

asserted that Ms. Haigh was identified as an expert before the hearing. The parties were given until January 31, 2020 to submit exhibits related to the interrogatory questions concerning the content of expert testimony and what information was disclosed concerning Ms. Haigh's testimony. (Transcript pages 151 -156, 181) Neither party submitted any information concerning the objection or any of the interrogatories or responses. Neither party discussed the objection in their briefs. As no additional information was submitted or briefed, the objection is overruled.

ISSUES

The extent of claimant's disability.

Commencement date for any permanent partial disability benefits.

The credit the defendants are entitled to for payment of permanent partial disability benefits.

Assessment of costs and payment for an independent medical examination (IME).

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

This case illustrates the devastating effects that workplace injuries have on employees, family members and employers. The claimant and his family lives changed forever when he suffered traumatic brain injury (TBI) as a result of a work accident. The employer lost a valuable employee.

Michael Shutters, claimant, was 41 years old at the time of the arbitration hearing. Claimant graduated from high school and has one year of college in general studies. Claimant has no college degree or college certificate.

Claimant worked for about 16 years for a lumber yard. His work was in the yard and in the office. Claimant would use a forklift, load and unload trucks and was generally very physical.

In June 2015 claimant started working for Oakland Foods as a maintenance mechanic. Oakland Foods produces hot dogs, sausage and bacon at the plant where claimant was working. Claimant testified that he was in good health on January 14, 2015.

Claimant said the work he performed was physically demanding with lifting and overhead work. He was exposed to both heat and cold.

On January 14, 2015, claimant was at work performing maintenance duties. He was taking a scissor lift into another room when his head and face got pinched between the lift and a metal beam. Claimant was taken to the University of Nebraska Medical Center in Omaha, Nebraska. Claimant then remembers waking up in an MRI machine. Claimant lost several teeth and had significant facial reconstruction. Claimant was in the intensive care unit (ICU) for three days and in the hospital a total of ten days. Claimant was released to home care while still using a feeding tube.

Claimant testified that after his cervical collar was removed he returned to work in the same position he had before the accident. Claimant returned to work as a maintenance mechanic with a ten pound and forty-hour work restriction. Claimant returned to work at Oakland Foods on March 30, 2015. (Exhibit D, p. 18)

Claimant testified that he was able to fumble his way through his work and was helped by a coworker. When he returned to work claimant was transferred so that claimant's brother became his immediate supervisor. Claimant testified that he had significant headaches after he stopped wearing the cervical collar. Claimant testified that he wanted to sleep when he got off work and would come home after his shift and all he wanted to do is sleep, which he did.

In order to lessen some of his headaches claimant tried having an occipital stimulator implanted. The occipital stimulator was implanted at a hospital in Texas. According to claimant and his ex-wife, Katherine Shutter, the device worked for a short time. Claimant still had the occipital stimulator at the time of the hearing and has had it reprogrammed/adjusted four or five times. Claimant went to Texas twice to have the occipital stimulator implanted and adjusted.

Claimant testified that exposure to noise, such as the machinery at work, made his headaches explode. For a time in 2018, claimant was working with earplugs and ear muffs to minimize noise exposure. Claimant was informed by Oakland Foods in October 2018 to stay home and not return to work. Claimant has not worked for Oakland Foods since that time. Oakland Foods has not offered claimant any work since his termination.

At the time of the hearing, claimant was renting a home and lives on his own, but has a hard time paying his bills on time. Claimant has received help from his mother, brother, current girlfriend and his ex-wife with bill paying. Before his injury claimant handled the household bills. Claimant does have his children live with him 50 percent of the time and is able to get them to school and other activities

Claimant contacted the Iowa Department of Vocation Rehabilitation (IDVR) to obtain vocational counseling and assistance. Claimant worked with Alyson Peters (credentials unknown). The defendants also provided vocational assistance to the claimant and hired Renee Haigh M.S., C.R.C. Claimant met with Ms. Haigh at the IDVR office in Atlantic, Iowa a number of times. Claimant said that Ms. Haigh would bring a

list of jobs and he would contact the leads, generally via the internet. While looking for positions claimant said his restrictions were that he had to work in quiet settings, in a stress free/low anxiety environment and not be involved in extremely heavy lifting.

Of all the job contacts, claimant had only one convenience store express interest in claimant and decided not to hire claimant after learning about his restrictions.

Claimant did attend a community college to learn how to be a pharmacy assistant. Claimant said that he had difficulty with remembering medications and stopped going to classes. Claimant missed some classes due to medical issues and the college program suggested claimant leave the program.

Claimant did obtain part-time employment in the fall of 2019. Claimant is working for the Pottawattamie County Recycling Center. Claimant is an attendant and works in a booth weighing trucks and issuing tickets. He works 20 hours per week and is paid \$16.75 per hour, with no benefits.

Claimant testified that there is a possibility he could be hired full time in the summer of 2020, if another employee retires and the recycling center decides to hire him. Claimant testified that the job at the recycling center is low stress and he could do the full-time job, if he was trained to use the skid loader.

Claimant testified that he is no longer a good driver. Claimant testified that he can fall asleep driving and has a hard time following directions. He said that he gets lost going to doctor appointments and driving to his brother's house. He also said that he has depression, anxiety, major mood swings, headaches and his memory is foggy and confused.

Kathrine Shutters testified at the hearing. Ms. Shutters was married to claimant and they have three children. Ms. Shutters is a nurse. Ms. Shutters testified that claimant's personality changed after his work injury of January 14, 2015.

Ms. Shutters saw the claimant in the ICU unit several hours after surgery. Claimant had extensive facial reconstruction surgery. Ms. Shutters said claimant was in the hospital for ten days and was released to go home. Ms. Shutters said claimant returned to work light duty at Oakland Foods in March 2018. Ms. Shutters said that around this time her husband took off his cervical collar and that claimant would sleep constantly after he returned from work. When Mr. Shutters got off work at 2:30 in the afternoon he would come home and sleep in a recliner, may wake up for dinner, and went to bed early. He was tired all the time. She said Mr. Shutters was not able to tolerate the normal noise that his children would make. Ms. Shutters said that if Mr. Shutters had a good day and he was able to be involved in an activity, Mr. Shutters would pay for it the next day.

Ms. Shutters testified that Mr. Shutters does not think right. That he is not able at apprehend the consequence of his actions. Ms. Shutters testified that since the accident Mr. Shutters would take three times longer to complete anything. That he would have difficulty staying on task and finishing anything. Ms. Shutters testified that claimant falls asleep driving and that he gets lost going to places that he had been to before, like his brother's home and his dentist and neurologist.

Ms. Shutters drove her husband to Texas to receive an occipital stimulator for his headaches. Ms. Shutters said that the occipital stimulator worked for a month or two. Ms. Shutters disagreed that Mr. Shutters had good relief from his headaches for over a year and said that claimant's condition got worse when he returned to work.

Ms. Shutters testified that after the accident Mr. Shutters was a different person; not the person she married. Ms. Shutters testified that due to Mr. Shutters' behavior changes and lack of awareness of the consequences of his actions she filed for divorce in July 2018 and was granted a divorce in October 2018. Ms. Shutters no longer lives with Mr. Shutters, however she has tried to straighten out his bills and finances. Ms. Shutters testified that he is still not able to do his finances and pay bills without help. Ms. Shutters attended many doctor appointments with Mr. Shutters. Ms. Shutters agreed that no physician has opined claimant could not work full time.

Ms. Haig has been a vocational counselor for 20 years. Ms. Haig testified she was hired by defendants to help claimant help find work. Her first interview with claimant was March 27, 2019. Claimant was cooperative in the interview. (Ex. 2, p. 1) Ms. Haig said she met with claimant about a half-dozen times in Atlantic, Iowa. Ms. Haig said she was unaware of the difficulties claimant had with driving long distances. Ms. Haig said that she was working with neurologist Chad Whyte, M.D.'s restrictions in looking for work for claimant. (Tr. p. 114) Ms. Haig's understanding was that claimant needed to work in a quiet, low stress environment and that he would need to take frequent breaks.

Claimant and Ms. Haig explored a number of positions for potential employment for car sales, security and pharmacy tech. Ms. Haig testified that claimant was "invited" not to return to the pharmacy tech program after claimant missed a number of classes. Ms. Haig identified a number of potential employment situations that claimant was interested in considering. Ms. Haig was informed by claimant after he obtained his part-time job at the recycling center that he did not need her services anymore.

Ms. Haig was asked by defendants' counsel at the hearing her opinion as to whether she believed claimant could find work in the future. Ms. Haig testified that she believed claimant could be employed in the future. Ms. Haig said that claimant told her he was able to handle the job at the recycling center.

Aaron Gordon, plant engineer at Oakland Foods, testified. Mr. Gordon was in charge of the maintenance department and was the overall supervisor of claimant.

Mr. Gordon said that there were a “couple of layers” between the claimant and his supervision. Mr. Gordon testified claimant returned to work after his injury in March 2015 performing light duty. In May 2015 claimant returned to full duty without restrictions. Mr. Gordon testified that from May 2015 through 2018, claimant was able to do his work. A company nurse informed Mr. Gordon that claimant was having difficulties with noise. Mr. Gordon said that all of the maintenance positions were noisy and that there were no jobs available for the claimant.

On January 14, 2015, claimant was admitted to the University of Nebraska, Omaha due to substantial face and mandible fractures and complex lacerations. (JE 1, p. 1) On March 20, 2015, Daniel Surdell, M.D. of the University of Nebraska completed a check-box form which stated that the brain mass on the MRI of March 17, 2015 was not related to the injury of January 14, 2015. (JE 1, p. 9) On April 23, 2015, Dr. Surdell said claimant could return to work with restrictions and after that time he was released to return to work full duty. (JE 1, p. 11)

On December 18, 2015, Renee Hudson, Psy.D. completed a neuropsychology examination of claimant. Dr. Hudson wrote,

The level of his cognitive deficits is disproportionate to the size of the mass found in the frontal lobe and deficits are likely due to injury rather than the small mass noted on imaging. He reported no prior cognitive symptoms or headache, behavioral or emotional changes, and had no seizure activity prior to the injury. Fractures from the January 14, 2015 injury were noted on all walls of the maxillary sinus on both sides, right nasal bone, and bilateral orbital wall as well as a comminuted nasal septum fracture all of which increase the likelihood of injury to the frontal lobes of the brain. In summary, the patient’s current cognitive profile is consistent with bilateral frontal lobe injury and the severity of deficits are unlikely due to the small mass-lesion noted in the left frontal area of the brain. Pain was constant during the current assessment but his profile is not consistent with pain effects, medication effects, or effects of depression. The patient is moderately depressed due to constant pain and diminished ability to engage in tasks as before the injury.

Recommendations:

1) Treatment for depression is strongly recommended, including sessions with a psychologist specializing in those with chronic pain (such as the psychology service at Nebraska Medicine, Dr. R. LaGrone and colleagues). The patient reported some suicidal ideation when headaches are severe but stated he will not act on these thoughts and has no plan to harm himself. Medication for depression should be considered and may also provide some improvement in his headaches. This of course is at the physician’s discretion.

2) Please consider a few sessions with speech therapy to teach the patient compensatory strategies to accommodate for impaired organization, including strategies to address impaired memory due to poor organization.

3) Fine motor speed is diminished in both hands although reaction time is within the average range. Small or delicate work (e.g. wiring) may be difficult for the patient.

4) The patient is somewhat concrete in his thinking and may have trouble with abstract concepts or conversations. Asking for information to be put in more concrete terms will help with this. He also tends to get stuck in one way of thinking about things. Brainstorming ideas with others on ways to approach a situation can be useful. At work, he may need to consult with a colleague when a new situation arises.

5) Follow up with neuropsychology is at the physician's discretion.

(JE 2, p. 16) Dr. Hudson recorded that claimant said he had difficulty staying focused at work and was very fatigued by the end of the day. (JE 2, p. 17)

On April 14, 2017, Dr. Hudson performed another neuropsychological evaluation. Her recommendations were,

- 1) As recommended previously, treatment for depression is strongly recommended, including sessions with a psychologist specializing in those with health related changes in functioning (such as the psychology service at Nebraska Medicine, Dr. R. LaGrone and colleagues).
- 2) Fine motor speed is diminished in both hands although reaction time is within the average range. Small or delicate work (e.g. wiring) may be difficult for the patient.
- 3) The patient is somewhat concrete in his thinking and may have trouble with abstract concepts or conversations. Asking for information to be put in more concrete terms will help with this. He also tends to get stuck in one way of thinking about things. Brainstorming ideas with others on ways to approach a situation can be useful. At work, he may need to consult with a colleague when a new situation arises.
- 4) The episode of getting lost driving to his brother's house as he was unable to recognize the house or the car is concerning for possible partial seizure activity or sub-clinical seizure activity. Monitoring of episodes like this is recommended as evaluation for seizure activity may be needed if this occurs again.

5) Follow up with neuropsychology is at the physician's discretion.

(JE 2, p. 20) In response to written questions from claimant's counsel, Dr. Hudson wrote that due to the work injury of January 14, 2015, her final diagnosis was frontal/executive dysfunction and that claimant was at maximum medical improvement (MMI) as of April 14, 2017. (JE 2, p. 25)

Dr. Whyte began treating claimant on January 25, 2016 for his headaches. His assessment was,

1. Chronic post-traumatic headache
2. Chronic migraine
3. Migraine without aura
4. Unspecified musculoskeletal disorders and symptoms referable to neck
5. Post-concussive syndrome

(JE 3, p. 29) On November 27, 2016, Dr. Whyte recommended a trial of an occipital nerve stimulator (ONS) for claimant's chronic intractable migraine headaches. (JE 3, p. 31)

On December 7, 2017, the trial ONS was implanted. (Ex. 7, p. 75) On May 25, 2017, claimant reported 75 – 80 percent relief. (JE 6, p. 66) On August 8, 2017, claimant's symptoms continued to increase despite undergoing the ONS. (JE 6, p. 96)

On January 5, 2017, Dr. Whyte reported that claimant had 80 percent relief after the trial of the ONS, although he still had daily headaches. (JE 3, pp. 32, 33) On October 4, 2017, Dr. Whyte noted claimant's headaches were not improving and that claimant was depressed. (JE 3, p. 35) On February 7, 2018, Dr. Whyte noted claimant was doing better after the ONS procedure, but had more headaches at work. (JE 3, p. 36) Dr. Whyte wrote on March 6, 2018,

I am in agreement with Dr. Will in that Michael is cleared to return to full duty work with the exception that he may need to take breaks from time to time due to an exacerbation of headache as they can be severe. It would be impractical for him to work during this time. The attack is unpredictable as well. If there are any questions, please feel free to contact me.

(JE 3, p. 39) Dr. Whyte found that claimant was at MMI for his headache and neck conditions on January 2, 2018 and had a moderate pain impairment under Chapter 18 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 3, p.

40) On August 8, 2018, Dr. Whyte recommended claimant be placed in a quiet area to work. (JE 3, p. 41) On December 5, 2018, Dr. Whyte responded to a letter from claimant's counsel. Dr. Whyte wrote,

My diagnoses remain Chronic Post-traumatic headache (AKA Persistent headache due to severe head trauma), intractable chronic migraine related to the head trauma, post-concussive syndrome, and musculoskeletal symptoms referable to the neck, all of which are due to the injuries sustained at work on January 14, 2015.

. . . .

I recommend that Michael can probably work in a quiet setting with an extremely low amount of stress. It was found recently that he is unable to tolerate an office setting with noise that resembles a vacuum cleaner. Migraine patients (whether or not due to head trauma) are very sensitive to normal sounds and light and therefore typical stimuli that would not cause a headache in those that have migraine, will trigger migraine to sensitive patients, of which Michael seems to be. He would more than likely need to take multiple breaks throughout the day even if the above restrictions were implicated (low stress and quiet). There is no feasible way to test his capabilities until he has been in this type of work setting.

He is having difficulty improving so ongoing medical care would mean an evaluation with the chronic pain program which he will be doing soon in Omaha (and if not effective, possibly Cleveland Clinic), and treatment for depression and possibly pain with serial ketamine infusions with an anesthesiologist. If the latter works, then he would need occasional subsequent infusions. He may need an evaluation with a psychiatrist as well.

(JE 3, p. 49)

I find, based upon Dr. Whyte's restrictions, claimant must work in a quiet setting, with an extremely low amount of stress and that he be in a setting where he can take multiple breaks throughout the day.

On June 26, 2017, Rosanna Jones-Thurman, Ph.D., evaluated claimant. Dr. Jones-Thurman's diagnostic impression was,

Major Depressive Disorder, Recurrent, Moderate

Generalized Anxiety Disorder

Panic Disorder

Rule Out Posttraumatic Stress Disorder

Mild Neurocognitive Disorder Due to Traumatic Brain Injury

Health, Family and Employment Issues

(JE 9, p. 87; DSM-5 Codes omitted)

On December 27, 2017, Terry Davis, M.D. performed a psychiatric evaluation of the claimant. Dr. Davis' diagnosis was, "1. Neurocognitive Disorder Due to Traumatic Brain Injury 2. Adjustment Disorder with mixed anxiety and depressed mood." (JE 11, p. 107) Concerning claimant's ability to work, Dr. Davis wrote,

It is my opinion that Mr. Shutters' current problems with sedation are severe enough that he should not be working in any position that involves operating or working with potentially dangerous machinery or a potential for significant risk of harm to himself or coworkers until his sedation improves. Likewise, it is my opinion that he should not be driving until his sedation improves.

(JE 11, p. 108)

On November 26, 2018, Dr. Jones-Thurman wrote to defendants that claimant was at MMI for his psychological issues. Dr. Jones-Thurman wrote,

However, he is still struggling with most of the issues that he initially complained of including physical pain, fatigue and loss of attention, concentration and memory. This has resulted in depression and anxiety as well as frustration and concerns about his daily life and future. He is currently diagnosed with: 296.32 (F33.1) Major Depressive Disorder, Recurrent, Moderate; 300.02 (F41.1) Generalized Anxiety Disorder; 300.01 (F41.0) Panic Disorder and 331.83 (G31.84) Mild Neurocognitive Disorder Due to Traumatic Brain Injury. I would recommend that he continue with utilizing the skills we have discussed and to follow-up with his treating physicians.

It is my opinion that he will not be able to return to work at his job at OSI as a mechanic due to the physical demands and the environment. As a result of his neurocognitive status it is not clear that he could be re-trained to develop another job position or skill. His environment will need to be monitored carefully due to his physical issues and resulting mental health difficulties and ongoing memory and cognitive issues.

(JE 9, pp. 100, 101)

On February 7, 2019, Jeremy Gallant, M.D. evaluated the claimant. Dr. Gallant provided a whole person impairment rating of 19 percent. (Ex. B, p. 11)

On September 20, 2019, claimant had a neuropsychological assessment conducted at the University of Iowa by Daniel Tranel, Ph.D. Dr. Tranel reviewed medical records, examined claimant and performed a large number of tests on the claimant. (Ex. 1, p. 8) Dr. Tranel issued a report on September 28, 2019. Dr. Tranel found,

Our evaluation indicates that Mr. Shutters has a mild neurocognitive disorder due to traumatic brain injury (DSM-5 331.83). Our findings indicate that he has permanent, mild deficits in several aspects of cognitive functioning, including sustained attention and concentration, working memory, visuoconstruction, learning and memory, and executive functioning. The findings are consistent with results from prior neuropsychological evaluations by Dr. Hudson (12/18/15, 4/14/17), and Mr. Shutters has shown some improvement over time (as would be expected for the normal trajectory of recovery from TBI). Our diagnosis is consistent with Dr. Hudson's conclusion that Mr. Shutters has frontal/executive dysfunction related to a bilateral frontal lobe injury. We also found that Mr. Shutters has ongoing psychological turmoil related to his ongoing problems with adjustment and coping, related to the January 2015 work accident. Previous providers have diagnosed him with an adjustment disorder, and our findings are consistent with this – however, as Mr. Shutters is now well into the chronic epoch of recovery (years post onset), depressive disorder, recurrent; generalized anxiety disorder; and panic disorder. Finally, we note that our conclusion that Mr. Shutters has a neurocognitive disorder due to TBI is consistent with several previous mental health providers, who have all reached the same conclusion (Dr. Hudson, Dr. Jones-Thurman, Dr. Davis, Dr. Gallant).

It is our conclusion that Mr. Shutters' conditions of neurocognitive disorder due to TBI, as well as MDD, GAD, and panic disorder, were caused by the January 2015 work related accident. At this point, he is at MMI, and we would agree with Dr. Whyte and Dr. Gallant that an appropriate MMI date is 1/2/18. We also agree with Dr. Whyte's work recommendations and restrictions – viz., that Mr. Shutters requires a quiet work area and frequent breaks to accommodate his headaches and other problems. Finally, we agree with all providers that the incidental mass lesion noted on Mr. Shutters' brain imaging is not the cause of his post-accident cognitive and psychological impairments.

(Ex. 1, p. 11)

Claimant has a high school diploma and no other formal degrees or certification. Claimant has restrictions that make it unlikely that he can work in most of his relevant labor market. His cognitive abilities were diminished as a result of his TBI. Claimant has anxiety and depression caused by his work injury. He must work in extremely low stress and a quiet environment where he can take breaks as needed. Driving long distances is not safe. He cannot perform any of his past vocationally-relevant work. Claimant was working part-time at the time of the hearing. I find claimant has an 85 percent loss of earning capacity.

Claimant has requested costs of the \$100.00 filing fee, \$8,240.00 for the IME report of Dr. Tranel and \$250.00 for a report by Neurology Consults of Nebraska. Claimant's total request for costs is \$8,590.00. (Ex. 4, p. 1)

Defendants submitted a statement of costs that included the report of Dr. Dobie for \$1,375.00, the report of Dr. Gallant for \$2,240.00 as well as the cost for the court reporter for the hearing on January 14, 2020. (Ex. G, p. 31)

I find that at the time of his injury claimant's weekly earnings were \$795.00 per week. Claimant was married and entitled to 5 exemptions. Claimant's weekly workers' compensation rate is \$540.32.

CONCLUSIONS OF LAW

This is a stipulated work injury. The claimant has an industrial disability. The primary issue in this case is the extent of claimant's disability.

Odd-Lot

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.

Claimant asserts he is odd-lot employee. The question is whether the remaining employment opportunities for claimant are so limited in quality, dependability, or quantity that a reasonably stable market for the claimant's services does not exist.

The initial burden of production under the odd-lot doctrine is upon the claimant. He must establish a prima facie case that he is not employable in the competitive labor market. Claimant was not able to find employment, other than part-time employment working at the recycling center.

Claimant testified that he expected to be hired full time in the summer of 2020 at the recycling center. Claimant testified that there was other work he thought he could perform. Additionally, Ms. Haigh testified that there was work that claimant should be able to perform. I find claimant is not an odd-lot employee.

Extent of disability

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).

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

Claimant's restrictions due to his work injury have severely limited his labor market. Claimant has shown a great deal of courage and fortitude in his efforts to recover from his injuries. Claimant still has daily headache and has migraines with the ONS implanted and medications. Claimant has worked despite depression and anxiety. Claimant worked at Oakland Foods as long as he could until the noise at work was such that claimant could no longer work there and was terminated. Claimant worked with the IDVR and Ms. Haigh to explore employment possibilities. Claimant has been determined to find work. He currently has a part-time position that he can perform.

Claimant was able to return to work at Oakland Foods and was able to work in a different department with his brother as a supervisor for an extended time period. However, his work-related symptoms increased so that Oakland Foods could no longer accommodate his restrictions.

To his credit, claimant was willing to explore many potential jobs and did not foreclose attempting to try them out. However, claimant's willingness to explore different job possibilities is not the same as his ability to perform such work. Claimant has very significant restrictions that limit the types of work he could realistically perform. Claimant attempted to attend a community college but was unable to continue due to missing classes as a result of his symptoms from his work injury. Claimant has cognitive limitations that he appears to minimize.

Claimant works in a booth at a recycling center part-time. It is low stress and he is able to manage his migraines in his current employment. Claimant testified that he believes he could work full time in his current job. Claimant's industrial base has been severely eroded. Based upon claimant's testimony about his belief that he can handle full time work at the recycling center that will become available this summer and his current part-time employment, I find that that claimant has an 85 percent industrial disability.

Commencement date

The next issue to determine is the commencement date for permanent partial disability.

Permanent partial disability benefits commence upon the earliest of the three factors outlined in Iowa Code section 85.34(1). Specifically, permanent disability benefits commence upon the earliest of the claimant's return to work, medical ability to return to substantially similar employment, or achieving maximum medical

improvement. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372-374 (Iowa 2016). In this case, claimant returned to work in some capacity on March 30, 2015 and this represents the first of the factors outlined in Iowa Code section 85.34(1). Therefore, I conclude that permanent disability benefits commenced when claimant returned to work on March 30, 2015. I find this is the date for commencement of permanent benefits.

Healing period benefits

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, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant is entitled to healing period benefits from January 14, 2015 through March 29, 2015. Claimant is entitled to intermittent healing period benefits during the time claimant was undergoing medical procedures in Texas. The parties did not present specific evidence on these dates and I can make no specific finding as to the dates claimant was entitled to intermittent healing period benefits.

The parties have stipulated that claimant was paid temporary partial disability for the time claimant was only working part-time or light duty.

Costs

Iowa Code section 86.40 states:

Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be . . . (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, . . . Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.

This rule is intended to implement Iowa Code section 86.40.

As claimant generally prevailed in this case, I award claimant costs of the \$100.00 filing fee and the \$250.00 medical report. Claimant is awarded \$350.00 in costs.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

Claimant has requested the costs of Dr. Tranel's evaluation. Defendants retained and obtained opinions as to claimant's impairment before Dr. Tranel issued his opinion. Claimant is entitled to the reasonable costs of this IME.

The cost of the IME was \$8,240.00. This is on the high end of IME costs that this agency sees. The IME consisted of a battery of testing performed at the University of Iowa Hospital. Dr. Tranel's list of neuropsychological tests he performed almost fill a complete page. (Ex. 1, p. 8) Given the extensive testing to determine claimant's cognitive abilities and effect of TBI, I find the costs to be reasonable. Defendants shall pay the \$8,240.00 costs of Dr. Tranel's IME.

Claimant is awarded total costs and IME expenses of \$8,590.00. Defendants are not awarded any costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant four hundred twenty-five (425) weeks of permanent partial disability benefits commencing on March 30, 2015 at the weekly rate of five hundred forty and 32/100 dollars (\$540.32).

Claimant is entitled to healing period benefits from January 15, 2015 through March 29, 2015 at the weekly rate of five hundred forty and 32/100 dollars (\$540.32).

Defendants shall have credit for benefits previously paid.


Defendants shall pay claimant's IME expenses in the amount of eight thousand two hundred forty and 00/100 dollars (\$8,240.00).

Defendants shall pay claimant three hundred fifty dollars (\$350.00) in costs.

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

Signed and filed this 4th day of March, 2020.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Charles Cutler (via WCES)

Jacob Peters (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.