BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CLIFFORD WATKINS,

Claimant,

vs.

CITY OF DES MOINES,

Self-Insured,
Employer,
Defendant.

FILED

JUL 29 2016

WORKERS COMPENSATION

File Nos. 5050202
5053231
5053283

ARBITRATION DECISION

Head Note Nos.: 1108, 1803, 4000

STATEMENT OF THE CASE

Clifford Watkins, the claimant, seeks workers' compensation benefits from defendant, the City of Des Moines, which is self-insured for the purposes of workers' compensation liability. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on May 24, 2016, but the matter was not fully submitted until the receipt of the parties' briefs and argument on June 8, 2016. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to claimant's exhibit 1, pages 2 through 4 will be cited as, "Ex. 1-2:4."

The parties agreed to the following matters in written hearing reports submitted at hearing:

Note: In the rate sections for each of the reports, the parties stipulated that claimant is entitled to zero exemptions. This is not possible in Iowa. A claimant is always entitled to one exemption for himself. I assume the parties meant to stipulate to one exemption as the amount of the weekly rate set forth in each report using the commissioner's published rate booklet was correct using one exemption.

File No. 5050202 (Date of Injury June 3, 2014) A Claim For Disability to Bilateral Shoulders and Back:

1. On June 3, 2014, claimant received an injury arising out of and in the course of employment with the City of Des Moines.

2. Claimant is not seeking additional healing period benefits.

3. The injury is a cause of some degree of permanent industrial disability to the body as a whole.

4. Permanent partial disability benefits commence March 16, 2015.

5. At the time of the alleged injury, claimant's gross rate of weekly compensation was $1,191.35. Also, at that time, he was single and entitled to 1 exemption for income tax purposes. Therefore, claimant's weekly rate of compensation is $681.38 according to the workers' compensation commissioner's published rate booklet for this injury.

6. Prior to hearing, defendants voluntarily paid ten weeks of permanent disability benefits for this work injury. This is a change from the written hearing report submitted at hearing for this injury claim, which was brought to my attention after the post-hearing briefs were submitted.

File No. 5053231 (Alleged Date of Injury June 9, 2014) A Claim for Disability to Bilateral Arms:

1. An employee-employer relationship existed between claimant and defendant at the time of the alleged injury.

2. If an injury is found to have caused permanent disability, the type of disability is a scheduled member disability to the bilateral arms.

3. If I award permanent partial disability benefits, they shall begin on March 15, 2015.

4. At the time of the alleged injury, claimant's gross rate of weekly compensation was $1,191.35. Also, at that time, he was single and entitled to 1 exemption for income tax purposes. Therefore, claimant's weekly rate of compensation is $681.38 according to the workers' compensation commissioner's published rate booklet for this injury.

File No. 5053283 (Alleged Date of Injury April 10, 2015) A Claim for Disability to the Left Knee:

1. An employee-employer relationship existed between claimant and defendant at the time of the alleged injury.

2. At the time of the alleged injury, claimant's gross rate of weekly compensation was $1,191.35. Also, at that time, he was single and entitled to 1 exemption for income tax purposes. Therefore, claimant's weekly rate of compensation

is $681.38 according to the workers' compensation commissioner's published rate booklet for this injury.

ISSUES

At hearing, the parties submitted the following issues for determination:

File No. 5050202 (Date of Injury June 3, 2014) A Claim For Disability to Bilateral Shoulders and Back:

I. The extent of claimant's entitlement to permanent disability benefits: and,

II. The extent of claimant's entitlement to medical benefits.

File No. 5053231 (Alleged Date of Injury June 9, 2014) A Claim for Disability to Bilateral Arms:

I. Whether claimant received an injury arising out of and in the course of employment;

II. The extent of claimant's entitlement to permanent disability benefits; and,

III. The extent of claimant's entitlement to medical benefits.

IV. The extent of claimant's entitlement to penalty benefits for an unreasonable delay or denial of weekly benefits pursuant to Iowa Code section 86.13.

File No. 5053283 (Alleged Date of Injury April 10, 2015) A Claim for Disability to the Left Knee:

I. Whether claimant received an injury arising out of and in the course of employment;

II. The extent of claimant's entitlement to permanent disability benefits; and,

Further Problems with Hearing Reports and Issues:

In his post-hearing brief, claimant argued for an industrial award in the claim from the June 3, 2014 injury and medical expenses. The hearing report also indicated a request for alternate care. What clamant is seeking in this claim for alternate care is unknown. Although a medical expense issue was raised, there was no listing of disputed medical expenses attached to the hearing report as instructed on the form. Adding to the confusion is that defendant stipulated in the report that the attached listing of medical expenses (there was none) are fair and reasonable, constitute reasonable treatment of the work injury, and were authorized. Such a stipulation would negate any

medical benefits issue. I therefore am unable to address any medical benefits issue for the June 3, 2014 injury claim.

In the post-hearing brief, claimant argued for alternate care of the left knee condition for the alleged injury of April 10, 2015, but a medical benefits issue was not raised in the hearing report for that injury claim. Defendant, as it did in the other hearing reports, stipulated that the attached listing of medical expenses (there was none) are fair and reasonable, constitute reasonable treatment of the work injury, and were authorized. Such a stipulation would negate any medical benefits issue. However, after reviewing the evidence, there is clearly an issue as to the claimant's entitlement to a total left knee replacement and defendants clearly contest the work-relatedness of the need for such a procedure. This issue will be dealt with in this decision.

Also the parties did not complete the credit section of the hearing reports for the June 9, 2014 and April 10, 2015 alleged injuries which is where the parties are to report the voluntary payment of weekly benefits. I emailed the parties about this deficiency and they report that no permanency benefits were paid for these injuries, but defendants did pay healing period benefits from September 3, 2014 to December 28, 2014, a total of 16 and 5/7 (16.714) weeks. This was paid in a lump sum on April 30, 2015.

There were also industrial disability benefits paid by this employer to claimant prior to the injuries in this case as a result of a 2010 hip injury. The particulars of this past payment of industrial disability benefits will be discussed further below.

Finally, claimant at hearing and in the post-hearing brief seeks benefits for a right shoulder condition. I do not find a claim for a right shoulder condition in the agency files for the three claims in this case. There was an amendment to include injury to the right upper extremity for the June 3, 2014 injury early on. Another deputy in a ruling whether or not to approve the amendment, directed claimant to clarify whether this was actually a separate claim for the bilateral carpal tunnel syndrome (CTS) condition. Further ruling was rendered moot when claimant filed a separate petition for bilateral cumulative trauma. At no time has claimant pled a right shoulder injury as a result of any of the claims in this case. At hearing, Clifford's testimony is more indicative of a new separate injury to the right shoulder. Therefore, I will not address any claim for a right shoulder disability.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Clifford, and to the defendant employer as the City.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Clifford credible.

Clifford was 62 years of age at the time of hearing. He left high school for a period of time to attend a school in California which trained aircraft pilots, but he dropped out of this training when he ran out of money. He returned to Iowa and attended high school at Lincoln Tech, which provided some vocational training in automotive and diesel mechanics. He graduated in 1981. He did not return to pilot training thereafter because he was in a motorcycle accident while in 11th grade (1979-1980) which resulted in amputation of his right leg below the knee. He has worn a prosthetic below the knee since that time.

Prior to working for the City, Clifford worked as a stocker at Hy-Vee, a disc jockey, a mechanic at a Target store, mechanic at a Jiffy Lube, and as a mechanic in his father's car repair business. For four to five years, he worked in maintenance for the Des Moines Water Works, an entity separate from the City.

Clifford began working for the City on November 19, 1992. Initially, he worked part-time at the Botanical Center as a night guard and set up person. At this time, he was also a full-time employee of the United States Postal Service as a mail handler. He then moved to full-time work for the City after the 1993 flood as a light equipment operator and maintenance person at a cemetery. He dug graves mostly with a backhoe, but manual digging was required for monument foundations and the graves of children and Muslims. Clifford testified this was heavy, demanding work and there is nothing in this record to suggest otherwise.

After several years in his cemetery job, Clifford was promoted to medium equipment operator in the public works department. According to the City's job description, persons in such jobs operate various types of powered mechanical equipment, such as motor patrol, two-yard loaders, motor graders in skilled blade work, shelled tractors with backhoe attachments, truck or tractor and trailer combinations, rotary snow plows, self-propelled concrete mixers and pavers, and bulldozers. Manual labor is also required for excavations, earth moving, finishing grades and sub-grades, disking and scarifying, and labor involved in resurfacing streets and installing and moving pipes. (Ex. A) Clifford testified that manual labor is required when machines cannot perform the work.

Eventually, Clifford was assigned primarily to operate a "low boy" semi-truck to haul city equipment. He continues in this job today. Clifford said that the initial truck he used had no suspension or no air brakes as it was not designed for over-the-road trucking. However, the trailer was permanently attached. The City now has purchased a new truck that requires attaching and detaching a trailer as is done typically by 18 wheel semi tractor-trailer trucks. Clifford said he has a problem repetitively climbing in and out of the truck cab during his work shift to attach and detach the trailer because he must put added stress on his left leg and knee because he is unable to put full weight on the prosthesis on this right leg. He said that he asked for an additional hand hold to be attached to the truck to assist in this climbing, but the City has not provided this to him. At the present time, Clifford is not doing a lot of heavy manual labor given

his various health problems. Although the job is called medium equipment operator, it appears that occupants of the job operate what would normally be classified as heavy equipment such as cement mixers, cement pavers, road graders and bulldozers.

Fairly recently, Clifford passed a test for public works section chief, a managerial position. There have been no openings for such a position since he passed the test, but he does fill in as section chief when needed. (Ex. B)

Clifford has had significant prior work injuries while working for the City. In the later part of 2008, Clifford suffered a left leg injury from his truck driving work for the City which was assessed and treated for a strain of the left hamstring and quadriceps muscle by Colin Kavanagh, D.O. The doctor released Clifford from care and back to full duty on December 3, 2008 following treatment with medications and physical therapy. (Ex. H) There is no evidence that any permanency benefits were paid for this injury.

Clifford testified he had a work injury to the left hip on March 2, 2010 which ultimately led to a total left hip replacement. He had several infections and three surgeries for this injury. Clifford reported to Sunil Bansal, M.D., an evaluator in this case, that he continues to have pain from this injury, E. coli remains in his hip region, and these problems increase with weather changes. (Ex. K-21) Nothing further about this injury was contained in this record for the purpose of applying the successive disability sections of Iowa Code section 85.34(7). Upon inquiring my email to the parties, I learned that pursuant to an Agreement for Settlement, Clifford was initially paid permanent disability benefits for a 10 percent industrial loss in 2012. This agreement was later re-opened and additional permanent disability benefits were paid for a 27.4858 percent industrial loss in 2013. Both parties agree the total industrial loss previously compensated for the 2010 hip injury was 37.4858 percent prior to the June 3, 2014 injury.

The first injury claim in this case arose from a fall on June 3, 2014. The City agreed that this was a work injury. On that date, Clifford fell onto a concrete surface from the truck, landing on his left side. Initial treatment was provided on June 3, 2014 by Richard McCaughey, D.O., the City's occupational medicine physician. The doctor's assessment was contusion of the low back, left shoulder and left elbow and he treated an elbow abrasion. At hearing, claimant testified that he is not requesting additional permanency for any additional hip injury in this case. Dr. McCaughey prescribed no medication and released Clifford back to regular duty the next day, but told him to return in a few days to assure the recovery was going well. (Ex. I-1:2)

Clifford was then referred to Wesley Smidt, M.D., an orthopedic surgeon who first saw Clifford on June 9, 2014. Dr. Smidt had previously treated Clifford and was the surgeon who performed the left hip replacement. Dr. Smidt diagnosed Clifford with contusions to his left buttock with probable left shoulder rotator cuff tear. Dr. Smidt also noted that Clifford was getting to the point of having constant numbness in his upper extremities. Dr. Smidt, on his patient status report, diagnosed left shoulder

impingement with acromioclavicular arthrosis and rotator cuff tear and bilateral carpal tunnel syndrome (CTS). The doctor checked the box under work-related as "yes." Dr. Smidt also noted pain along Clifford's back on the left side. (Ex. J-1:4) On July 15, 2014, Dr. Smidt performed left shoulder arthroscopy repair surgery as well as carpal tunnel release surgery on the left side. (Ex. J-6:7) Dr. Smidt performed right carpal tunnel release surgery on September 3, 2014. (Ex. J-13:14)

Although they accepted the left shoulder as work related, the City initially denied the causation of the bilateral CTS to his work. In a response dated October 20, 2014 to an inquiry by Clifford's counsel asking whether the bilateral CTS was causally related to the June 3, 2014 fall or Clifford's work as a heavy equipment operator over the years, the doctor simply responded by saying "yes." (Ex. J-16)

On December 1, 2014, Dr. Smidt released Clifford back to regular duty without restrictions. The prior restrictions by Dr. Smidt were only for the left shoulder and bilateral CTS, not any spine-related condition. (Ex. J-19:20) Clifford returned to Dr. McCaughey on November 18, 2014 for follow-up on the left shoulder and CTS. The doctor noted that Dr. Smidt released claimant to full duty as of December 1, 2014 and Dr. McCaughey did likewise. (Ex. I-7) Clifford returned to Dr. Smidt on December 29, 2014 requesting more physical therapy for the left shoulder and the doctor complied with the request. (Ex. J-23)

On February 10, 2015, an attorney for the City asked Dr. Smidt to clarify his causation opinion for the CTS condition. Dr. Smidt responded on February 16, 2015 that he was presented by Clifford's attorney with two causation options, either the June 3, 2014 fall or a cumulative injury from years of work as a heavy equipment operator. The doctor opined that the CTS conditions were the result of a cumulative injury from Clifford's work at the City as a heavy equipment operator. (Ex. J-25:26)

Dr. Smidt saw Clifford on March 16, 2015 and Clifford reported he was doing well and performing full activities, but has some continued discomfort bringing his arm across the chest and reaching behind his back. The doctor placed Clifford at maximum medical improvement at this time for his left shoulder and bilateral CTS conditions. (Ex. J-28) Also, at this time, Clifford reported to the doctor he had left knee pain since an injury from a broken clutch, which also involved the left hip injury. He stated that he was going to file a new claim for the left knee. In a letter to a claims representative for the City, Dr. Smidt opined that as a result of his left shoulder injury, he has a three percent permanent partial impairment to the left upper extremity under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. J-30) The doctor utilized Tables 16-27 to arrive at a ten percent rating for a distal clavicle excision, then reduced this to three percent using Table 16-18. Based on this rating, defendants paid ten weeks of permanent partial disability benefits for the left shoulder injury.

At the request of Clifford's counsel in February 2016, the left shoulder condition was evaluated by Dr. Bansal. (Dr. Bansal at this time evaluated all of the claimed

disabilities in this case which will be discussed separately in these Findings) Clifford reported to Dr. Bansal that he continues to have pain in the left shoulder, especially when raising his arm to shoulder level or when reaching behind his back. He also has weakness in the left arm and cannot forcefully push down with his left hand. (Ex. K-22) These are the same continued complaints reported to Dr. Smidt. Dr. Bansal opines that the left shoulder condition constitutes a 13 percent permanent partial impairment to the left upper extremity under the same AMA Guides, which was a total of 10 percent impairment for a distal clavicle resection under Table 16-27 and 3 percent lost range of motion using Figures 16-40 through 16-46. This then converts to an 8 percent body as a whole impairment using Table 16-3. Dr. Bansal explains that Dr. Smidt's use of Table 16-18 to reduce the 10 percent impairment for a distal clavicle resection under Table 16-18 was improper because Table 16-18 only applies to units of joint impairment assessed in Table 16-23, not to impairment under Table 16-27. Dr. Bansal opined that Clifford's shoulder had permanent restrictions for all of these conditions. Clifford has asked him not to impose these as he could not hold his current job with restrictions. However, the doctor opined that for the left shoulder condition, his restrictions should consist of no lifting greater than 10 pounds occasionally over shoulder level and to avoid frequent over shoulder lifting. (Ex K-35)

Given the views of Dr. Smidt, claimant is asserting a bilateral CTS injury separate from his fall injury on June 3, 2014 with an alleged injury date of June 9, 2014, the day Dr. Smidt first diagnosed the condition. There is no dispute that Clifford was off work following Dr. Smidt's diagnosis due to surgeries from September 3, 2014 through December 28, 2014; a total of 16 and 5/7 weeks. As previously stated, defendants paid these benefits, but not until April 20, 2015. Claimant seeks penalty for this delay and defendants have offered no evidence concerning their investigations and/or reasons for this delay in paying weekly benefits.

Permanent impairment/disability from the CTS injury is in dispute. Dr. Smidt opines that Clifford has no impairment or disability from this CTS injury under the AMA Guides, Fifth Edition. (Ex. J-24) In his evaluation, Clifford reported to Dr. Bansal that he has pain in the left hand and constant numbness and tingling in all of the left fingers and thumb. (Ex. K-22) Dr. Bansal opines using the Guides that claimant has a three percent permanent partial impairment to the right upper extremity or two percent to the body as a whole and a four percent permanent partial impairment to the left upper extremity or two percent to the body as a whole as a result of his bilateral CTS injury. (Ex. K-27) Using the combined values chart in the AMA Guides, page 604, the combined impairment to the body as a whole for Dr. Bansal's ratings is four percent. Dr. Bansal recommends permanent restrictions of no frequent squeezing, pinching, or grasping with either hand. (Ex. K-35) At hearing, claimant complained of continued numbness and tingling in both hands/fingers.

Clifford testified that he has continued low back problems stemming from his fall injury on June 3, 2014. The initial treating physician, Dr. McCaughey, noted low back complaints immediately after the fall. (Ex. I-2) When Clifford returned to

Dr. McCaughey on July 1, 2014 for his shoulder and CTS, he reported that Dr. Smidt told him he has some degenerative disk disease in his low back. Dr. McCaughey agreed. (Ex. I-5) At the November 18, 2014 visit with Dr. McCaughey when he was released to full duty for his left shoulder and CTS, Clifford also reported he had seen Lynn Nelson, M.D., an orthopedist, on November 4, 2014, for low back symptoms that would impact his ability to return to full duty. The doctor told Clifford that he was asked to assess the left shoulder and CTS complaints and he does not know what the City's position was in having him assess and treat low back problems, but he would defer to whatever restrictions were recommenced by Dr. Nelson. The doctor also noted that the City was questioning the causation of CTS. (Ex. I-7)

On November 25, 2014, Clifford returned to Dr. Nelson, following an MRI of the low back. The doctor reports that the MRI did not show any neurologic impairment that could be addressed by surgery. The doctor recommended that Clifford undergo an epidural steroid injection (ESI) which may provide some intermediate relief, but Clifford declined because he had no success with an ESI during treatment for a prior injury. Dr. Nelson had nothing else to offer as treatment. The doctor stated that Clifford has no work restrictions from a spine standpoint. (Ex. J-21) There are no further reports in evidence from Dr. Nelson.

Clifford told Dr. Bansal in the February 2016 evaluation that he has constant back pain which increases after prolonged standing or sitting. He has occasional numbness and tingling in the left hip. Dr. Bansal opines that claimant suffered a low back injury from his June 3, 2014 fall, which was a permanent aggravation of a prior lumbar spondylosis with disc extrusion and rated this condition as constituting a five percent permanent impairment to the body as a whole. (Ex. K-27) The doctor recommends permanent restrictions of no frequent bending, squatting, climbing or twisting and no sitting, standing or walking more than 60 minutes at one time. (Ex. K-35)

Clifford also asserts a new work injury to his left knee with an injury date of April 10, 2015. Clifford had approached Dr. McCaughey about a left knee problem on March 3, 2015 and was told that he is only authorized to treat the left shoulder and CTS. (Ex. I-8) Clifford was first treated on April 10, 2015, for the alleged left knee injury by an authorized doctor, Jon Yankey, M.D., another occupational medicine physician. Clifford reported that he had left knee problems after his June 3, 2014 fall, but these resolved. However, Clifford explained to the doctor that over the last three months, he had noticed pain in the left knee and popping in this left knee when getting in and out of his truck and operating the clutch in his truck. The doctor's assessment was a flare-up of severe degenerative joint disease in the left knee. The doctor recommended OTC medications, and released Clifford back to full duty work. (Ex. I-10) In a letter to defendant's claims representative, Dr. Yankee opined that the knee pain was a temporary exacerbation of the severe degenerative arthritis in the left knee. The doctor stated that the left knee pain was not related to work activities because Clifford could not relate the pain to a specific incident or activity at work. (Ex. I-12)

Dr. Smidt evaluated the left knee pain on June 15, 2015. Clifford reported difficulty getting up from a seated position, difficulty kneeling and squatting, especially because he is relying on his left leg to compensation for his loss of use of the right leg due to the amputation. Dr. Smidt's assessment was "End-stage DJD of the left knee." (Ex. J-32) Clifford again declined steroid injections. The doctor then recommended a total knee replacement. (Ex. J-33) In a response to an inquiry by Clifford's counsel dated July 9, 2015, Dr. Smidt agreed with counsel's statement that Clifford's work driving a truck for 20 years with a broken clutch for some period of time and/or his alternated gait from the work related prior left total hip replacement surgery was a substantial causal, aggravating or accelerating factor in Clifford's need for a left total knee replacement surgery. Dr. Bansal agrees with Dr. Smidt's view that the left knee condition is work related, and opines that absent further treatment, the left knee condition constitutes a 25 percent permanent impairment to the left lower extremity. (Ex. K-28, 32)

At hearing, despite stating he had never received medical treatment for a right shoulder condition, Clifford asserts that he now has a work related right shoulder disability. He described having difficulty putting on his compression stocking for the left knee that has caused bruising in the right arm extending to the right shoulder. He said that the right shoulder problems arose in the same manner as those in the left shoulder. He states the right shoulder problems make it difficult to stand up from a sitting position. Clifford told Dr. Bansal that he partially fell onto his right arm in the June 3, 2014 fall and continues to have right shoulder pain and aching. He has numbness and tingling down his right arm to his right hand and fingers. His right hand and elbow locks up on occasion. (Ex. K-22) Dr. Bansal relates the condition to not only his June 3, 2014 fall, but to repetitive overuse of the right arm from climbing into his truck. (Ex. K-31) Dr. Bansal opines the right shoulder condition constitutes a two percent of the body as a whole permanent impairment due to lost range of motion and he relates this to an injury on June 9, 2014.

Ultimate Findings:

I find that the work injury of June 3, 2014 is a cause of a 13 percent permanent partial impairment to the body as a whole from the left shoulder condition. This is based on Dr. Bansal's assessment. I agree with Dr. Bansal that Dr. Smidt misapplied the Tables in the AMA Guides, Fifth Edition, and Dr. Bansal's assessment is consistent with those Guides. While Clifford has no formal permanent activity restrictions for his left shoulder in his current job and has not lost any income from these injuries, clearly he has a loss of use that would impair his ability to perform the heavy manual labor for the city prior to driving the low boy truck. The record is not clear as to the views of Dr. McCaughey on left shoulder impairment.

I am unable to find that the injury of June 3, 2014 resulted in permanent disability to the low back. The report concerning Dr. Nelson's views is only refuted by Dr. Bansal. I find Dr. Nelson's views that there is no work related permanency from the spine

condition to be more convincing given his greater expertise in orthopedic conditions. Clifford has not sought any aggressive treatment for his back since seeing Dr. Nelson in 2014.

Clifford has hip problems from his 2010 work injury. Again, while Clifford has no formal permanent activity restrictions for his past hip injury, he had no lost income from the injury. However, his continued hip problems would impair his ability to perform the heavy manual labor for the city prior to driving the low boy truck.

I find that the combined disability from the left shoulder injury of June 3, 2014 and the 2010 left hip injury to be a 50 percent loss of earning capacity. Heavy work is no longer available to him due to his work injuries. His age makes retraining unlikely. Clifford's loss of earning capacity is only mildly worsened since his hip injury. He has no physician-imposed permanent activity restrictions. He remains in his job as before without loss of income or job security, albeit with continued physical symptoms. As will be noted in the next section of this decision, Clifford has already been compensated for 37.4858 percent of this combined disability.

I find that Clifford suffered a cumulative trauma to both arms, simultaneously, on or about June 9, 2014. Why defendant has not stipulated to this work injury is unknown as Dr. Smidt's causation views that this is a work related condition is uncontroverted. While the mechanism of the injury was not clarified by Dr. Smidt until October 2014, Dr. Smidt's reports as early as June 30, 2014 that he believed the CTS was work related. (Ex. J-4) This opinion never changed and no physician opined otherwise. While defendant eventually compensated Clifford for his time off for these surgeries, this was not done until April 30, 2015. As stated before, there is no evidence submitted by defendant to support this delay in paying healing period benefits which total 16.417 weeks. Such delay is found unreasonable. At the stipulated rate for this injury of $681.38, the total monetary amount delayed was $11,387.22.

I find that as a result of the June 9, 2014 cumulative and simultaneous trauma injury to each extremity, claimant has suffered a four percent permanent impairment to the body as a whole. This is based on the views of Dr. Bansal. Clifford continues to have symptoms in his fingers and only Dr. Bansal rated this sensory loss. I do not find that this injury resulted in a total loss of earning capacity using an industrial analysis.

I find that Clifford has suffered a cumulative trauma injury on or about April 10, 2015 to the left knee arising out of and in the course of his employment for the City. I did not find the views of Dr. Yankey convincing as he based his views on the fact that claimant could not relate his left knee problems to a specific injury. Dr. Yankey is apparently unaware that in Iowa a gradual onset of symptoms from work activity over time is recognized as compensable work injury. Therefore, Dr. Smidt's causation views are not controverted by a credible opposing opinion. Also, his recommendation that the injury is the cause of a need for a total knee replacement is likewise uncontroverted. As far as an injury date for this injury, I believe the alleged time of April 10, 2015 is

appropriate in that this is the time Clifford first received treatment by Dr. Yankey for the knee problem. Therefore, the April 10, 2015 injury is a cause of a need for a total knee replacement and such additional treatment constitutes reasonable and necessary treatment for this injury. The most appropriate provider for such care is Dr. Smidt given his past clinical experience with Clifford.

It is premature at this time to assess permanency for the April 10, 2015 injury as medical treatment has not been completed. There is no showing of any time off work for this injury at this time.

As stated before, I do not recognize any claim for the right shoulder and no findings with reference to that condition are made at this time.

CONCLUSIONS OF LAW

I. The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler,

483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

In this case there are two disputes as to the occurrence of a work injury. I found a cumulative and simultaneous injury arising out of and in the course of claimant's work with a manifestation date of June 9, 2014, as alleged in claimant's petition. I also found a cumulative trauma injury to the left knee arising out of and in the course of claimant's work with an injury date of April 10, 2015.

II. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983);

Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

The parties agreed in the hearing report that the work injury of June 3, 2014 is a cause of some degree of permanent, industrial disability to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earning capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from whatever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffen v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa 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 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the worker's future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve viewing a loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

In this case, the fresh start rule is only applicable to any disability arising from the right leg amputation as that occurred before he was hired by defendant. However, it is not applicable to the injuries claimed in this case because there was no break in employment between a prior work injury causing industrial disability. Therefore, I must apply the provisions of Iowa Code section 85.34(7) in dealing with successive disabilities. Under that Code section, if there is no reduction in income after the prior work injury/disability, I am to apply subsection b(1) of section 85.34(7) which states that this agency is to assess the combined disability caused by the prior and present injury and the employer is entitled to a credit against their liability for the combined disability to the extent of the percentage of disability for which the employee was previously compensated. I found that the prior hip injury and current injury to the left shoulder to cause a 52.4858 percent loss of earning capacity. Claimant was previously compensated for a 37.4858 percent loss of earning capacity. Claimant is entitled to the difference, an additional 15 percent loss of earning capacity. Such a finding entitles claimant to 75 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. Claimant was paid 10 weeks of this entitlement prior to hearing. Defendants will be ordered to pay the remainder.

For the cumulative trauma injury to both arms from CTS, I found that this occurred over the same period of time. Therefore, this is a scheduled member disability compensated under Iowa Code section 85.34(2)(s). Under Iowa Code section 85.34(2)(s), this agency must first determine the extent of industrial disability or loss of earning capacity caused by the 2 simultaneous injuries. If there is a 100 percent or total loss of earning capacity, then clamant is entitled to permanent total disability benefits. If the injury caused a loss of earning capacity that is less than total or 100 percent then the extent of the permanent disability is measured only functionally as a percentage of loss of use for each extremity, which is then translated into a percentage of the body as a whole and combined together into one body as a whole value. If the industrial disability is total or there is a total loss of earning capacity, then claimant is entitled to permanent total disability benefits under Iowa Code section 85.34(3). Simbro v. DeLong's Sportwear 332 N.W. 2d 886 (Iowa 1983); Burgett v. Man An So Corp., III Iowa Industrial Commissioner Reports 38 (App. November 30, 1982).

In the case sub judice, it was found that claimant had not suffered a total loss of earning capacity from the CTS injury. Consequently, his entitlement to permanent disability benefits is measured functionally. Based upon the findings of a combined 4 percent impairment to the body as a whole as a result of the injury, claimant is entitled as a matter of law to 20 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(s), which is 4 percent of the 500 weeks, the maximum allowable for a simultaneous injury to both arms in that subsection.

Claimant was not seeking additional healing period benefits for the June 9, 2014 injury.

I was unable to find that claimant is entitled to weekly temporary or permanent disability benefits for the left knee injury of April 10, 2015 in that treatment has not been completed for this injury and there was no showing of time off work for this injury as of the date of hearing.

III. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In this case, the only medical benefits issue that was properly submitted was claimant's entitlement to alternate care for the left knee injury. I found that a total left knee replacement surgery as proposed by Dr. Smidt constitutes reasonable and necessary treatment for this injury and treatment by him shall be awarded.

IV. Claimant seeks additional weekly benefits under Iowa Code section 86.13(4). That provision states that if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award extra weekly benefits in an amount not to exceed 50 percent of the amount of benefits that were unreasonably delayed or denied if the employee demonstrates a denial or delay in payment or termination of benefits and the employer has failed to prove a reasonable or probable cause or excuse for the denial, delay or termination of benefits. (Iowa Code section 85.13(4)(b)). A reasonable or probable cause or excuse must satisfy the following requirements:

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis of the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay or termination of benefits.

(Iowa Code section 86.13(4)(c)).

The employer has the burden to show a reasonable and probable cause or excuse. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable." City of Madrid v. Blasnitz, 742 N.W.2d 77, 83 (Iowa 2007); Christensen v.

Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996); Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

In this case, claimant seeks a penalty for the delay in paying the healing period benefits for the CTS injury of June 9, 2014. The record shows that the work-relatedness of the CTS condition was never in question and defendant offered no evidence for the almost 9 month delay in paying healing period benefits during treatment of this injury. Such a delay is unreasonable. There was no showing in the record of any prior assessments of a penalty against this employer. A penalty of 25 percent of the benefits delayed, $2,846.81, is appropriate

ORDER

File No. 5050202 (Date of Injury June 3, 2014):

1. Defendant, the City of Des Moines, shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated rate of six hundred eighty-one and 38/100 dollars ($681.38) per week from the stipulated date of March 16, 2015. Defendant shall receive a credit against this award for the ten (10) weeks previously paid.

2. Defendant, the City of Des Moines shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

3. Defendant, the City of Des Moines shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendant, the City of Des Moines shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

5. Defendant, the City of Des Moines shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

File No. 5053231 (Date of Injury June 9, 2014):

1. Defendant, the City of Des Moines, shall pay to claimant twenty (20) weeks of permanent partial disability benefits at the stipulated rate of six hundred eighty-one and 38/100 dollars ($681.38) per week from the stipulated date of March 16, 2015.

2. Defendant, the City of Des Moines, shall pay to claimant the sum of two thousand eight hundred forty-six and 81/100 dollars ($2,846.81) as a penalty for an unreasonable delay in paying healing period benefits.

3. Defendant, the City of Des Moines shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

4. Defendant, the City of Des Moines shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

5. Defendant, the City of Des Moines shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

6. Defendant, the City of Des Moines shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

File No. 5053283 (Date of Injury April 10, 2014):

1. Defendant, the City of Des Moines, shall provide all medical care by Wesley Smidt, M.D., deemed necessary by Dr. Smidt, to treat the left knee injury of April 10, 2015, including any appliances, medications and referrals for further testing, imaging, therapy and other treatment by other providers. This medical care shall include, but is not limited to, a total left knee replacement.

2. Defendant, the City of Des Moines shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

3. Defendant, the City of Des Moines shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 29th day of July, 2016.

LARRY WALSHIRE
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.