BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD OLSON, Claimant, vs. A-TEC ENERGY CORP., Employer, and EMC INSURANCE, Insurance Carrier, Defendants.	FILED MAY 15 2018 WORKERS COMPENSATION	File Nos. 5058021, 5058022 ARBITRATION DECISION Head Note Nos.: 1402.40, 1803, 2206, 2907

STATEMENT OF THE CASE

Donald Olson, claimant, filed two petitions in arbitration seeking workers' compensation benefits from defendants A-TEC Energy Corp., employer, and its insurer, EMC Insurance. The hearing occurred before the undersigned on April 11, 2018 in Des Moines, Iowa.

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

The evidentiary record consists of: Joint Medical Exhibits JE 1 through JE 11, Claimant's Exhibits 1 through 8, and Defendants' Exhibits A through D.

Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record closed on April 11, 2018. The case was considered fully submitted upon receipt of the parties' briefs on May 4, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

File No. 5058021:

1. Whether the stipulated injury on January 20, 2015 was a cause of permanent disability.

2. Extent of industrial disability, if any.

3. Commencement date for permanent partial disability benefits, if any are awarded.

4. Costs.

File No. 5058022:

5. Whether the stipulated injury on March 2, 2016 was a cause of permanent disability.

6. Extent of industrial disability, if any.

7. Commencement date for permanent partial disability benefits, if any are awarded.

8. Costs.

FINDINGS OF FACT

After a review of the evidence presented, the undersigned finds as follows:

Background

Claimant was 54 years old at the time of the hearing. (Transcript page 12) He is a high school graduate with no additional formal education. (Id.; Claimant's Exhibit 6:89) His ability to navigate a computer is "poor," and he is not a proficient typist. (Tr. p. 15)

Claimant's employment history is best described as manual labor work. (Cl. Ex. 6:91-92) In high school he worked as a landscaper and was required to lift railroad ties that weighed up to 100 pounds. (Tr. pp. 17-18; Cl. Ex. 6:91-92) In his next job, claimant buried cable underground and handled equipment and rods that weighed up to 80 pounds. (Tr. pp. 18-19; Cl. Ex. 6:91)

From 1982 to 1994, claimant was employed by Midwest Vet Supply, first as a warehouse laborer, then as a working assistant manager, and eventually as a working branch manager. (Tr. pp. 19-21; Cl. Ex. 6:92) Claimant was required to lift and move freight and product that weighed roughly 70 pounds with this employer, even when he was working in a managerial capacity. (Tr. pp. 20-21; Cl. Ex. 6:92)

Claimant next worked for Fawn Engineering where he put screws into vending machine doors. (Tr. p. 23) While this position required very minimal lifting, it required frequent bending. (Id.)

Claimant then found work with the City of Clive's Parks Department. (Tr. p. 24; Cl. Ex. 6:92) He was a laborer responsible for the installation of park equipment and

landscaping material such as trees and boulders. (Id.) He was required to lift up to 70 pounds in this job. (Id.) Claimant received a pesticide applicator certification while employed by the City of Clive, but this certification has since expired. (Tr. p. 12)

Claimant's last job before being hired with the defendant employer was with Hammond Industries, where he was employed as a working branch manager. (Tr. p. 26; Cl. Ex. 6:92) Hammond sold heating and air conditioning equipment, and claimant was required to pull orders such as furnaces, air conditioning units, and duct work that weighed up to 80 pounds. (Tr. pp. 26, 91; Cl. Ex. 6:92)

Claimant was hired by the defendant employer in 2000 as a residential energy auditor. (Tr. p. 29; Cl. Ex. 6:92) In this position, described in detail in Defendants' Exhibit C, claimant checked the energy efficiency of residential properties. (Tr. p. 29, Defendants' Exhibit C) While the job required claimant to be able to lift up to 50 pounds, claimant only engaged in 50-pound lifting once every 3 to 4 weeks when he loaded his truck up with freight. (Tr. p. 31) Claimant more regularly lifted 20 to 30 pounds when handling items such as his tool bag or 6-foot ladder. (Tr. p. 30) The auditor job also required claimant to climb a ladder roughly 4 times a day and to install light bulbs, faucets, and other similar fixtures 15 to 30 times a day. (Tr. pp. 92-94) The auditor position was the least physically demanding job claimant ever held. (Tr. p. 102)

For a three-year period claimant transferred from his residential energy auditor position to a job in which he checked new construction for energy leakage. (Tr. p. 33) In this job claimant carried a fan that weighed roughly 80 pounds. (Id.) Claimant eventually went back to his job as a residential energy auditor, and he was working as an auditor on both dates of injury in this case. (Tr. p. 35)

During the course of claimant's employment with the defendant employer, he received a certification in "new construction" energy monitoring and in HERS rating, which is a rating system for energy efficiency. (Tr. p. 12)

Claimant was terminated from his employment with the defendant employer in early February of 2018. (Tr. p. 68; Def. Ex. B) The termination was based on claimant's driving record and the refusal of A-TEC's insurance company to cover claimant as an insured driver of the company vehicles. (Def. Ex. B) Although claimant argues the termination had something to do with his physical capabilities, he admits he was doing his auditor job without any doctor-imposed restrictions at the time of his termination, though he continued to have pain. (Tr. pp. 59-60) Had he not been terminated, claimant could and would have continued performing the auditor job so long as he continued receiving medical treatment for his work-related injuries. (Tr. pp. 102-03)

Current Employment

Claimant was not employed at the time of the hearing, nor had he been employed since his termination from the defendant employer. (Tr. p. 72) He received unemployment benefits subsequent to his termination, and he was required to maintain

a job search log as a condition of these benefits. (Def. Ex. D:4 [Deposition Transcript pp. 11-12]) That log contains eight entries, which claimant explained were a mix of informal inquiries with acquaintances and formal applications. (Tr. pp. 71-72; Def. Ex. D:4-5 [Depo. Tr. pp. 12-16]; Cl. Ex. 8) Since that log was completed, claimant also gave his resume to another acquaintance and began communicating with a temporary staffing agency. (Tr. pp. 71-72) At the time of the hearing, claimant had not received any employment offers. (Tr. p. 72)

Prior Injuries

Claimant has a history of back injuries and migraines with related neck pain. He sustained his first major low back injury in the 1980s while working for Midwest Vet Supply. (Tr. p. 21) He ruptured a disc while lifting a pallet, resulting in a laminectomy. (Tr. p. 22) Claimant, however, was able to return to his regular job without restrictions and required no long-term, ongoing treatment for the back injury. (Id.)

His second low back injury occurred in the 1990s while he was employed by the City of Clive. (Tr. p. 25) He had a second laminectomy but was again able to return to his full-duty job without any consistent, long-term treatment. (Id.)

Claimant re-injured his low back sometime in 2009 when he slipped and fell on a fan while working for the defendant employer. (Tr. p. 34) This back pain resolved with one injection. (Tr. p. 35) Claimant had another re-injury to his low back in 2013 while employed by the defendant employer after he fell on a client's stairs. (Tr. p. 35) He was again treated with injections and also received chiropractic care. (Tr. pp. 36, 38; JE 2:46-51) His final injection relating to the fall on the stairs occurred on August 8, 2014, roughly five months before the first injury at issue in this case. (Tr. p. 39; JE 2:47)

Between August of 2014 and the January 20, 2015 injury at issue in this case, claimant's back was "good." (Tr. p. 39)

Claimant's migraines date back to before he was hired by the defendant employer. (Tr. p. 36) Prior to the dates of injury at issue in this case, he was periodically seen by a chiropractor for these headaches and related neck pain. (JE 1:1-8)

January 20, 2015 Injury and Subsequent Medical Treatment

Claimant sustained a stipulated work injury on January 20, 2015, when he was involved in a motor vehicle accident while driving his company truck. (Tr. pp. 40-41) He was on his way to an appointment when he missed a stop sign and T-boned another vehicle. (Id.; Cl. Ex. 5:83-85) He was traveling at roughly 30 miles per hour at the time of impact, which caused the airbag to deploy. (Tr. pp. 40-41; Cl. Ex. 5:8) Claimant struck his head on the ceiling of the truck, and while he did not definitively lose consciousness, he felt as though he "woke up" slumped over the steering wheel. (Tr. p. 41)

After the accident claimant presented to a walk-in clinic with a dislocated finger on his left hand, but he was immediately directed to the emergency room (ER) when the walk-in clinic nurse discovered he was disoriented with complaints of headache and neck pain. (JE 4:64) Upon arrival at the ER, claimant complained of neck pain and left ring finger pain and swelling. (JE 4:57) Claimant also had back pain "[a]ll the way up and down," although the ER note indicates claimant denied any "new back pain." (Tr. p. 44; JE 4:57) Claimant explained the ER physicians were focused primarily on his head and the possibility that he sustained a concussion. (Tr. p. 45)

Imaging studies of the brain, cervical spine, and chest were negative for acute injuries or fractures, although the CT scan of the neck revealed some degenerative changes. (JE 4:59-62) Claimant was diagnosed with a neck strain and a dislocated finger and instructed by the ER staff to follow up with his primary care provider for the neck strain and a specialist for the finger. (JE 4:62)

The next day claimant was seen by his chiropractor. (JE 1:12) Prior to the appointment claimant filled out a pain diagram on which he indicated he was experiencing symptoms in his low back, neck, head, and left ring finger. (JE 1:16) This pain diagram is consistent with claimant's testimony at hearing about the symptoms he was experiencing shortly after the accident. (Tr. p. 44)

Claimant continued to treat primarily with his chiropractor until defendants sent claimant to Dr. Miller at Occupational Medicine Plus, PC, in April of 2015. (JE 1:41-45; JE 5:65-71) At the initial appointment, Dr. Miller ordered updated imaging studies of the brain and neck, both of which were unremarkable except for some mild cervical spondylolisthesis. (JE 6)

After a short stint of conservative care with Dr. Miller, claimant was referred to Dr. Ledet for injections. (Tr. pp. 51-52; JE 7) Claimant had his first lumbar epidural steroid injection (ESI) with Dr. Ledet on June 13, 2015. (JE 8:97) Claimant did not receive any additional injections until after the second work injury at issue in this case, although he continued to see the chiropractor on a regular basis. (Tr. p. 54; JE 1:33-41)

March 2, 2016 Injury and Subsequent Medical Treatment

Claimant sustained another stipulated work injury on March 2, 2016 when his company truck, which was at a complete stop, was rear-ended by another vehicle. (Tr. pp. 54-55; Cl. Ex. 5:82) Claimant received no treatment on the date of the accident but presented to his chiropractor the next day with pain in his neck and back. (Tr. pp. 56-57; JE 1:32)

He was eventually seen again by Dr. Ledet on March 29, 2016. (JE 8:98) He told Dr. Ledet being rear-ended "was enough to jolt his body in a way that re irritated his neck and back." (Id.) He commented that his pain was of the same "pattern" but had "intensified" after the March 2, 2016 accident. (Id.) As a result, Dr. Ledet administrated another lumbar ESI. (JE 8:102-104)

Claimant had additional lumbar ESIs on June 16, 2016; October 13, 2016; January 16, 2017; June 22, 2017; September 14, 2017; and January 11, 2018. (JE 8:117, 122, 137, 144, 148, 152) Claimant's most recent ESI was administered a week before the hearing. (Tr. p. 58) Claimant also received trigger point and Botox injections for neck pain on November 28, 2016; January 6, 2017; February 7, 2017; and February 2, 2018. (JE 8:129, 132, 139, 158) The injections were significantly beneficial to claimant, as he consistently reported 60 to 90 percent relief. (See, e.g., JE 8:111, 120, 127, 135, 139, 141, 149) Claimant continued to receive back and neck adjustments from his chiropractor as well. (JE 1:20-30)

Expert Opinions

Claimant was evaluated by Joshua D. Kimelman, D.O., an orthopedic surgeon, for an independent medical examination (IME) at defendants' request on November 8, 2017. (JE 11:166) It was claimant's impression that Dr. Kimelman's examination was focused largely on claimant's complaints of possible carpal tunnel syndrome (which are not being claimed as a part of either work injury)—and not his neck or back complaints. (Tr. p. 66) Claimant also noted Dr. Kimelman took no measurements of claimant's back or neck during his examination. (Id.)

In his report, Dr. Kimelman diagnosed claimant with "[c]hronic cervical and lumbar pain with headaches and left leg radiculopathy without neurologic deficit." (JE 11:169) He answered several questions posed by defendants. When asked whether claimant sustained any permanent impairment related to the January 20, 2015 injury, Dr. Kimelman responded, "Mr. Olson has had lumbar disc surgery at 2 levels previously. At this time, I believe he represents a DRE Level I injury." (Id.) He recommended no permanent restrictions or additional medical treatment relating to the January 20, 2015 date of injury. (Id.)

Regarding the March 2, 2016, date of injury, Dr. Kimelman opined that claimant was at maximum medical improvement "at this time," which presumably referred to the date of the exam. (Id.) When asked whether claimant sustained any permanent impairment related to the March 2, 2016 injury, Dr. Kimelman provided the following response:

> I believe he has a pre-existing permanency because of 2 previous lumbar disc surgeries. Mr. Olson continues to have, every 3 to 6 months, trigger point injections, has had Botox injections, and epidural steroid injections, which he has found necessary for him to continue with his maximal comfort level regarding his ongoing neck and back injuries related to his job-related motor vehicle accidents.

(JE 11:170) He recommended no permanent restrictions but indicated claimant would likely require injections in the future. (Id.)

Defendants later wrote to Dr. Kimelman asking him clarify whether he believed claimant sustained any permanency relating to the March 2, 2016 injury. (JE 11:172)

Defendants' letter specifically asked Dr. Kimelman to address both claimant's lumbar spine and cervical spine. (Id.) Dr. Kimelman provided the following response

> I believe at this time, based on Mr. Olson's benign physical examination without any objective sign of weakness, neurologic deficit, sciatic tension signs or restriction of motion, that he would be considered a DRE I Cervical Category, Table 15-5, of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, with a 0% impairment as well as a DRE Category I for lumbar spine injury, Table 15-3, of the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition.

(JE 11:174)

Claimant later participated in a functional capacity evaluation (FCE) at claimant's attorney's request. (Cl. Ex. 1) Based on the testing, claimant was found to be capable of working in the "lower medium category (up to 30 lbs. on an occasional basis at waist level)." (Cl. Ex. 1:3)

After the FCE, claimant was evaluated by David H. Segal, M.D., for an IME at claimant's attorney's request. (Cl. Ex. 2) Dr. Segal causally related the following diagnoses to claimant's injuries on January 20, 2015, and March 2, 2016: traumatic cervical facet arthropathy; cervical radiculopathy; aggravation of preexisting degenerative changes of the cervical spine; occipital neuralgia; post-concussive syndrome; bilateral shoulder arthropathy; aggravation of preexisting thoracic radiculopathy; traumatic lumbar facet arthropathy; and left lumbar radiculopathy. (Cl. Ex. 2:43)

Dr. Segal assigned an 18 percent whole body rating for claimant's cervical spine; a 2 percent whole body rating for claimant's bilateral shoulders; a 6 percent whole body rating for claimant's thoracic spine; an 18 percent whole body rating for claimant's lumbar spine, a 3 percent whole body rating for claimant's cervical and lumbar facet arthropathy; and a 7 percent whole body rating for claimant's post-concussive symptoms. (Cl. Ex. 2:44)

He recommended restrictions as follows: a maximum of 30 consecutive minutes of sitting/standing/walking/driving; a maximum floor to/from waist lift of 30 pounds (rarely); a maximum waist to/from crown lift of 13 pounds (rarely); a maximum front carry of 21-25 pounds (rarely); a maximum push/pull of 20 pounds (rarely); a maximum bend of 3-5 times per hour (rarely); occasional reaching; rare repetitive tasks with arms overhead; rare squatting/crouching/kneeling/stooping, no crawling; and rare ladder use. (Cl. Ex. 2:44-45)

Permanent Disability and Restrictions

January 20, 2015 (File No. 5058021)

While defendants acknowledge claimant sustained a work-related injury on January 20, 2015, they dispute claimant's entitlement to permanent disability benefits as a result of that injury. Thus, the threshold inquiry to be determined is whether claimant sustained any permanent disability relating to the January 20, 2015 injury.

Although claimant saw the chiropractor on a regular basis after the January 20, 2015 accident, he reported to his chiropractor in April of 2015 that "all is well . . . just the common lower back pain and occasional headaches still." (JE 1:41) Claimant only had one injection relating to the January 20, 2015 injury, which was performed on June 12, 2015. (JE 8:97) Claimant described the time after this injection as "five or six months there that [he] was doing well." (Def. Ex. D:9 [Depo. Tr. p. 30]) He also explained he was feeling "slightly better" leading up to the second motor vehicle accident (Tr. p. 54; JE 2:43)

While Dr. Segal indicated in his report that claimant's conditions were permanently aggravated by the January 20, 2015 accident, he did not attribute specific percentages of permanent impairment to the January 20, 2015 accident. Further, his own report indicates claimant's "second accident exacerbated all the symptoms to the way they were at their worst after the first injury." (Cl. Ex. 2:43) As such, Dr. Segal's opinion that the January 20, 2015 accident resulted in any permanent disability is not persuasive.

Because claimant's symptoms relating to the January 20, 2015 injury were improving at the time he sustained his second injury on March 2, 2016, it is found that claimant's January 20, 2015 work injury caused only temporary injuries. Claimant sustained no permanent disability and required no permanent restrictions relating to the January 20, 2015 injury. This finding renders moot the disputes regarding the commencement date and claim for industrial disability benefits with respect to the January 20, 2015 injury.

March 2, 2016 (File No. 5058022)

Defendants also agree claimant sustained a work-related injury on March 2, 2016, but it is their position that claimant did not sustain a permanent impairment from that injury. Therefore, it must first be determined whether claimant sustained any permanent disability relating to the March 2, 2016 injury.

After the March 2, 2016 motor vehicle accident, claimant required regular injections to his back and neck. (Tr. pp. 58-59; JE 8:117, 122, 129, 132, 137, 139, 144, 148, 152, 158). In contrast, although claimant had back injuries and neck pain before his motor vehicle accidents, he did not require an injection for several months before the first date of injury at issue in this case. (Tr. p. 39; JE 2:47) This uptick in treatment,

particularly after the March 2, 2016 accident, is consistent with claimant's testimony that his symptoms after the motor vehicle accidents were more intense. (Tr. pp. 47-48, 72-73; Cl. Ex. 2:43 (noting the March 2, 2016 motor vehicle accident "exacerbated all the symptoms to the way they were at their worst after the first injury, and that level of aggravation has continued")).

With these facts in mind, Dr. Segal's opinion that claimant sustained permanent impairment to his back and neck from the March 2, 2016 injury is more persuasive than the opinions of Dr. Kimelman. Dr. Kimelman opined that claimant had no permanent impairment relating to his neck and that any permanency related to claimant's lumbar spine was "pre-existing . . . because of 2 previous lumbar disc surgeries." (JE 11:170, 174) While Dr. Kimelman is correct that claimant had two back surgeries prior to the motor vehicle accidents at issue in this case, claimant was able to return to his regular jobs without restrictions or the need for long-term treatment after both of those surgeries. (Tr. pp. 21-22, 25) The same cannot be said of claimant's need for regular pain management for his back after the March 2, 2016 accident.

Dr. Kimelman's opinions are likewise not consistent with claimant's intensified symptoms or need for recurrent injections—which Dr. Kimelman recognized in his own report. (See JE 11:170) Dr. Kimelman's acknowledgement that claimant will require regular injections for his "ongoing neck and back injuries related to his job-related motor vehicle accidents" undercuts his opinion that claimant sustained no permanent impairment. For these reasons, Dr. Kimelman's opinion is given little weight.

Dr. Segal considered and acknowledged claimant's prior back injuries and neck symptoms in his report, but he concluded these conditions were permanently aggravated by the March 2, 2016 motor vehicle accident. (Cl. Ex. 2:43-44) This conclusion is in accord with claimant's description of intensified and worsened symptoms in his back and neck after the March 2, 2016 accident, along with claimant's need for regular injections in his back and neck after the March 2, 2016 accident. For these reasons, Dr. Segal's opinion that claimant sustained a permanent whole body impairment relating to his back and neck is found to be more convincing than the opinions of Dr. Kimelman. Claimant, therefore, is found to have sustained permanent injuries to his neck and back as a result of the March 2, 2016 accident.

Dr. Segal assigned an 18 percent whole person impairment for claimant's lumbar spine condition; the Guides however, only allow for a 10 percent to 13 percent rating for individuals who fit into the DRE Lumbar Category III. (Cl. Ex. 2:44; AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 384) Thus, while it is found that claimant sustained a permanent impairment to his lumbar spine, a specific percentage of impairment is not adopted.

The greater weight of the evidence supports the remainder of Dr. Segal's impairment ratings for claimant's back and neck: 18 percent whole person for claimant's cervical spine; 6 percent whole person for claimant's thoracic spine; and 3 percent whole person for pain related to claimant's cervical and lumbar facet arthropathy. (Cl. Ex. 2:44)

Regarding claimant's shoulders, claimant's own testimony reveals his pain after the March 2, 2016 injury was primarily located in his "head, neck, and back"—not his shoulders. (Tr. pp. 44, 56) Any treatment to claimant's shoulders after the March 2, 2016 accident was incidental to his neck complaints. While it is acknowledged that Dr. Segal assigned a two percent whole person impairment for "chronic pain syndrome of the shoulder" pursuant to Table 16-10 of the Guides (Cl. Ex. 2:44), this table rates impairment resulting from peripheral nerve disorders and "*is not to be used for pain in the distribution of a nerve that has not been injured.*" Guides, p. 482 (emphasis in original). Dr. Segal's diagnosis for claimant's shoulder condition was "arthropathy"—not a nerve injury. (Cl. Ex. 2:43) Because Dr. Segal's rating for claimant's shoulders is not consistent with the medical records or in conformity with the Guides, it is not convincing. It is therefore found that the March 2, 2016 accident did not cause a permanent disability to claimant's shoulders.

Dr. Segal also assigned a seven percent whole person impairment for post-concussive symptoms, but claimant was not reporting or receiving treatment for impaired memory, judgment, or problem solving after the March 2, 2016 accident until his IME. (Cl. Ex. 2:44; Tr. p. 94) Based on the absence of complaints or treatment related to any post-concussive symptoms, Dr. Segal's rating for these post-concussive symptoms is not persuasive. It is therefore found that claimant did not sustain a permanent disability with respect to his head injury from the March 2, 2016 accident.

In summary, claimant is found to have sustained permanent injuries to his neck and back, and therefore a permanent whole body impairment, relating to the March 2, 2016 injury.

With respect to permanent restrictions, it is acknowledged that claimant worked without doctor-imposed restrictions through his termination with defendant employer. However, claimant credibly testified that the physical requirements of the energy auditor job were, for the most part, consistent with Dr. Segal's recommended restrictions. (Tr. p. 104) Claimant also credibly testified that he deliberately declined restrictions from Dr. Ledet because he wanted to continue working for the defendant employer, but the work was difficult and painful. (Tr. pp. 52-53) Further, Dr. Segal had the benefit of reviewing the objective results contained in the FCE when he assigned restrictions. Thus, it is found that claimant requires the restrictions as recommended by Dr. Segal (Cl. Ex. 2:44-45) as a result of his March 2, 2016 injury.

Industrial Disability

Having found the March 2, 2016 motor vehicle accident resulted in permanent whole body impairment based on claimant's neck and back injuries, an industrial disability has been sustained. Claimant's physical impairment and functional limitations are still considered despite having not adopted a specific percentage of whole body impairment for claimant's back condition. Claimant now requires regular injections to manage his symptoms in his back and neck. (Cl. Ex. 2:44; Tr. p. 58) He also has permanent restrictions that limit him to the lower medium physical demand category. (Cl. Ex. 2:44-45; Cl. Ex. 1:3) Based on his impairment and restrictions, it is found that

claimant is likely incapable of returning to most of the jobs he held before being hired by the defendant employer.

On the other hand, claimant was physically capable of performing his job with the defendant employer until his termination, which was unrelated to his physical abilities. Additionally, while it is found that claimant is motivated to eventually find work, his job search up until the time of the hearing was somewhat nonchalant, relying more on the hope that he would stumble upon an opening through an acquaintance rather than intensely pursuing known job leads.

Considering the above and all other appropriate factors related to industrial disability, it is found that claimant sustained 50 percent industrial disability relating to the March 2, 2016 injury.

Commencement Date

There is no evidence that claimant was restricted from working in the days after the March 2, 2016 injury. Because claimant returned to work immediately after the March 2, 2016 injury, claimant's entitlement to permanency benefits also commenced immediately. Therefore, it is found that the commencement date for permanency benefits in File No. 5058022 is March 3, 2016.

CONCLUSIONS OF LAW:

Permanent 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).

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).

Based on the above findings of fact, it is concluded that claimant did not satisfy his burden to prove he sustained any permanent disability relating to the January 20, 2015 date of injury (File No. 5058021). As explained above, claimant's symptoms from the January 20, 2015 accident were improving when he was involved in the second motor vehicle accident at issue in this case. Claimant, therefore, is not entitled to any permanent partial disability benefits relating to the January 20, 2015 injury.

Having concluded the injury on January 20, 2015 did not cause a permanent disability, the disputes regarding the extent of claimant's alleged industrial disability and the commencement date for any permanent partial disability benefits are moot.

Based on the above findings of fact, it is concluded claimant satisfied his burden to prove he sustained a permanent whole body impairment relating to the March 2, 2016 injury (File No. 5058021). As explained above, claimant had prior back injuries and neck pain, but his conditions were permanently worsened by the March 2, 2016 motor vehicle accident, as evidenced by his subsequent medical treatment, particularly the need for regular injection therapy, and worsening symptoms.

Industrial Disability

Having concluded the injury on March 2, 2016 caused a permanent disability to claimant's body as a whole, the next issue to be decided is the extent of claimant's industrial disability.

Because 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).

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39 (App. 1981).

Based on the above findings of fact, it is concluded that claimant sustained a 50 percent industrial disability due to the March 2, 2016 injury. As explained above, claimant's functional impairment, age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, and inability to engage in employment for which the he is fitted were all contemplated when determining claimant's industrial disability. More specifically, consideration was given to the fact that claimant now requires regular injection therapy for his back and neck due to the injuries sustained in the March 2, 2016 motor vehicle accident. Of great significance is the fact that his March 2, 2016 work injury also resulted in permanent restrictions that likely preclude him from returning to most of his past jobs. However, claimant was physically capable of doing the job with defendant employer until his termination in February of 2018 for reasons unrelated to his work injuries. Further, while claimant credibly testified he would like to work, his job search since his termination lacked intensity and focus. A 50 percent industrial disability entitles claimant to 250 weeks of permanent partial disability benefits.

Commencement Date

Having concluded claimant is entitled to permanent partial disability benefits, the next issue to be decided is the date on which those benefits are to commence.

Compensation for permanent partial disability begins at the termination of the healing period. Iowa Code § 85.34(1). The healing period is terminated when claimant returns to work, when it is medically indicated that significant improvement from the injury is not anticipated, or when claimant is medically capable of returning to substantially similar employment, whichever occurs first. See id.

In this case, claimant returned to work immediately after the March 2, 2016 injury. Because claimant's return to work was "the earliest of the three triggering events," this date established the end of his healing period and the commencement of permanent partial disability benefits. See Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016). It is therefore concluded that permanent partial disability benefits commence on March 3, 2016.

Costs

Claimant seeks the following costs: $100.00 (filing fee); $6.72 (service fee); $6.72 (second service fee); $900.00 (FCE report). Claimant originally indicated on the hearing report that he was seeking reimbursement for the IME performed by Dr. Segal, but the undersigned removed this dispute from the hearing report with the consent of

the parties when it was discovered that defendants had already paid or were in the process of paying that cost. As such, the cost of claimant's IME is not considered.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Because claimant was generally successful in his claim, an assessment of costs is appropriate. In the discretion of the undersigned, costs are assessed as follows under File No. 5058022:

The $100.00 filing fee is taxed to defendants pursuant to rule 876 IAC 4.33(7).

One $6.72 service fee is taxed to defendants pursuant to rule 876 IAC 4.33(3).

With respect to the cost of the FCE, rule 876 IAC 4.33(6) allows for the taxation of reasonable costs associated with obtaining two reports of doctors or practitioners. The FCE was not conducted by a physician, but was conducted by a "practitioner." However, only the expense of preparing the FCE report is a taxable expense. 876 IAC 4.33(6); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). In this case, the report itself cost $350.00. (Cl. Ex. 7:99) Therefore, $350.00 is taxed to defendants pursuant to rule 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

File No. 5058021:

Claimant shall take nothing.

File No. 5058022:

Defendants shall pay claimant industrial disability benefits of two hundred fifty (250) weeks, beginning on the commencement date of March 3, 2016, until all benefits are paid in full.

All weekly benefits shall be paid at the stipulated rate of five hundred forty and 14/100 dollars ($540.14) per week.

All accrued benefits shall be paid in a lump sum.

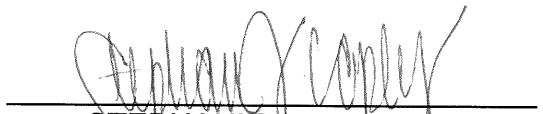
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall 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 (2) percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall reimburse claimant costs in the amount of four hundred fifty-six and 72/100 dollars ($456.72).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 15th day of May, 2018.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SJC/srs

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