BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GERALD S. AKES,

Claimant,

vs.

DSM DESIGNS, LLC,

Employer,

and

ACUITY,

Insurance Carrier,
Defendants.

File No. 5054074

ARBITRATION DECISION

Head Note Nos.: 1108, 1803

STATEMENT OF THE CASE

Gerald Stanley Akes ("Stan") filed a petition for arbitration seeking medical benefits from, the employer, DSM Designs, LLC, and Acuity, the insurance carrier.

The matter came on for hearing on May 18, 2016, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 11; Claimant's Exhibits 12 through 20; Defense Exhibits A through M; as well the sworn testimony of claimant, Stan Akes and the employer's office manager, Melissa Heins. Roxann Zuniga was appointed court reporter. The parties argued this case and the matter was fully submitted on June 10, 2016. Attorneys for both parties did an excellent job briefing this matter.

ISSUES AND STIPULATIONS

The parties have stipulated that the claimant suffered an injury which arose out of and in the course of employment on July 7, 2014. The claimant received some medical treatment for this work injury which was authorized and paid for by the defendants. The defendants contend that the claimant fully healed from this injury and deny that the stipulated work injury resulted in any temporary or permanent disability. The claimant alleges he was off work and entitled to disability benefits between November 17, 2014, and April 30, 2015. The defendants admit that claimant was off work during this period of time, but deny that his condition is causally connected to his work injury. The parties also dispute the nature and extent of the claimant's disability. Claimant alleges he is entitled to permanent total disability benefits under the odd-lot theory. Defendants

allege he is entitled to no permanent partial disability benefits. It is stipulated that if the claimant is entitled to disability benefits, the disability is industrial in nature. The parties dispute the commencement date for permanency benefits.

The parties stipulate to the claimant's marital status and dependents, however, his precise average weekly wage is disputed. Claimant alleges wages of $802.00 per week; while defendants allege $776.00 per week.

Claimant seeks medical expenses as outlined in Claimant's Exhibits 15 and 17. These expenses are denied by the defendants. The parties stipulate that defendants are entitled to a credit under Iowa Code section 85.38(2) for payment of long-term disability benefits.

FINDINGS OF FACT

Gerald "Stan" Akes was born in 1952 and was 63 years old as of the date of hearing. He is married to his wife, Sandra Akes for 40 years. He now resides in Polk City, Iowa.

Mr. Akes testified live and under oath at hearing. I find him to be credible. He graduated from Central Decatur Community High School in 1970. He attended Indian Hills Community College in Centerville, Iowa before transferring to Northwest Missouri State in Maryville, Missouri. He graduated in 1974 with a bachelor's degree in Secondary Education. (Cl. Ex. 12, p. 1) Claimant's work history is set forth in Claimant's Exhibit 20. He worked from 1976 to 2002 as a draftsman for Hy-Vee, Inc., in Chariton, Iowa. He developed construction plans and made cabinets for displays. This position was eliminated in 2002. His other jobs were mostly similar to this, operating CNC machines and constructing cabinets. In October 2012, he began working for DSM Design as a cabinet maker. (Claimant's Exhibit 20, page 2) His position involved, lifting, standing, bending and twisting. He lifted parts weighing as much as 100 pounds.

There is no evidence in the record that claimant ever had any substantial treatment for his low back prior to his July 7, 2014, work injury. There are some records which indicate claimant may have had a chronic back ache prior to his work injury. (Joint Ex. 3, p. 55) If this is so, it was apparently untreated.

On July 7, 2014, claimant was working for DSM Design. He was loading a coffee table into a trailer with a co-worker named Tim Steel. The injury did not seem particularly significant at the time. Mr. Akes, however, did report the injury to DSM Design manager, Melissa Heins, the following morning. He reported that he hurt his back and left shoulder. (Defendants' Ex. M, Akes Deposition, p. 31) Initially, Mr. Akes did not think he would need any treatment and declined to go to his physician.

Claimant first saw a physician for this injury on July 25, 2014. The following is documented. "Gerald is here with complaints of mid back pain which is aggravated by his work as a cabinet maker. He denies any associated numbness or paresthesias. He states it got quite a bit worse on Monday when he was doing more heavy lifting." (Jt.

Ex. 1, p. 6) John Zittergruen, D.O., diagnosed thoracic myofascial strain, instructed him to use heat and a muscle relaxer.

Mr. Akes testified that his pain worsened throughout August until he returned to Dr. Zittergruen on September 4, 2014. Dr. Zittergruen noted low back pain which went into his hips "primarily on the right, but somewhat on the left as well." (Jt. Ex. 1, p. 8) He diagnosed "[r]ight lumbar radiculopathy" and recommended a lumbar MRI. (Jt. Ex. 1, p. 8) After seeing Dr. Zittergruen, Mr. Akes reported the situation to Ms. Heins. At this point, Mr. Akes was directed to Concentra where he was examined by Judith Nayeri, D.O., on September 26, 2014. (Jt. Ex. 2, p. 21)

He reported an accurate history of his injury to Dr. Nayeri. She diagnosed a lumbar strain, started him on physical therapy and provided Skelaxin. (Jt. Ex. 2, pp. 21-23) She did not order an MRI, as Dr. Zittergruen had recommended. Unremarkable x-rays were performed. (Jt. Ex. 2, pp. 26-28) Claimant started therapy right away. The therapy notes document the history of his pain and symptoms in greater detail, noting that his back pain had remained consistent after the injury, but began to increase significantly around Labor Day (early September) 2014. (Jt. Ex. 2, p. 24) Mr. Akes returned to Dr. Nayeri a couple days later. She continued to diagnose lumbar and shoulder strains. He was instructed to continue therapy, alternate ice and heat on his back and continue his medications. (Jt. Ex. 2, p. 30) He returned to Dr. Nayeri on October 8, 2014, and again on October 22, 2014. On both occasions, Dr. Nayeri noted that the symptoms were essentially unchanged and his condition was exacerbated by any movement. (Jt. Ex. 2, pp. 34, 46) In spite of this, Dr. Nayeri stated that Mr. Akes was at maximum medical improvement and that he "should be at baseline now." (Jt. Ex. 2, p. 46)

Claimant testified that he was not, in fact, back to "baseline" at that point. Nevertheless, Dr. Nayeri released Mr. Akes to full-duty work. Mr. Akes returned to Dr. Zittergruen. "He has been seeing the work comp doctor and doing PT and was told he had arthritis." (Jt. Ex. 1, p. 11) "They told him that they felt that his problem was mainly arthritic in nature." (Jt. Ex. 1, p. 12) Dr. Zittergruen referred claimant to the Mercy Arthritis Center. I find that the claimant was not back to baseline at this time.

The claimant's condition, however, did become substantially worse on November 16, 2014. On that date, Mr. Akes went to the emergency room for severe low back pain. Mr. Akes took off work on the afternoon of November 13, 2014, and all day November 14, 2014, to help his son move into a new house. He performed moving tasks. (Def. Ex. A)

The following is documented in the emergency records.

> The patient reports that since July he has had problems with lower back pain after 'lifting something I shouldn't have'. He has seen his PCP for this a few times and had an MRI scheduled. However, he reports worker's comp clinic did not agree with MRI and "cancelled it". He generally has been taking anti-inflammatories for this and has been doing

> relatively well. However, this morning when he awoke, his pain was very severe and he could not get out of bed without assistance. He has had trouble walking today as well. His medications have not worked.

(Jt. Ex. 3, p. 50) Mr. Akes was admitted to the hospital for pain control. Further history was taken.

> 62 y/o CM who works as a commercial cabinet builder presenting to ER with worsening low back ache for a few months. Sharp knife like pain located on the left SI joint and radiates on to the front of the left thigh. Pain worse on standing and better when he lays [*sic*] down. Had chronic low back ache for years but had lifted heavy weights in July and since then had more worsening pain. He saw his PCP and doctor with workman's [*sic*] comp but neither did not feel that he needed an MRI.

(Jt. Ex. 3, p. 55) Claimant was also evaluated by orthopedist, Lynn Nelson, M.D., in the hospital. Dr. Nelson took a thorough history and diagnosed the herniated disc fairly conclusively. (Jt. Ex. 3, pp. 58-60)

A lumbar MRI revealed disc bulges at the L5-S1 and L3-4 with compression on the L3 nerve root and contact with the S1 nerve root. (Jt. Ex. 3, pp. 77-78) Over the next couple days, the medications dramatically helped claimant's severe pain, although his new left leg numbness persisted. (Jt. Ex. 3, p. 69) Mr. Akes followed up with Dr. Zittergruen on November 24, 2014. He diagnosed herniated disc. (Jt. Ex. 1, p. 13) He followed up with Dr. Zittergruen who ordered physical therapy and instructed claimant to follow up with workers' compensation if his symptoms did not improve. (Jt. Ex. 1, p. 17) Claimant's symptoms did not improve.

Mr. Akes never returned to work following this visit to the emergency room. Claimant saw various physicians for his low back in 2015. He saw Susan Jacobi, M.D. at the Mercy Arthritis Center on January 8, 2015. She opined that degenerative arthritis was not the primary problem in claimant's low back, rather his pain was "consistent with disc rupture. MRI consistent with this." (Jt. Ex. 5, p. 86) He also saw Thomas Hansen, M.D., at the Iowa Clinic. (Jt. Ex. 6, p. 93) Dr. Hansen performed a left-sided epidural steroid injection (ESI).

On January 15, 2015, Dr. Zittergruen wrote the following opinion:

> Gerald Stan Akes had a work-related back injury, which occurred on 07/07/2014. He did follow appropriate Work Comp rules and was seen first by the work compensation doctors. He then saw me for followup on 07/25/2014, 09/04/2014, 11/03/2014, 11/24/2014 and 12/29/2014. All of these visits were directly related to his workmen [*sic*] compensation injury. If you have further questions for me, please feel free to contact me.

(Jt. Ex. 1, p. 20)

The insurance carrier refused to authorize any of the recommended care and instead had claimant evaluated by Daniel Miller, D.O., for causation opinions. (Jt. Ex. 7) Dr. Miller opined that claimant's continuing problems were simply due to pre-existing degenerative issues. (Jt. Ex. 7, p. 107) Dr. Miller did not render any opinion about the November moving incident being an "intervening cause."

Dr. Hansen performed a second ESI in April 2015, which did not help significantly. (Jt. Ex. 6, p. 100) Dr. Zittergruen then referred claimant for a surgical evaluation. Claimant returned to Dr. Nelson. On April 30, 2015, Dr. Nelson diagnosed "[r]ight sided low back pain" and "L3-4 HNP" but noted that the symptoms were mostly in his left leg. (Jt. Ex. 8, p. 109) Dr. Nelson advised against surgery. "It was discussed with the patient that his chief complaint of right sided low back pain does not well match symptoms expected from a left sided L3-4 HNP. It was discussed with the patient that therefore I do not recommend surgical treatment or further injections." (Jt. Ex. 8, p. 109) This is the point that claimant reached maximum medical improvement.

Since seeing Dr. Nelson, claimant has treated conservatively for pain management with Dr. Zittergruen.

Sunil Bansal, M.D., performed an independent medical evaluation on November 6, 2015. Dr. Bansal performed a thorough review of the medical records in this file. (Jt. Ex. 9, pp. 111-114) It is clear, he knew of all of claimant's prior treatment. He also examined the claimant and took a history of the work injury. (Jt. Ex. 9, pp. 114-119) Dr. Bansal opined the following with regard to medical causation. "The above mechanism of lifting a heavy cabinet coupled with his immediate clinical presentation is consistent with his development of a L3-4 disc herniation." (Jt. Ex. 9, p. 121) He assigned an eight percent whole body rating for the back injury and a three percent whole body rating for the left shoulder. (Jt. Ex. 9, pp. 21-22) Dr. Bansal recommended a ten pound lifting restriction and sit, stand, and walk as tolerated. (Jt. Ex. 9, p. 122)

In February 2016, Mr. Akes was evaluated by Daniel McGuire, M.D., at Iowa Spine Care. He is an orthopedic surgeon. Dr. McGuire was provided an accurate history of the situation. (Jt. Ex. 10, p. 124) He diagnosed ongoing "back aches and pains that are multifactorial in origin," as well as "some aggravation of underlying lumbar spondylosis." (Jt. Ex. 10, pp. 125-26) He also diagnosed the ongoing disc issues as "manifestations of a left L3 radiculopathy with numbness," and "[e]xtruded disk fragment here in the left foramen getting the left L3 nerve root." (Jt. Ex. 10, p. 126) Dr. McGuire assigned zero percent impairment rating for the left shoulder, and a ten percent whole body for the low back. (Jt. Ex. 10, p. 123) He did not recommend any formal restrictions, but rather, merely opined that it would be difficult for claimant to find any work at this time. (Jt. Ex. 10, p. 123) He opined this impairment was related to the July 2014, work injury. (Jt. Ex. 10, p. 123)

Mr. Akes has not worked since November 2014, nor has he looked for work. He applied for but was denied Social Security Disability benefits. Carma Mitchell prepared a vocational report which assessed claimant's loss of access to the job market. She

found he was restricted from 95 percent of the labor market due to his injury. (Jt. Ex. 12, p. 5)

CONCLUSIONS OF LAW

The first question is whether the admitted July 7, 2014, work injury is a cause of permanent disability, and if so, the extent of such disability. I note that this is a very close, difficult case. Both parties made compelling cases.

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

By a preponderance of evidence, I find that the July 2014, work injury is a proximate cause of disability in the claimant's lower back.

The expert opinions as to the medical impairment in this case are conflicted. I find the greater weight of evidence supports the opinions of Dr. Zittergruen, Dr. Bansal and Dr. McGuire. These three physicians provided opinions supporting medical

causation. I find there is little or no doubt that the claimant was highly-functional and had virtually no lower back problems until he experienced a fairly minor incident of injury on July 7, 2014. After this incident, his lower back did not improve and became progressively worse over the subsequent months. He was treated with conservative care and then released by the company physician, Dr. Nayeri. His symptoms, however, persisted as evidenced by his own credible, sworn testimony, as well as the contemporaneous medical documentation which proves he continued to seek treatment for ongoing low back pain.

The main stumbling block to reaching an opinion regarding medical causation is the sudden increase of symptoms which occurred in November 2014. Prior to November 16, 2014, claimant was working. His work was fairly heavy. There is no doubt that he had not returned to "baseline" as suggested by Dr. Nayeri, however, he was at least functional. After helping his son move into a new house, he woke up on November 16, 2014, essentially unable to move. I believe claimant that there was no specific new injury. I also believe the claimant's testimony that his help moving his son was less strenuous than his daily activities at work. There is no question, however, that his symptoms changed, at least initially, on November 16, 2014.

The defendants argue forcefully, that the symptoms not only became more severe, they changed location. This is true to some degree. Prior to November 16, 2014, most of his symptoms were on the right side. On November 16, 2014, he had severe symptoms on the left side and down his left leg. I note, however, that some left-sided symptoms had been documented before November 16, 2014, and soon after the November 16, 2014, flare-up, the symptoms on the right side were again routinely noted in the records. Nevertheless, there is no question that the rather sudden onset and increase of such severe symptoms raises questions about whether there was an intervening cause which breaks the chain of causation.

The defendants' own expert, however, did not support this theory. Instead, Dr. Miller piggybacked on Dr. Nayeri's expert opinions that the claimant had fully healed from his low back strain and that he returned to baseline. According to Dr. Miller's expert opinion, all of the claimant's ongoing symptoms and problems were degenerative. I do not find this theory convincing.

Dr. Zittergruen, Dr. Bansal and Dr. McGuire rejected this theory. None of these qualified experts concurred with Dr. Miller's opinion. Moreover, all three of these physicians had a full understanding of the progressive development of claimant's symptoms after his initial work injury and all three were unconcerned by the increase of symptoms in November 2014. In particular, the opinion of Dr. Zittergruen is given significant weight. He was a treating physician whose sole interest in this case was to help the claimant get better. Well after the November 2014, increase in symptoms, Dr. Zittergruen wrote the following opinion:

> Gerald Stan Akes had a work-related back injury, which occurred on 07/07/2014. He did follow appropriate Work Comp rules and was seen first by the work compensation doctors. He then saw me for followup on

> 07/25/2014, 09/04/2014, 11/03/2014, 11/24/2014 and 12/29/2014. All of these visits were directly related to his workmen [*sic*] compensation injury. If you have further questions for me, please feel free to contact me.

(Jt. Ex. 1, p. 20)

In truth, this case may be less close if these physicians had taken time to explain their causation opinions in greater detail. The failure to explain in greater detail why they were unconcerned about the sudden increase of symptoms in November 2014, does leave some uncertainty in the claimant's case. As mentioned above, however, I do find that all of these physicians were aware of the increase in symptoms, and all three rendered favorable causation opinions in any event.

For these reasons, I find the claimant has met his burden that his work injury is a proximate cause of disability. This entitles the claimant to medical expenses, healing period benefits and an assessment of industrial disability.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27 (2013).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

I have reviewed Claimant's Exhibits 15 and 17. The defendants have denied these expenses on the basis of medical causation, whether they are reasonable and necessary and whether the fees were reasonable. The defendants also disputed authorization for some of the bills, however, authorization is not a defense for any of the bills after the claim was denied in early 2015.

Pursuant to the guidelines set forth herein, I award the following medical expenses set forth in Claimant's Exhibit 15. I find that the expenses were causally connected, fair and reasonable, as well as reasonable and necessary. If any treatment was not authorized, I find it was beneficial treatment under Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 202 (Iowa 2010). Expenses which are outstanding shall be made directly to the provider. Expenses which have been paid by the claimant shall be reimbursed to the claimant. The defendants are entitled to a credit under section 85.28(2) for any benefits paid under claimant's group plan as stipulated by the parties. The defendants shall pay for the mileage as set forth in Claimant's Exhibit 17.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The claimant has proven entitlement to healing period benefits from the date he was provided medical restrictions causing him to leave work, November 17, 2014, through his date of maximum medical improvement April 30, 2015.

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.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987);

Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

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.

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

The claimant seeks benefits for permanent total disability. The defendants argue his industrial disability is quite limited.

There is no doubt that claimant has suffered a significant industrial disability from his lower back condition. I find that the claimant has suffered a 50 percent loss of earning capacity as a result of his work injury. Claimant was 63 years old as of the date of hearing. He is highly-educated and has demand skills in machine operating, including the use of computers. He is bright and presents well.

I agree with Dr. McGuire that there is no permanent impairment associated with claimant's left shoulder. He has an eight to ten percent functional impairment of his

whole body related to his lower back. The symptoms and pain he experiences would make it difficult to work as a cabinet maker without significant accommodations. I find the claimant should not perform heavy lifting and should have a job where he can alternate sitting, standing and walking. I do not agree with his most severe restrictions. He underwent a fairly lengthy treatment regimen which impacted his ability to continue working for this employer. As stated above, he is probably not well-suited for this exact type of work any longer in any event.

The claimant has not looked for work since leaving employment, making it somewhat difficult to know his precise ability or inability to work. He has applied for Social Security Disability, which, as of the time of hearing, had been denied.

When considering all of the factors of industrial disability, the greater weight of evidence supports a finding of 50 percent disability.

The final dispute in this case is in regard to the claimant's rate of compensation and, in particular, his gross wages.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

I have reviewed the defendants' rate calculation in Defendants' Exhibit K, as well as the claimant's calculation in Claimant's Exhibit 16. I find the defendants' calculation more persuasive. The burden is on the claimant to prove the rate calculation. The greater weight of evidence supports a finding that the claimant's gross wages were $776.00 per week. He was married with two exemptions at the time of accident, creating a rate of $505.72 per week.

ORDER

THEREFORE IT IS ORDERED

The parties shall follow all stipulations set forth in the Hearing Order.

Defendants shall pay all benefits at the rate of five hundred and five and 72/100 ($505.72) per week.

Defendants shall pay healing period commencing November 17, 2014, through April 30, 2015.

Defendants shall pay the claimant two hundred and fifty (250) weeks of permanent partial disability benefits commencing upon the completion of healing period.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for long-term disability payments made, as stipulated in the hearing report.

Defendants shall pay the medical expenses as set forth in Claimant's Exhibit 15 and mileage in Claimant's Exhibit 17, in a manner consistent with this decision.

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

Costs are taxed to defendants.

Signed and filed this 23rd day of May, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.