BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

JOHN WALTER PODGORNIAK, Claimant, vs. ASPLUNDH TREE EXPERT COMPANY, Employer, and LUMBERMEN'S MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5005649, 5011316, 5011317 REVIEW-REOPENING DECISION Head Note Nos. 2905, 1804, 2701

STATEMENT OF THE CASE

The claimant, John Podgorniak, filed a petition for review-reopening on three files, seeking additional workers' compensation benefits from Asplundh Tree Expert Company, employer, and Lumbermen's Mutual Insurance Company, insurance carrier. The claimant was represented by Mark Soldat. The defendants were represented by Richard Book.

The three files have been consolidated herein are:

File No. 5005649; date of injury February 11, 2002 (hit by branch to head, neck, left side)

File No. 5011316; date of injury January 21, 2002 (slipped on ice, left arm, shoulder)

File No. 5011317; date of injury January 29, 2002 (slipped on ice, left arm, shoulder)

This matter originally came on for hearing on February 9, 2005 before Deputy Commissioner Jon Heitland. At that time, two additional files were included. Those two files have since been resolved. The original arbitration decision was filed on August 30, 2005. The decision concluded that claimant sustained injuries as outlined above, but

essentially treated the three separate injury dates as one disability for compensation purposes. Claimant was awarded a running healing period award commencing March 27, 2002 at $348.02 per week, a $2,000.00 penalty and medical expenses. The defendants appealed and claimant cross-appealed. On June 26, 2006, the arbitration decision was affirmed with minimal additional analysis. That decision was not appealed and became a final agency decision and the law of the case.

On February 17, 2009, claimant filed for review-reopening on the files set forth above. A hearing was held again before Deputy Commissioner Heitland on November 16, 2009. A proposed arbitration decision was filed on February 22, 2010. The decision ordered the defendants to continue the running award on all three files, in addition to a substantial penalty and further medical expenses. This is, of course, an oversimplification, but it is adequate for the purposes herein. The defendants appealed. On July 6, 2011, the appeal decision was filed. The appeal decision essentially upheld the running award and medical benefits, but reversed the penalty, finding the denial of the payments was fairly debatable.

Claimant filed for judicial review and defendants counterclaimed for judicial review. The District Court, Honorable Richard Blane, issued a ruling on December 27, 2011, affirming the appeal decision of the agency. Claimant appealed. The Court of Appeals issued a ruling on January 24, 2013, affirming the ruling of the district court. The Supreme Court declined to take further review. At that time, the July 6, 2011, appeal decision became final agency decision and the law of the case.

The matter came on for review-reopening hearing on July 22, 2014, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa. The record in the case consists of Claimant's Exhibits VII through IX and Defense Exhibits A through E. The claimant testified under oath at hearing, in addition to his spouse, Jane Podgorniak. The parties requested the record be held open following the hearing to allow the defendants to submit a report from its medical expert. The report, marked Defendants' Exhibit E, was received and filed on July 29, 2014. Official notice has been taken of the agency files, including decisions, filings and evidence in the prior hearings. The agency possesses four boxes of files from all combined proceedings. Every document within those boxes was reviewed and considered.

Ann T. Moyna was appointed the official reporter and custodian of the notes of the proceeding. The matter was fully submitted on September 25, 2014 after briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant has demonstrated that his condition warrants an end to, diminishment of, or increase of compensation previously awarded.

2. What is the commencement date for permanency benefits (when did the claimant's healing period end)?

3. Whether the claimant's disabilities are causally connected to his work injuries.

4. Whether the claimant is permanently and totally disabled or whether the claimant is entitled to permanent partial disability benefits.

5. Whether the claimant is entitled to medical expenses as outlined in claimant's exhibit VIII.

6. Whether the claimant is entitled to alternate medical care.

7. Whether the claimant is entitled to penalty benefits.

8. What is the appropriate credit for past benefits paid?

STIPULATIONS

A number of issues are no longer in dispute, either having been decided in a prior arbitration decision or stipulated in the hearing report:

1. The parties had an employer-employee relationship.

2. Claimant sustained injuries which arose out of and in the course of employment on January 21, 2002, January 29, 2002 and February 11, 2002. Those injuries resulted in an extended healing period.

3. The weekly rate of compensation is $348.02.

4. Affirmative defenses have been waived.

FINDINGS OF FACT

As mentioned above, official notice has been taken of the prior proceedings. The agency findings of fact in both of the previous final agency decisions are preclusive and are hereby considered the law of the case. The factual determinations in those final decisions shall not be re-litigated, nor recited specifically in this decision. They serve as snapshots of the claimant's condition as of February 9, 2005, and November 16, 2009. At those moments (snapshots) in time, it was determined that the claimant was not at maximum medical improvement for a host of work-related conditions and he was provided a running award pending the outcome of treatment. Treatment was ordered through Michael Ulrich, M.D. By order, he became the authorized treating physician.

The parties are in agreement that the claimant has now reached maximum medical improvement and permanency should be assessed. As set forth above, the undersigned has also taken notice of the evidence presented at the underlying

hearings, both the exhibits, as well as the transcripts of testimony. This includes both hearing transcripts and all previous exhibits submitted by the claimant and the defendants.

The claimant, John Podgorniak, was 59 years old at the time of the July 2014 hearing. He grew up in Northwood, Iowa. He has been married for 32 years to the same woman, Jane Podgorniak. Together, they have two grown, adult children.

John Podgorniak's Condition Since November 16, 2009: Mr. Podgorniak returned to Michael Ulrich, M.D., on January 26, 2010. (Exhibit VII, page 4) Dr. Ulrich documented Mr. Podgorniak's ongoing symptoms and treatment. The diagnoses were chronic pain syndrome, neck pain (cervicalgia) and low back pain. Medications were refilled. (Ex. VII, p. 5) He continued to keep Mr. Podgorniak off work. (Ex. VII, p. 6) In February, Dr. Ulrich noted that Mr. Podgorniak's low back pain was worsening. (Ex. VII, pp. 7-8) An MRI was ordered which showed degenerative changes in "lower 3 discs with bulge but no canal or foraminal stenosis . . ." (Ex. VII, p. 9) Deputy Heitland issued the arbitration decision from the November 16, 2009, hearing on February 22, 2010.

During this timeframe, Mr. Podgorniak wrote a lengthy letter to Dr. Ulrich. (Ex. VII, pp. 11-12) The letter is not dated but is included in the file immediately after a letter dated March 11, 2010 and right before an office note from March 29, 2010. (Ex. VII, p. 13) The letter details Mr. Podgorniak's use of medications. He indicated the combination of Hydrocodone and ibuprofen were not controlling his pain and he was relying upon morphine to a greater degree than he liked. (Ex. VII, p. 13) He particularly focused on his new back pain, stating, "I can't recall any incident that would have exacerbated this back pain. It just appeared one day and didn't go away, as I had become accustomed to." (Ex. VII, p. 11)

On April 6, 2010, the defendants' attorney, Richard Book, wrote to Mr. Podgorniak's attorney and indicated that the defendants would comply with the alternate care ruling in the November 2009 decision. He stated that the defendants "reserve their right to object to and contest any care prescribed by Dr. Ulrich which is not reasonable and necessary or causally related to the work injury." (Ex. VII, p. 16) He then agreed to arrange for an appointment for the tinnitus and a pain clinic or spine center. To say Mr. Podgorniak was not impressed is an understatement. His response is in the record. He believed that the defendants, through Book, were interfering with his care which would make it impossible for him to obtain meaningful treatment. (Ex. VII, p. 17) Following this, Dr. Ulrich arranged an appointment for Mr. Podgorniak to see a mental health provider. (Ex. VII, p. 18)

Mr. Podgorniak saw Susan Welnel, Psy.D., in June 2010. She performed a thorough and thoughtful examination and diagnosed adjustment disorder with mixed anxiety and depressed mood and assessed his functioning level (GAF) at 55. (Ex. VII, p. 27) She recommended neuropsychological testing to assess his memory issues. (Ex. VII, p. 28) On June 10, Mr. Podgorniak wrote to Dr. Ulrich, indicating that without his medications, he could hardly stand up or walk. (Ex. VII, p. 31) On June 14,

Dr. Ulrich again evaluated Mr. Podgorniak and he again recommended treatment for the tinnitus as well as comprehensive pain management. (Ex. VII, p. 34)

He then followed up with Dr. Welnel for mental health treatment. (Ex. VII, p. 37) He had the neuropsychological testing recommended and essentially scored below average in most of the categories. (Ex. VII, pp. 38-39)

> John Podgorniak's total scale score on the RBANS was in the low average range. His scores on Immediate Memory, Visuospatial/Constructional, and Delayed Memory were all in the low-average range. Language abilities were in the average range. His Delayed Memory scores were in the borderline range.

(Ex. VII, p. 39) He continued psychotherapy visits with Dr. Welnel throughout the summer which focused on his feelings of loss associated with his physical impairments.

In August, Mr. Podgorniak was contacted by W. Michael Hooten, M.D., from Mayo Comprehensive Rehabilitation Center (PRC). (Ex. VII, p. 45) Mr. Podgorniak responded by questioning what information PRC had been provided and by whom. Mr. Podgorniak provided the letter to his attorney, Mr. Soldat, who wrote a lengthy letter to defense counsel, Mr. Book, on September 24, 2010. In the letter, Mr. Soldat outlined the two alternate medical care decisions ordered by Deputy Jon Heitland, first in the August 20, 2005, arbitration decision and the second in the February 22, 2010, arbitration decision. Mr. Soldat pointed out that the authority to control the care had been completely stripped from the defendants and that any care recommended by Dr. Ulrich for any of Mr. Podgorniak's myriad of conditions and symptoms that were found to be work-related. (Ex. VII, pp. 52-53) Mr. Soldat concluded by asking Mr. Book to abide by Deputy Heitland's ruling. (Ex. VII, p. 53)

Mr. Podgorniak was next seen with a physician's assistant at Albert Lea Medical Center. He was given medication prescriptions and his history was revisited. (Ex. VII, p. 55) The cold weather caused an increase in Mr. Podgorniak's low back pain in December 2010. (Ex. VII, p. 59)

The parties' attorneys finally communicated in, what appeared to be, a meaningful way about treatment in December 2010. On December 13, 2010, Mr. Soldat emailed Mr. Book. "Dr. Ulrich feels helpless to do anything because although he has prescribed a referral to Mayo Clinic Spine Clinic, this Clinic will not accept him, until your clients guarantee payment there, and apparently your clients have refused to do so." (Ex. VII, p. 61) Mr. Book wrote back the same day, stating that it was his understanding Mayo Clinic was waiting to hear from Mr. Podgorniak. (Ex. VII, p. 62) Dr. Ulrich opined that it was his intent to refer Mr. Podgorniak to the Spine Center, not the Pain Center, although he felt pain treatment was an appropriate option. (Ex. VII, p. 62)

On December 16, 2010, Jane Podgorniak wrote to Dr. Ulrich documenting Mr. Podgorniak's deteriorating condition in his low back. "John is rapidly deteriorating from the pain. He can't take five steps without reaching for support from the extreme pain – even on a high dose of the pain killer." (Ex. VII, p. 63) Dr. Ulrich saw him the following day. Dr. Ulrich documented the worsening symptoms in some detail. It was a lengthy visit and a plan was developed to send Mr. Podgorniak to Jeffrey Brault, M.D., a physician with the Spine Center, in addition to other referrals. (Ex. VII, p. 65) He also started Mr. Podgorniak on a trial of gabapentin. On December 29, 2010, Dr. Ulrich wrote to Dr. Brault, making an appropriate referral with details. (Ex. VII, p. 74)

In the meantime, Mr. Book updated Mr. Soldat on the status of approval of medical appointments. (Ex. VII, pp. 76-77) On January 11, 2011, Dr. Ulrich saw Mr. Podgorniak again. "I am somewhat alarmed by his current presentation. He has an absence of a L3-4 reflex on the right side." (Ex. VII, p. 83) Although an appointment had been arranged for Mr. Podgorniak to see Dr. Brault in mid-February, Dr. Ulrich ordered a new MRI due to the alarming new circumstances. At that time, he also wrote a prescription for a wheelchair and a handicap sticker. (Ex. VII, p. 83) The MRI demonstrated a large herniated disk on the right side. (Ex. VII, p. 88) The appointment with Dr. Brault was moved up as a result. (Ex. VII, p. 89)

Mr. Podgorniak saw Dr. Brault on January 18, 2011. Dr. Brault evaluated him and made several treatment recommendations including L4-5 epidural steroid injection, physical therapy, use of exercise and over-the-counter pain medications and, possibly, an EMG and surgical consultation if there was no improvement. (Ex. VII, p. 94) He did have a couple of shots. Later that month, he began seeing Dr. Welnel again. (Ex. VII, p. 106) She assessed Mr. Podgorniak's depression in the "severe depression range". (Ex. VII, p. 118)

On March 7, 2011, Ahmad Nassr, M.D., evaluated Mr. Podgorniak. Dr. Nassr diagnosed "right lower extremity pain possibly secondary to foraminal extrusion at L4-5 in the setting of instability at this level with spondylolisthesis in the setting of a work-related injury and chronic low back pain." (Ex. VII, p. 123) He recommended another injection for the purpose of evaluating whether he is a surgical candidate. (Ex. VII, p. 123) Mr. Podgorniak followed up with Dr. Ulrich, who attempted to help him process all of the issues involved. Mr. Podgorniak continued to have significant pain in spite of the injection. (Ex. VII, p. 127) He started some physical therapy in March as well. (Ex. VII, p. 139) He also received a back brace. (Ex. VII, p. 142)

In April 2011, Mr. Podgorniak wrote a lengthy letter to Dr. Welnel outlining his frustration with medical treatment and his difficulty with gabapentin. (Ex. VII, p. 153-54) He continued his physical therapy and visits with Dr. Welnel throughout the spring. He also attended a group session at the University of Iowa Hospitals & Clinics in early May 2011. On May 12, 2011, her returned to Dr. Welnel who documented the following.

> John was distracted during much of this session. He feels he needs to be off gabapentin. . . . He was also complaining of chest pain during this session and encouraged to visit Urgent Care or the Emergency Department after leaving here. He continues to exhibit pain behaviors. He seems evasive when asked about self-harm. Continued monitoring is recommended.

(Ex. VII, p. 165)

Mr. Podgorniak wrote to Shelley Witt, MA/CCC-A, from the University of Iowa Clinic, Department of Otolaryngology in an effort to set up an appointment for his tinnitus. (Ex. VII, p. 166) She wrote back and offered a variety of options. (Ex. VII, p. 170) As a result, he ended up scheduling an appointment for June 7, 2011.

On May 23, 2011, Mr. Podgorniak visited Donald Maschka, M.D., and various hearing tests were performed. (Ex. VII, p. 171) He was encouraged to keep his appointment with Dr. Tyler at the University of Iowa. On June 7, 2011, Mr. Podgorniak was finally evaluated for tinnitus by Ms. Witt, an audiologist. (Ex. VII, p. 175) She reviewed his history, confirmed the diagnosis and related the condition to the February 2002 work injury. (Ex. VII, p. 175) She provided several treatment options for him in the form of wearable "sound therapy devices" or Neuromonics. (Ex. VII, p. 175) She also wrote to Dr. Ulrich providing essentially the same information.

Mr. Podgorniak was involved in a physical altercation with an individual in June 2011. A minor attacked him. The minor backed Mr. Podgorniak against a wall and attempted to jerk a camera out of his hands. The camera was strapped around Mr. Podgorniak's neck. This wrenched his neck and caused a muscle spasm. (Def. Ex. D, Adjudicatory Order, p. 3) This exacerbated his chronic pain issues and he followed up right away with the emergency room and then Dr. Ulrich. (Ex. VII, p. 186) It appears to have been merely a temporary aggravation of his condition. (Ex. VII, pp. 187, 189) There is no evidence in the record that this incident, in any way, permanently changed Mr. Podgorniak's condition. In fact, the incident was fairly minor except for the fact that Mr. Podgorniak already suffered from severely disabling conditions in his neck and back.

In July 2011, the Workers' Compensation Commissioner issued final agency action in the review-reopening case. Defendants did not seek judicial review. Mr. Podgorniak did.

In August 2011, Mr. Podgorniak returned to the University of Iowa for a Neuromonics evaluation. (Ex. VII, p. 193) He followed up with Dr. Welnel on August 25, 2011, who continued with psychotherapy sessions. (Ex. VII, p. 197) He continued with treatment from chronic pain through Dr. Ulrich, counseling visits with Dr. Welnel, and tinnitus treatments through Ms. Witt through the fall and winter of 2011. He was finally fitted with a Neuromonics device for tinnitus management on October 12,

2011. (Ex. VII, p. 203) On October 18, 2011, he followed up with Randy A. Shelerud, M.D., at the Mayo Clinic Spine Center. He ordered some additional tests and indicated that pain management treatment was the most likely option. (Ex. VII, p. 205)

Thereafter, he followed up with Dr. Welnel in November 2011, and Dr. Ulrich in December 2011. (Ex. VII, pp. 206, 210) During this time frame, the notes reflect that Mr. Podgorniak had started to accept his limitations. He also had some minor improvement with the acute symptoms in his low back, however, he reported increased difficulties with memory and concentration. He described a fogginess which made it difficult to write. (Ex. VII, p. 211)

By February 2012, Mr. Podgorniak's condition had stabilized. His pain had moderated to some degree. (Ex. VII, p. 213) The diagnoses at that time were chronic pain syndrome and memory loss. Dr. Ulrich noted the following. "He continues with complaints as noted previously. No real change with this. He does continue with the morphine 15 mg, generally taken in the evening before bed." (Ex. VII, p. 214) The bigger concern during this time frame was his relatively sudden decline in cognitive abilities and concentration. Thereafter, Mr. Podgorniak continued to see Dr. Ulrich and Dr. Welnel on occasion. He was placed on Adderall for his concentration issues which helped. Dr. Ulrich routinely reviewed his use of heavy narcotics for chronic pain, including morphine, while Dr. Welnel engaged in counseling/psychotherapy sessions. He treated through the remainder of 2012 and 2013 in this fashion. Mr. Podgorniak had occasional flare-ups of his chronic pain throughout this time.

In November and December 2012, the parties began discussing payment of the medical bills pursuant to the July 2011 final agency action. (Ex. VII, pp. 236-39)

On April 30, 2013, Dr. Ulrich noted the following. "[Mr. Podgorniak] continues with chronic pain, well-documented. He has been a little bit better lately and things seem to flare up at times. He has had very severe pain around the neck and pain down his back and that seems to have settled." (Ex. VII, p. 240) The diagnoses at that time were (1) chronic pain syndrome, (2) cervicalgia, (3) hypertension, (4) attention-deficit disorder, (5) tinnitus. (Ex. VII, p. 241) Mr. Podgorniak's condition had clearly stabilized at this point. Following this visit, there are very few treatment notes in the record.

The defendants sought and eventually obtained a defense medical examination. Mr. Podgorniak did obtain a medical opinion from Dr. Ulrich, indicating it was not in his best interest from a mental health standpoint to participate in the examination. (Ex. VII, p. 258) Even so, Mr. Podgorniak eventually relented and agreed to the evaluation. (Ex. VII, p. 263) Robert Rondinelli, M.D., evaluated Mr. Podgorniak on June 3, 2014, in Des Moines, Iowa. (Defendants' Exhibit A, p. 1) Dr. Rondinelli is the Medical Director of Rehabilitation Services, Unity Point Health and a Board Certified Physical Medicine and Rehabilitation Physician. His credentials are extensive and impressive. (Def. Ex. B)

It is unclear precisely what information Dr. Rondinelli reviewed, but he clearly had medical records available to him. He possessed a letter from defense counsel, which is not in the record. (Def. Ex. A, p. 1) Dr. Rondinelli performed a thorough evaluation of Mr. Podgorniak. (Def. Ex. A, p. 3) The description of the evaluation is unusual. "[Podgorniak] was quite apprehensive and suspicious during examination so much so that I asked my office assistant, Deb, to accompany me to verify that I did not do anything to potentially harm him." (Def. Ex. A, p. 3) He reviewed the history of the injuries and treatment with Mr. Podgorniak from memory, beginning with the first work accident in January 2002. (Def. Ex. A, pp. 1-2)

Dr. Ulrich prepared a report summarizing Mr. Podgorniak's medical condition for "snapshot" purposes on July 16, 2014. (Ex. VII, p. 273) He listed the following 18 conditions or symptoms, which is familiar from the prior cases.

1. Tinnitus.
2. Chronic pain syndrome.
3. Cervicalgia including myofascial pain or pain syndrome in the neck, shoulders, upper back but not nerve root or spinal cord compression alone.
4. Headaches.
5. Shoulder girdle pain.
6. Shoulder capsulitis.
7. Hand and wrist pain.
8. Depression.
9. Adjustment and/or anxiety disorder.
10. Memory loss.
11. Low back pain.
12. Vision loss.
13. Teeth grinding.
14. Sleep disturbance.
15. Medication reaction such as head blasts.
16. Socialization loss.

17. Cold intolerance.

18. Carpal tunnel syndrome.

(Ex. VII, pp. 273-74) These conditions or symptoms have been found to have been causally connected to his three work injuries in the previous decisions. (Appeal, July 6, 2011, page 19) Those findings are the law of the case, however, for purposes of this review-reopening decision, I will narrow the conditions being evaluated based upon the evidence which was presented in the July 2014 hearing.

Mr. Podgorniak's primary disabling conditions, as of July 2014 are the following:

1. Chronic Pain Syndrome.
2. Cervicalgia, Myofascial Neck Pain.
3. Shoulder Pain, Shoulder Capsulitis and Shoulder Girdle Pain.
4. Low Back Pain, Herniated Disks.
5. Tinnitus.
6. Depression.
7. Adjustment/Anxiety Disorder.

The remaining "conditions" really appear to be symptoms of the conditions outlined above. For example, Mr. Podgorniak has significant sleep issues. The best evidence in the record is the sleep disturbance is really a symptom of his chronic pain syndrome and mental conditions, not an independent condition. It is also noted that the hand, wrist and arm disabilities were resolved in a separate claim and are not part of this decision.

Dr. Ulrich found that each of these conditions had become permanent.

> I am familiar with all of these complaints with the exception of vision loss and I believe that significant improvement from the injuries is no longer anticipated. Given the chronicity of the complaints and especially given the fact that I have cared for Mr. Podgorniak for over a decade and given the fact that the commissioner determined that, as of November 16, 2009, it was medically indicated that significant improvements from the work injuries was anticipated at that time, I would suggest that since no improvement was demonstrable after 10 years from the date of injury, these impairments would therefore be permanent. A decade or 10 years from injury would be approximately February 2012. In my decade of caring for Mr. Podgorniak, he has never wavered from the complaints as documented.

(Ex. VII, p. 274) Thus, Dr. Ulrich found the conditions became permanent as of February 21, 2012, precisely ten years after the final, most significant accident.

Dr. Ulrich found that each of the listed conditions was a cause of permanent impairment. He did not provide a numeric rating for the impairments. Instead, he described them in significant detail.

> With respect to each of these listed conditions above, he does continue with permanent impairment. He does continue with tinnitus symptoms, although he has had some assessment and treatment which does help somewhat. He still has the intensity of the tinnitus that he has had since the accident. In terms of the chronic pain, he continues with chronic pain that he rates between approximately 6 out of 10 to 8 to 10 out of 10 at times involving the neck and back and shoulder girdle region. He has not wavered from this.
>
> We have attempted many treatment modalities in the past including physical therapy and consultation with Physical Medicine and Rehabilitation doctors and spinal surgeons and neurosurgeons. Somewhat reluctantly, Mr. Podgorniak has had trials of pain medications, and I must add that he had been extremely reluctant to even try these and would not fill them regularly but did ultimately find that they were helpful to him. There has been no evidence of tolerance or habituation to these medications and there are times when he will not ask for a refill, but there are times when he will have exacerbations of pain such that medications are helpful. Given the fact that the pain complaints have continued over a decade as documented, this is certainly a permanent chronic impairment.
>
> The cervicalgia and myofascial pain symptomatology is as above. In terms of the headaches they continue from time to time as such are permanent and related to the initial injuries as he was not having these complaints prior. He does continue with the shoulder girdle pain which is related to the cervicalgia and chronic pain as above as such that is related and he would have permanent impairment. As for the shoulder capsulitis, he does continue with difficulties with range of motion about the shoulder and it is somewhat difficult to separate this from the myofascial component but I would say he has permanent impairment. . . .
>
> In terms of depression, adjustment disorder and/or anxiety disorders, he does continue with symptomatology. He has tried antidepressants in the past and has not had much effect but he does continue with depressive and anxiety symptoms and given the fact they have persisted for over 10 years after the accident, I would say they are permanent.

> As part of this, he has some occasional memory loss which is related to the chronic pain syndrome with the depressive symptoms. As such, this is permanent impairment and related.
>
> The low back pain is also related as noted above including the chronic pain syndrome. Mr. Podgorniak did have some lumbosacral pain with a radicular component that appeared to be discogenic in nature with loss of the L3-4 reflex on the right side for which he was sent to the Spine Center. Per the history, I believe that it is probable that this is related to his initial injuries; as such, he has permanent impairment related to the accidents.

(Ex. VII, pp. 274-75) He also opined, to a reasonable degree of medical certainty, that the medical charges for his care for these conditions, was reasonable and necessary and causally connected to the work injuries.

Dr. Ulrich further provided an opinion regarding Mr. Podgorniak's fitness for work. "I do believe, to a reasonable degree of medical certainty, that he remains unfit for any kind of work. In other words, I believe it is probable that he medically cannot perform any kind of work on a sustained basis." (Ex. VII, p. 276) He provided further details describing the pain as being "crippling" around his "neck, shoulder girdle and low back." (Ex. VII, p. 276) He described that the pain interfered with Mr. Podgorniak's ability to interact with others, his sleep and his mental abilities. "It is quite clear that during a given work day, he would have to change position and rest multiple unpredictable times throughout the day." (Ex. VII, p. 276)

Dr. Rondinelli prepared a report dated July 18, 2014, which was entered into the record formally on July 29, 2014. (Def. Ex. E) He stated the following:

> I have had opportunity to interview and perform a limited examination on Mr. Podgorniak on June 3, 2014. Since that time I have reviewed the proceedings of the hearing from the appeal decision of the Iowa Workers' Compensation Commissioner awarding benefits for multiple conditions deemed to be work related in this case.
>
> You [defense counsel] have requested that I perform a physical examination in order to assess Mr. Podgorniak's current physical condition and, based upon the same, to provide my opinions within a reasonable degree of medical certainty concerning any changes in Mr. Podgorniak's condition (caused by work injuries) since the November 16, 2009 hearing and what, if any, additional treatment I would recommend concerning these work-related injuries.

> I regret that I am unable to accommodate your request at this time due to the lack of additional objective and verifiable medical information upon which to base my opinions medical probability, after having attempted to examine Mr. Podgorniak on June 3.

(Def. Ex. E, p. 1) He went on to recite Mr. Podgorniak's apprehension of possibly being injured during the examination as a cause of the incomplete assessment. "He was suspicious, was self-limiting throughout the examination in terms of effort, and minimally cooperative to frankly uncooperative with my examination." (Def. Ex. E, p. 2) He characterized Mr. Podgorniak's performance during the examination as "limited and invalid" ultimately "categorically" recommending a "psychological evaluation and testing" before further treatment is authorized. (Def. Ex. E, p. 2)

I find the medical opinion of Dr. Ulrich to be the most credible opinion in the record. When read in conjunction with the entire file, including the final snapshot decisions from 2005 and 2009, including the corresponding evidence associated with both, Dr. Ulrich clearly has the most complete understanding and credible opinions regarding Mr. Podgorniak's medical conditions. In particular, it is consistent with the sworn testimony of Mr. Podgorniak and his spouse, Jane Podgorniak. Both testified regarding Mr. Podgorniak's physical incapacities. (Tr., pp. 37-45; 101-06; 110-16) There is no reason in this record to disbelieve the testimony of Mr. or Mrs. Podgorniak. Their testimony was consistent with previous sworn testimony and there was nothing about their demeanor or mannerisms which caused any concern. Mr. Podgorniak appeared uncomfortable through much of his testimony. He had a consistent work history until this series of work injuries in 2002.

Dr. Ulrich's opinion is unorthodox in that it does not provide numeric ratings for each separate condition. It is not in the standard format which the agency is used to receiving. Nevertheless, I find his opinions credible with regard to medical causation, maximum medical improvement, permanency and work restrictions/abilities.

The defendants argue that Dr. Ulrich lacked objectivity and should be rejected. They point to Dr. Ulrich's e-mail exchanges with Mr. Podgorniak where Dr. Ulrich asked him how to proceed regarding impairment ratings. "Please ask Mark [Soldat] what he feels impairment rating should be per AMA 5th edition Guide to the Evaluation of Permanent Impairment 5th Ed." (Def. Ex. C, p. 2) There is limited explanation of this email exchange in the record. I do not read as much into it as defendants do. My opinion might be different if claimant's counsel had suggested a number and then Dr. Ulrich used that number. The reality is the physical impairment ratings are of limited value in this case. In any event, Dr. Ulrich is a Minnesota family medicine physician. Since 2013, he is the Department Chair for Family Medicine at Mayo Clinic Health System. (Ex. VII, p. 278) There is nothing in the record to suggest that he regularly handles Iowa workers' compensation cases. My reading of the evidence is that the email exchange shows little more than a physician who had limited experience with the Iowa workers' compensation system was attempting to figure out how to respond to an

inquiry by the insurance carrier. To be sure, Mr. Podgorniak does not trust the employer or insurance carrier or anyone associated with them. Dr. Ulrich is generally quite protective of his patient and seems to concur with Mr. Podgorniak's distrust. This, however, is not indicative of an inappropriate bias.

The opinion of Dr. Rondinelli is unfortunately not helpful. He essentially opined that Mr. Podgorniak is mentally unstable and, if there is truly anything wrong with him, it is probably mental. He saw Mr. Podgorniak on one occasion more than 12 years after his final work accident. It is unclear precisely which records he reviewed. He did mention he reviewed the "appeal decision from the Iowa Workers' Compensation Commissioner awarding benefits for multiple conditions deemed to be work related in this case." (Def. Ex. E, p. 1) It is understandable, however, how this case would look to Dr. Rondinelli, or any physician, who was not involved or did not understand the full context of this file. Mr. Podgorniak was defensive and guarded to a point which probably seemed paranoid or even mentally unstable to Dr. Rondinelli. It is undoubtedly true that, at this point, Mr. Podgorniak is somewhat paranoid. It has taken the undersigned scores of hours to review this file completely in order to have a full understanding of Mr. Podgorniak's medical conditions. It is not surprising that Dr. Rondinelli reached the conclusion that he did given his limited involvement with Mr. Podgorniak.

The greater weight of evidence has established Mr. Podgorniak has reached maximum medical improvement as of February 11, 2012.

The greater weight of evidence has established he has permanent disabling impairments best summarized as the following:

1. Chronic Pain Syndrome.

2. Cervicalgia, Myofascial Neck Pain.

3. Shoulder Pain, Shoulder Capsulitis and Shoulder Girdle Pain.

4. Low Back Pain, Herniated Disks.

5. Tinnitus.

6. Depression.

7. Adjustment/Anxiety Disorder.

The evidence has established that there are a number of disabling symptoms associated with each of these conditions.

The greater weight of evidence has established that each of these conditions were each substantially caused or materially aggravated by Mr. Podgorniak's work injuries in January and February 2002.

The greater weight of evidence has established that Mr. Podgorniak is unable to work in any full-time, gainful employment, as a result of the foregoing conditions.

CONCLUSIONS OF LAW

The threshold question is whether this is an appropriate action under review-reopening.

In a proceeding to reopen an award for payments or agreement for settlement as provided by Iowa Code section 86.14, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon. Iowa Code section 86.14(2) (2013). In order to demonstrate eligibility for an increase of compensation under section 86.14(2), the claimant must demonstrate what his physical or economic condition was at the time of the original award or settlement. At a subsequent review-reopening hearing, claimant has the burden to prove that there is a substantial difference in such condition which warrants an increase in compensation. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). The difference can be economic or physical. Blacksmith v. All-American Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). Essentially, two snapshots of the claimant's condition are taken; one in each hearing. The claimant must prove that there is something substantially different between the two snapshots such that it warrants an increase in benefits. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968).

The principles of res judicata apply and the agency should not reevaluate facts and circumstances that were known or knowable at the time of the original action. Kohlhaas at 392. Review-reopening is not intended to provide either party with an opportunity to relitigate issues already decided or to give a party a "second bite at the apple." The agency, however, is forbidden from speculating as to what was contemplated at the time of the original snapshot. Id.

The burden remains upon the injured worker to prove by a preponderance of the evidence that the current condition is proximately caused by the original injury. Kohlhaas, 777 N.W.2d at 392. When a work-related injury causes another injury to the worker, this new injury (sequela) may also be considered as a work-related injury under Iowa's workers' compensation laws. When an employee suffers from a compensable injury and another condition or injury arises that is the consequence or result of the previous injury, the sequelae rule applies.

> If 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. Where an employee suffers a compensable injury and thereafter returns to work and, as a result, thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for.

Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480, (1936). The employer is liable for all consequences that naturally and proximately flow from the accident.

This is not a classic review-reopening case where an injured worker has received an award for permanency and then asks to have it reassessed based upon appropriate factors such as a change of condition. In this case, two previous snapshot determinations concluded that Mr. Podgorniak had not yet fully healed. Those decisions specifically found that additional treatment was needed and permanency could not be assessed until the treatment was received. The final running award order stated the following.

> In file numbers 5005649, 5011317, and 5011316, defendants shall pay to claimant healing period benefits from February 9, 2005, to November 16, 2009, and shall continue to pay running healing period benefits from November 16, 2009, at the rate of three hundred forty-eight and 02/100 dollars ($348.02) per week until the requirements for termination of healing period benefits under Iowa Code section 85.34(1) are met.

(Appeal Decision, July 6, 2011)

The parties now agree that Mr. Podgorniak has reached maximum medical improvement and his permanency should be assessed. Given that the parties have stipulated that Mr. Podgorniak is at maximum medical improvement, I find that he has met the conditions precedent of Iowa Code section 86.14(2) as a matter of law. In other words, the fact that the injured worker has reached maximum medical improvement entitles the parties to an assessment of the extent of the disability. Mr. Podgorniak has also met the conditions precedent for Iowa Code section 86.14(2) as a matter of fact based upon the well-reasoned opinions of Dr. Ulrich.

Therefore, I find that the conditions precedent for review-reopening have been satisfied.

The next issue is Mr. Podgorniak's entitlement to healing period benefits. As mentioned, the parties agree that Mr. Podgorniak ceased being entitled to healing period benefits at some point following the November 16, 2009, snapshot hearing. Mr. Podgorniak argues the appropriate date is February 11, 2012, the date Dr. Ulrich found that the claimant reached maximum medical improvement. The defendants argue the appropriate date to terminate healing period is January 25, 2012. (See Def. Brief, p. 51)

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing

period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The record reflects that Mr. Podgorniak has not returned to work and has been, at all relevant times, incapable of returning to substantially similar employment. The issue therefore is the appropriate date of maximum medical improvement. I find that the medical opinion of Dr. Ulrich to be the most compelling and credible. He opined that "no further improvement of these conditions would be anticipated at the 10-year point from the initial injuries." (Ex. VII, p. 274) The final injury occurred on February 11, 2002; therefore the maximum medical improvement date was February 11, 2012. The date proposed by the defendants is not at all unreasonable but is not specifically supported by any expert medical opinion.

The next issue is medical causation. Mr. Podgorniak relies upon the medical opinion of Dr. Ulrich to establish medical causation. The defendants contend that "while Podgorniak does have some permanent disability caused by the work injuries, he has failed to prove that his claimed inability to work at the present time was proximately caused by the work injury." (Def. Brief, p. 41)

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).

There are numerous expert medical opinions in this "four-box" file but there are only two opinions which specifically discuss permanency of medical causation after November 2009. Dr. Ulrich's opinion is the most credible and is accepted. He opined

that the conditions he outlined and provided treatment for are causally connected to the work injuries and they are permanent. The major deficiency in Dr. Ulrich's opinion is that he did not clearly state which of the three injuries were responsible for which portion of the disability. After reviewing every decision, every exhibit, every transcript and scouring the briefs, I determine that the February 11, 2002, injury was a substantial factor in bringing about the claimant's permanent disabilities as set forth herein. This is consistent with the previous decisions which essentially treated the combination of the three injuries as manifesting on the final injury date for rate purposes. Throughout these entire proceedings, the three injuries have been essentially treated as one disability. The February 11, 2011, was, in fact, substantially more traumatic and damaging than the other injuries and is the most likely precipitating cause of the chronic pain syndrome, Mr. Podgorniak's most disabling condition. (*See* Ex. VII, pp. 273-75; *see also* Ex. IV, pp. 187-189)

The next issue is the nature and extent of claimant's disabilities. Mr. Podgorniak contends that he is permanently and totally disabled as a combination of his three work injuries and, is therefore, entitled to lifetime benefits commencing as of the date of maximum medical improvement. The defendants argue that, while Mr. Podgorniak may have some permanency, he is not totally disabled as a result of the work injuries.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

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 Comm'r. Report 134 (App. May 1982).

The greater weight of evidence establishes that Mr. Podgorniak is not employable in the competitive job market. At the time of hearing, he was 59 years old. He is bright and thoughtful. He has written numerous letters which are part of the record which demonstrate good writing and critical thinking skills. He attained a GED and has some community college courses. He could be a candidate for retraining although I find that this is much more difficult at his age, particularly when considering his documented difficulties with concentration and memory. Nevertheless, Mr. Podgorniak strikes me as the type of person who could do very well in school if he could overcome his concentration and memory issues.

He has a varied and interesting work history. His work experience includes custodial work, groundskeeping, and driving trucks and buses. He has worked as a road construction laborer, and operated his own property maintenance company. When he moved to Iowa he worked fixing up their residence as well as some other properties, and worked for a time for an asphalt company. He has numerous demand skills.

His permanent, work-related conditions are summarized as follows.

1. Chronic Pain Syndrome.

2. Cervicalgia, Myofascial Neck Pain.

3. Shoulder Pain, Shoulder Capsulitis and Shoulder Girdle Pain.

4. Low Back Pain, Herniated Disks.

5. Tinnitus.

6. Depression.

7. Adjustment/Anxiety Disorder.

His most disabling condition, without doubt, is the chronic pain syndrome. Dr. Ulrich described the chronic pain syndrome in stark terms.

> I believe that John has developed Chronic Pain Syndrome (CPS) as a direct result of his injuries. As described in the A.M.A. Guide to the Evaluation of Permanent Impairment, 4th ed., sections 15.4, 15.6 and 15.7, pp. 306-309 (1993): "Chronic pain is a self-sustaining, self-reinforcing, and self-regenerating process. It is not a symptom of an underlying acute somatic injury, but rather a destructive illness in its own right. It is an illness of the whole person and not a disease caused by the pathological state of an organ system. Chronic pain is persistent, long-lived, and progressive. Pain perception is markedly enhanced. Pain-related behavior becomes maladaptive and grossly disproportional to any underlying noxious stimulus, which usually has healed and no longer serves as an underlying pain generator . . . chronic pain that is not recognized and properly treated results in a deterioration of coping mechanisms. Under such circumstances, limitations of functional capacity are apt to occur. The patient's maladaptive behavior may have medical, social, and economic consequences that greatly outweigh any somatic components of the illness. These consequences may include despair, alienation from the family and society, loss of job, isolation, invalidism, and suicidal thoughts. Yet, chronic pain is not a psychiatric disorder . . . chronic pain may result from inappropriate management of acute pain. It is not possible to predict the course of a patient's condition from inception of the noxious stimulus to the development of the complete chronic pain syndrome . . . .
>
> In my educated opinion, Mr. Podgorniak does meet the criteria for Chronic Pain Syndrome (CPS) as detailed above, and in the more recent AMA 6th edition guide including: 1. excessive dependence on health care providers (although he has been denied access to programs that may help), spouse, or family; 2. secondary physical de-conditioning due to disuse and/or fear-avoidance of physical activity due to pain; 3. withdrawal from social milieu, including work, recreation, or other social contacts; 4. failure to restore pre-injury function after a period of disability, such that the physical capacity is insufficient to pursue work, family, or recreational needs; 5. development of psychosocial sequelae after the initial incident, including anxiety, fear-avoidance, depression, or nonorganic illness behaviors. To qualify as CPS, the patient needs only 3 of these criteria. John has all of them except the use of prescription drugs beyond the recommended duration. In fact, John has been reluctant to take pain medications all along, indicating a lack of primary or secondary gain.

(Ex. IV, pp. 188-89) The chronic pain syndrome therefore adversely affects and interacts with all of his other conditions. While Dr. Ulrich did not assign a numeric

impairment rating, he did make quite clear that the impairment is severe. The chronic pain syndrome is likely responsible for disabling symptoms of sleep disturbance, memory loss, socialization loss and headaches. It probably contributes to his depression and adjustment/anxiety disorder as well.

The tinnitus is stable and somewhat better since Mr. Podgorniak has obtained treatment, including assistive devices. The tinnitus is independently disabling. This condition contributes to his socialization, sleep and concentration difficulties. (Ex. VII, p. 226) The mental conditions are also independently disabling. He has consistently experienced moderate to severe depression on the Beck Depression Inventory scale. This affects mood and his interactions with others. It also likely contributes to his negative interactions with the defendants and their representatives.

As a result of all of his conditions, Mr. Podgorniak had a 10 year healing period which has prevented him from returning to the labor market in any capacity. During this time, his condition, in general, worsened. He received substantial treatment during this period although there were substantial periods where he received no treatment at all. In this case, however, the ten years he spent out of the workforce is devastating to his realistic opportunity to return to gainful employment.

The treating physician, Dr. Ulrich, has opined the following:

> I do believe, to a reasonable degree of medical certainty, that he remains unfit for any kind of work. In other words, I believe it is probable that he medically cannot perform any kind of work on a sustained basis. He has chronic pain on a daily basis that varies between approximately 6 out of 10 and 9 out of 10 with pain per documentation related around his neck, shoulder girdle and lower back. This is a crippling description of pain that affects his psyche and the ability to interact with others. It has significant impairment on sleep and ability to have adequate sleep and be well rested. John has given me many examples over the years of activities that he has not been able to participate in that he could before. He has been a self-described physical fitness buff and did in fact have some ownership in a small town gym which he had not been able to participate in. He had volunteered as a photographer for the small local paper and found that he increasingly was unable to do simple tasks such as taking photographs for local sports teams. The fact that he was unable to tolerate activities that he formally [sic] enjoyed is indicative that he would be unable to be employable. It is quite clear that during a given work day, he would have to change position and rest multiple unpredictable times throughout the day. In a given month, he would have to call in sick at the very minimum of 4 days out of a given month.

(Ex. VII, p. 276)

Importantly, this medical opinion is entirely consistent with the sworn testimony of John and Jane Podgorniak. The Podgorniaks each testified regarding Mr. Podgorniak's current abilities. The snapshot created is bleak, however, it is entirely consistent with Dr. Ulrich's opinion.

The defendants correctly argue that Mr. Podgorniak does engage or at least attempt to engage in some activities. He has volunteered at the newspaper his wife runs in Northwood, including taking photographs, proofreading and picking up bundles of papers from the printer. (Tr., pp. 21, 43, 46) Mrs. Podgorniak testified, however, that there is no way he could perform a normal, gainful job. "I can't depend on him to be available to come to work on a consistent basis [volunteering at the newspaper]. I don't think that he can have an 8:30 to 5:00 - - 8:00 to 5:00 job five days a week." (Tr., p. 40) She went on to describe his lack of consistency and the fact that engaging in projects which are strenuous, either physically or mentally, tend to inhibit his ability to function.

He has also engaged in some travelling, visiting his children in California for example. (Tr., p. 37) He performs some house work, including washing clothes and dishes. (Tr., p. 42) He mows the lawn on a tractor, although he takes it slow and wears a foam neck brace because the bouncing aggravates his pain. (Tr., pp. 39, 53) He can only mow for approximately an hour and a half at a time. When he does mow, he ends up exhausted and in pain. (Tr., p. 39)

The reality is Mr. Podgorniak is able to do very little and the more he does, the more he suffers later. This is tragic, but it is, nevertheless, the facts of the case.

Mr. Podgorniak clearly concurs with Dr. Ulrich that he is unable to work. He has applied for, and been denied, Social Security Disability. He has not looked for work.

The primary argument of the defendants is that not all of Mr. Podgorniak's conditions, symptoms and employability problems stem from the work accidents. Their argument is virtually identical to their argument in the first review-reopening.

> Defendants assert that claimant's current conditions are not wholly caused by his work injuries. They argue the majority of his complaints are due to preexisting conditions and claimant's self-perception of his condition based on his own personality traits. They also advocate a finding that claimant has reached maximum medical improvement, and that his disability does not exceed 20 percent. To support their position, defendants had claimant evaluated by four different doctors since the arbitration hearing.

(Appeal, July 6, 2011, p. 18) Just as this argument was rejected in the prior decisions, it is rejected now.

The record demonstrates that Mr. Podgorniak had a strong work history prior to the series of serious work injuries in January and February 2002. The defendants have challenged his credibility repeatedly and those challenges have been rejected by this agency in the prior decisions. I find nothing in the current snapshot of Mr. Podgorniak's condition to overturn the prior assessments. I find Mr. Podgorniak, and his wife, Jane Podgorniak to be credible. Their testimony has been consistent now throughout multiple opportunities to provide sworn testimony over a twelve-plus year period.

When considering all of the factors of industrial disability, I cannot imagine Mr. Podgorniak being employable in the competitive job market at this time. This is extremely unfortunate because Mr. Podgorniak would have a great deal to offer an employer in the world of work and he is really too young to be in the position he is in. It would undoubtedly be better for him if he could work, even in a limited capacity. The greater weight of evidence, however, supports the foregoing finding.

The next issue is medical expenses. Mr. Podgorniak has outlined unpaid (or paid by private insurance) medical expenses in Exhibit VIII. As clarified in claimant's brief, pages 87 through 105, these are mostly mileage payments and prescriptions. (Ex. VIII, pp. 87-105) The defendants made no serious effort to challenge these expenses in any portion of the record or briefs.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. Iowa Code section 85.27 (2013). For all claimed medical expenses, the claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

In his brief, claimant's counsel argues that mileage payments in the amount of $2,818.79 are owed. (Cl. Brief, p. 96) Based upon the record before the undersigned, it appears that this may be the first time the defendants have seen any actual mileage calculations. Nevertheless, the mileage claimed corresponds to documentation in the record establishing medical services rendered on specific dates. Since the computations were not presented at hearing, however, I decline to rule specifically upon those calculations. The defendants are responsible for all reasonable and necessary transportation expenses incurred, however, I order the claimant to submit the expenses to the defendants for payment.

The defendants also apparently failed to pay for prescriptions authorized by Dr. Ulrich. How and why this happened is not in the record, nevertheless, it appears that the prescriptions were paid by Mr. Podgorniak's private insurance carrier. He

incurred out of pocket expenses of $1,195.66. Having reviewed exhibit VII, pages 22 through 42, I find claimant is entitled to the out-of-pocket payments for medical prescriptions as outlined in his brief. The defendants are responsible for the prescriptions in evidence in exhibit VII, as summarized in claimant's brief, pages 87 through 104.

The defendants also apparently failed to pay for several office visits from Dr. Ulrich, the primary treating physician and Dr. Welnel, Mr. Podgorniak's primary mental health provider.

May 9, 2011	Dr. Ulrich	$203	Cl. Ex. VIII, p. 18
Oct. 10, 2011	Dr. Welnel	$310	Cl. Ex. VIII, p. 19
Nov. 15, 2011	Dr. Welnel	$349	Cl. Ex. VIII, p. 19
Feb. 27, 2012	Dr. Welnel	$134	Cl. Ex. VIII, p. 28
Nov. 20, 2012	Dr. Ulrich	$212	Cl. Ex. VIII, p. 28
Apr. 30, 2013	Dr. Ulrich	$220	Cl. Ex. VIII, p. 28

These physicians were both authorized at all relevant times. Defendants have not briefed these bills and seem to acknowledge they are owed. If they have not been paid at this time, they are owed directly to the provider, including any lawful late payments or fees imposed by the provider.

Mr. Podgorniak also seeks an order of alternate medical care, not for any specific treatment modality, but rather to confirm that Dr. Ulrich is the authorized treating physician and the defendants should not interfere with his medical judgment. Claimant's counsel described the issue as follows.

> As of the last decision Dr. Ulrich had been named the treating doctor as alternate care. There have been a series of disputes since that time as to what that means, whether that means if he orders something it happens and the defendants have to pay for it, or whether they retain some ability to object or otherwise interfere with that.
>
> That's really what we're seeking, a clarification of the previous alternate care order. There just really wasn't space in the hearing report to explain that.

(Tr., p. 7) Defense counsel responded. "I would just add, Your Honor, alternate care is a case by case basis. It depends – it's not something that could be determined into the future." (Tr. p. 7)

The parties agree that an alternate care order was entered by Deputy Heitland on two occasions. These orders were affirmed in separate appeals and both ultimately became final decisions and the law of the case. Defendants have not challenged that Dr. Ulrich is the authorized treating physician. The defendants have, however, failed to pay for all of the treatment recommended by Dr. Ulrich, including the prescriptions and office visits outlined above. The defendants appear to insist that they still have the right to challenge certain care and specific items of care are either not reasonable, necessary or causally connected to the work injury. For his part, the claimant appears to assert that anything Dr. Ulrich states must be automatically granted by operation of law. Neither party is entirely correct.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care January 31, 1994).

The legal issue presented is best described as follows: What are the legal powers of the authorized treating physician? More specifically, from a practical standpoint, under what circumstances can an employer deny or delay care recommended by the authorized treating physician? The law is clear that an employer may not substitute its judgment for the authorized doctor's judgment, however, the question is, what the appropriate remedy is when this occurs.

I agree with the defendants that an employer must retain some due process ability to object to treatment which is not appropriate under the law. An authorized treating physician does not become all-powerful and unquestionable when designated as such. For example, if an authorized treating physician recommended a referral to a witch doctor or a faith healer to cure an injured worker's herniated cervical disc, the defendants must have some due process ability to challenge this. Or, if an injured worker being treated for a torn meniscus is referred for a CT scan of the head, the defendants must have some type of procedural right to object or at least question the causal connection of the treatment. The problem is, of course, these are extreme and unlikely examples, which are mostly not applicable to the case before the agency.

Under section 85.27, an employer does not have authority to file an alternate care proceeding. An employer's only due process mechanism to challenge the treatment recommendations of an authorized treating physician, is to deny payment. Therefore, I conclude that while an employer may not substitute its medical judgment for an authorized medical physician's judgment, the employer always maintains the right to determine the injured worker's legal entitlement to the benefits, so long as it is acting reasonably and in good faith. Section 85.27 was clearly designed to place the onus and responsibility upon the injured worker to file an expedited alternate care hearing request in such instances where care is denied under such circumstances.

In this case, there have been numerous unreasonable delays in treatment. To say the very least, these delays have not been good for Mr. Podgorniak's physical or mental well-being. There have been delays in the medical treatment beginning early on in this file and the delays have continued since Mr. Podgorniak's previous hearing in 2009. The delays are numerous and there are various reasons for each delay and some reasons may have been reasonable. For example, the claimant was diagnosed with herniated disc problems in 2010. Based upon the evidence in the record, this appears to have been a new diagnosis. The defendants had a right to investigate a new diagnosis made some eight years after the original accidents. I would note, however, that I find very little in this file that this was actually the reason the defendants failed to authorize any specific treatment related to the disc. Nevertheless, while there may be some legitimate excuses for some of the delays, I ultimately find the defendants have repeatedly failed to follow Dr. Ulrich's treatment recommendations in a timely manner. This failure has resulted in numerous delays which are simply unacceptable.

Specifically, instead of allowing Dr. Ulrich to direct the care, the defendants have continued to assign a case manager who, instead of simply following the treatment recommendation Dr. Ulrich ordered, or even seeking clarification of his recommendation, attempted to direct treatment in a manner not specifically recommended by Dr. Ulrich. This naturally confused and confounded Mr. Podgorniak's opportunity to receive timely, beneficial treatment to help him get better. Based upon the record before me, it appears that a significant part of the problem is that the defendants have refused to accept the previous final agency decisions, which have clearly held that Mr. Podgorniak's disabilities are compensable. This is inexcusable.

In this case, however, Mr. Podgorniak has never utilized the agency procedure under section 85.27 to obtain alternate medical care. Instead, he has included alternate medical care as an issue in the case and expected that the defendants will follow the agency orders without ever questioning specific treatment modalities. While no injured worker is required to avail himself of the expedited hearing process, if he chooses not to do so, then he must wait for a hearing which is not expedited. This can, and has in this case, compounded the delays.

At this time, having found that Mr. Podgorniak's treatment has continued to be unreasonably delayed since the 2009 hearing, I order alternate medical care as follows consistent with Iowa Code section 85.27. The defendants have lost control of the care. Dr. Ulrich is the designated and authorized treating doctor. Mr. Podgorniak's future treatment shall flow through Dr. Ulrich. If and when Dr. Ulrich recommends any further treatment, including referrals, for the conditions outlined in this decision, he (or his office) shall promptly notify the defendants in writing of any treatment recommended and whether the treatment recommended is reasonable and necessary and causally connected to claimant's work disabilities. The defendants shall immediately authorize all treatment recommended by Dr. Ulrich. If the defendants object to any of the treatment recommended by Dr. Ulrich, including a delay to conduct a reasonable investigation of the treatment recommended, the defendants shall immediately forward the objection to Dr. Ulrich's office and claimant's counsel, which shall list each and every reason for the delay or denial of the recommended treatment. The defendants are, of course, entitled to request further information from Dr. Ulrich to determine the legal obligation to pay for the treatment he recommends. The failure to comply with this order may result in sanctions.

The next issue is penalty. Mr. Podgorniak alleges that virtually all of his benefits since the August 2009 hearing have been late. The defendants have exerted a minimal defense. Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse.

The relevant factual timeline in this case is as follows. On November 16, 2009, a review-reopening hearing was held providing a second snapshot of claimant's condition. Based upon the record before me, it appears the defendants had ceased paying Mr. Podgorniak weekly benefits on or about December 8, 2008. A review-reopening decision was entered on February 22, 2010, ordering a running award. Both parties appealed. The defendants continued to deny that it owed any further payments and made no benefit payments through September 28, 2011. On July 6, 2011, the review-reopening running award decision became a final agency decision. On October 5, 2011, the defendants made a payment to Mr. Podgorniak of $57,895.14, which purported to make payments from December 9, 2008 through September 28, 2011. This time frame amounts to 146.1428 weeks. The October 5, 2011, payment appears to contain interest, although no calculations are included in the record. (Ex. IX, p. 6) The principal on 146.1428 weeks is $50,860.61.

These payments were due when the decision became a final decision which was July 6, 2011, or, at the very latest, August 5, 2011, when the defendants' time to seek judicial review passed. These payments are late and the burden shifts to the defendants for a reasonable excuse for the delay. There is no excuse in the record as to why the defendants did not pay these benefits until October 5, 2011. Penalty is therefore owed on the principal amount.

Numerous subsequent payments were late as well. (See Ex. IX, pp. 15-23). In addition, Mr. Podgorniak argued the following through counsel. "The balance as of the 10/10/11 payment remained at $1,634.45. Thus, the 4 payments ($1,392.08), which came due thereafter were never paid when due because the payments were applied to the outstanding balances on those dates." (Cl. Brief, p. 111) The claimant then goes on to argue that because of the late payments, the defendants were never caught up and all of the subsequent payments (129 of them through the date of hearing) were late.

Based upon the record before me and utilizing all of the permissible factors set forth under the law as stated above, I find that a significant penalty of $15,000.00 is appropriate for the defendants' late payments in this case. This significant amount is primarily designed to deter the defendants from making late payments in the future, both to this injured worker and others.

The next issue to be determined is the extent of credit to which the defendants are entitled. The parties agree the defendants have made 245 payments to the claimant since the last hearing. The parties further agree that defendants are entitled to a credit for those payments. (Tr., pp. 10-13) The real issue is interest. Mr. Podgorniak

seeks to ensure that the defendants do not receive a credit for payments purporting to be principal, which were really for interest. The relevant law regarding payment of interest is as follows.

Pursuant to Iowa Code section 85.30 and applicable case law including Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261-262 (Iowa 1996) and Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 234-236 (Iowa 1996), defendant(s) shall pay interest at the rate of 10 percent per annum upon unpaid weekly temporary total disability, healing period, permanent partial or permanent total disability benefits awarded herein as follows:

1) Iowa Code section 85.30 provides for an 11 day grace period after the injury during which time payments of compensation need not be made and interest cannot accrue.

2) Weekly benefits shall be paid by the end of a compensation payment week composed of 7 calendar days. The first compensation payment week begins with the first day of entitlement specified in the award. However, if the first day of entitlement is the injury date or if the first day is within the statutory grace period, the first compensation payment week will begin on the 11th day after the injury.

3) Interest on unpaid amounts for each compensation payment week begins on the first day following the expiration of that compensation payment week and continues until full payment. Interest on unpaid amounts for compensation during the grace period begins on the 11th day after the injury and continues until full payment.

4) All payments shall first be applied to interest due and any excess on the principal amount. Payments are considered made on the date of delivery to claimant or, if mailed, the date the payment was placed in the United States Mail depository.

In this case, for any payments which were late, interest is paid first and therefore no credit is applied to the principal for amounts which were paid which were paid as principal but were really interest. Based upon the record before me, there is nothing else to decide.

The final issue is taxation of costs. "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code section 86.40 (2013). Defendants shall pay the costs of this action.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay the claimant healing period benefits from the date of the previous hearing (November 16, 2009) through February 11, 2012, the date he reached maximum medical improvement, at the rate of three hundred and forty-eight and 02/100 ($348.02) per week.

The defendants shall pay claimant permanent total disability benefits at a rate of three hundred and forty-eight and 02/100 ($348.02) per week, commencing February 12, 2012.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the weeks previously paid. For any payments which were late, interest is paid first, per the U.S. Rule, and therefore no credit on principal is applied to the principal for amounts which were paid which were paid as principal but were really interest. The parties are ordered to work together in good faith to determine the correct credit and interest owed based upon the foregoing. In the event of disagreement as to interest amounts due and unless otherwise agreed, the parties shall jointly retain a certified public accountant who shall calculate the interest to a specified date in the manner provided above. This accountant's calculations shall be binding upon the parties and the parties shall split the cost.

Defendants shall pay medical expenses as outlined herein. The claimant shall submit medical mileage to the defendants and it shall be processed and paid as allowed by law. The defendants shall pay claimant one thousand one hundred ninety-five and 66/100 dollars ($1,195.66) for out-of-pocket medical expenses. The defendants shall directly pay unpaid office visits and reimburse private insurance as outlined in Claimant's Exhibit VIII, and recited on pages 23 and 24 of this decision.

The claimant is awarded the following alternate medical care. Dr. Ulrich is the designated and authorized treating doctor. The claimant's future treatment shall flow through Dr. Ulrich. If and when Dr. Ulrich recommends any further treatment for the conditions outlined in this decision, he shall promptly notify the defendants in writing of any treatment recommended and whether the treatment recommended is reasonable and necessary and causally connected to his work disabilities. It is recommended the parties agree to a form for this purpose. The defendants shall immediately authorize all treatment (including referrals) recommended by Dr. Ulrich. If the defendants object to any of the treatment recommended by Dr. Ulrich, including a delay to conduct a reasonable investigation of the treatment recommended, the defendants shall immediately forward the objection to Dr. Ulrich and claimant's counsel which shall list

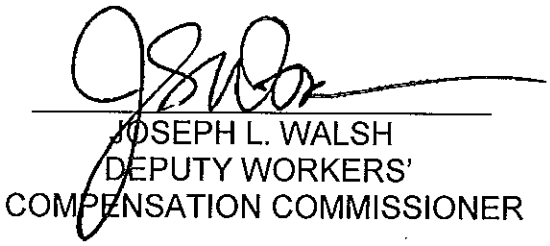
each and every reason for the delay or denial of the recommended treatment. The defendants are, of course, entitled to request further information from Dr. Ulrich to determine the legal obligation to pay for the treatment he recommends. The failure to comply with this order may result in sanctions.

The defendants shall pay the claimant a penalty of fifteen thousand and no/100 dollars ($15,000.00) for late payments.

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

Costs are taxed to defendant.

Signed and filed this 8th day of May, 2015.



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JLW/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.