BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT SEAMAN,

Claimant,

vs.

CITY OF DES MOINES, IOWA,

Employer,
Self-Insured,
Defendant.

File No. 5053418

REVIEW-REOPENING

DECISION

SCOTT SEAMAN,

Claimant,

vs.

CITY OF DES MOINES, IOWA,

Employer,
Self-Insured,
Defendant.

File Nos. 5057973, 5057974

ARBITRATION

DECISION

Headnotes: 1402.30, 1402.40, 1402.50, 1803, 1804, 2206, 2208, 2209, 2401, 2501, 2905

Claimant Scott Seaman filed a review-reopening action, and two petitions in arbitration on December 9, 2016, File Numbers 5053418, 5057973, and 5057974. File Number 5053418 is a review-reopening action, involving injuries to Seaman's right shoulder, back, and spine occurring on December 11, 2014, while working for the defendant, City of Des Moines ("the City"). The City filed an answer on January 10, 2017. In File Number 5057973, Seaman alleges he sustained a hernia while working for the City on October 9, 2016, and he seeks medical benefits only. The City filed an answer on January 10, 2017, denying Seaman sustained a work injury. In File Number 5057974, Seaman alleges he sustained hearing loss and tinnitus while working for the City on November 29, 2016. The City filed an answer on January 10, 2017, denying Seaman sustained a work injury.

An arbitration hearing was held on October 12, 2017, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Corey Walker represented Seaman. Seaman appeared and testified. Phillip Davis testified on behalf of Seaman. Assistant City Attorney Michelle Mackel-Wiederanders represented the City, and Assistant City Attorney Larry Dempsey observed the hearing. Craig Shepherd appeared and testified on behalf of the City. Matt Beckman also appeared and testified on behalf of the City. The City failed to disclose information Seaman requested during the course of discovery

involving Beckman. As a result of the failure to disclose the information, Beckman's testimony was stricken from the record as a sanction under rule 876 Iowa Administrative Code 4.19(e). Joint Exhibits ("JE") 1 through 14, Exhibits 13 through 31, and Exhibit A were admitted into the record. The record was held open through November 13, 2017, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared hearing reports for each case, listing stipulations and issues to be decided. For File Number 5057974, the City raised the affirmative defense of lack of timely notice under Iowa Code section 85.23. The City waived all other affirmative defenses for File Number 5057974 and for File Numbers 5053418 and 5057973.

FILE NUMBER 5053418

STIPULATIONS

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

2. Seaman sustained an injury on December 11, 2014, which arose out of and in the course of his employment with the City.

3. The alleged injury was the cause of a temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.

5. The alleged injury is a cause of permanent disability.

6. The disability is an industrial disability.

7. The commencement date for permanent partial disability benefits is May 30, 2015.

8. At the time of the alleged injury Seaman's gross earnings were $1,128.78 per week, he was married and entitled to four exemptions, and his weekly rate was $715.06.

9. Prior to the hearing Seaman was paid 126 weeks of compensation at the rate of $715.06 per week.

10. The costs have been paid.

ISSUES

1. Has Seaman sustained a change of condition warranting an award of additional industrial disability benefits?

2. If Seaman sustained a change of condition warranting an award of additional industrial disability benefits, what is the extent of disability?

3. Has Seaman established he is permanently and totally disabled under the statute?

4. Is Seaman entitled to recover the cost of an independent medical examination?

5. Should costs be assessed against either party?

FILE NUMBER 5057973

STIPULATION

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

ISSUES

1. Did Seaman sustain an injury on October 9, 2016, which arose out of and in the course of his employment with the City?

2. Is Seaman entitled to recover medical expenses?

3. Is Seaman entitled to recover the cost of an independent medical examination?

FILE NUMBER 5057974

STIPULATIONS

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

2. Temporary benefits are no longer in dispute.

3. At the time of the alleged injury Seaman's gross earnings were $1,070.53 per week, he was married and entitled to three exemptions, and the parties believe the weekly rate is $692.58.

4. Costs have been paid.

ISSUES

1. Did Seaman sustain an injury on November 29, 2016, which arose out of and in the course of his employment with the City?

2. Has the City established Seaman failed to provide timely notice under Iowa Code section 85.23?

3. Is the alleged injury a cause of temporary disability during a period of recovery?

4. Is the alleged injury a cause of permanent disability?

5. If the injury is found to be a cause of permanent disability, has Seaman sustained an industrial disability?

6. If the injury is found to be a cause of permanent disability, what is the extent of disability?

7. If the injury is found to be a cause of permanent disability, is the commencement date for permanent partial disability benefits November 30, 2016?

8. Is Seaman permanently and totally disabled under the statute?

9. Is Seaman entitled to recover medical expenses?

10. Is Seaman entitled to recover the cost of an independent medical examination?

11. Should costs be assessed against either party?

FINDINGS OF FACT

Seaman lives in Des Moines with his wife, and two of his six children. (Transcript, pages 8-9; Ex. A, p. 3) Seaman is a high school graduate. (Exhibits A, p. 4; 21, p. 271; 27, p. 301; Tr., pp. 9-10) Seaman earned B and C grades in high school. (Tr., p. 10) Seaman is right-hand dominant. (Tr., p. 9; Ex. A, p. 3) At the time of the hearing he was fifty-eight. (Tr., p. 8)

The City hired Seaman in 1979, as an animal control officer. (Ex. 21, p. 272; Tr., p. 10) The City sent Seaman to the Animal Control Training Academy and he attended courses at the Academy over the course of his career as an animal control officer. (Tr., p. 10; Ex. A, p. 5) As an animal control officer, Seaman responded to citizen complaints, investigated animal bites, investigated animal cruelty, transported injured animals, destroyed animals, issued citations, and appeared in court on citations. (Tr., p. 11)

Seaman worked as an animal control officer for seventeen years. (Tr., p. 11) The kennel the City used was made out of concrete. (Tr., p. 11) The kennel often had over 140 dogs and the barking was loud. (Tr., pp. 11-12) Seaman was responsible for cleaning the kennel once or twice per week as part of his job duties. (Tr., p. 12) The cleaning would take between thirty minutes and three hours, depending on the condition of the facility. (Tr., p. 12) Seaman was also responsible for using a tranquilizer gun on animals, and euthanizing animals by firing a shotgun. (Tr., p. 13) During the 1970s and 1980s, Seaman fired a gun up to ten times per night. (Tr., p. 13) The City did not provide Seaman with hearing protection. (Tr., pp. 13-14)

Following the death of one of his children in 1996, Seaman took a voluntary demotion to a laborer position where he did not have to euthanize animals and dispose of large piles of dead animals. (Exs. 21, p. 272; 23, p. 283; Tr., pp. 14-15) The City assigned Seaman to the compost where he worked next to the tree limb grinder. (Tr., p. 14) Seaman testified the grinder was loud and he was exposed to the noise of the grinder six to seven hours per day. (Tr., p. 15) Seaman wore hearing protection while working as a laborer, but reported the dust would cake in his ears so he would need to remove his hearing protection to remove the dust, and he also had to remove his hearing protection to speak with his coworkers. (Tr., p. 16)

Seaman obtained a Class A CDL and moved to a truck driver position after working as a laborer for approximately one year. (Tr., p. 15) Seaman drove a tandem truck hauling sweeper dumps, compost, trash, and other items for the City. (Tr., p. 17) Seaman reported the trucks did not have air conditioning, so he operated the trucks with the windows down, and he was exposed to loud exhaust. (Tr., p. 17) Seaman relayed he was also exposed to the loud noise of the grinder when he hauled material to the compost. (Tr., p. 17) The City did not provide Seaman with hearing protection when he worked as a truck driver. (Tr., p. 17)

In 2000, Seaman moved to a sweeper operator position with the cleanup crew for the City. (Tr., p. 18) The cleanup crew performed the court-ordered cleanups of homes in the Des Moines area. (Tr., p. 18) Seaman operated a case loader with a bucket he described as "old and rickety and loud." (Tr., pp. 18-19) During the warm months the employees took the doors off the case loader, which exposed Seaman to loud noise. (Tr., p. 19) Seaman received ear protection from the City, but relayed he did not wear earplugs often because he had to be able to communicate with the laborers working in front of him picking up things. (Tr., p. 19)

Seaman also ran the street sweeper. (Tr., p. 20) Seaman relayed the street sweeper is rough, loud, and he would feel every bounce and bump when he operated it. (Tr., pp. 20-21) The City provided Seaman with hearing protection, but Seaman reported he also needed to listen to the City radio to communicate with the truck driver who was taking the dumps from his sweeper, so he would have to take his hearing protection in and out. (Tr., p. 21) Seaman continued to work as a street sweeper until his accident on December 11, 2014. (Tr., p. 21)

Before his accident in December 2014, Seaman sustained work injuries to his right shoulder, which required surgery, and to his back. (Tr., pp. 21-22) Seaman recovered from his injuries and he returned to his street sweeper duties. (Tr., p. 22) Seaman was also diagnosed with a hernia before December 2014, and relayed that his physician told him it was work-related due to his sweeper duties. (Tr., p. 22) Seaman recovered from his prior hernia injury and he returned to his sweeper duties. (Tr., p. 23)

I. December 11, 2014 Injury

On December 11, 2014, Seaman was operating a street sweeper. (Tr., p. 23) He stopped and as he was getting out of the sweeper he hit one of the removable steps, the step came off, and he fell backwards onto the parking. (Tr., p. 24; Ex. A, p. 11) Seaman testified he felt immediate pain in his back and shoulder, and reported his injury to the City. (Tr., p. 24)

The City sent Seaman to Richard Bratkiewicz, M.D. (Tr., p. 24; Ex. 2, p. 7) Dr. Bratkiewicz assessed Seaman with multiple contusions to his midback, low lumbar spine, and buttocks. (Ex. 2, p. 7)

Seaman was placed on sedentary duty and he was referred to Donna Bahls, M.D. (Ex. 3) Dr. Bahls assessed Seaman with a right labrum tear and shoulder impingement syndrome, and imposed restrictions of no work at or above shoulder height with the right arm, use of the right hand for light paper work only, and imposed a one pound lifting restriction with the right arm. (Ex. 3, p. 38)

In March 2015, Mark Fish, D.O., an orthopedic surgeon practicing with Dr. Bahls, examined Seaman and assessed him with a right labrum tear, right shoulder impingement syndrome, and right AC joint osteoarthritis, and recommended surgery. (Ex. 3, p. 41) Seaman underwent a right shoulder arthroscopy with SLAP labral repair with subacromial bursectomy, subacromial decompression, and distal claviculectomy on April 3, 2015. (Ex. 3, p. 45) Dr. Fish ordered physical therapy. (Ex. 3, p. 50) Seaman continued to complain of pain and received a right shoulder injection in addition to physical therapy. (Ex. 3, p. 89)

Dr. Fish ordered a functional capacity evaluation. (Ex. 3, pp. 89, 101) Dr. Bahls noted the functional capacity evaluation revealed Seaman did not meet the requirements of his job duties. (Ex. 3, p. 101) Dr. Bahls placed Seaman on light duty with restrictions of sitting, standing, and walking as needed. (Ex. 3, p. 102)

Seaman returned to Dr. Fish on October 19, 2015. (Ex. 3, p. 103) Dr. Fish informed Seaman the functional capacity evaluation determined his permanent work restrictions and revealed he could not reasonably perform his current job. (Ex. 3, p. 104) Dr. Fish imposed a restriction of no overhead motion, and a five pound lifting restriction. (Ex. 3, p. 104)

Seaman continued to complain of right lumbar spine pain. (Ex. 3, p. 59) In June 2015, he attended an appointment with Clay Ransdell, D.O., an anesthesiologist, for pain management, reporting he was experiencing constant shooting, gnawing, and aching pain on his right side. (Ex. 3, p. 59) Dr. Ransdell examined Seaman, assessed him with lumbar radiculopathy, and performed an epidural steroid injection. (Ex. 3, p. 62)

Dr. Bahls sent a letter to the City's representative on November 23, 2015, noting she had treated Seaman for a prior work injury and rendered a rating of five percent for his low back in February 2010, which included low back and right leg pain. (Ex. 3, p. 106) With respect to the December 2014 work injury, Dr. Bahls noted,

> [f]ollowing his injury 12/11/14 his back and right leg symptoms increased and when I first evaluated him 1/19/15 for his injuries he also reported new right testicle pain. I reviewed his MRI reports of the lumbar spine 2/10/10 and 2/3/15 and his degenerative disc and joint disease had progressed over the years but the findings on his recent MRI of the right posterior lateral disc bulge/protrusion at L3-4 contacting the right L3 nerve root was felt to correlate to his new right testicular symptoms and therefore I did feel he sustained a new structural injury in his low back. I am providing him a 5% whole person impairment per category II of the DRE lumbosacral model per the AMA Guides to the Evaluation of Permanent Impairment Fifth Edition.

(Ex. 3, p. 106)

On December 9, 2015, Dr. Fish sent a letter to the City's representative, opining under the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"),

> [o]n range of motion, he had flexion to 135, which gives three (3) percent impairment, extension to 20, which gives two (2) percent impairment, abduction to 140, which gives two (2) percent impairment, internal rotation to 45 degrees, which is two (2) percent, and external rotation to 70 degrees, which is zero (0) percent, for a total impairment on range of motion of nine (9) percent. On strength, he had flexion of 4+/5, which is two (2) percent, extension of 5/5, which is zero (0) percent, abduction of 4+/5, which is one (1) percent, and external rotation of 4+/5, which is one (1) percent, for a total strength impairment of four (4) percent. This gives a total of 13 percent impairment of the right upper extremity, which would give an eight (8) percent whole person impairment.

(Ex. 3, p. 108)

Dr. Bahls responded to a form letter, agreeing Seaman's chronic low back and right leg pain were caused and/or materially aggravated by the December 11, 2014

work injury, noting she had opined Seaman had sustained a five percent whole person impairment, and imposing lifting restrictions of ten pounds frequently, fifteen to twenty pound occasionally, and restrictions of sitting, standing, and walking as needed, and no repetitive bending, twisting, lifting, or stooping. (Ex. 3, p. 122)

Dr. Bahls referred Seaman to Alison Weisheipl, M.D., an anesthesiologist, for pain management. (Ex. 7, p. 158) Dr. Weisheipl assessed Seaman with lumbar spondylosis, sacroiliitis, intervertebral lumbar disc disorders, lumbar spinal stenosis, lumbar osseous stenosis of the neural canal, and a right shoulder superior glenoid labrum lesion. (Ex. 7, p. 161) Dr. Weisheipl monitored Seaman's opioid prescriptions and pain management, including injections. (Ex. 7, pp. 161-70)

Mark Taylor, M.D., conducted an independent medical examination for Seaman on April 21, 2016. (Ex. 15, pp. 223-36) Dr. Taylor reviewed Seaman's medical records and examined him. (Ex. 15, pp. 223-36) Dr. Taylor diagnosed Seaman with right shoulder impingement and labral tear, status post right shoulder labral repair, subacromial bursectomy and decompression, distal claviculectomy, and aggravation of chronic low back pain. (Ex. 15, p. 231)

Using the AMA Guides, Dr. Taylor assigned Seaman a twelve percent whole person impairment for his lumbar spine, and a twelve percent whole person impairment to the shoulder, which he combined for a twenty-three percent whole person impairment. (Ex. 15, p. 233) Dr. Taylor recommended lifting restrictions of fifteen to twenty pounds occasionally between knee and chest level up to two times per hour, five pounds with the right arm, ten pounds between knee level and above shoulder level, and restrictions of avoiding overhead tasks with the upper right extremity, alternating sitting, standing, and walking as needed, no climbing of ladders, rarely or occasionally squatting, bending, kneeling, and crawling, and avoiding pushing and pulling with the right arm. (Ex. 15, pp. 233-34)

Seaman retained Phil Davis, M.S., to conduct a vocational assessment. (Ex. 27) Davis reviewed Seaman's records, and interviewed him. (Ex. 27, p. 300) Davis noted Seaman has Facebook and Twitter accounts, but he has no knowledge of Excel, Word, or other programs used in employment settings, and described his keyboarding skills to be "hunt and peck." (Ex. 27, p. 301) Davis noted Seaman's past employment fell primarily within the range from medium to very heavy physical demand level, and his current physical capacity fell in the sedentary physical demand level. (Ex. 27, pp. 304-05) Davis opined ninety percent of the occupations in the Des Moines area fall outside his current physical ability to perform, and the positions he is capable of working in generally require a higher level of education, training, or skills beyond those possessed by Seaman. (Ex. 27, p. 305) Davis testified Seaman had lost access to sixty-five to seventy percent of the labor market and economy. (Tr., pp. 59-60)

The City accommodated Seaman with temporary light duty work while he was recovering from shoulder surgery. (Ex. 24, p. 289) After receiving his permanent

restrictions, Seaman could not return to his duties as a sweeper operator. (Ex. 24, p. 289) The City accommodated Seaman's restrictions and offered him a public works assistant position. (Ex. 24, pp. 286-89) Seaman moved to the public works assistant position effective July 6, 2016. (Ex. 24, p. 290) The City assigned Seaman to the night shift, 11:15 p.m. to 7:15 a.m., pursuant to seniority. (Ex. 24, p. 290) As a sweeper operator Seaman worked during the day, Monday through Friday. (Tr., p. 30) When the City moved him to the public works assistant position, he worked Wednesday through Sunday. (Tr., p. 30) Seaman testified he has sleep apnea, and his personal physician restricted him from working from 11:00 p.m. to 7:00 a.m. (Tr., p. 31)

While working as a public works assistant Seaman was responsible for entering data into the HEAT system, which is the system the City uses to process citizen complaints. (Tr., p. 33) Seaman testified the City did not have a published manual for him to use. (Tr., p. 33) Seaman reported he had difficulty performing his duties as a public works assistant because he is not good with computers, and he requested additional training. (Ex. 24, p. 290) The City provided Seaman with training. (Ex. 24, p. 290) Seaman reported he also had trouble hearing around the other employees, so the City moved him to an empty office. (Tr., pp. 34-35)

The Workers' Compensation Commissioner approved an agreement for settlement between Seaman and the City on October 18, 2016. (Ex. 1) The parties stipulated Seaman sustained injuries arising out of and in the course of his employment with the City on December 11, 2014, and that he had sustained a thirty-eight percent loss of earning capacity as a result of his work injury, entitling him to 190 weeks of permanent partial disability benefits commencing on May 29, 2015. (Ex. 1, p. 1) The agreement for settlement also provided

> [t]he parties acknowledge that Claimant's work restrictions caused by the work related injury are being accommodated and that Claimant continues to be employed and working for Defendant-Employer on a full time basis, sometimes working overtime, which continued employment is a substantial factor in reaching this Agreement for Settlement. Also, Claimant's medical condition is stable and is not anticipated to worsen.

(Ex. 1, p. 2)

On November 29, 2016, the City sent Seaman a letter stating the City had accommodated his physical restrictions with the public works assistant position, but

> it is your decision that you cannot learn or perform the duties of the job; there is no evidence that you are unable to perform the work of a PWA. Public Works has provided you significant additional training with staff members in the Public Works Call Center and provided training manuals for your use. You have also received on-the-job training with experienced full-time Public Works Assistants. Unfortunately, you have not demonstrated the capacity to do the work of a Public Work Assistant even

> those tasks that are within your physical restrictions. Further, no other positions have been identified nor have you applied for any other positions that you may have been qualified for and within your restrictions.
>
> Based on the above, which includes: your own admission that you cannot meet the expectations of the PWA, your restriction to only work days; your light duty position as a Street Sweeper Operator not being a regular full-time civil service job, coworkers being required to do additional work that you are unable to perform; and because there are no other available positions within the City for which you have expressed interest or applied, your employment with the City of Des Moines is terminated effective December 2, 2016. You will be paid through December 2, 2016, however you are relieved of your duties effective immediately.

(Ex. 24, pp. 290-91)

Seaman testified following his termination from the City he applied for a driving job for Clark Services, and for a job at an ice cream stand. (Ex. A, p. 33) Seaman was not offered either position. (Ex. A, p. 33)

Seaman applied for Social Security Disability Insurance. (Ex. 26; Tr., p. 45) The Social Security Administration approved his application on May 21, 2017, finding he became disabled on November 30, 2016. (Ex. 26, p. 295) Seaman also receives retirement benefits through IPERS. (Ex. A, p. 34)

Davis provided an addendum to his April 2016 report in August 2017. (Ex. 28) Davis reviewed Seaman's records, and interviewed him. (Ex. 28, p. 306) Davis opined

> based upon Seaman's past education and lack of computer skills and the acknowledged fact that even though he was provided with '*significant additional training*' by PWA employees, he could not '*demonstrate the capacity to perform the work of a Public Works Assistant.*' Thus further demonstrating his lack of transferable skills and ability to retrain in order to perform in a more clerical/customer service related position.

(Ex. 28, p. 308) Davis testified Seaman has sustained a total loss of access to the labor market following his termination, due in part to his lack of computer skills and other transferable skills. (Tr., pp. 61-62)

After entering into the agreement for settlement, Seaman continued to receive treatment with Dr. Weisheipl. (Ex. 7, p. 184) Seaman was treating with Dr. Weisheipl at the time of the hearing. (Tr., p. 47) Seaman testified he was taking Nucynta, Tizanidine, Lyrica, and reported he uses lidocaine patches, Diclofenac cream, and a TENS unit. (Tr., p. 47; Ex. A, pp. 10-11)

Seaman testified since his work injury he can no longer vacuum, unload dishes to high shelves from the dishwasher, walk his dog, mow, perform snow removal,

perform maintenance on his vehicles, or ride his motorcycle. (Tr., pp. 50-52; Ex. A, pp. 14-17)

II. October 9, 2016 Hernia Injury

Seaman testified that on October 9, 2016, he was studying the HEAT materials by the computer. (Tr., pp. 37-38) Seaman went to the bathroom, and when he returned he pulled the materials closer to him and knocked his pen, causing it to roll underneath his desk. (Tr., p. 38) Seaman testified, "[s]o I precariously got down, had my hand – one hand on my chair and I was trying to reach for my pen under there and the chair and I lurched a little bit and I just felt this tear right through my stomach. It was a quick lurch, is all it was." (Tr., p. 38) Seaman reported the injury to the City, but the City denied his claim. (Tr., p. 38)

Seaman attended an appointment with Dr. Bratkiewicz's practice partner, Richard McCaughey, D.O., on October 10, 2016. Dr. McCaughey documented Seaman reported he bent over to pick up a paperclip and felt pain over his umbilicus and in his right groin. (Ex. 2, p. 16) Dr. McCaughey noted Seaman had a history of an umbilical herniorrhaphy with mesh, and he had reported he had always had a lump over his umbilicus following surgery. (Ex. 2, p. 16) Dr. McCaughey documented he explained he believed whether the hernia is work-related was debatable because it was preexisting, and whether bending over to pick up a paperclip would present a material aggravation of the condition was also debatable. (Ex. 2, p. 16) Dr. McCaughey noted Seaman was on "chronic sedentary duty for something else" and he would not impose any additional restrictions for his hernia. (Ex. 2, p. 17)

Seaman was referred to Jamie Patel, D.O., a surgeon. (Ex. 9) Dr. Patel diagnosed Seaman with an incarcerated ventral hernia, and performed surgery to repair the hernia with mesh. (Ex. 9)

III. June 2017 Independent Medical Examination

Dr. Taylor conducted a second independent medical examination of Seaman on June 7, 2017. (Ex. 15, pp. 237-46) Dr. Taylor reviewed Seaman's medical records and examined him. (Ex. 15, pp. 237-46) Dr. Taylor diagnosed Seaman with a right shoulder impingement and labral tear, status post right shoulder labral repair, a subacromial bursectomy and decompression, and distal claviculectomy, chronic low back pain, and an incarcerated ventral hernia resulting in surgery. (Ex. 15, p. 242)

Dr. Taylor opined "it does not appear that there has been a substantial change associated with his right shoulder or low back." (Ex. 15, p. 242) Dr. Taylor noted Seaman had a bulging over the area of his hernia for a number of years and he questioned whether it was a rectus diastasis as opposed to a ventral hernia. (Ex. 15, p. 242) Dr. Taylor found, based on a review of his medical records and history, "it appears more likely than not that, assuming that he had a pre-existing ventral hernia, Mr. Seaman became symptomatic when he was obtaining his pen from under his desk,"

due to positioning of his body. (Ex. 15, p. 243) Dr. Taylor did not assign an impairment rating with regard to the hernia and subsequent surgery, and he did not recommend any additional restrictions from his earlier report. (Ex. 15, pp. 243-44)

IV. Hearing Loss and Tinnitus

In January 2003, the City performed an audiometric examination of Seaman. (Ex. 11, p. 215) The City documented Seaman had high frequency hearing loss on the right and the left. (Ex. 11, p. 215) Seaman reported he had been exposed to chainsaws with hearing protection at home, motorcycles with helmets, loud music, and gunfire in the past. (Ex. 11, p. 215) Seaman relayed he had worked as a sweeper operator since 1999. (Ex. 11, p. 215)

On March 31, 2014, Seaman prepared an injury investigation report for the City, alleging he had sustained hearing loss "[a]fter many years of being around loud constant noise." (Ex. 10, p. 212) Seaman reported he believed his hearing loss was caused by the street sweeper, trucks, and loaders he operated for the City. (Ex. 10, p. 212)

Seaman attended an appointment with Dr. Bratkiewicz on April 2, 2014. (Ex. 2, p. 3) Dr. Bratkiewicz noted Seaman's chief complaint was hearing loss, with a date of injury of March 31, 2014. (Ex. 2, p. 3) Dr. Bratkiewicz documented Seaman

> states that he knew he had hearing loss and has actually independently gone to Woodward Hearing Center but states he cannot afford hearing aids. He states that he works around machinery such as street sweepers for the past 35 years and was told by the hearing aid specialists at Woodward that this is not uncommon in this field. He feels that his hearing loss is job-related.

(Ex. 2, p. 3) Dr. Bratkiewicz found "[f]rom frequencies 2000 and upwards, he has severe hearing loss between 40 and 60 decibels," assessed Seaman with high frequency hearing loss, and noted he did not have an old audiogram to compare with the current audiogram and "an old audiogram would make this a very simple process but at this point he has a mild to severe amount of hearing loss that will probably only progress if he continues to work in an environment that is loud." (Ex. 2, p. 3) Seaman testified the City denied his hearing loss claim in 2014. (Tr., p. 41)

Valerie Christianson, Au.D., performed a hearing test on Seaman on March 22, 2017. (Ex. 14, p. 222) Dr. Christianson found:

> Left: Within normal limits steeply sloping to severe sensorineural hearing loss.
>
> Right: Mild rising to within normal limits steeply sloping to severe rising to moderate sensorineural hearing loss.

SRT: Mild bilaterally.

WRS: Left – Good

Right – Excellent

Rec: Binaural hearing aid fitting.

(Ex. 14, p. 222)

Richard Tyler, Ph.D., an audiologist, conducted an independent audiological examination of Seaman in March 2017. (Ex. 18) Dr. Tyler reviewed Seaman's medical records, and interviewed him by telephone; he did not examine Seaman personally. (Ex. 18, p. 251) Dr. Tyler noted Seaman has worked in animal control, as a laborer, truck driver, and sweeper for the City. (Ex. 18, p. 252) When working in animal control he had to shoot dogs with guns and he was not provided with hearing protection. (Ex. 18, p. 252) Dr. Tyler noted the City did not provide Seaman with hearing protection until 1997, and he used both earplugs and earmuffs together, but he had to remove his hearing protection to hear his coworkers. (Ex. 18, p. 252) Dr. Tyler opined Seaman was exposed to high levels of damaging noise while working for the City, causing him to develop hearing loss and tinnitus. (Ex. 18, p. 260)

Dr. Tyler noted the first audiogram from May 2000 showed a notch in both ears, and later audiograms from 2014 and 2017 showed Seaman's hearing worsened, particularly in the high frequencies, which he opined is consistent with noise exposure. (Ex. 18, p. 253) Seaman's father is ninety-one and his mother is eighty, and neither parent reports a hearing loss or tinnitus. (Ex. 18, p. 253) Dr. Tyler documented Seaman is not a hunter and he has not used a chain saw. (Ex. 18, p. 254) This is contrary to information provided by Seaman to the City during a hearing test in 2003. (Ex. 11, p. 215) Seaman reported he had been exposed to chainsaws with hearing protection at home, motorcycles with helmets, loud music, and gunfire in the past. (Ex. 11, p. 215) Dr. Tyler opined Seaman's March 2017 audiogram shows a fourteen percent bilateral hearing loss under the Iowa Code. (Ex. 18, p. 254)

Seaman also reported he has tinnitus or ringing in his ears that started a few years ago and became constant in 2014. (Ex. 18, p. 255) Seaman told Dr. Tyler he asked the City for help, but it refused. (Ex. 18, p. 255) Dr. Tyler opined Seaman has sustained a twenty percent whole body impairment as a result of his tinnitus. (Ex. 18, p. 259)

Seaman testified his hearing loss and tinnitus did not affect his ability to work as a street sweeper, but affected his ability to work as a public works assistant. (Tr., p. 39) Seaman relayed he had a difficult time understanding citizens on the telephone, and he noticed he was missing words. (Tr., pp. 39-40) When he would come in the next day he would receive copies of HEATs stating "[y]ou missed this" or "that." (Tr., p. 40)

Seaman testified he believes his hearing loss and tinnitus are part of the reason he ended up getting fired by the City. (Tr., p. 40)

CONCLUSIONS OF LAW

I. October 2016 Hernia

Seaman seeks medical benefits for a hernia condition he developed in October 2016. The City contends Seaman's hernia condition is preexisting and was not caused by his employment with the City.

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. Ciha, 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 the 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).

Seaman had a preexisting hernia condition that was repaired through surgery in 2008. Two physicians have provided opinions regarding his October 2016 hernia, Dr. McCaughey, a treating physician, and Dr. Taylor, an occupational medicine physician retained to perform an independent medical examination for Seaman. I find Dr. Taylor's opinion more persuasive than Dr. McCaughey's opinion. Dr. McCaughey's opinion is equivocal. Dr. McCaughey documented he believed whether the hernia is work-related was debatable because it was preexisting, and whether bending over to pick up a paperclip would present a material aggravation of the condition was also debatable. (Ex. 2, p. 16) Dr. Taylor opined, "it appears more likely than not that, assuming that he had a pre-existing ventral hernia, Mr. Seaman became symptomatic when he was obtaining his pen from under his desk," due to positioning of his body. (Ex. 15, p. 243) Dr. Taylor did not assign an impairment rating with regard to the hernia and subsequent surgery, and he did not recommend any additional restrictions from his earlier report. (Ex. 15, pp. 243-44) Seaman has established his work injury aggravated, accelerated, worsened, or "lighted up" his preexisting hernia condition.

Seaman seeks to recover medical bills he incurred as a result of the October 2016 work injury. An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefore, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id.; Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability").

The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). The Iowa Supreme Court has held an employer may be responsible for unauthorized care "upon proof by a preponderance of the evidence that such care was reasonable and beneficial," meaning "it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Gwinn, 779 N.W.2d at 206.

As analyzed above, Seaman's hernia condition was aggravated, accelerated, worsened, or "lighted up" while working for the City. Seaman is entitled to recover the cost of the treatment he received from the City, set forth in Exhibit 31. The City is responsible for all causally related medical bills.

II. Hearing Loss and Tinnitus

A. Lack of Notice under Iowa Code section 85.23

Seaman avers he sustained cumulative injuries, hearing loss and tinnitus, while working for the City. The City contends Seaman failed to provide timely notice to the City of his claim under Iowa Code section 85.23.

Cumulative injuries are occupational diseases that develop over time. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015). A cumulative injury results from repetitive trauma in the workplace. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681.

Under the notice provision, an employee is required to provide notice to his or her employer within ninety days of the occurrence of an injury, unless the employer or the employer's representative has actual knowledge of the occurrence of the injury. Iowa Code § 85.23 (2017). The purpose of the notice provision is to afford the employer the opportunity to investigate the circumstances of the injury when the information is fresh. Johnson v. Int'l Paper Co., 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). "Actual knowledge must include information that the injury might be work related." Id. The employer bears the burden of proving the affirmative defense. DeLong v. Iowa State Highway Comm'n, 299 Iowa 700, 703, 295 N.W. 91, 92 (1940).

The Iowa Supreme Court has held the discovery rule is applicable to the notice and limitation provisions contained in Iowa Code sections 85.23 and 85.26. IBP, Inc. v. Burress, 779 N.W.2d 210, 218-19 (Iowa 2010). Seaman bears the burden of establishing the discovery rule is applicable to this proceeding. Id. at 219. Under the discovery rule, the period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature, seriousness[,] and probable compensable character' of his or her injury." Baker, 872 N.W.2d at 685. Thus, the claimant must have actual or imputed knowledge of all three elements before the period begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-51 (Iowa 2000).

Under the imputed knowledge prong, the period begins to run

> when a claimant gains information sufficient to alert a reasonable person of the need to investigate. Thus, a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the *possible* compensability of the condition. This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable investigation.

Id. (internal citations omitted). The discovery rule does not require "exact knowledge of the seriousness of an injury," nor does it require an expert opinion "to establish knowledge of the characteristics of the injury," rather, the claimant has a duty to investigate when the claimant is aware of the problem. Id. at 650-51. "[I]f it is reasonably possible an injury is serious enough to be compensable as a disability, the seriousness of the test is satisfied." Id. at 651.

The City conducted periodic tests of Seaman's hearing. Following testing Seaman asserted he had sustained work-related hearing loss in 2014. Seaman also reported he has tinnitus or ringing in his ears that started a few years ago and became constant in 2014. (Ex. 18, p. 255) Seaman told Dr. Tyler he asked the City for help, but it refused. (Ex. 18, p. 255) The City denied his claim in 2014. The record evidence establishes the City had actual notice of Seaman's hearing conditions within ninety days. The City has not established the affirmative defense of lack of notice under Iowa Code section 85.23.

B. Waiver of Affirmative Defense under Iowa Code section 85.26

In its post-hearing brief, the City also raises statute of limitations under Iowa Code section 85.26. Under the statute of limitations provision, an employee is required to bring a contested case proceeding within two years "from the date of the occurrence or injury for which benefits are claimed" if weekly compensation benefits have not been paid to the employee. Iowa Code § 85.26(1). The City did not raise statute of limitations under Iowa Code section 85.26 on the hearing report or during the hearing.

Under 876 IAC 4.19(3)(f),

> [c]ounsel and pro se litigants shall prepare a hearing report that defines the claims, defenses, and issues that are to be submitted to the deputy commissioner who presides at the hearing. The hearing report shall be signed by all counsel of record and pro se litigants and submitted to the deputy when the hearing commences.

The hearing report must be prepared prior to the commencement of the hearing and must be signed by the parties and the presiding deputy. James R. Lawyer, Iowa Practice Series – Workers' Compensation § 21.24, at 275-76. The parties can stipulate to or dispute issues, including, but not limited to the claimant's entitlement to permanency benefits. Id. at 276.

When completing the hearing report for File Number 5057974, the parties stipulated to a number of issues, and identified the issues to be determined by the deputy commissioner. The hearing report provides affirmative defenses are asserted by circling "A". The City initially raised lack of timely notice under Iowa Code section 85.23, and Iowa Code section 85B.8, as affirmative defenses. (Hearing Report) The City agreed it was not raising an affirmative defense under Iowa Code section 85B.8, and the defense was stricken. (Hearing Report) The City did not raise the affirmative defense the claim was untimely under Iowa Code section 85.26. (Hearing Report)

When the parties submitted the hearing report to the deputy commissioner, the City only raised the affirmative defense of lack of timely notice under Iowa Code section 85.23. If the City believed the affirmative defense of statute of limitations under Iowa Code section 85.26 applied, the City should have raised the defense before the deputy commissioner. Instead of doing so, the City waited until the filing of its post-hearing brief to raise the issue, after the evidentiary record was closed. If the City had raised the affirmative defense at the time of the hearing, it could have been addressed by the deputy commissioner and the parties. The City's attorney signed the hearing report and did not raise the affirmative defense of statute of limitations under Iowa Code section 85.26.

This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. The City waived the affirmative defense of statute of limitations under Iowa Code section 85.26 by failing to raise the affirmative defense

on the hearing report or with the deputy commissioner during the hearing. Cf. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 186-87 (Iowa 1980) (concluding claimant's attorney failed to preserve error on foundation objection by failing to object when the deposition was offered into evidence before the deputy, and by failing to afford "his adversary [with the opportunity] to remedy the alleged defect"); Hawkeye Wood Shavings v. Parrish, No. 08-1708, 2009 WL 3337613, at *4 (Iowa Ct. App. 2009) (concluding the defendants waived the issue of whether they were entitled to a credit for benefits already paid for the September 2000 injury because on the hearing report signed by the defendants, the defendants stipulated "0 weeks" of credit); Burtnett v. Webster City Custom Meats, Inc., No. 05-1265, 2007 WL 254722, at *3-4 (Iowa Ct. App. Jan. 31, 2007) (concluding the deputy commissioner did not commit an abuse of discretion by refusing the claimant's request to change dates in the joint hearing report, and noting the agency's approach requiring claimants to list dates prior to hearing in a hearing report "is more than reasonable").

C. Nature and Extent of Disability

As discussed above, an employee bears the burden of establishing his injuries arose out and in the course of his employment with the employer. Fernandez, 528 N.W.2d at 128. The claimant must establish the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers, 731 N.W.2d at 17; Jordan, 569 N.W.2d at 153. The cause does not need to be the only cause, [i]t only needs to be one cause." Kubli, 312 N.W.2d at 64.

Medical causation falls within the domain of expert testimony. Pease, 807 N.W.2d at 844-45. When considering the evidence, the deputy commissioner weighs the evidence, and may accept or reject expert testimony. Id.; Frye, 569 N.W.2d at 156. In determining the weight of an expert opinion, the deputy commissioner 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. Prince, 366 N.W.2d at 192.

Iowa Code section 85B.4(3) defines "occupational hearing loss" as

> that portion of a permanent sensorineural loss of hearing in one or both ears that exceeds an average hearing level of twenty-five decibels for the frequencies of five hundred, one thousand, two thousand, and three thousand Hertz arising out of and in the course of employment caused by excessive noise exposure.

"Occupational hearing loss" does not include hearing loss attributable to age or any other condition or exposure that is not work-related. Iowa Code § 85B.4(3).

The Iowa Supreme Court has found tinnitus does not qualify as a scheduled injury under Iowa Code section 85.34(2)(r) or as an occupational hearing loss under

Iowa Code section 85B.4, and thus is an unscheduled injury under Iowa Code section 85.34(2)(u). Ehteshamfar v. UT Engineered Sys. Div., 555 N.W.2d 450, 453 (Iowa 1996).

The City did not retain an expert witness to evaluate Seaman's hearing loss and tinnitus. One expert has provided an opinion in this case, Dr. Tyler, a recognized expert in the field of audiology. Dr. Tyler opined Seaman's March 2017 audiogram shows a fourteen percent bilateral hearing loss under the Iowa Code caused by noise exposure from his work with the City. (Ex. 18, pp. 253-54) I find his opinion unrebutted. Dr. Tyler's report contains additional findings independent from the standard imposed by the Iowa Code. I disregard that portion of his opinion.

Seaman also reported he has tinnitus or ringing in his ears that started a few years ago and became constant in 2014. (Ex. 18, p. 255) Seaman told Dr. Tyler he asked the City for help, but it refused. (Ex. 18, p. 255) Dr. Tyler opined Seaman has sustained a twenty percent whole body impairment due to his tinnitus. (Ex. 18, p. 259) Seaman has established he sustained permanent occupational hearing loss and tinnitus caused by his work for the City.

"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 shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

Seaman testified his hearing loss and tinnitus did not affect his ability to work as a street sweeper, but affected his ability to work as a public works assistant. (Tr., p. 39) Seaman relayed he had a difficult time understanding citizens on the telephone, and he noticed he was missing words. (Tr., pp. 39-40) When he would come in the next day he would receive copies of HEATs stating "[y]ou missed this" or "that." (Tr., p. 40) Seaman testified he believes his hearing loss and tinnitus are part of the reason he ended up getting fired by the City. (Tr., p. 40) The City rejects Seaman's assertion.

The City terminated Seaman's employment when he was unsuccessful in performing the duties of the public works assistant position. Considering all the factors of industrial disability, I conclude Seaman has established he sustained a twenty-five

percent loss of earning capacity due to his hearing loss and tinnitus. Seaman is awarded 125 weeks of permanent partial disability benefits, at the stipulated rate of $692.58, commencing on November 30, 2016.

As discussed above, the City is responsible for all causally-related medical bills. The City is responsible for all medical care and treatment recommended by Dr. Christianson, including hearing aids.

III. Review-Reopening Action

A. Change of Condition

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code § 86.14(2). The deputy commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she suffered an *impairment or lessening of earning capacity proximately caused by the original injury.*" Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999) (Emphasis in original.)

Just over a month after this agency approved the agreement for settlement, the City terminated Seaman's employment. Seaman reported that his hearing loss and tinnitus interfered with this ability to perform his position with the City. Seaman has applied for two jobs since his termination, but he was not hired. I conclude Seaman has established he has met his burden of providing he sustained a lessening of earning capacity proximately caused by the original injury.

B. Extent of Disability

Given Seaman has met his burden with respect to the review reopening action, and with respect to his hearing loss and tinnitus claims, it is necessary to consider the extent of his 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). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., No. 14-2097, 2016 WL 3125846, at *9 (Iowa June 3, 2016)

In the agreement for settlement, the parties agreed Seaman sustained a thirty-eight percent loss of earning capacity as a result of the work injury, entitling him to 190 weeks of permanent partial disability benefits commencing on May 29, 2015. (Ex. 1, p. 1) Dr. Taylor did not assign an additional impairment rating to Seaman following the agreement for settlement. (Ex. 15, pp. 243-44)

Seaman alleges he is entitled to permanent and total disability benefits under the statute and under the odd-lot doctrine. The City rejects Seaman's assertion. Seaman obtained the only vocational expert opinion in the case from Davis.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

A worker is totally disabled under the odd-lot doctrine if the services the worker can perform "are so limited in quality, dependability, or quantity that a reasonable stable

market for them does not exist." Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985) (quoting Lee v. Minneapolis Street Railway Co., 230 Minn. 315, 320, 41 N.W.2d 433, 436 (1950)). This flows from the principle that a worker who has no reasonable prospect of securing employment has no material earning capacity. Id. The trier of fact considers whether there are jobs in the community the worker can realistically compete for. Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 198 (Iowa 2014) In establishing total disability, "an employee need not look for a position outside the employee's competitive labor market." Id.

Under the odd-lot doctrine, a worker must present a prima facie case of total disability "by producing substantial evidence that the worker is not employable in the competitive labor market." Guyton at 106. If the worker establishes a prima facie case, then the burden switches to the employer to present evidence of suitable employment. Id. If the employer fails to produce evidence of suitable employment, and the deputy commissioner concludes the worker falls within the odd-lot category, the worker is entitled to a finding of total disability. Id.

Seaman has not presented a prima facie case of total disability. Seaman lives in an urban area, Des Moines. Seaman has established he applied for two positions following his termination. Seaman has not applied for any additional positions in the Des Moines area. I find Seaman is not motivated to work.

The evidence supports Seaman has sustained an increase in his lack of employability since the original arbitration hearing. The record also establishes he sustained a loss of earning capacity due to his hearing loss and tinnitus. The record does not support Seaman is permanently and totally disabled. At the time of the review-reopening hearing Seaman was fifty-eight. (Tr., p. 8) In his original report, Dr. Taylor recommended lifting restrictions of fifteen to twenty pounds occasionally between knee and chest level up to two times per hour, five pounds with the right arm, ten pounds between knee level and above shoulder level, and restrictions of avoiding overhead tasks with the upper right extremity, alternating sitting, standing, and walking as needed, no climbing of ladders, rarely or occasionally squatting, bending, kneeling, and crawling, and avoiding pushing and pulling with the right arm. (Ex. 15, pp. 233-34) After the filing of the review-reopening action Dr. Taylor did not recommend any additional restrictions from his earlier report. (Ex. 15, pp. 243-44)

Based upon the restrictions imposed by Dr. Taylor, as supported by Drs. Fish and Bahls, Seaman cannot return to his past relevant work. The evidence supports The City accommodated Seaman's restrictions by offering him the public works assistant position. Seaman was unsuccessful during his training, and the City terminated his employment.

Prior to the agreement for settlement, Davis opined ninety percent of the occupations in the Des Moines area fall outside Seaman's current physical ability to perform, and the positions he is capable of working in generally require a higher level of education, training, or skills beyond those possessed by Seaman. (Ex. 27, p. 305) In

his second report, Davis found Seaman had sustained a 100 percent loss of earning capacity. At hearing Davis testified at the time of his first report Seaman had lost sixty-five to seventy percent loss of access to the labor market and economy. (Tr., pp. 59-60) Those figures are not present in his report. Davis did not provide any information in his report or testimony concerning other possible positions he considered and rejected in the Des Moines area through a market search of available positions. I do not find his opinion persuasive.

Based on all of the evidence and applying the factors for determining industrial disability, I conclude Seaman has sustained an additional twenty-five percent loss of earning capacity with respect to the review-reopening action. He is entitled to an additional 125 weeks of permanent partial disability benefits, at the stipulated rate of $715.06. As analyzed above, I conclude he has also sustained a twenty-five percent loss of earning capacity for his separate hearing loss and tinnitus claim, entitling him to 125 weeks of permanent partial disability benefits, at the stipulated rate of $692.58.

IV. Costs

Seaman seeks to recover the $1,445.00 cost of Dr. Taylor's examination, the $1,552.50 cost of Dr. Taylor's report, the $1,369.00 cost of Dr. Tyler's examination and report, and the $858.95 cost of Phil Davis's meetings, expenses, and report.

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 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 choosing." Id. The record does not support the City obtained an impairment rating with respect to the review-reopening action.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

> [w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Given the City did not obtain an impairment rating before Dr. Taylor issued his opinion, Seaman is not entitled to recover the cost of Dr. Taylor's independent medical examination. The rule expressly allows for the recovery of the report. Seaman is entitled to recover the $1,552.50 cost of Dr. Taylor's report.

Dr. Tyler's bill is not itemized. In LaGrange v. Nash Finch Co., File No. 5043316 (App. July 1, 2015), the Commissioner declined to award the cost of a functional capacity evaluation and a vocational evaluation because only the cost of the reports can be taxed, and the costs were not itemized. Seaman is not entitled to recover the $1,369.00 cost of Dr. Tyler's examination and report.

Davis's bill is itemized. The administrative rule expressly allows for the recovery of two practitioners' reports. Under LaGrange, using my discretion, I find Seaman is entitled to recover the $612.50 cost of Davis's report.

ORDER

IT IS THEREFORE ORDERED, THAT:

With respect to File Number 5053418,

Defendant shall pay the claimant an additional one hundred twenty-five (125) weeks of permanent partial disability benefits, at the rate of seven hundred fifteen and 06/100 dollars ($715.06) per week.

Defendant shall pay accrued benefits in a lump sum with interest on all weekly benefits provided by law.

With respect to File Number 5057973,

Defendant is responsible for all causally related medical bills.

With respect to File Number 5057974,

Defendant shall pay the claimant one hundred twenty-five (125) weeks of permanent partial disability benefits, at the rate of six hundred ninety-two and 58/100 dollars ($692.58) per week.

Defendant shall pay accrued benefits in a lump sum with interest on all weekly benefits provided by law.

Defendant is responsible for all causally related medical bills and treatment.

With respect to File Numbers 5053418, 5057973, and 5057974,

Defendant is assessed the one thousand five hundred fifty-two and 50/100 dollars ($1,552.50) cost of Dr. Taylor's report, and the six hundred twelve and 50/100 dollars ($612.50) cost of Davis's report.

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 23rd day of January, 2018.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/sam

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.