 2017, claimant sustained multiple injuries after a skid loader ran over him. He suffered serious abrasions in multiple regions of his lower torso and lower extremities, broke his right arm, the bone above his right ankle, shattered his right knee, sprained his left knee, cracked his vertebrae and ribs, and injured his pelvis. (JE 1:1) Arnold Delbridge, M.D., gives a more exhaustive, detailed account of the injuries in his IME report.

> His history is that on December 6, 2017 while at work, he was run over by a skid loader and badly injured. He was apparently taking some laser sightings at the time and was struck and injured by the skid loader. He had numerous injuries which I will delineate throughout this communication. He was taken first to Allen Hospital and put under anesthesia. The orthopedic surgeon there found he had unstable pelvic fractures and decided to send him on to University Hospitals in Iowa City. He was seen there by the trauma surgeon and was operated on for his pelvis and left fractured humerus on December 8, 2017. His pelvic injuries were considerable. He had diastasis or displacement of both sacroiliac joints. He had some chip fractures of his sacrum. He had pelvic ring disruption with pelvic fractures of the rami and diastasis of the symphysis. In addition, he had a displaced, somewhat comminuted fracture of the left humerus. Dr. Karam and his people took him to the operating room and reduced his pelvis and put two screws in the right sacroiliac joint and one screw in the left sacroiliac joint to stabilize the sacroiliac joints. They did a closed reduction of the disrupted pelvic ring anteriorly. Although Dr. Chen later states that he had fused sacroiliac joints, there is no mention in the record of any bone graft or shaving the joints or freshening the joints to expect that fusion would occur. The best term is to say that Dr. Karam reduced the sacroiliac joints and stabilized them with screws as described.
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> The fractured humerus was then reduced on the left side and then plated and was noted on post x-rays to be stable. X-rays were taken on 12-9-17. They were ordered by Sara Burgcamp, MD. It is also noted there was an ordering provider, Craig Akoh, MD, for fluoroscopic visualization during the procedure.
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> The findings postop on 12-9-17 indicated there had been interval stabilization of the mild diastatic bilateral sacroiliac joints with two screws. X-rays on 12-9-17 showed interval stabilization of the sacroiliac joints with two screws through the right sacroiliac joint and a single screw through the left sacroiliac joint. The extent of diastasis of the pubic symphysis appears about the same in comparison to preoperative imaging. As far as the humerus is concerned, postoperative changes of side plate and screw

> fixation of the proximal to midshaft comminuted humeral fracture without intermediate complication and improved alignment was noted. There is a displaced fracture fragment noted posterolaterally of the glenohumeral joint. Surgical staples were noted. There was some degenerative joint disease of the glenohumeral joint noted as well.
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> In addition to the acute pelvic and humeral fractures noted were additional injuries consisting of an avulsion fracture of the medial condyle of the right femur, a right anterior cruciate ligament tear and medial collateral ligament tear of the right knee as well as a medial meniscus tear and there was also a medical meniscus tear of the left knee as well. There was also a right fibula fracture and broken ribs and spine injuries consisting of avulsion of four or five of the transverse processes of the lumbar spine. Some reports state four and some state five. I cannot be sure of the fifth one when I reviewed the x-rays, but there is [*sic*] at least four. On 12-14-17 there was a report of a 9 mm widening of the pubic symphysis of the pelvis.
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> In addition to those injuries discussed above, when he was hit by the skid loader there was apparently no loss of consciousness. There were large abrasions over his right plank and palm-sized ecchymosis and swelling of his low back. He remembers the incident and assures me that he was not knocked unconscious. The screws utilized on his sacroiliac joints were put in percutaneously after closed reduction under fluoroscopic control.
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> Further evaluation at University Hospitals revealed that there was a right small pulmonary contusion which might be caused by an embolus but there was no indication that a pulmonary embolus occurred. That was beneath the 10-12th ribs on the right.

(CE 1:1-3)

As stated in Dr. Delbridge's notes, claimant was initially taken to Allen Hospital but because of the extensiveness of his injury, claimant was transferred to University of Iowa Hospitals and Clinics (UIHC). (JE 1:13)

He began treating at the UIHC on December 8, 2017, and eventually underwent a right knee ACL reconstruction partial medial meniscectomy, superficial MCL reconstruction, deep posterior oblique ligament/deep MCL repair and mass excision on March 7, 2018, with Matthew Bollier, M.D. (Exhibit C:1) A month later, on April 8, 2018, he underwent left knee arthroscopy, partial medial meniscectomy, and synovectomy with Dr. Bollier.

Claimant was discharged to a skilled nursing facility on December 21, 2017. (JE 1:14)

By July 9, 2018, claimant was four months following the right knee surgery and three months following the scope and meniscal debridement of the left knee. (Ex C:10) Claimant was doing well with aching, dull pain in the bilateral knees at a range of three to four on a ten scale. He also complained of pain in the right foot, right shoulder, and right hip with numbness from the mid-thigh to just below the right knee and at the anterior left knee and dorsal aspect of both feet. (Ex C:10) On examination, he had functional range of motion and strength. (Ex C:11) No restrictions were given regarding his knees but Dr. Bollier deferred on the issues of the pelvis and right shoulder to Dr. Karam. (Ex C:12)

Dr. Bollier assigned the following impairments:

> To the nearest degree of medical certainty he has a permanent partial impairment rating of 2% of the right lower extremity according to the Guides to the Evaluation of Permanent Impairment of the AMA, 5th Edition. This rating is the result of partial medial meniscectomy per table 17-33 on page 546 of the Guides. He was released to work without restrictions.

(Ex C:12)

> To the nearest degree of medical certainty he has a permanent partial impairment rating of 2% of the left lower extremity according to the Guides to the Evaluation of Permanent Impairment of the AMA, 5th Edition. This rating is the result of partial medial meniscectomy per table 17-33 on page 546 of the Guides. He was released to return to work without restrictions. Future treatment for this injury could include non-steroidal anti-inflammatory medications and physical therapy.

(Ex C:13)

For his pelvic injuries, claimant was treated by Dr. Karam, who referred claimant to Dr. Chen for an impairment evaluation. On September 28, 2018, Joseph Chen completed an evaluation of claimant. (Ex D) During this appointment, claimant's pain was a three to five on a ten scale and that prolonged standing and walking increased his pain. (Ex D:15) He also had dull, achy pain in the right arm. (Ex D:15) Hls gait was minimally antalgic and he reported that he used a cane for longer distance ambulation. (Ex D:17) Dr. Chen agreed that the use of the cane was appropriate for longer distances and that claimant should continue to work on longer distance endurance exercises, tacitly acknowledging claimant's fatigue. (Ex. D:20) Dr. Chen placed claimant at maximum medical improvement (MMI) with restrictions of no lifting more than 50 pounds on an occasional basis, no squatting, kneeling, climbing or lifting more than 10 pounds overhead. (Ex D:20) Dr. Chen assigned the following impairment ratings: 3 percent whole body due to the pelvic fracture, 3 percent of the whole body for the chronic right trochanteric bursitis leading to an abnormal gait, 2 percent impairment of the whole person for the decrease range of motion in the right shoulder. (Ex D:21) Given Dr. Bollier's assessments of 2 percent lower extremity impairments bilaterally, Dr.

Chen concluded claimant sustained a 10 percent impairment of the whole person. (Ex D:21)

Claimant has not returned to care since September 29, 2018. The parties agree that the commencement date for PPD is September 30, 2018.

On July 22, 2019, claimant underwent an IME with Arnold Delbridge . (CE 1:1) Dr. Delbridge assigned a 37 percent whole person impairment and recommended claimant work a sedentary job. (CE 1:8-9) Dr. Delbridge was deposed on August 12, 2020, and the testimony is part of the record as Claimant's Exhibit 2. (CE 2) The statements of Dr. Delbridge are basically a recitation of his impairment assessment detailed below. Dr. Delbridge has 44 years of experience as an orthopedic surgeon. (CE 2:2) During the examination, claimant expressed good range of motion in the ankle but that he is stiff and in pain in the morning. (CE 1:6) Claimant's pain ameliorates with some exertion. (CE 1:6) He had good range of motion in the hips, functional range of motion in the knees, but a deterioration in the right shoulder range of motion since his September 2018 evaluation with Dr. Chen. (CE 1:7) Dr. Delbridge disagreed with the finding by Dr. Chen that claimant suffered a weaver's bottom or problems while sitting. (CE 1:7) The lack of pain in the bottom while sitting was confirmed by the claimant. (CE 1:7)

Dr. Delbridge agreed claimant had trochanteric bursitis but attributed the abnormal gait to weakness in the claimant's hip abductors. (CE 1:7) Overall, Dr. Delbridge gave a higher impairment rating for the following reasons:

> From previous, Dr. Bollier had a 1% impairment of the body as a whole as a result of a meniscal resection of his knee giving a 2% impairment of the body as a whole on the right and left lower extremities.
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> When we combine the 7% from abductor weakness with the 2% from the knee lower extremity impairment, we obtain a 9% impairment. When we further combine that with 15% impairment from the diastasis pubis disruption of the pelvis, Table 15-19, page 428, we get 23% impairment of the body as a whole. Combining 23 with 6% which is due to the sacroiliac disruption, gives a 28% impairment of the body as a whole. That 28%, combined with a 4% body as a whole injury from the left shoulder, gives a 31% impairment of the body as a whole.
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> He had transverse process fractures in this spine, at least four and perhaps five, on the right side. That is adequately described as being in impairment as a DRE Category II page 384 Table 15-3 (bottom of 2nd column) in Guides to Evaluation of Permanent Impairment, fifth edition. As such, he has a 5-8% impairment of the body as a whole on that basis. My conclusion is that he has an 8% impairment body as a whole because he has a lot of initial stiffness in his spine and had at least four transverse process disruptions. An 8% impairment combined with 31! Is a 37% impairment of the body as a whole.

(CE 1:8)

Besides the differing opinion regarding the weaver's bottom diagnosis, Dr. Delbridge pointed out additional errors in Dr. Chen's report. First, Dr. Chen assumed that the claimant's pelvis had been fused both in the rear and the front but it was only fused in the rear. Dr. Delbridge noted the single fusion in the rear could lead to instability and increased pain for the claimant. Dr. Chen did not assign any impairment rating for the spinal fractures either.

For these reasons, Dr. Delbridge's opinions are given greater weight and his impairment rating is adopted and relied upon going forward.

Gary Tangen testified on behalf of the claimant. They have been friends for 45 years. He retired in 2016 at the age of 72 and testified that claimant had planned to work into his 70s as well. Claimant's brothers testified that they believed claimant could have continued to work into his 70s but for the work injury. They also testified it was unlikely claimant could find work outside of construction. Claimant's younger brother, James Patrie, was 65 at the time of hearing, still working, with no plans for retirement.

Beyond the general aches and pains that accompany his injuries, claimant is easily fatigued. He testified that he has to rest every few hours and often naps due to lack of endurance.

Claimant testified that he intended to work until around the age of 70, possibly not past it. His friend and brothers testified that claimant had planned to continue to work as long as possible. Claimant's older brother retired at the age of 72. His family has a history of working past the age of 65 and into the 70s. Based on the claimant's testimony and that of his friend and brother, it is found that claimant likely would have retired around the age of 70.

His transferrable skills are in the heavy duty, labor intensive work fields. He has not worked an office job in the relevant past and his skills are not transferable into light duty or sedentary duty work. He has no experience in office work, computer usage, internet work or clerical work. Claimant testified that driving for long periods of time results in pain in his legs which requires rest and no exertion before the pain is alleviated.

Claimant has looked for sedentary work but most of the sedentary jobs claimant could find were in the medical field, outside of his area of expertise. Light duty jobs such as a line cook would present difficulties due to claimant's inability to stand on his feet for significant periods of time.

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 Rule of Appellate Procedure 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).

Industrial disability was defined in Diederich v. Tri-City Ry. 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).

Iowa Code section 85.34(2)(v) (2017) now provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability **shall** take into account the permanent partial disability of the employee and **the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury**. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. (emphasis added)

It was previously found that claimant's work was cut short by approximately 5 years. He retired at the age of 65 but would have worked until the age of 70 but for the accident. He has looked for new employment but is not confident in his ability to retrain for sedentary work. He is an older worker with no experience with clerical, office, or customer service work. There was scant evidence as to what type of work claimant could do within restrictions of no lifting greater than 50 pounds and no squatting, kneeling, climbing, or lifting more than 10 pounds overhead. He also tires easily, requiring rest after a couple of hours on his feet. Driving long distances also results in increased pain. He has to use a cane for long distance ambulation. Claimant's physical state is best suited for a desk job that allows him to take breaks every few hours. However, this type of work is not within claimant's experience, training or background.

Claimant's injury was serious. He suffered a number of broken bones, had serious abrasions, fractures in his pelvis. He required three surgeries including fusion of his rear pelvis, repair to the right knee, and scope and debridement of the left knee. There was no employment offer from the defendants prior to hearing.

Based on the claimant's age, motivation to return to work, experience, education, qualifications, seriousness of the injury, restrictions and impairment, it is determined claimant is permanently and totally disabled.

Claimant's alternate theory of recovery under the odd-lot doctrine need not be considered.

Claimant also requests an assessment of costs. 876 IAC 5.33 allows for the assessment costs at the discretion of the deputy. Given that claimant has prevailed in this matter, the assessment of costs against defendant employer and insurer are appropriate except for the examination of Dr. Delbridge. Only reports are permissible under 876 IAC 4.33.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant permanent and total disability benefits at the rate of four hundred forty-two and 09/100 dollars ($442.09) per week from September 22, 2018

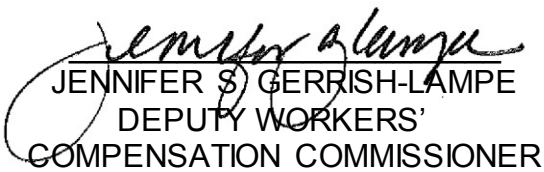
That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 except for the examination performed by Dr. Delbridge.

That defendants are entitled to a credit of benefits previously paid.

Signed and filed this 29th day of January, 2021.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Judith O'Donohoe (via WCES)

Jason A. Kidd (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.