BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT WORKMAN,	:	
Claimant,	:	File Nos. 19006854.01 1616685.01
vs.	:	
MENARD, INC.,	:	ARBITRATION DECISION
Employer,	:	
and	:	
XL INSURANCE COMPANY OF AMERICA, INC.,	:	
Insurance Carrier, Defendants.	:	Head Note: 1803, 4000.1

STATEMENT OF THE CASE

The claimant, Scott Workman, filed two petitions for arbitration and seeks workers' compensation benefits from Menard, Inc., employer, and XL Insurance Company of America, Inc., insurance carrier. The claimant was represented by Rick Crowl. The defendants were represented by Kathryn Hartnett.

The matter came on for hearing on September 23, 2021, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via CourtCall videoconferencing system. The hearing was completed on September 28, 2021. The record in the case consists of Joint Exhibits 1 through 14; Claimant's Exhibits 1 through 15; and Defense Exhibits A through J. Claimant's counsel objected to Defendants' Exhibit J. The objection was overruled. The claimant testified at hearing, as did witnesses, Barbara Workman and Ryan Holford. Kristi Miller was appointed and served as the official court reporter for the proceeding. The matter was fully submitted on November 8, 2021, after written arguments by the parties.

The parties submitted a combined hearing report which contained the disputed issues, as well as a number of stipulations. The claimant indicated he is seeking no further benefits in relation to File No. 19006854.01. He did not ask to dismiss, however, he presented no evidence for this file. The hearing report was accepted, and the stipulations contained therein are binding upon the parties.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the injuries.

2. Claimant sustained two injuries which arose out of and in the course of employment, the first on May 10, 2016, and the second on December 2, 2019. The injuries caused both temporary and permanent disability.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The parties have stipulated to all of the elements comprising the rate of compensation and assert the correct weekly rate of compensation is $312.82.

5. Defendants have paid and are entitled to a credit as set forth in the Hearing Report.

6. Affirmative defenses have been waived.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's permanent disability. Claimant alleges he is permanently and totally disabled and has asserted odd-lot.

2. The commencement date for permanency benefits is disputed.

3. Whether claimant is entitled to medical expenses under Iowa Code Section 85.27. At hearing, defendants took the position that all of the medical expenses in Claimant's Exhibit 2 have been or will be paid. Defendants do not dispute the medical expenses set forth therein. (Transcript, pages 6-7)

4. Whether claimant is entitled to penalty.

FINDINGS OF FACT

Claimant Scott Workman was 29 years old as of the date of hearing. He works as a sales associate for the defendant employer. He testified live and under oath during the video hearing. I find Mr. Workman to be a credible witness. He was a relatively good historian under the circumstances. His testimony generally matches with the other evidence in the record, including contemporaneous medical reports, as well as his deposition testimony. His testimony was lengthy. He spoke slowly and deliberately, and he paused often. There was nothing about his demeanor which caused me concern for his truthfulness.

Mr. Workman suffered a work injury on May 10, 2016, wherein he alleges he sustained a serious traumatic brain injury. The injury itself, is stipulated between the parties. The parties also agree that this injury resulted in some permanent disability.

As a child, Mr. Workman suffered from arteriovenous malformation (AVM), which caused his blood to clot, resulting in internal bleeding. (Tr., pp. 24-25) This caused him to suffer from seizures and resulted in a total of six craniotomy surgeries as a minor. These conditions were significantly disabling for a period of time as he had to relearn to walk and talk. His last craniotomy surgery was in 2005. (Tr., p. 25) Thereafter, Mr. Workman contends – and the records support – his condition had been stable. His medical records from University of Nebraska Medical Center are in evidence. (Def. Ex. A, pp. 1-16) Other preexisting condition records are in evidence as well, including evidence that claimant suffered from depression prior to the work injury. (Def. Ex. B, pp. 17-29) In regard to his preexisting condition of AVM, I find that, in fact, the claimant's condition was stable and controlled following his 2005 surgery. The primary fighting issue in this case is the nature and extent of permanent disability Mr. Workman sustained from this fall.

In spite of his significant brain condition, Mr. Workman was a very good student in high school. He graduated in 2011, earning As and Bs. He also graduated with an associate's degree from Iowa Western Community College in 2012 in construction technology. He began working for Menard, Inc., (hereafter, "Menard's") in the garden department in 2012 earning $8.25 per hour. The position was full-time. He eventually moved to the electrical department. At the time of hearing, he was still employed by Menard's, earning $14.00 per hour. He was not working under any medical restrictions when he began.

At hearing, Mr. Workman's mother, Barbara Workman, testified live and under oath. I find her testimony to be highly credible. She managed his medical treatment for his AVM condition when he was a child. As an adult, Mr. Workman has remained very close to his mother, having regular contact. She testified that before his work injury, Mr. Workman was active and healthy. (Tr., pp. 109-110) She essentially confirmed that his preexisting condition of AVM was stable, manageable and was not impairing his ability to live and work.

On May 10, 2016, Mr. Workman was working with some stock at Menard's on a 12-foot ladder. While reaching to straighten a box, he lost his balance and fell, striking his head and right arm. He testified he tried to catch himself, but he ended up falling to the ground and striking the left side of his head (in the front). (Tr., p. 31) He testified that the left side of his skull was "caved in." (Tr., p. 31) He was dazed and has a foggy memory of the incident. He was assisted by co-workers and emergency response was called. During the ambulance ride, Mr. Workman testified he vomited.

Mr. Workman's relevant treatment records are in evidence. (Jt. Exs. 1-14) He was first treated at Nebraska Medical Center in Omaha on the same day as the incident. The following is documented.

> HPI:
> Scott Workman is a [] y.o. male who sustained a fall from a 12 foot ladder today. He states he did not lose consciousness but did strike his head. He is also complaining of left shoulder and neck pain. He denies numbness or paresthesias.

(Jt. Ex. 2, p. 1) A substantial workup of his condition was undertaken, and he was admitted for several days, ultimately being diagnosed with a fracture of his skull/eye orbit, a concussion and traumatic brain injury (TBI). Various diagnostic scans were taken. (Jt. Ex. 3) Surgery was performed to correct the left frontal and orbital fractures. (Jt. Ex. 2, pp. 13-14) When he was released on May 14, 2016, numerous referrals were made, including occupational therapy, physical therapy, speech therapy, orthopedics and ophthalmology.

Mr. Workman continued medical care thereafter with several different physicians, including Nicholas Bruggeman, M.D. (Jt. Ex. 4), Jason Miller, M.D. (Jt. Exs. 5-8), William Thorell, M.D. (Jt. Ex. 10), Angie Rakes, M.D. (Jt. Ex. 11) and Morgan LaHolt, M.D. (Jt. Ex. 14). On May 26, 2016, Dr. Bruggeman treated Mr. Workman for a right wrist "triquetral fracture." (Jt. Ex. 4, p. 1) He was primarily treated with a cast for this condition. In September 2016, Dr. Miller performed surgery described as "Removal of deep buried cranial hardware." (Jt. Ex. 7, p. 1) Mr. Workman continued to follow up with Dr. Miller throughout 2016. He was off work for approximately 23 weeks following the injury, finally returning to work with restrictions around October 17, 2016. (Def. Ex. E) He continued, however, to be highly symptomatic. In fact, it appears some of his symptoms worsened after he returned to work.

In March 2017, Dr. Thorell examined Mr. Workman. Dr. Thorell was Mr. Workman's surgeon in 2005 for the AVM condition. The following is documented at their March 2017 visit.

> Scott A Workman is a [] y.o. Caucasion right handed male referred by Teresa Dowling APRN for discussion of ongoing issues that he has had related to a work comp injury sustained back in May 2016. Patient was admitted at our facility with a left frontal skull fracture after a fall from 12 feet. We were never consulted during the patient's hospitalization and were not aware of his injury. He does have a remote history of arteriovenous malformation and history of hemorrhage in the right parietal region. He required surgical resection of this and then developed a recurrence of the AVM requiring a redo resection in September 2005. He has not had any surgery for the AVM since that time. He had a diagnostic angiogram in 2011 that showed no evidence of recurrence we have not seen him since that time. Patient states since his fall in May 2016, he has had ongoing daily headaches which have been worse over the last 2-3 months. Describes these as a sharp pain in the bilateral temporal region as well as the left frontal region over his prior skull fracture site. Describes this as throbbing as well. Most days, pain ranges from 5 to an 8/10. He has been working on a part-time basis at Minard's [*sic*] but when he

> returned to work, his symptoms were exacerbated from when he was at home and he has difficulty doing sustained activity longer than 4 hours at a time. He feels that he has had short-term memory troubles as well and this affects his duties at work. He loses concentration easily and has also had difficulty sleeping at night, averaging 4-6 hours per night. He frequently feels fatigued. He has been managing the headaches with exercise and Tylenol but this does not really help the headache. He was seen by a neurologist over in Council Bluffs who did an EEG that showed no evidence of seizure activity. His work comp case manager relates that they have been trying to get him in with trauma as well as other services, but have not been successful thus far and requested to return to see us in clinic.

(Jt. Ex. 10, p. 1)

Dr. Thorell noted that Mr. Workman had not undergone extensive therapy since his injury and referred him for neuropsychological evaluation. "We feel that this prior insult was exacerbated during his traumatic brain injury and is likely contributing to the left-sided difficulties that he is currently having. He is also having postconcussive sequela including headaches, instability, mild visual difficulties and feel he would benefit from evaluation by our concussion clinic." (Jt. Ex. 10, p. 3) He also recommended physical medicine examination and a referral to Dr. Rakes for treatment of the headaches. Dr. Thorell kept Mr. Workman on significant medical restrictions of only working 4 hours a day for no more than 5 days per week. Dr. Thorell and Brandon Reicks, P.A., thereafter continued to treat Mr. Workman through 2018. Mr. Workman was released at maximum medical improvement (MMI) for his physical symptoms on November 1, 2018. His treating physician documented the following:

> Physically, feel that [*sic*] patient is near her [*sic*] at MMI as he has long-standing left-sided weakness and footdrop that he manages with a brace, but has been able to work 40+ hours a week and feels that his physical function is 85% of what it was before his fall. He feels stable with regard to this. With regard to his mental status and emotional condition, this was exacerbated after his fall in 2016 and traumatic brain injury and he is currently undergoing medical management for this as well as evaluation by psychology at outside institution. I encouraged him to continue with this. I cannot reasonably anticipate how much longer he will need continued care for this, but shared with his work comp case manager that he will need continued care for the foreseeable future from this standpoint and this is related to his fall. He may need referral back to neuropsychology and may need to potentially see neurology in the future based on their evaluation. We will leave further follow-up to their discretion, will not follow up further with neurosurgery in clinic. Thoughts were shared with the patient and mom and they are in agreement with the plan.

(Jt. Ex. 10, p. 7) The only formal restriction provided was no work from elevated heights

or work on ladders. (Jt. Ex. 10, p. 7)

Thereafter, Mr. Workman continued to treat with Dr. Rakes for headaches. She attempted to manage his headaches with medications and periodic injections. (Jt. Ex. 11, pp. 5-7) As of December 23, 2019, Dr. Rakes documented relatively good control of the headaches. "Patient reports patient is more functional and is able to perform all activities with minimal to no hindrance. Patient reports the migraines are not as intense, prior to treatment were a 8/10 and now a 2-3/10." (Jt. Ex. 11, p. 5) This is the last record from Dr. Rakes in evidence.

Mr. Workman underwent a neuropsychological evaluation in August 2017, by Matthew Garlinghouse, Ph.D. (Cl. Ex. 3) The evaluation was quite thorough. The following is documented in the Recommendations section of the report:

> At present Scott's performances show primary weaknesses on tests of visual perception, left-handed motor / sensory function, visual problem solving and the independent retrieval of visual material from memory. He also showed some slowing with respect to information processing speed, as well as variable working memory ability which tended to impact his scores on timed tests with a visual component. He also demonstrated mild difficulty with aspects of expressive language. However, his performance on other tests of his core verbal function, receptive language and verbal memory were largely average or better.
>
> These findings are suggestive of primary parietofrontal systems dysfunction within the non-dominant (presumably right) hemisphere. However, the patient also shows some expressive language weaknesses that suggest some disruption of frontotemporal pathways in the language dominant (presumably left) hemisphere.
>
> The etiology of these findings is likely multifactorial. The initial onset of the bulk of these symptoms appears to be primarily to do with the rupture and surgical treatment of his AVM as a child. However the patient did report substantial improvement cognitively over time, despite the need for special education services. Then, after falling in 2016, the patient reported the re-emergence of many of his prior symptoms as well as perhaps some new language-based disturbances. As a result, in many ways the patient is experiencing the effects of multiple traumatic brain injuries, with the initial injury being hemorrhagic as a child and the second being traumatic as an adult in 2016.

(Cl. Ex. 3, pp. 9-10) Dr. Garlinghouse recommended a series of behavioral strategies to help Mr. Workman adjust to his cognitive challenges. (Cl. Ex. 3, p. 10)

Dr. Garlinghouse re-evaluated Mr. Workman in August 2020. (Cl. Ex. 4) He documented the following:

> At the time of his previous evaluation, Scott reported problems with slowed processing speed, decreased complex attention, word finding and decreased memory function. Specific concerns include forgetting if he has completed certain tasks, if he has taken his medications, slowed thinking when it comes to task completion and some inattentiveness. Scott mentioned that post-surgically, with respect to his treatment for his AVM some of these symptoms were transiently present but remitted until his fall. He does have some persistent left-sided weakness. Since his fall these symptoms re-emerged, worse, and have persisted to the present. Scott reported these concerns were improving over time. Prior to the onset of these symptoms the patient was able to independently complete instrumental activities of daily living.

(Cl. Ex. 4, p. 2) Again, he recommended a number of strategies for dealing with his challenges: These do not appear to be formal medical restrictions.

1. Write notes to yourself, use a memory book to keep things organized.

2. Develop patterns and routines.

3. When you need to remember something, try to make a picture in your mind, of the objects together (not as separate things). Remembering one thing or a picture of three things takes the same mental “space”. Therefore, group objects to be remembered.

4. Actively listen in conversations, restate (in a different way) what you thought you heard in the conversation.

5. Talk yourself through difficult tasks.

6. Reduce sensory overload, (i.e. reduced lighting, noise or commotion).

7. Avoid having to perform cognitively challenging tasks in a noisy environment.

8. When needing to speak in public, say what you want to say “in your head” first, as a practice before saying it out-loud.

9. Learn relaxation skills. Biofeedback may be helpful. Use relaxation skills when feeling overwhelmed.

10. Take a short “nap” in the early afternoon to help “charge up your battery.”

11. When feeling anger, do some exercises.

12. At night, take some quiet time to "process" the day, to settle things in your mind before trying to sleep. Try a little daydreaming to help calm your thoughts.

(Cl. Ex. 4, p. 5)

Dr. Bruggeman prepared an expert report dated November 16, 2020, assigning a 3 percent impairment rating for his right upper extremity as a result of the May 2016, work injury. (Cl. Ex. 5)

Mr. Workman also underwent an independent medical evaluation at the direction of his attorney on June 24, 2021. (Cl. Ex. 6) The evaluation was performed by David Segal, M.D., J.D., a board certified neurosurgeon. Dr. Segal reviewed and summarized relevant records, took a thorough patient history, and evaluated Mr. Workman. His report is 53 pages. Dr. Segal engaged in a detailed, almost tedious, assessment of permanent impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He assigned the following ratings:

Cognitive Impairment 18%

Emotional and behavioral 9%

Post-traumatic migrainous 10%

Visual dysfunction 5%

Vestibular dysfunction 13%

Arousal and Sleep dysfunction 5%

(Cl. Ex. 6, p. 47) Combining all of these impairments, he concluded that Mr. Workman had sustained a 48 percent whole body impairment resulting from the TBI and post-concussive symptoms. He also assigned ratings for Mr. Workman's cervical and right shoulder complaints. In total, he assigned a 52 percent whole body rating. (Cl. Ex. 6, p. 49) He assigned maximum medical improvement as of August 12, 2020, the date of his second neuropsychological evaluation. (Cl. Ex. 6, p. 42) For permanent restrictions, he suggested that Mr. Workman "does not have a realistic ability to participate in full-time employment in his occupation at the level prior to his work injury." (Cl. Ex. 6, p. 51) He did recommend lengthy, specific and detailed medical restrictions as well. (Cl. Ex. 6, p. 52)

Prior to hearing, the defendants obtained a medical report from Dr. LaHolt, who had examined Mr. Workman in February 2021. (Jt. Ex. 14; Def. Ex. J) At the February 2021, examination, Dr. LaHolt had concluded that Mr. Workman's headaches were under control. He did not recommend further medical intervention for this. (Jt. Ex. 14, p. 5) He opined that the "majority of his symptoms do appear to be related to his prior

neurological dysfunction." (Jt. Ex. 14, p. 5) He opined that his condition was stable but recommended a multidisciplinary examination at the TBI clinic. (Jt. Ex. 14, p. 5) In July 2021, Dr. LaHolt prepared an expert opinion report for defense counsel based upon his February 2021 examination. He opined claimant needed further treatment and was not at maximum medical improvement. (Def. Ex. D, p. 32) At the request of defense counsel, he prepared another report in September 2021, after the case completion deadline had passed. (Def. Ex. J) Claimant's counsel objected to the admission of this exhibit which was overruled. In this report, Dr. LaHolt assigned an 8 percent whole body rating based upon Mr. Workman's TBI and wrist fracture. (Def. Ex. J, pp. 64-66) He assigned the following permanent restrictions:

> I was also asked to provide opinion as to what, if any, permanent work restrictions that Mr. Workman may require as a result of his fall. Mr. Workman will not require any restrictions as it relates to his right wrist fracture. As it relates to his traumatic brain injury, I would recommend that he be precluded from working at unprotected height. Mr. Workman already has strategies in place to cope with his pre-morbid cognitive dysfunction which should remain in place, such as requesting clarification and/or repetition of longer verbal instructions and note taking during important conversations. Mr. Workman would otherwise not have any additional restrictions as it relates to his traumatic brain injury.

(Def. Ex. J, p. 66)

Having reviewed the record, I do not find any documentation that Mr. Workman was provided any strategies by medical providers to "cope with his pre-morbid cognitive dysfunction" as suggested by Dr. LaHolt. Rather, the only documented strategies were suggested by his neuropsychologist following the injury. Otherwise, I find Dr. LaHolt's report generally credible.

Mr. Workman testified at hearing that he continues to suffer from severe depression (including some suicidal ideation), blurred vision of the left eye, migraine headaches, bilateral loss of hearing, left side weakness and fatigue, drop foot, loss of memory and migraine headaches. He testified he gets lightheaded and dizzy. He sometimes has difficulty or feels overwhelmed in pressure or noisy situations. He testified he has memory difficulties. (Tr., pp. 39-57) He also obtained an expert vocational evaluation which suggests that he is unable to work in the competitive job market. (Cl. Ex. 7) Mrs. Workman testified that since his work injury, Mr. Workman is generally not as capable of managing his day-to-day life as he was before. (Tr., pp. 119-131) This testimony is believable.

In spite of all this, Mr. Workman has continued to work successfully for Menard's with minimal accommodations. Mr. Workman's direct supervisor at Menard's is Ryan Holford, who also served as the employer representative at hearing. Mr. Holford testified live and under oath at hearing and his testimony is found to be credible. Mr. Holford has known Mr. Workman for several years and worked with him both before and after the accident. (Tr., p. 153) Mr. Holford' sister also happens to be Mr. Workman's

fiancée. Mr. Holford testified that Menard's is a busy, retail environment. He testified that Mr. Workman is his best employee in the electrical department. (Tr., p. 155) "I mean, he stays busy. I don't have to baby-sit him. He knows what he is doing. When other team members have other questions, they'll go to him if I'm not around." (Tr., p. 154) He generally testified that he has not noticed much difference between Mr. Workman before or after the accident. He testified that he was unaware that Mr. Workman had any work restrictions. (Tr., p. 168) Since the claimant's direct supervisor is not even aware of his medical restrictions, I understand this to mean that he is not really provided with any type of work accommodations.

Prior to hearing, the defendants had paid no permanency benefits to Mr. Workman, other than the 3 percent rating for the right wrist fracture. (Def. Ex. E) The employer offered no explanation or evidence for its failure to assess claimant's permanent disability or pay any permanent disability benefits. In their brief, defendants argued that the issue of permanency did not become ripe until Dr. LaHolt assigned permanent impairment (and assigned MMI) just prior to hearing in September 2021.

Claimant submitted a medical expenses exhibit which included all of his medical bills, some alleged to be unpaid. At hearing, defendants submitted that all of these expenses were either paid or would be paid.

CONCLUSIONS OF LAW

The first question submitted is the extent of claimant's disability. The injury occurred in May 2016, prior to the 2017 legislative changes. Therefore, claimant's disability is evaluated with respect to his loss of earning capacity under Iowa Code Section 85.34(2)(u) (2015).

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

It is well-settled in Iowa that when physical trauma causes or aggravates a mental condition which increases or prolongs disability, all disability, including the effects of the nervous disorder, is compensable. Gosek v. Garmer & Stiles Co., 158 N.W. 2d 731,733 (Iowa 1968). No special legal causation test showing unusual stress is required in such cases. *See generally*, Lawyer and Higgs, Iowa Workers' Compensation Law and Practice (2nd (Ed.), sections 4-6, p. 31). Also, a psychological condition caused or aggravated by a scheduled injury is to be compensated as an unscheduled injury even if the mental condition does not result in permanent impairment or work restrictions. Mortimer v. Fruehauf Corp., 502 N.W. 2d 12 (Iowa 1993); Smith v. Aramark, File No. 1199677 (App. Dec. April 30, 2001).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "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." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

It has long been the law of Iowa that Iowa employers take an employee subject to any active or dormant health problems and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). A material aggravation, worsening, lighting up or acceleration of any prior condition has been viewed as a compensable event ever since initial enactment of our workers' compensation statutes. Ziegler v. United States Gypsum Co., 252 Iowa 613; 106 N.W.2d 591 (1960). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established in Iowa that a cause is "proximate" when it is a substantial factor in bringing about that condition. It need not be the only causative factor, or even the primary or the most substantial cause to be compensable under the Iowa workers' compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

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 Ry. Co. of Iowa, 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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the “odd-lot doctrine.” Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are “so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.” Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker’s reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker’s physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker’s burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

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 Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935).

Industrial disability is evaluated without respect to accommodations which are (or are not) made by an employer. The Iowa Supreme Court views "loss of earning capacity in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer." Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

The claimant argues that he is permanently and totally disabled and has asserted "odd-lot." Under "odd-lot" once the claimant produces prima facia evidence of total disability, the burden shifts to the defendants to prove that there is work in the competitive job market he could perform.

In this case, there is a disconnect between the claimant's expert opinions and the underlying facts of the case. Claimant's expert, Dr. Segal, opined that he is essentially unemployable in his condition. This is verified by claimant's vocational expert. The facts, however, suggest that Mr. Workman has continued to work since 2018, with, in reality, minimal accommodations in his job at Menard's. Mr. Workman has proven to be a valuable, reliable employee in a busy, retail environment without any real accommodations. In fact, the employer has failed to even recognize or enforce his work restrictions. On the one hand, this looks bad for the employer because it has poorly managed the situation. On the other hand, it is fairly convincing evidence that Mr. Workman is not totally disabled.

It is noted that this is a great credit to Mr. Workman himself, who has used the strategies recommended by his neuropsychologist to remain employed, rather than opting for unemployment and disability. He has done this with little actual help from his employer who failed to even acknowledge the limited permanent medical restrictions he has been assigned by his physician. It is a testament to his strong motivation, work skills and work ethic. Nevertheless, this is, in fact, strong evidence that, as of the time of hearing, Mr. Workman is not permanently and totally disabled.

I have found Mr. Workman to be a credible witness. He has testified that he is able to work, even sometimes ignoring his clear medical restriction from his treating physician that he should not use ladders or work at heights. At the time of hearing, Mr. Workman is appropriately employed and appears to even have the possibility of advancement. He is a valued and valuable employee who brings substantial skills and benefits to his employer.

In reaching these findings, I am not at all finding that Mr. Workman has not sustained a significant industrial disability. On the contrary, he has sustained a severe permanent disability as a result of his work injury, essentially aggravating his childhood condition of AVM to the point that it is significantly disabling as of the time of hearing. Other individuals, who are less skilled and motivated, likely would have become

permanently and totally disabled. Mr. Workman himself would be substantially impaired from obtaining employment in the competitive job market in light of the evidence presented at hearing. He has substantial, ongoing symptoms related to his work injury which make him a less attractive candidate in the competitive labor market. Starting with a new employer in the competitive job market would likely create substantial barriers for him. While he has managed to overcome these limitations and remained highly productive, his functional disability is real and substantial. He is required to remain disciplined with his strategies for managing his disability on a daily basis or he runs the risk of being unable to function effectively. Having reviewed all of the relevant evidence of industrial disability, I find that Mr. Workman has sustained a 60 percent loss of earning capacity in the competitive job market as a result of his work injury. This finding is an objective finding based upon Mr. Workman's ability to find work in the competitive job market. I conclude this entitles him to 300 weeks of compensation at his stipulated weekly rate of compensation.

The parties dispute the appropriate commencement date for permanency benefits.

Permanent partial disability (PPD) benefits commence upon the termination of the healing period. Iowa Code section 85.34(1). As the Iowa Supreme Court explained, the healing period terminates and permanent partial disability benefits commence at the earliest of claimant's return to work, medical ability to return to substantially similar employment, or the point at which the claimant achieves maximum medical improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 374 (Iowa 2016).

Both parties focused almost exclusively upon the date Mr. Workman achieved MMI. Under Evenson, this is not the standard. The issue is when he returned to work. By a preponderance of the evidence, I find that Mr. Workman returned to work on or about October 16, 2016. Therefore, permanent partial disability benefits shall commence on October 17, 2016.

The next issue is medical expenses.

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

Claimant 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. See, 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).

Defendants shall pay or reimburse the medical expenses as set forth in Claimant's Exhibit 2.

The final issue is penalty.

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) 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.

Claimant seeks a penalty for the employer's failure to pay PPD benefits prior to hearing. Mr. Workman returned to work in October 2016. At that time, Mr. Workman's physical symptoms were stable per Dr. Thorell. The symptoms from his traumatic brain injury did not really stabilize until he was released by his neuropsychologist in 2020. It is unclear why the defendants did not attempt to assess claimant's permanency at that time. The employer argues that the issue of permanency was not "ripe" until it received a permanent impairment rating from Dr. LaHolt just prior to hearing. The evidence, however, suggests that Dr. LaHolt could have issued this report any time after August 2020.

I find that defendants had a reasonable excuse for not paying permanency up through the date they received Dr. LaHolt's September 2021, report. Previously, in July 2021, Dr. LaHolt had opined that claimant was not at maximum medical improvement. On or about September 10, 2021, however, Dr. LaHolt assigned an impairment rating. At that point in time, no reasonable excuse exists for failing to pay weekly benefits after Mr. Workman's condition stabilized in August 2020. The benefits actually should have commenced back to the date he returned to work in October 2016. Since their own physician assigned an impairment rating of 8 percent, defendants were on notice at that time that claimant was owed at least 40 weeks of permanent partial disability benefits or $12,512.80. It is evident that the report in question was received just prior to hearing. Defendants had even attempted to obtain an MMI opinion and rating from Dr. LaHolt in July 2021, and he declined to perform such a rating. In any event, after receiving Dr. LaHolt's late report on September 10, 2021, defendants were required to pay benefits accordingly and undertook no effort to make such payment prior to hearing. In essence, defendants needed to take a position on payment of permanency benefits even though the hearing was upon them. Therefore a penalty is mandatory. Utilizing the appropriate factors, I find that a penalty of should be assessed in the amount of $3,000.00 in order to deter defendants from this type of claims handling practice in the future. I did not assess a full 50 percent penalty because of the foregoing extenuating circumstances.

ORDER

THEREFORE IT IS ORDERED

File No. 1616685.01:

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of three hundred twelve and 82/100 dollars ($312.82) per week commencing October 17, 2016, the date he returned to work.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due

which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall be given credit for the 7.5 weeks previously paid as stipulated.

Defendants shall pay or reimburse medical expenses as set forth in Claimant's Exhibit 2 consistent with this decision.

Defendants shall pay a penalty of three thousand and 00/100 dollars ($3,000.00).

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

Costs are taxed to defendants.

With regard to File No. 19006854.01, claimant shall take nothing further.

Signed and filed this __3rd___ day of May, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Rick Crowl (via WCES)

Paul Prentiss (via WCES)

Kathryn Hartnett (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.