ELECTRONICALLY FILED 2020-May-13 09:54:59 DIVISION OF WORKERS' COMPENSATION

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KYLE GELDER, Claimant, vs. YOUNG GUNS CONSTRUCTION, INC., Employer, and GRINNELL MUTUAL REINSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5066923 A R B I T R A T I O N D E C I S I O N Head Notes: 1803, 2700

STATEMENT OF THE CASE

Kyle Gelder, claimant, filed a petition in arbitration seeking workers' compensation benefits from Young Guns Construction, Inc. (Young Guns) and its insurance carrier Grinnell Mutual Reinsurance Company as a result of an injury he sustained on March 7, 2017 that arose out of and in the course of his employment. This case was heard in Waterloo, Iowa and fully submitted on April 30, 2020. The evidence in this case consists of the testimony of claimant, William Schwartz, Joint Exhibits 1 - 13, Defendants' Exhibits A - J and Claimant's Exhibits 1 - 3. Defendants objected to pages 14 – 16 of Claimant's Exhibit 1 as not being timely disclosed. Defendants' objection was sustained. Both parties submitted briefs.

The parties informed the undersigned that they had resolved the issue of payment for the independent medical examination (IME) by Sunil Bansal, M.D. and the defendants have paid this expense.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

1. The extent of claimant's industrial disability.

2. Whether claimant is entitled to alternate medical care.

3. Payment of certain medical expenses.

4. Assessment of costs.

FINDINGS OF FACT

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

Kyle Gelder, claimant, was thirty-seven years old at the time of hearing. Claimant did not complete high school and does not have a GED. (Transcript page 14) Claimant attended community college for two semesters and did not graduate or receive any certifications. (Tr. p. 15)

Claimant's significant work history has been in door-to-door sales, meat packing, car wash assistant manager, cook, laborer and construction laborer. Claimant worked with his father and for himself at Gelder Construction. (Exhibit G, p. 11) Claimant testified that Gelder Construction had not been active for the last year and one half. (Tr. p. 18) Claimant said he has performed a couple of short construction jobs after his work injury. (Tr. p. 18)

On March 7, 2017 claimant was working for Young Guns working on building a pole barn in western Iowa. (Tr. p. 27) A 20-foot pole, that weighed approximately 200 pounds, fell and hit claimant on the left side of his head. Claimant lost consciousness and was taken by ambulance to the hospital. (Tr. pp. 26 – 27, 79)

Claimant testified that he currently has dizziness, headaches, tinnitus, vertigo and increased anxiety as a result of his work injury. (Tr. pp. 28, 33) Claimant's memory of the accident was foggy and he was found to have a fractured rib and fractured temporal bone. (Tr. p. 29)

Claimant said he was referred to Timothy Doyle, ARNP and saw him on March 17, 2017. (Joint Exhibit 12, p. 118) ARNP Doyle on March 29, 2017 recommended claimant should avoid heights. (JE 12, p. 119) Claimant had five vestibular therapy treatments. (Tr. pp. 31, 61; JE 13, pp. 125 – 131) Claimant's last vestibular therapy treatment was on April 26, 2017. (Tr. p. 61; JE 13, p. 131)

Claimant testified that he has dizzy spells and vertigo that make him feel like he is going to pass out. (Tr. p. 33) Claimant said he is getting headaches three or four times a week that brings on extreme pain. Claimant said the headaches last about half an hour. (Tr. pp. 34, 35)

Claimant said that before his accident he had been diagnosed with attention deficit hyperactivity disorder (ADHD). Claimant testified that his ADHD has gotten worse since the accident making his focus harder. Claimant said he has increased his ADHD medication since the accident. (Tr. pp. 36, 37) Claimant said his anxiety has increased since his accident and he has taken different medications for anxiety after the accident. (Tr. p. 39)

Claimant testified that he hears ringing/buzzing in his ear. Claimant said the ringing is higher pitched than he previously experienced. Claimant puts cotton in his ear to dampen the sound. (Tr. p. 37)

Claimant testified that he wanted the additional vestibule therapy recommended by Sunil Bansal, M.D. (Tr. pp. 40, 41)

Claimant was released to return to work light duty March 28, 2017 and full duty on May 5, 2017. (Tr. p. 63; Ex. H, p. 17) Claimant worked for Young Guns until he was terminated in September 2018. Claimant said that when he returned to work he did more work on sales and work for the roofing portion of Young Guns and did much less work on erecting pole barns. Claimant said he did less physical work. (Tr. pp. 42, 43) Claimant testified that he self-restricted his work to avoid lifting above his head and to avoid heights. (Tr. p. 43)

Claimant was not working at the time of the hearing. Claimant has submitted applications to Tyson, a car wash, fast food restaurants and has talked to the Iowa Department of Vocational Rehabilitation. (Tr. p. 48) Claimant said that he worked one day at a car wash and became very dizzy due to the bending. (Tr. p. 49)

Claimant was assaulted in 2007 and had vestibular therapy. (Tr. p. 50: JE 5, p. 26)

Claimant testified that prior to his work accident he had no problems with headaches. Then claimant testified he was confused and did not remember receiving treatment in 2010, 2011 and 2012. (Tr. p. 50)

Claimant testified that prior to his work accident he did not have hearing problems. Claimant said he did not recall seeing a doctor for hearing problems in 2012. (Tr. p. 51) Claimant testified that other than his injury in 2007 he did not have difficulty with dizziness. (Tr. p. 51)

Claimant admitted that he had a history of addiction to narcotics and use of street drugs. He denied that he ever made up accidents to get narcotics from medical providers. (Tr. pp. 52 - 54)

William Schwartz, the owner of Young Guns, testified at the hearing. Mr. Schwartz was present at the work site on March 7, 2017 when claimant was struck by a pole and rendered unconscious. Mr. Schwartz called the ambulance after the claimant's injury. (Tr. pp. 79, 80) Mr. Schwartz testified that he fired claimant because

he was undependable, that claimant was not showing up for work. (Tr. p. 76) Mr. Schwartz did not inform claimant of the reason for his discharge. (Tr. p. 79)

Claimant's past medical history is relevant to his claim for workers' compensation benefits. On April 23, 2009 claimant was admitted to the hospital due to acute respiratory failure due to drug overdose. The discharge diagnoses were:

Acute respiratory failure secondary to drug overdose.

Tachycardia.

Aspiration.

Depressive disorder.

Panic disorder with agoraphobia.

Pneumomediastinum.

Hypoxia.

Positive blood cultures.

(JE 1, p. 1)

Claimant was seen at the University of Iowa Hospitals and Clinics (UIHC) on August 5, 2010. Claimant reported that a week ago he was drunk and slid down a pole upside down and dropped 4 – 5 feet and hit his head. (JE 3, p. 13) On February 25, 2011 claimant reported to Peoples Community Health Clinic (Peoples) that he need to reduce the medication he was using for his neck pain. Claimant reported he fell in August 2010 and fractured the C-7 spine. Claimant reported to Peoples he was drinking but not drunk. (JE. 2. p. 7)

On June 6, 2011 claimant reported to the emergency department at Sartori Hospital for neck pain. Claimant reported he was in a motor vehicle accident 24 hours ago. (JE 4, p. 21) On April 25, 2012 claimant was court committed for substance abuse treatment. (JE 5, p. 38) On June 21, 2012 claimant was admitted to Sartori Hospital for a drug overdose. (JE 4, p. 23) Claimant had additional court ordered substance treatment on April 21, 2013. (JE 5, p. 44) Claimant voluntarily sought drug abuse treatment in September 2014, January 2015 and May 2015. (JE 5, pp. 47, 52, 53)

On February 25, 2012 claimant was seen at UIHC for headaches for a motor vehicle accident in January. Claimant was assessed with post-concussive syndrome. (JE 3, pp. 16, 18) On March 27, 2012 claimant went to UIHC for neck pain and reported a motor vehicle collision a week ago. (JE 3, p. 18) On April 24, 2012 claimant went to the Covenant Medical Center Emergency Department. Claimant said he was in a motor vehicle accident yesterday and struck his head. (JE 5, p. 36)

On May 6, 2012 claimant was seen in the emergency department complaining of "Temporal headache every morning past 2 weeks that is usually resolved by ibuprofen. Today has headache and generalized weakness and reports has "blacked out" several times this morning while walking. Diarrhea past 2 days." (JE 1, p. 3) On May 8, 2012 claimant was seen at Peoples for headache and that he had been blacking out. (JE 2, p. 9)

On December 31, 2018 claimant reported to Peoples that he was in a motor vehicle accident in Colorado in January and that when he turns his head things go black and he falls. Claimant was assessed with migraine. (JE 2, pp. 10, 11)

On March 7, 2017 Myles Tieszen, M.D. examined claimant after his work injury. Chest CT showed a, "Mildly displaced right posterior medial ninth rib fracture with underlying pulmonary contusion." (JE 7, p. 90) The head CT showed,

> 1. Fracture involving the left temporal bone. There is a small amount of intracranial air and a small hemorrhagic contusion within the adjacent left temporal lobe. There is fluid within the left mastoid air cells and middle ear cavity.
> 2. 6 mm hyperdensity within the right temporal lobe. In the setting of trauma, this likely represents a hemorrhagic contusion. A cavernous angioma is a consideration although the lesion is more hyperdense than is typical. An aneurysm is also a consideration although is felt to be less likely. Recommend attention on follow-up.

(JE 7, p. 90) Dr. Tieszen assessment was:

> #1 closed head injury secondary to blunt trauma (wooden pole falling and striking left occipital region of head). #2. Left temporal bone fracture secondary to #1. #3 hemotympanum secondary to #1. #4 left ninth posterior aspect rib fracture with localized pulmonary contusion. #5. Adult attention deficit disorder

(JE 7, p. 91)

Andrew Gaul, M.D. also examined claimant on March 7, 2017. Dr. Gaul prescribed antibiotic ear drops and said no additional treatment is needed for the temporal bone fracture. He recommended an outpatient workup and audiologic examination. (JE 7, p. 96) Claimant had a neurosurgical consultation by Keith Lodhia, M.D. Dr. Lodhia assessed claimant with "Left temporal fracture with mastoid fluid and hemotympanum." (JE 7, p. 98) Claimant was discharged on March 8, 2017 and told to see an ENT doctor in his home town. (JE 7, p. 101)

Brian O'Shaughnessy, M.D. examined claimant on March 27, 2017 for post-concussion syndrome, chronic post-traumatic headaches-not intractable and vertigo.

Claimant reported his major complaint is dizziness. (JE 11, p. 109) Dr. O'Shaughnessy's impression/plan was,

> Kyle was seen for residual from head injury. He complains of positional vertigo. I suspect he may have a vestibular injury on the left side from his head injury. I will have a CT of the temporal bones done. I will start him on vestibular rehabilitation 3 times a week for 2-3 weeks. As the neurologist who saw him when he was in the hospital had some concerns about the CT findings, I will also have an MRI of the brain done with and without gadolinium. Currently he is unable to work because of the dizziness. He will have an appointment to see ear nose and throat is [sic] he is a perforated TM on the left and has hearing changes on the left. I will see him when he has finished his physical therapy.

(JE 11, p. 112) On March 31, 2017 ARNP Doyle's plan for claimant was,

> 1. Chronic posttraumatic headache, non-intractable: Patient notes that his headache seems to be getting better, we'll go ahead and have him utilize the tramadol for both the headache as well as the close fracture of the rib.
> 2. Tympanic membrane perforation, left colon does appear to be continued blood draining from his ear. We will go ahead and refer him to ENT as he is continuing to have pain for further evaluation and management.
> 3. Closed fracture of one rib: Patient will be weaned off his Norco and have him utilize tramadol for pain management.

(JE 12, p. 122) On May 3, 2018 ARNP Doyle saw claimant for an ear infection. (Ex. 12, p. 123) Claimant has requested payment for this visit. (Ex. 3, p. 1)

On April 13, 2017 Dr. O'Shaughnessy, reviewed am MRI of claimant's brain. No significant abnormalities were seen. (JE 8, p. 103) On May 4, 2017 Dr. O'Shaughnessy examined claimant and wrote,

> Kyle was seen for the follow-up of Seroquel life from a head injury. Since I've seen him last he's gone through vestibular rehabilitation and no longer has any dizziness. There are no new neurological symptoms. He is being evaluated by ear nose and throat for the decreased hearing in the left ear. He did have an MRI of the brain that showed only some nonsignificant white matter hyperintensities. I do not feel they're related to his condition. His examination today did not show any neurological focality, signs of dizziness, signs of ataxia. From my point of view he has improved and does not need further neurological follow-up. I feel he could return to work today without restrictions except any restrictions that he may have regarding the hearing issues in the left ear.

(JE 11, pp. 113, 114)

On May 4, 2017 Tanya Nielsen, M.S. CCC-A, a clinical audiologist examined claimant. Claimant reported unilateral tinnitus in the left ear. Ms. Nielsen found,

> Today's results are consistent with a mild high-frequency hearing loss, bilaterally. There is a slight (20dB) asymmetry in hearing loss, at 4000 Hz only, with right ear improved compared to the left ear. Tympanometry results are within normal limits and suggest no middle ear pathology.

(JE 9, p. 104)

On May 24, 2017 Michael Telisak, M.D. examined claimant. Dr. Telisak is an ENT physician. Dr. Telisak noted claimant's dizziness had resolved. Dr. Telisak wrote, "The patient presents with a history of bilateral constant tinnitus. This is occurring in the left ear only. This occurred in March early March 2017 immediately after head trauma." (JE 10, p. 105) Dr. Telisak wrote that the head trauma could have caused the tinnitus in his left ear. Dr. Telisak also noted that medication, TMJ, anxiety and caffeine can cause tinnitus. (JE 10, p. 108)

On August 4, 2017 Kenneth McMains, M.D. performed an independent medical examination (IME). (Ex. I, pp. 19 - 21) Dr. McMains found claimant was at maximum medical improvement (MMI) as of May 24, 2017. Dr. McMains wrote:

> In spite of the fact that there is no objective evidence of injury the worker has had a consistent story of these symptoms from day one, leading me to believe that there is evidence of an impairment rating based on the chronicity of his is [sic] complaints of hyperacusia and tinnitus of the left ear and dizziness on full extension of his head, also with turning his head to the left when he rolls over in bed at night to go to sleep For that reason, I would assign Mr. Gelder a 3% Whole Person Impairment. The worker does not have any problems with activities of day to day living and has returned to full employment, with no restrictions.

(Ex. I, p. 20) Regarding restrictions, Dr. McMains wrote,

> As noted above there is [sic] no restrictions for return to any and all activities and no expected further treatment based on the injuries that occurred on 03/07/2017. Likely the worker will continue to have hyperacusia of the left ear, and finds that by using the cotton in the ear it dampens the amount of sensitivity to high noises and also helps somewhat with the tinnitus. The worker also goes to bed at night with a TV going for background noise, that also helps block out the tinnitus. The worker is aware he needs to move from a bent forward to astanding [sic] position slowly to avoid light-headedness and has adjusted to that nicely; on a day to day basis. He [sic] rib fracture has healed, his temporal fracture has healed and there is no residual from his concussion.

(Ex. I, pp. 20, 21)

Claimant relapsed and was using methamphetamine in July 2018. (JE. 1, p. 4)

On June 19, 2019 Dr. Bansal performed an IME. (Ex. 1, pp. 1 – 12) Dr. Bansal found claimant developed traumatic brain injury from his head injury and developed dizziness, tinnitus and cognitive impairments. Dr. Bansal noted that claimant was not experiencing head or neurological pathology prior to his work injury. (Ex. 1, pp. 10, 12)

Dr. Bansal wrote that claimant suffers from a constellation of neurological impairment and provided a 5 percent whole body impairment. Dr. Bansal provided a 3 percent whole person rating for vertigo, 2 percent for the tinnitus and a 3 percent for the left temporal bone fracture. Dr. Bansal recommended claimant not climb ladders or operate machinery due to his symptoms and utilize hearing protection. He recommended ongoing vestibular therapy. (Ex. 1, pp. 11, 12) Dr. Bansal charged claimant $582.00 for the examination and $2,212.00 for the report, for a total of $2,794.00. (Ex. 1, p. 13)

On August 27, 2019 Dr. McMains provided an additional report after reviewing Dr. Bansal's IME. Dr. McMains disagreed with how Dr. Bansal utilizes the AMA Guides for most of his rating. The only item that Dr. McMains agreed with Dr. Bansal on was that claimant had a 2 percent whole body impairment due to the tinnitus. (Ex. I, p. 23) Dr. McMains did not agree that claimant should have restrictions of no ladder climbing or machine operating due to headaches, memory difficulties and dizziness. Dr. McMains noted that claimant returned to work and was on roofs and using a ladder at work and therefore did not need restrictions.

On February 3, 2020 Dr. Bansal responded to Dr. McMains' August 27, 2019 report. Dr. Bansal asserted he used the correct criteria in the AMA Guides. (Ex. 1, pp. 14, 15) Dr. Bansal disagreed with Dr. McMains' rationale that claimant did not need restrictions as he returned to his roofing job. (Ex. 1, p. 15)

Claimant was deposed on June 20, 2019. Claimant testified that he had not been in any motor vehicle accidents that required medical treatment since he was 14. (Ex. J; Deposition p. 13) Claimant testified that he has received medication for his anxiety and depression since 2005, and ADHD medication since 2012. (Ex J, Depo p. 17) Claimant testified that he was never hospitalized related to his drug usage. (Ex. J, Depo. p. 23) Claimant testified in his deposition that his current symptoms were,

> My anxiety and depression have increased two to three times what they were before. I have ringing in my ears. I think they said it's tinnitus or something. It's a constant ringing in my ear. I always have to wear a cotton ball or keep a cotton ball in my ear because the sounds – the higher-pitched frequencies or sounds are sharper in my ear.
>
> I also have headaches almost on a daily basis. Dizziness. When I stand up or bend over, anything like that, I get dizzy. I almost black out a little bit. Also – let's see. Dizziness. Headaches. Suicidal thoughts. I've never had

> those before. Not before the injury. That's close. I'm sure I'm missing one or two issues in there.

(Ex. J, Depo p. 24) Claimant testified that other than the assault in 2007 he did not have problems with headaches prior to his work injury. (Ex. J, Depo p. 25)

I find that at the time of his injury claimant's gross weekly wage was $499.85 per week, he was single and entitled to one exemption. Claimant's weekly workers' compensation rate is $316.30.

CONCLUSIONS OF LAW

The parties have stipulated claimant had an injury that arose out of and in the course of his employment. A one-hundred fifty to two-hundred-pound post fell and hit claimant on his head. Defendants paid a 3 percent whole body impairment rating to the claimant. The primary issue to determine is the extent of claimant's disability.

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).

When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

It is the duty of the commissioner or deputy commissioner to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. Arndt v City of LeClaire, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as

the finder of fact, may believe ail, part or none of any witness's testimony. State v. Holtz, 548 N.W.2d 162, 163 (Iowa App, 1996). In assessing the credibility of witnesses, the deputy commissioner should consider the evidence using his or her own observations, common sense and experience. State v. Holtz, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. State v. Holtz, 548 N.W.2d 162, 163 (Iowa App. 1996).

Claimant has serious credibility issues. In fact, he is not credible. Claimant's testimony cannot be relied upon. The claimant's testimony and the medical records cannot be squared. Claimant testified that he did not receive treatment for headaches before his work injury. He did. Claimant said in his deposition that the last car accident he was in that required medical care was when he was 14 years old. The medical records is replete with claimant claiming car accidents in Iowa and Colorado and claimant seeking medical care[1]. Claimant said he was never hospitalized for his illegal drug usage. That is false. Claimant provided inconsistent information to various medical providers. I cannot use claimant's testimony to evaluate the extent of his disability.

Dr. Bansal wrote that claimant did not have head or neurological pathology prior to the work injury. That makes Dr. Bansal's IME unreliable, as the medical evidence shows significant complaints of headaches and dizziness prior to his injury. Dr. Bansal's IME relies upon information claimant provided him. Claimant's information is untrustworthy and I do not find his IME convincing.

The most reliable evaluation of claimant's impairment is Dr. McMains' August 4, 2017 IME[2]. That IME was performed close to claimant's injury. Dr. McMains found claimant had a 3 percent industrial disability for claimant's tinnitus. Dr. McMains noted claimant had dizziness with full extension of his head and would continue to have hyperacusia of the left ear. (Ex. I, p. 20) Dr. McMains found no permanent impairment for any other neurological, temporal fracture or any symptom as a result of the March 7, 2017 work injury.

I do not agree with Dr. McMains' conclusion that since claimant went back to work and did some roofing with no restrictions no restrictions should be imposed. Claimant, and more importantly, the employer Mr. Schwartz, testified that his work at height was limited after his return for work.

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[1] It is possible that some of the claims of car accidents were the result of claimant improperly seeking pain medication and he may not have had car accidents. If that is the case, it does not aid his credibility.

[2] Claimant's brief attacked the credibility of Dr. McMains. All IME physicians have at one time or another been found to be not as credible, if they have provided a number of reports to this agency. Each IME report is evaluated on the facts of each claim.

The only credible evidence as to claimant's impairment is the August 2017 IME report. I find claimant has tinnitus and some dizziness when fully turning his head and hyperacusia. As Dr. McMains found in August 2017, claimant had dizziness in fully extending his head, I find claimant should rarely work around heights.

In Ehteshamfar v. UTA Engineered Systems Division, 555 N.W.2d 450, 453 (Iowa 1996) the Iowa Supreme Court held that tinnitus should be compensated as an injury to the body as a whole, rather than as a hearing loss, because the condition arises, not from an inability to hear, but from the perception of sounds that do not exist.

Claimant was paid the scheduled rating of 3 percent whole body for his injury. Claimant's injury is to be evaluated industrially. Claimant's industrial disability is higher than the AMA Guides rating.

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 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 did not graduate from high school and does not have a GED. Claimant has done-to-door sales and has been able to sell commercial roofing and pole buildings. Since his termination of employment claimant's motivation for work has been minimal. Even with limited education claimant is bright and has some skills in communication. Claimant worked at Young Guns for over a year after his work injury, although he avoided heights and heavy work. Claimant has done some limited construction after his termination.

With his sensitivity to noise (hyperacusia) and limitation of working at heights, I find claimant has an 8 percent loss of earning capacity. I find claimant is entitled to an 8 percent industrial disability. Claimant is entitled to 40 weeks of permanent partial disability (500 x 8% = 40).

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 526 2 N.W.2d 433 (Iowa 1997). Iowa Code section 85.27 provides, in relevant part:

> For purposes of this section, this employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefore, allow and order other care.

The question of reasonable care is a question of fact. An application for alternate medical care is not granted simply because the employee is dissatisfied with the care the employer has chosen. Mere dissatisfaction with the care is not sufficient grounds to grant an application for alternate medical care. The employee has the burden of proving that the care chosen by the employer is unreasonable. Unreasonableness can be established by showing 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 Company, 528 N.W.2d 122 (Iowa 1955). Unreasonableness can be established by showing that the care authorized by the employer has not been effective and is “inferior or less extensive” than other available care requested by the employee. Pirelli-Armstrong, at 437.

Claimant has requested vestibular therapy as recommended by Dr. Bansal. As I found that Dr. Bansal’s IME was based upon incomplete information claimant has not met his burden of proof that defendants have failed to provide reasonable care. Claimant received vestibular therapy shortly after his injury, which was successful. There was no recommendation for additional therapy at that time. No award of alternate care is being made.

Claimant’s request for payment for the medical visit to ARNP Doyle on May 3, 2018 is denied. Claimant’s visit was for an ear infection that was not shown to be related to his work injury.

As claimant has prevailed in this case to the extent he is receiving additional indemnity benefits, I award the claimant the $100.00 filing fee pursuant to 876 IAC 4.33.

ORDER

Defendants shall pay claimant forty (40) weeks of permanent partial disability benefits commencing on May 5, 2017 at the weekly rate of three hundred sixteen and 30/100 dollars ($316.30).

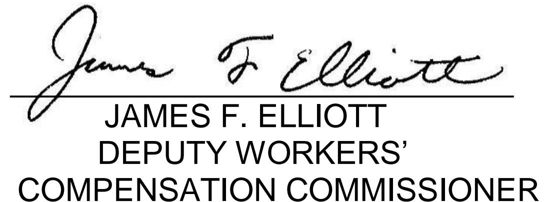
Defendants shall pay claimant one hundred dollars ($100.00) for costs.

Defendants shall have a credit for benefits previously paid.

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 13th day of May, 2020.



JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Jenna Green (via WCES)
Aaron Oliver (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.