

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUSTIN NASER,	FILED	
	JAN 31 2019 :	
Claimant,	:	File No. 5060296
	WORKERS' COMPENSATION :	
vs.	:	ARBITRATION DECISION
	:	
WINNEBAGO INDUSTRIES, INC.,	:	
	:	
Employer,	:	
Self-Insured	:	
Defendant.	:	Headnotes: 1402.40, 1803

Claimant Justin Naser filed a petition in arbitration on November 20, 2017, alleging he sustained injuries to his back on August 4, 2016, February 14, 2017, and June 16, 2017 from lifting and repetitive trauma. Defendant Winnebago Industries, Inc. ("Winnebago"), filed an answer on December 12, 2017, admitting Naser sustained a work injury.

An arbitration hearing was held on November 1, 2018, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Thomas Drew represented Naser. Naser appeared and testified. Attorney Lindsey Mills represented Winnebago. Joint Exhibits ("JE") 1 through 6, and Exhibits 1 and 2, and A through H were admitted into the record. The record was held open through January 16, 2019, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Winnebago waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Winnebago and Naser at the time of the alleged injuries.
2. Naser sustained injuries on August 4, 2016, February 14, 2017, and June 16, 2017, which arose out of, and in the course of his employment with Winnebago.
3. The alleged injuries are the cause of temporary disabilities during periods of recovery.
4. Temporary benefits are no longer in dispute.

5. If the injuries are found to be the cause of permanent disability, the disability is an industrial disability.
6. The commencement date for permanent partial disability benefits, if any are awarded, is November 1, 2017.
7. At the time of the alleged injury Naser's gross earnings were \$653.20 per week, he was married and entitled to four exemptions, and the parties believe the weekly rate to be \$448.09.
8. Prior to the hearing Naser was paid temporary benefits set forth in Exhibit E.
9. Prior to the hearing Naser was not paid any permanent benefits.
10. Costs have been paid.

ISSUES

1. Did the alleged injuries cause a permanent disability?
2. If the alleged injuries caused a permanent disability, what is the extent of disability?
3. Is Naser entitled to recover the cost of an independent medical examination?
4. Should costs be assessed against either party?

FINDINGS OF FACT

Naser is married and lives with his wife and her children in Lake Mills. (Transcript, page 9) Naser graduated from high school in Lake Mills in 1994. (Exhibit F, p. 26; Tr., p. 10) Naser was an average student in high school. (Tr., p. 11) Naser obtained two certificates in industrial workplace from NIACC while he was working. (Ex. F, p. 26; Tr., pp. 11-12) Naser has not completed any additional postsecondary training. At the time of the hearing Naser was forty-three. (Tr., p. 10)

From 1994 through 2010, Naser worked for Larson Manufacturing building storm doors and windows. (Tr., pp. 12-13; Ex. F, p. 27) When he left Larson Manufacturing, Naser was earning \$14.20 per hour. (Tr., p. 13) Naser next worked for Minnesota Corrugated Box in Albert Lea, Minnesota making different sized boxes where he earned \$12.00 per hour. (Tr., p. 13)

On September 7, 2010, Winnebago hired Naser to work at its Forest City location. (Ex. F, p. 27; Tr., p. 14) Naser performed a number of different positions and he received raises during his employment. (Tr., p. 14) When Naser left Winnebago he

was earning \$15.00 per hour as an A-frame operator, where he cut fiberglass panels for cabinet drawers or cabinets. (Tr., p. 15) Naser was trying to transfer to the Lake Mills location of Winnebago where he grew up. (Tr., p. 16) Winnebago did not approve the transfer, so Naser left Winnebago to work as an operator in the customs department of TruStile. (Tr., pp. 15-16)

In May 2015, Winnebago hired Naser to work at the Lake Mills location in the finals department where he earned \$14.10 per hour. (Ex. F, p. 28; Tr., p. 17) Naser worked in the finals department until August 2016. (Tr., p. 17) At the time of the hearing Naser was still working for Winnebago in Lake Mills. (Ex. F, p. 31)

On August 4, 2016, Naser was working on installing drawers in a cabinet on the galley side of a coach and reported

I was in a bent-over leaning position so I could reach what my work area was. And when I was finished, I went to stand up, and I felt an extreme shift in my back, pop; and then I felt – my lower extremities, my legs down to my toes, I couldn't – I couldn't feel.

So I held myself against the counter, and I told my coworker that something was very wrong, that I was unable to feel my lower extremities. And she went to get the supervisor, so at that time then – they didn't call the ambulance or anything, which later the doctor stated that they should have.

(Tr., pp. 18-19) Naser testified he had never had pain in his back like that before. (Tr., pp. 19-20)

Naser sought emergent care at Mercy Medical Center on August 4, 2016. (JE 2, p. 9) Hospital staff documented Naser reported he had bent down to install drawers in a cabinet at work that day and when he lifted himself up he developed back pain that worsened until it became unbearable. (JE 2, p. 9) Naser described the pain as dull with occasional sharp pains in his left lower back that is relieved by sitting. (JE 2, p. 9) Naser relayed he left work early because of the pain. (JE 2, p. 9) Naser received lumbar spine x-rays and the reviewing radiologist listed an impression of “[m]ild to moderate multilevel degenerative disc disease with mild lower lumbar facet arthropathy, most prominent at L5-S1.” (JE 2, p. 11) The attending physician prescribed Norco and Flexeril, discharged Naser, and ordered him to follow up with his primary care provider. (JE 2, p. 11)

On August 11, 2016, Naser attended an appointment with James McGuire, PA-C, a physician's assistant employed by Winnebago. (JE 1, p. 1) Naser reported he had been off for one week after injuring himself at work, it was difficult for him to get up and down from a chair and to lie down at night, and he could not tolerate any bending. (JE 1, p. 1) Naser complained of pain radiating down into his left lower extremity, but he did not report any numbness, tingling, or weakness. (JE 1, p. 1) McGuire assessed Naser

with lumbar pain with left leg radiculopathy, prescribed a Medrol Dosepak and Flexeril, and imposed restrictions of no lifting over five pounds, no bending, and no twisting. (JE 1, p. 1)

Naser returned to McGuire on August 23, 2016, complaining of back pain, and problems with bending, twisting, and sleep. (JE 1, p. 2) McGuire documented Naser reported the physical therapy he had received was helpful, and he reported no pain radiating into his lower extremities, numbness, or tingling sensations. (JE 1, p. 2) McGuire listed an impression of a back strain and continued Naser's work restrictions and physical therapy. (JE 1, p. 2)

During an appointment on August 25, 2016, Naser reported he was experiencing more pain that day and spasms the night before his appointment while trying to sleep. (JE 1, p. 3) Naser relayed he had returned to a light-duty job that involved occasional reaching, and after an eight-hour day his pain was worse. (JE 1, p. 3) McGuire assessed Naser with back pain, continued his restrictions, and also imposed a restriction of light-duty work limited to four hours per day maximum. (JE 1, p. 3)

On August 30, 2016, Naser attended a follow-up appointment with McGuire, complaining of more back pain the last several days when working four hours per day. (JE 1, p. 4) McGuire documented, "he says that the back is more uncomfortable by the time he gets done with this and he has started to have pain radiating down into his left hip and down the leg. Sometimes he can feel tingling down into his toes as well" and he had not noticed much change with physical therapy. (JE 1, p. 4) McGuire listed an impression of lumbar pain with left leg radiculopathy, continued Naser's work restrictions and physical therapy, ordered magnetic resonance imaging, and restricted Naser from working until the imaging was completed. (JE 1, p. 4)

Naser attended an appointment with McGuire on September 6, 2016, reporting his back pain had not changed and he continued to have pain radiating down into his left leg with numbness and tingling sensations, even though he had been off work. (JE 1, p. 5) McGuire restricted Naser from working until McGuire received the results of the magnetic resonance imaging. (JE 1, p. 5)

During an appointment on September 15, 2016, McGuire noted the magnetic resonance imaging showed no "significant neural foraminal impingement." (JE 1, p. 6) Naser continued to complain of low back pain with pain radiating down his left leg. (JE 1, p. 6) McGuire listed an impression of lumbar pain and continued Naser's restrictions. (JE 1, p. 6)

Naser underwent lumbar spine magnetic resonance imaging on September 12, 2016. (JE 3, p. 16) The reviewing radiologist listed an impression of "[m]ild multilevel degenerative disc disease, and mild to moderate facet disease, as above. There is minimal effacement of the left lateral recess both at L3-L4, as well as L5-S1, without discrete nerve root impingement. Mild foraminal narrowing at L4-L5 and L5-S1, as described." (JE 3, p. 16)

On September 22, 2016, Naser returned to McGuire reporting his back was not better and he was experiencing pain in his left lower back with any bending or twisting, and he occasionally felt twinges shooting down into his left hip and thigh. (JE 1, p. 7) McGuire continued Naser's work restrictions, and prescribed Flexeril. (JE 1, p. 7)

Naser attended an appointment with McGuire on October 6, 2016, complaining of back pain. (JE 1, p. 8) McGuire listed an impression of back pain, and restricted Naser from working until a follow-up appointment in two weeks, and continued his therapy. (JE 1, p. 8)

On October 20, 2016, Naser attended an appointment with Lynn Nelson, M.D., an orthopedic surgeon, upon a referral from Charles Mooney, M.D. (JE 4, p. 18) Naser relayed he was installing drawers at Winnebago, and when he went to stand up, he experienced low back pain and bilateral lower extremity paresthesias, and denied previous back problems. (JE 4, p. 18) Naser reported the last day he worked was August 30, 2016. (JE 4, p. 18) Dr. Nelson ordered and reviewed x-rays, and reviewed Naser's lumbar spine magnetic resonance imaging, which he found "demonstrates a broad central to left disk protrusion with lateral extension as well as moderately severe L5-S1 DDD with Modic type II changes." (JE 4, p. 19) Dr. Nelson listed an impression of left low back pain, central to left L5-S1 disc protrusion, L5-S1 degenerative disc disease, and obesity. (JE 4, p. 19) Dr. Nelson discussed treatment options including waiting for improvement over time, an ESI trial, or a fusion at L5-S1. (JE 4, p. 19) Naser testified Dr. Nelson recommended conservative treatment for three to six months. (Tr., p. 23) Dr. Nelson imposed restrictions of no lifting over ten pounds, and no repetitive bending or twisting, and noted Naser would return to occupational medicine. (JE 4, p. 19)

Naser attended an appointment with Dr. Mooney on November 29, 2016, complaining of back pain. (JE 5, p. 20) Dr. Mooney reviewed Naser's medical records and examined him. (JE 5, pp. 20-21) Dr. Mooney documented Naser was complaining of pain predominantly on the left side of his low back, that increases with activity and moderately impacts his activities of daily lifting, and documented Naser denied leg symptoms of any consistency. (JE 5, p. 20) Dr. Mooney assessed Naser with "[s]ymptoms of low back pain with evidence of mild retrolisthesis at L5-S1 with concomitant degenerative disc disease without evidence of radiculopathy at this time," and evidence of left S1 dysfunction and mild myofascial spasm. (JE 5, p. 21) Dr. Mooney recommended additional physical therapy, prescribed prednisone to be followed by naproxen, and baclofen, and released Naser to return to work with a lifting restriction of ten pounds and restrictions of no repetitive bending or twisting, and no prolonged standing greater than twenty minutes at a time. (JE 5, p. 21) Naser testified things went well with Dr. Mooney, at first. (Tr., p. 24)

During an appointment on January 4, 2017, Dr. Mooney documented Naser "feels like he is better than 90% better." (JE 5, p. 22) Dr. Mooney noted Naser had been compliant with physical therapy, he had lost twenty pounds, and his core strength had improved. (JE 5, p. 22) Dr. Mooney assessed Naser with symptoms of low back

pain with underlying spondylolisthesis, noted “[h]e is markedly improved,” and released him to return to work in a “step-wise fashion, achieving full unrestricted duties in approximately 30 days.” (JE 5, p. 22) Dr. Mooney imposed a lifting restriction of twenty-five pounds and a restriction of limiting floor to waist lifting to occasional or thirty percent of his work day, continued Naser’s physical therapy, and ordered Naser to return to unrestricted duty on February 4, 2017. (JE 5, p. 22) Naser testified he has not been “right” since the August 2016 work injury. (Tr., p. 28)

Naser returned to light-duty work at Winnebago and Winnebago assigned him to a different department. (Tr., pp. 24-25) Naser testified on February 14, 2017,

I was working with a seat belt, and I felt a shift in my back, pop. And then I went down to my knees and told the – my coworker that need to go get the supervisor. And they came at that time, and then they called the ambulance because I was having lower extremity numbness.

(Tr., p. 25) Naser testified he had never felt numbness like he did on February 14, 2017, after his August 2016 work injury. (Tr., p. 25)

Naser sought emergent care at Mercy Medical Center reporting he was bending over at work that morning when he felt a pop in his back with immediate pain. (JE 2, p. 13) Naser denied any weakness or numbness in his legs or pain radiating into his legs, and described the pain as severe and worse with movement. (JE 2, p. 13) The attending physician diagnosed Naser with lumbar back pain, discharged him with a Medrol Dosepak, and ordered him to follow up with his primary care provider. (JE 2, p. 15)

On February 14, 2017, Naser attended an appointment with Jeff Eaton, D.C., reporting he was working that morning taking a seatbelt out and bending properly when he felt his back give out, and he slowly went to the ground and waited for his supervisor to arrive. (JE 6, p. 38) Dr. Eaton performed chiropractic manipulation on Naser and documented Naser felt better. (JE 6, p. 38)

On February 16, 2017, Naser completed an injury report for Winnebago, documenting, he was “[w]orking in a Ford van disassembling seatbelt assembly in squatting [sic] position and felt a pop in my lower back and then slowly let myself to my knees and the [sic] to the van floor and was assisted out and transported by ambulance to Albert Lea Medical Center.” (JE 5, p. 23)

Naser returned to Dr. Mooney on February 17, 2017, reporting the February 14, 2017 injury, and complaining of low back pain on the left side with difficulty with weightbearing on the left leg and extreme pain when attempting to sit. (JE 5, p. 24) Dr. Mooney documented Naser did not complain of numbness, tingling, or weakness. (JE 5, p. 24) Dr. Mooney assessed Naser with “[s]ymptoms of left S1 dysfunction, which

appear to be acute and accompanied with myospasm," prescribed oxycodone, continued his prednisone, increased his baclofen, referred Naser to therapy, and restricted him from working. (JE 5, p. 24)

On March 3, 2017, Naser attended a follow-up appointment with Dr. Mooney. (JE 5, p. 25) Dr. Mooney documented Naser reported no radicular symptoms, and "his back pain is very reasonable, although he does have some stiffness." (JE 5, p. 25) Dr. Mooney assessed Naser with symptoms of sacroiliac dysfunction, and noted he has underlying spondylolisthesis "which does not appear to be aggravated at this time." (JE 5, p. 25) Dr. Mooney opined Naser did not need any additional physical therapy and he could return to normal activities. (JE 5, p. 25) Dr. Mooney imposed a lifting restriction of twenty pounds and restrictions of no repetitive bending or lifting floor to waist, and found Naser could return to unrestricted duty on March 17, 2017. (JE 5, p. 25) Naser returned to work. (Tr., p. 27)

Dr. Mooney sent a letter to Winnebago's representative on May 12, 2017, stating Naser "felt to be doing very well after physical therapy and appeared to be resolving all symptoms," noted Naser was released to unrestricted duty on March 17, 2017 and he had not reported increasing symptoms or difficulty related to his sacroiliac dysfunction and low back pain. (JFE 5, p. 26) Dr. Mooney placed Naser at maximum medical improvement on May 3, 2017. (JE 5, p. 26) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Mooney opined Naser had sustained no permanent partial impairment related to his work injury. (JE 5, p. 26)

On June 16, 2017, Naser was working on the coach line in the finals department, and reported:

[i]t was the same occurrence. I was doing final drawers, and I felt a shift. And then I felt numbness in my left leg, so I went to report it. Had supervisor reported – got it reported to the supervisor; and at that time I was sent back to, I believe, Forest City Clinic to be seen.

(Tr., pp. 27-28)

On June 21, 2017, Naser returned to Dr. Mooney reporting on June 6, 2017, he knelt down to install drawers at work and felt his back shift, resulting in severe left-sided back pain, and buttock pain. (JE 5, p. 28) Dr. Mooney assessed Naser with "[s]ymptoms of re-aggravation of left sacroiliac dysfunction" and referred him to physical therapy. (JE 5, p. 28) Dr. Mooney restricted Naser from working until he could more comfortably stand and walk. (JE 5, p. 28) During an appointment on June 27, 2017, Dr. Mooney issued restrictions of no lifting or pulling over ten pounds, no repeated bending or twisting of the back, no uninterrupted sitting over twenty minutes per hour, no uninterrupted walking or standing over twenty minutes per hour, and no work beyond eight hours per day or forty hours per week. (JE 5, p. 30)

Naser attended a follow-up appointment with Dr. Mooney on July 11, 2017, regarding his low back symptoms. (JE 5, p. 31) Dr. Mooney documented Naser reported he was fifty percent improved, but he continued to complain of tightness, particularly on the left side of his lumbar area, and noted he was not complaining of any numbness, tingling, weakness, or radiating pain, but did report occasional shooting pain into his buttock and hip when lifting his left leg while walking. (JE 5, p. 31) Dr. Mooney assessed Naser with symptoms of ongoing back pain with degenerative disc disease, spondylolisthesis, and sacroiliac dysfunction with "some abnormal pain behavior." (JE 5, p. 31) Dr. Mooney reported he counseled Naser on the need to participate in physical therapy and to continue home exercises and activity, and he prescribed Relafen and Baclofen. (JE 5, p. 31) Dr. Mooney released Naser to return to work with restrictions of no lifting over twenty pounds, no bending or twisting, no work over eight hours per day or over forty hours per week, and that he be allowed to sit or stand for comfort with the majority of his work being performed in a standing position. (JE 5, p. 31)

On August 2, 2017, Naser returned to Dr. Mooney with increased back pain noting he had been performing clerical work. (JE 5, p. 32) Dr. Mooney documented Naser did not complain of any lower extremity symptoms, numbness, tingling, or weakness. (JE 5, p. 32) Dr. Mooney assessed Naser with symptoms of ongoing back pain with increasing symptoms of pain without evidence of specific objective findings, and non-physiologic findings. (JE 5, p. 32) Dr. Mooney provided Naser with a TENS unit, and noted he did not see any evidence of any ongoing disc disorder, radicular findings, or any findings that would be addressable through interventional pain techniques. (JE 5, p. 32) Dr. Mooney opined Naser was approaching maximum medical improvement, and he encouraged Naser to continue home exercises and increase his activity levels. (JE 5, p. 32) Dr. Mooney released Naser to return to work with restrictions of no lifting over twenty pounds, and no work over eight hours per day, and stated he would order a functional capacity evaluation. (JE 5, p. 33)

Naser underwent a functional capacity evaluation on August 14, 2017. (Ex. D, p. 11) The physical therapist documented the test was invalid because Naser had performed inconsistently during repeated measures protocol. (Ex. D, p. 11)

Naser testified after the functional capacity evaluation he saw Dr. Mooney one more time and Dr. Mooney told him

the FCE test was basically garbage and that he should crumple it up and throw it in the garbage, that there was nothing further at that time that he could do for me.

Tried to state that possibly more therapy would help, but – because it seemed like it was helping working with the therapist. He didn't see it

that way, didn't order any more and just left, slammed the door and left me there.

(Tr., pp. 32-33)

Naser contacted Dr. Mooney's nurse and asked whether his restrictions could be lifted. (Tr., p. 48) On August 23, 2017, Dr. Mooney's nurse documented she spoke with Dr. Mooney and he did not want to release Naser to full duty until November 1, 2017, and that Naser should be allowed to use his TENS unit while at work. (JE 5, p. 34) Naser testified when he was under restrictions he was not receiving his full wages at Winnebago and he was receiving temporary disability benefits. (Tr., pp. 48-49)

Naser testified Winnebago had placed him in the Spyder prep position in August 2017, and described it as an off-line production job. (Tr., p. 34) Naser testified the position is much easier because he does not have to engage in constant bending or twisting, he works with everything in front of him on a worktable, and he does not have to stoop or put himself in awkward positions. (Tr., p. 35) Naser relayed the Spyder prep position does not allow him flexibility to work in many positions in the plant. (Tr., pp. 36-37) The Spyder prep position is a position that other employees hold in the plant. (Tr., p. 47)

On November 21, 2017, Dr. Mooney issued an opinion noting he had treated Naser for low back pain including sacroiliac pain. (JE 5, p. 35) Using the AMA Guides, Dr. Mooney opined Naser had not sustained a permanent partial impairment as a result of the August 4, 2016 work injury. (JE 5, p. 35)

Naser returned to Dr. Eaton on December 23, 2017, reporting he had aggravated his left lower back while lifting at work. (JE 6, p. 39) Dr. Eaton performed a chiropractic manipulation on Naser and documented Naser felt better. (JE 6, p. 39) Naser continued to treat with Dr. Eaton and he received chiropractic manipulation again on January 8, 2017. (JE 6, p. 40)

On February 7, 2018, Dr. Mooney issued an opinion letter for Winnebago. (Ex. C) Dr. Mooney documented he had treated Naser for low back complaints and sacroiliac dysfunction and last saw him on August 22, 2017, noting Naser was demonstrating ongoing symptoms that appeared multifactorial and "also demonstrated illness behavior with pain complaints exceeding objective findings." (Ex. C, p. 9) Dr. Mooney noted he had released Naser to full duty without restrictions on November 1, 2017, and after reviewing his functional capacity evaluation, he had determined Naser could return to all regular activities based on inconsistencies in the evaluation, and found he reached maximum medical improvement on November 20, 2017. (Ex. C, p. 9) Dr. Mooney opined he did not believe Naser would benefit from interventional pain techniques regarding his ongoing complaints. (Ex. C, p. 9)

Todd Harbach, M.D., an orthopedic surgeon, conducted an independent medical examination for Winnebago on July 15, 2018. (Ex. B) Dr. Harbach reviewed Naser's medical records, examined him, and responded to questions posed by counsel. (Ex. B) Dr. Harbach diagnosed Naser with advanced lumbar degenerative spondylosis with all five lumbar discs showing decreased signal on the T2-weighted images and posterior high-intensity zones indicative of annular tears, a small posterolateral disc herniation, left L5-S1 impinging upon the left S1 nerve root, intractable back pain, frequent back spasms with flare-up, and he found Naser was overweight and deconditioned. (Ex. B, p. 6)

With respect to causation, Dr. Harbach opined Naser's work injuries on August 4, 2016, February 14, 2017, and June 16, 2017 all "aggravated the preexisting degenerative conditions." (Ex. B, p. 7) Dr. Harbach noted "[i]t is certainly possible that his herniated disk at L5-S1 was caused by his original injury. However, the patient only has 20% of his total pain complex as left lower extremity radicular pain and 80% of his pain complex being intractable back pain." (Ex. B, p. 7) Dr. Harbach opined Naser reached maximum medical improvement when he returned to work after his June 16, 2017 injury in August 2017. (Ex. B, p. 7) Dr. Naser further opined,

[t]he patient relates that he never had back pain before he injured his back and his original injury at work on August 4, 2016. There are no records provided that demonstrated a history of treatment for back pain prior to that accident in August 2016. Since his injury at work, he has not returned to his previous level of function and has had to accept a lesser degree of work or cross train at his work since that time. Therefore, I believe with a reasonable degree of medical certainty that his injury did accelerate him to an end that he would have come to naturally, but this accelerated him to an end much sooner than that would have occurred. Therefore, I believe he fits into DRE lumbar category #2, which is on page 384, table 15-3 [of the AMA Guides]. In that category he should receive a 5% permanent impairment of the whole person. It is also important to discuss apportionment because this claimant had irritation of a preexisting degenerative condition. The patient's work injury should be responsible for only 40% of his outcome or injury, as 60% of his problem was the degeneration that already existed prior to the injury at work.

(Ex. B, p. 7) Dr. Harbach noted Naser had failed a functional capacity evaluation because of inconsistent performance, he believed a functional capacity evaluation is the only way to determine specific restrictions, and because Naser failed the evaluation he would not recommend any specific restrictions. (Ex. B, p. 8)

Jacqueline Stoken, D.O., a physiatrist, conducted an independent medical examination for Naser on August 13, 2018, and issued her report on August 23, 2018. (Ex. 1) Dr. Stoken reviewed Naser's medical records and examined him. (Ex. 1) Dr. Stoken listed an impression of an acute back strain, sacroiliac joint dysfunction, and chronic low back pain. (Ex. 1, p. 10) Dr. Stoken opined the lifting and repetitive trauma

caused Naser's injury to his body in August 2016, February 2017, and June 2017. (Ex. 1, p. 10)

Dr. Stoken opined using Table 15-3 of the AMA Guides on page 384, Naser "fits into the DRE Lumbar Category II with 5-8% Impairment of the Whole Person. His clinical history and examination findings are compatible with the specific injury. He does have asymmetric loss of ROM and muscle spasms. I would assign 8% Impairment of the Whole Person due to this injury." (Ex. 1, p. 10) Dr. Stoken recommended permanent work restrictions of no lifting over ten pounds on a frequent basis, and to avoid repetitive bending, lifting, and twisting. (Ex. 1, p. 10)

Naser testified his low back and leg pain feels like a nagging, twisting, burning and numbness down the back of his leg. (Tr., p. 38) Naser reported he continues to receive chiropractic treatments and he has prescriptions for baclofen and Relafen. (Tr., pp. 39-40) Naser testified he could not return to his position at Larson Manufacturing because he had to work with extruded aluminum pieces that were twenty feet long and the position involved a lot of lifting. (Tr., p. 37)

Naser is able to move from sitting to standing at Winnebago. (Tr., p. 38) He reported standing during his shift bothers his back and leg. (Tr., p. 39) Naser also uses his TENS unit at work when he needs it, approximately once a month, or every other week. (Tr., p. 39) Naser agreed no physician has imposed a standing restriction for him. (Tr., p. 52) Naser reported there has not been a time he has not had severe leg pain since August 2016. (Tr., pp. 56-57)

Naser has received regular raises at Winnebago. (Tr., p. 40) At the time of his work injury Naser was earning \$14.05 per hour. (Tr., p. 52; Ex. H) Two weeks before the hearing Naser received a raise and he was earning \$16.58 per hour. (Tr., pp. 41, 54)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including the issues of extent of disability, recovery of the cost of an independent medical examination, and interest under Iowa Code sections 85.34, 85.39, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.33, 85.34, and 85.39 apply to injuries occurring on or after the effective date of the Act. This case involves alleged injuries occurring before July 1, 2017. Therefore, the provisions of the new statute involving extent of disability under Iowa Code section 85.34, and recovery of the cost of an independent medical examination under Iowa Code section 85.39 do not apply to this case.

The calculation of interest is governed by Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018). (Interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent). Under Gamble, the interest rate changed for benefits accruing on or after July 1, 2017.

II. Permanency and Extent of Disability

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Cihā, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App.

1997). The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers’ compensation that “if a claimant [has] a preexisting condition or disability, aggravated, accelerated, worsened, or ‘lighted up’ by an injury which arose out of and in the course of employment resulting in a disability found to exist,” the claimant is entitled to compensation. Iowa Dep’t of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a “personal injury” under our Workmen’s Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

The parties agree Naser sustained three work injuries. Naser avers he sustained a permanent impairment and he seeks an award of five to fifteen percent industrial disability. Winnebago alleges the evidence shows Naser sustained no or very little permanent disability as a result of his work injuries, and that the February 14, 2017 and June 16, 2017 injuries were acute exacerbations of the original August 4, 2016 injury. (Brief at 1)

Three physicians have provided opinions on permanency, Dr. Mooney, a treating occupational medicine physician, Dr. Harbach, an orthopedic surgeon retained by Winnebago to conduct an independent medical examination only, and Dr. Stoken, a physiatrist retained by Naser to conduct an independent medical examination only. Dr. Mooney opined Naser had sustained no permanent impairment. Dr. Harbach opined Naser’s work injuries aggravated his preexisting degenerative conditions. Dr. Stoken opined Naser’s lifting and repetitive trauma at work caused injuries to his body in August 2016, February 2017, and June 2017. I find the opinion of Dr. Harbach, as supported by the record evidence, most persuasive.

Dr. Harbach possesses superior training to Drs. Mooney and Stoken. Dr. Stoken's report is conclusory in nature. Dr. Mooney became frustrated with Naser when he failed the functional capacity evaluation to determine permanent restrictions, and then opined Naser had not sustained a permanent impairment. As noted by Dr. Harbach, there are no medical records demonstrating Naser had a history of treatment for back pain before the August 4, 2016 work injury. Dr. Harbach opined the injuries on August 4, 2016, February 14, 2017, and June 16, 2017 all aggravated his preexisting conditions. (Ex. B, p. 7) While Naser continues to work for Winnebago, he did not return to his normal work duties at Winnebago after his work injuries, and he is performing a different job. Naser has established he sustained a permanent impairment.

The parties stipulated if Naser has sustained a permanent impairment, he has sustained an industrial disability. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

As noted above, I found Dr. Harbach's opinion most convincing. Dr. Harbach assigned Naser a five percent permanent impairment, apportioning forty percent of the impairment to his work injuries. (Ex. B, p. 7) Dr. Harbach did not assign any permanent restrictions.

At the time of the hearing Naser was forty-three. Naser is a high school graduate. He obtained two certificates at a community college while working for an employer many years ago. Naser has experience building storm doors and windows, manufacturing corrugated boxes, as an operator, and manufacturing recreational vehicles for Winnebago. Naser continues to work for Winnebago, and he has received several raises since his original work injury. Naser has a preexisting condition in his back that was permanently aggravated by his work injuries. Naser has not returned to his baseline. I believe he has sustained a slight industrial disability as a result of his work injuries. Based on the factors of industrial disability, I conclude Naser has sustained a five percent permanent industrial disability. Naser is entitled to twenty-five weeks of permanent partial disability benefits at the stipulated rate of \$448.09 per week.

III. Costs

Naser seeks to recover the \$100.00 filing fee, and the \$3,200.00 cost of Dr. Stoken's independent medical examination. (Ex. 2)

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides,

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice" Id.

Dr. Stoken was retained to conduct an independent medical examination after Dr. Harbach issued an impairment rating in the case for Winnebago. Under the statute, Naser is entitled to recover the \$3,200.00 cost of Dr. Stoken's independent medical examination.

The administrative rule expressly allows for the recovery of the filing fee. Naser is entitled to recover the \$100.00 filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits at the stipulated weekly rate of four hundred forty-eight and 09/100


dollars (\$448.09), commencing on the stipulated commencement date of November 1, 2017.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay the claimant three thousand two hundred and 00/100 dollars (\$3,200.00) for the cost of Dr. Stoken's independent medical examination, and one hundred and 00/100 dollars (\$100.00) for the filing fee.

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

Signed and filed this 31st day of January, 2019.


HEATHER L. PALMER
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.