BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HELEODORO "LEO" MORA,

Claimant,

vs.

JACK LINK'S BEEF JERKY,

Employer,

and

AMERICAN ZURICH INS. CO.,

Insurance Carrier,
Defendants.

File No. 5065970

ARBITRATION

DECISION

Head Note Nos.: 1803; 1803.1; 3000; 2502

STATEMENT OF THE CASE

Claimant, Heleodoro "Leo" Mora, filed a petition in arbitration seeking workers' compensation benefits against Jack Links Beef Jerky, employer, and American Zurich Insurance Company, insured employer, defendant, for an accepted work injury dated February 19, 2015. This case was heard on September 11, 2018, and considered fully submitted on October 2, 2018, upon the simultaneous filing of briefs.

The record consists of joint exhibits 1-11, claimant's exhibits 1-4, and defendants exhibits A-G along with the testimony of claimant.

ISSUES

1. Whether claimant sustained an industrial or scheduled member injury;
2. Whether claimant is entitled to permanent disability benefits; and, if so,
3. The extent of those benefits;
4. Entitlement to IME;
5. Rate; and
6. The assessment of costs.

STIPULATIONS

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

The parties agree claimant sustained an injury on February 19, 2015, which arose out of and in the course of employment. The parties agree that claimant sustained a temporary disability entitlement to which is not in dispute.

They further agree that the commencement date for permanent partial disability benefits, if any are awarded, is December 17, 2015.

At the time of the injury, claimant was married and entitled to two exemptions.

Defendants waived all affirmative defenses. Prior to the hearing, claimant was paid $1,056.08, approximately four weeks of compensation at the rate of $264.02.

FINDINGS OF FACT

Claimant, Heleodoro "Leo" Mora, was a 39 year-old person at the time of hearing. His past education includes graduation from high school in Mexico. He made note that he was never taught to write in cursive and has a difficult time reading cursive.

He attended courses at Metropolitan Community College and then Bellevue University but received no degree.

At the time of the hearing, he had a minor dependent who was living with him full-time until December 2017. He tested positive for methamphetamine while driving and his daughter was removed from his home. His driver's license was also revoked due to two DUI's. He is in the process of regaining his license but has not been able to take the driving test due to a backlog of requests to the DOT. He also served two weeks in jail for his meth usage.

His past work history includes serving as a customer service agent who managed customer accounts for a credit card customer service company. He was paid a minimum wage. Physically, he sat at a station using a headset and a computer.

Claimant does not believe he could return to this job due to the current pain in his low back and knee.

He then went to work as a customer services representative and tech support employee at a cable/internet company. He primarily sat using a headset and a computer. Again, he does not believe he could return to this position because of pain in his lower back and left leg. He then managed credit card applications at a bank.

At some point, he returned to Mexico and managed a property. The type of property was not specified. He returned to the United States and became an employee of a temporary placement agency. Through this, he was sent to Jack Links where he worked on the production line as a production floor worker. He was required to lift weights between 5 pounds up to 50 pounds, on occasion. The work also required bending, stooping, and squatting.

On February 19, 2015, claimant went to wrap a pallet with plastic. This task involved bending to the floor, sticking a piece of the plastic on the corner of a pallet, and pulling and twisting the plastic around the pallet two or three times until the film is secure and then moving up around the pallet until it is completely wrapped.

On the above mentioned date, claimant squatted near a pallet and felt a sharp, popping pain in his left thigh. He reported this injury and was instructed to take a break and was given an ice pack.

Claimant went home with the belief that the injury would improve. He returned to work the following day. The pain did not abate so on Saturday, the claimant informed the supervisor that his pain was increasing and his thigh was beginning to grow numb.

On February 21, 2015, claimant went to the emergency department complaining of throbbing pain in the left thigh. (JE 1:1) He attributed this to an injury sustained while lifting a pallet on the previous Thursday. (JE 1:2) During the examination, he exhibited normal range of motion, normal strength, no swelling, no deformity but did have mild distal hamstring tenderness upon palpation. (JE 1:8)

He was diagnosed with a minor hamstring muscle strain, given medication and discharged with instructions to follow up with a personal physician. (JE 1:4)

He believed that his pain was worsening and he returned for medical care. Three days later, claimant was seen by Robert E. Byrnes, M.D., at CompChoice. (JE 2) The medical records note that claimant informed the doctor that he was diagnosed with a small tear of the muscle in the back of his leg and that this was putting pressure on the nerve serving the dermatomal area. (Joint Exhibit 2:11) During the medical visit, he was able to ambulate without any difficulty, showed no swelling or bruising in the left lateral thigh region, was able to squat down and arise without any difficulty. Subjectively there was a slight diminution of light touch in the lateral left thigh when compared to the right. (JE 2:11) Dr. Byrnes informed claimant that he did not exhibit the usual signs of a pinched nerve or a torn or damaged connective tissue injury. (JE 2:11). Claimant was discharged and returned to work with no restrictions. Id.

On March 12, 2015, claimant returned to Dr. Byrnes with reports of terrible pain. (JE 2:13) His numbness had abated. During the examination, he was able to rise from the chair easily. He walked without any discernible limp. His left thigh was normal and there was no pain on palpation. (JE 2:13) Dr. Byrnes returned claimant to work with restrictions of standing and walking and lifting only 20 pounds occasionally. (JE 2:14) Dr. Byrne referred claimant to physical therapy. (JE 2:13)

On March 13, 2015, Dean K. Wampler, M.D., recommended a lumbar MRI scan given claimant's ongoing complaints. (JE 2:15) However, due to his mother's illness, claimant was not able to complete the treatment recommendations. He returned to Dr. Wampler's office on April 2, 2015 with worsening low back pain along with numbness and pain in the left eye that travels down the upper lateral thigh and into the anterior thigh stopping at his knee. (JE 2:19) Nothing seemed to alleviate his pain. Id. He exhibited some diffuse mild tenderness throughout the low back and markedly limited lumbar mobility due to tightness and fear of pain. (JE 2:19) Deep tendon reflexes showed slight decrease in the left knee jerk compared to the right, but no other signs of asymmetry or injury. Id. Dr. Wampler gave claimant a prescription for gabapentin and re-requested the MRI. (JE 2:20) He was returned to work with restrictions of no bending or stooping or lifting and limited sitting, standing, or walking to one hour at a time. (JE 2:21)

During his physical therapy, claimant was noted to have a normal gait pattern, non-antalgic, with DTRs equal and symmetric. (JE 3:51) He had no pain behavior with normal heel and toe walk and was able to fully squat. No pain was able to be reproduced. The therapist believed claimant presented with non myotomal and non dermatomal injury but rather soft tissue in nature. (JE 3:51)

Dr. Wampler became concerned about claimant's ongoing pain and took him off work completely. (JE 2:22) In the meantime, claimant was attending to his ill mother in Mexico.

On April 9, 2015, claimant was able to undergo an MRI which showed no lumbar pathology that would explain his pain. (JE 4:54)

> Five lumbar type vertebral bodies. Vertebral body height, alignment and marrow signal are normal. The conus has normal position and morphology. There is no intervertebral disc abnormality, facet arthrosis, central canal stenosis or neural foramen narrowing at any level. Imaged paraspinal tissues are unremarkable.

(JE 4:54)

Dr. Wampler concluded that "it is most reasonable that he has nerve injury within his left leg causing nerve pain that is very limiting." (JE 2:24) Dr. Wampler's plan was to moderate his gabapentin, allow him to return to work in a sedentary capacity, and refer to pain management. Id.

On April 13, 2015, claimant called in to Dr. Wampler's office complaining of severe pain without the use of medication and drowsiness with the gabapentin. (JE 2:26) Dr. Wampler wrote that he had a dilemma.

> On one hand I can't explain the severity of his pain by exam; but on the other I cannot exclude a severe nerve pain like Casualgia [sic]. I am going to have to take him off work until he can have consultation and treatment. In addition to his pain management consult, I have also requested a neurology consultation to better define the condition and make sure we have the right treatment.

(JE 2:26)

On the same date, the physical therapist noted claimant had completed 7 sessions of therapy and denied lower back pain but instead focused on numbness along the distal anterior thigh of the left leg. (JE 3:53)

> Summary of Findings:
>
> Leo has mild tenderness to the distal anterior left thigh soft tissue. He has full terminal knee extension. No patellar laxity. He demonstrates a normal gait pattern. Forward bending is 90°. There is no tenderness in the left buttock. Clinical neurological test are normal.

(JE 3:53)

On April 16, 2015, claimant was seen at the pain management clinic by Scott A. Haughawout, D.O. (JE 5:56) Claimant reported constant pain along the outer left side of his left thigh. (JE 5:56) On exam, he had no tenderness upon palpation of the lumbar region, knee, hips, buttocks or pelvis. Id. He had normal reflexes, strength and sensation. Id. In Dr. Haughawout's opinion, the exam was consistent with a meniscal injury rather than a spinal one. (JE. 5:59)

He returned to Dr. Wampler on April 17, 2015, with complaints of pain in the thigh but no radiation into the back. (JE 2:28) Dr. Wampler did not believe claimant had a lateral meniscus tear as suggested by Dr. Haughawout as the pain pattern did not match that type of injury. (JE 2:28) Dr. Wampler ordered Lidoderm patches. (JE 2:28) Claimant did not want to return to work, but Dr. Wampler did not excuse him. (JE 2:28)

He was then sent for EMG study. (JE 6:69) The results showed a mild injury to both myelin as well as axons, with some evidence of mild active denervation in the tibialis anterior muscle. (JE 6:69) There was no sign of radiculopathy, lumbosacral plexopathy, or polyneuropathy. (JE 6:69) The neurologist did believe claimant had evidence of a common peroneal mononeuropathy due to compression at or just proximal to the fibular head and that prolonged squatting could have caused this. (JE 6:70)

On April 29, 2015, Dr. Wampler saw claimant to discuss the EMG results. (JE 2:30) Claimant had no symptoms of peroneal injury and denied any sensory abnormalities or weakness in that region. The pain remained in the lateral quadriceps. (JE 2:30) Dr. Wampler could not palpate the pain. Further, mass and power on the left quadriceps seemed comparable to the right. (JE 2:3) Dr. Wampler was stumped and asked for an orthopedic consult. Until that occurred, claimant was kept off work with the continued use of two lidocaine patches a day. (JE 2:30)

An MRI of the left knee was conducted on May 26, 2015. (JE 7:77) There was increased signal on the T2-weighted imaging anterior compartment left lower leg suggesting injury to the perineal nerve along with a small popliteal cyst. (JE 7:88)

He was then seen at a pain clinic by Jeffrey C. Ottmar, M.D. (JE 8:84) There was no reproduction of pain in the lumbar spine and he had reduced flexion and dorsiflexion on the left compared to the right. (JE 8:84) He was diagnosed with Meralgia paresthetica on the left side. (JE 8:85) The decision was made to perform a left lateral femoral cutaneous nerve block. (JE 8:85) The injection was not successful in relieving any symptoms. Id. Another block was attempted two weeks later but had no impact. (JE 8:88) He then underwent a left lumbar transforaminal epidural steroid injection with immediate pain relief of 75-80 percent for approximately two hours after which the pain returned. (JE 8:92)

Thomas Brooks, M.D., was stymied by the result and suggested a neurosurgical evaluation. The evaluation took place on August 21, 2015. (JE 9:95) His physical examination was largely unremarkable although his diagnosis included meralgia paresthetica on the left lower extremity and resolving left foot drop. (JE 9:95) The neurologist recommended gabapentin therapy but no surgery. (JE 9:96)

On August 26, 2015, claimant returned to Dr. Wampler, having had no success with orthopedics or pain management. (JE 2:32) Claimant informed Dr. Wampler that he engaged in no physical activity due to pain. Id. Dr. Wampler concluded that claimant likely had nerve pain that would abate in six months. Id. Because of the ongoing pain, claimant was kept off work with an increased dosage of gabapentin. (JE 2:33)

On September 15, 2015, Dr. Wampler directed claimant to return to work at four hours per shift. He noted, "His medical condition is not one we expect should be debilitating. After extensive evaluation and treatment, I cannot validate or verify the claim severity of his pain, so I need to insist he begin working." (JE 2:37)

Defendant employer presented claimant a work plan consistent with Dr. Wampler's restrictions. (Ex. A:1) If the claimant was unable to work each scheduled day in full, he was required to go to the Comp Choice Clinic and see Dr. Wampler. (Ex. A:1) He was placed in the Clip Strip line in Production. (Ex. A:1) A chair was provided that would allow claimant to stand or sit as needed. (Ex. A:1)

Claimant returned a week later reporting that he was only able to work three hours yesterday and an hour and thirty minutes the day of the visit because of pain. (JE 2:39) Dr. Wampler refused to increase claimant's pain medication and the claimant indicated that he was willing to abide by those restrictions, but the nurse case manager reported that claimant was contemplating going to the emergency room for pain. Id.

On September 24, 2015, claimant returned to Dr. Wampler reporting that claimant could not work due to pain. (JE 2:41) Dr. Wampler ordered a prednisone pulse and suggested a transcutaneous nerve stimulator. (JE 2:41)

The following day, claimant was back in Dr. Wampler's office complaining of heel pain in addition to his low back and thigh pain. (JE 2:43) Dr. Wampler found nothing unusual about claimant's heel pain and refused to change claimant's work restrictions or his pain medication. (JE 2:43) Dr. Wampler ended the medical record of that visit with the following statement: "Mr. Mora has a pain syndrome that I cannot explain and cannot verify objectively. My patience is challenged with him because he continues to complain about such severe pain he cannot work, but yet whenever he is in my office, he has normal affect and no real pain behaviors." (JE 2:43-44)

On September 29, 2015, claimant returned to Dr. Wampler to pick up his TENS unit. (JE 2:47) The prednisone pulse did not provide benefit. Dr. Wampler could not pinpoint any abnormalities and recommended claimant undergo an IME for an assessment regarding claimant's maximum medical improvement. (JE 2:47) Dr. Wampler reiterated this position on an October 6, 2015, visit, effectively discharging claimant. (JE 2:49)

Claimant testified he has gone on to have occasional chiropractic treatment as well as care provided by his family physician. He began chiropractic care on May 5, 2016. (Ex. 4) To the chiropractor, claimant reported lower back pain, hip problems, left thigh pain, and left foot pain. (Ex. 4:19) Testing revealed normal results for the lumbar, thoracic, and hip region. (Ex. 4:20) He had positive Kemp's test bilaterally and radicular pain upon compression which Dr. Tonweya Langille attributed to nerve root compression. (Ex. 4:20) Claimant also had a positive straight leg raise test along with hypoasthesia over the left L5 dermatome and moderate trigger points on the left piriformis, left quadratus lumborum, right serratus posterior and left suboccipital. (Ex. 4:22) Claimant then developed cervical spine issues. Id. He continued to have treatment throughout the month of May 2016 and ended the month with relatively the same symptoms as he started with. (Ex. 4:31)

At some point, claimant underwent an MRI on September 25, 2017, which showed minimal disc bulging at L4-5 and L5-S1. (JE 10:97)

Claimant is concerned about his future. He testified he cannot engage in physical activities but does manage to do his household chores, but not as rapidly and not without pain. He stated he is in constant pain and can only do sedentary work. He

has been treating with his family physician who purportedly gave him a back brace and prescribed medications. There are no records for these medical visits.

On December 17, 2015, Michael J. Morrison, M.D., issued an opinion letter at the request of the defendant. (Ex. B) Dr. Morrison examined claimant and reviewed the medical records. (Ex. B:1) On examination, Dr. Morrison found no objective evidence that would restrict claimant from working. (Ex. B:3) Treatment recommendations were discontinuation of the gabapentin, use of over-the-counter anti-inflammatories, and pursuit of a self-motivated core strengthening program. No restrictions were provided. (Ex B:4)

Claimant underwent an IME on February 10, 2016, with Michael H. McGuire, M.D. (Ex. 1) Claimant reported left thigh pain localized in the anterolateral surface of the distal third of the thigh. (Ex. 1) Chiropractic manipulations provided temporary relief. (Ex. 1:1) He also described challenges with extending the toes of his left foot. Id.

During examination, claimant was observed to walk with a slow, careful gait. Dr. McGuire did not identify or palpate any soft tissue masses around the left groin or hip. His straight leg raising exam was negative bilaterally. The sensory and motor functions of both lower extremities were intact. (E 1:2) Dr. McGuire adopted the diagnosis of meralgia paresthetica arising out of a work incident resulting in a 10 percent impairment of the left lower extremity. (Ex. 1:3) He did not offer any restrictions on work or recreational activities. (Ex. 1:3)

Claimant also underwent an FCE on November 18, 2016. On examination, he exhibited light touch sensation partial paresthesia in the left lateral thigh but was normal in all other areas. (Ex. 2:5) He had normal, non-antalgic gait. (Ex. 2:5) He reported pain with a straight leg test, but his left lower extremity was normal but for partial paresthesia in the left lateral thigh. (Ex. 2:5) The FCE was deemed invalid due to only passing 55 percent of the validity tests. (Ex. 2:8) Nonetheless, the results showed that claimant could perform sedentary work. (Ex. 2:9)

A vocational assessment was performed which placed claimant's wage loss at approximately 0-10 percent. (Ex. 3:16)

Claimant's credibility has been specifically challenged by the defendants. Based on the conduct of the claimant during the hearing, as well as his attitude, his answers, and the records, it is determined claimant was not credible.

Claimant's testimony at hearing, at times, was almost a word for word exact regurgitation of the deposition testimony as if he had memorized the document and recited passages instead of providing answers from his own recollection. When convenient, his testimony differed. For instance, claimant initially asserted in his deposition that he had cancer. There were no medical records supporting this diagnosis. During hearing he tried to explain that he was informed he had a blood disorder, but that the terminology was confusing for him and he adopted the cancer

diagnosis because of this confusion. This befuddlement was not in evidence at hearing. Claimant exhibited specific knowledge regarding some medical issues, using sophisticated terms for medical things such as that blood is developed in the marrow and that acid reflux in the esophagus could develop into Barrett's syndrome. It seems unlikely that he would mistake one diagnosis for cancer.

Claimant had a tendency to give verbose, and not necessarily relevant, answers to questions where his previous testimony deviated from hearing testimony. His medical presentation of pain did not match the objective testing. His inability to work also did not match his physical complaints. Claimant's expert reported claimant moved with a normal gait, mostly normal strength, normal range of motion and only slight tenderness in the left thigh. Yet, claimant could not work even a few hours at an accommodated setting that allowed him to sit and stand as needed.

Claimant also maintained that he requested no work restrictions be imposed so as to not limit his employment, yet, he regularly informed his treating doctors he could not work even four hours. Further, there is no mention of his desire to avoid restrictions even in his own expert's report.

Claimant began working at Edwards Auto Group selling cars on or about October 10, 2016. (Ex. C) He worked at Edwards Auto Group for four periods from October 2016 to April 2018. On his application, he indicated he was guilty of interference with official acts. (Ex. C:2) He also wrote that he was injured at Jack Links but was "fully recovered." (Ex. C:3) At hearing, he testified that he did not want to limit his employment opportunities.

His employment there was sporadic and he was terminated more than once for attendance despite his assertion that he had not been terminated from his job. Claimant attributed his absences to pain. In one of the 2018 employment file notes, the violation was noted as follows:

> It has become a pattern that Leo doesn't come to work the day after the weekend / or day off. This instance he text early a.m. that he had court + would be in by 2 pm. At 3:30 pm Andrea text + called b/c no show. The only repose for remainder of day was at 3:37 pm — 'i will be in tomorrow.'

(Ex. C:8)

Claimant was also terminated from his bank position based on attendance issues. When confronted on this issue during cross examination, he conceded, "That could be the case."

None of the employment records indicate he was having physical problems. (Ex. C8-9) Throughout the time he was at the dealership, claimant asserted he was terminated and re-employed because of his back pain, but the employment records

reflect only his absenteeism. There is one reference to a medical visit but that claimant testified that was regarding his "cancer" diagnosis.

Claimant also maintained that he wore a back brace because of his back pain but felt it prevented sales because customers thought it was a bulletproof vest.

Claimant did not consent to a deposition and was ordered to attend one by another deputy in the division. During the deposition, he revealed for the first time that he had been undergoing treatment for his back condition, which he related to the work injury. However, he refused to allow his attorney to obtain the medical records and those treatment documents are not part of this evidentiary record.

Claimant lives in an apartment on the third floor and transverses those stairs regularly to enter and leave his home, yet is too incapacitated to work even a sedentary position.

Based on all the foregoing, the claimant is deemed non credible.

Claimant testified that at the time of his injury, he was earning between $9.00 and $10.25 per hour. In his answers to interrogatories, he claimed an $11.00 per hour pay. (Ex. E:2) The vocational report of May 2017 recorded claimant's earnings at $10.00 per hour. (Ex. 3:13) Defendants offered spreadsheets which indicate a different rate of pay. Both pieces of evidence are not supported by actual wage records. However, given that claimant has been deemed non credible and his testimony varied greatly as to what his actual wage was, defendants' wage rate is adopted. (Ex. G) Claimant's benefit rate is deemed to be $199.47.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The

expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In the brief, claimant argues that his left-sided numbness and pain is the result of a nerve injury that starts in his back and therefore, claimant's work injury is an industrial one. Dr. Ottmar, Dr. Brooks, and claimant's expert, Dr. McGuire, opined claimant sustained a meralgia paresthetica. However, Dr. Byrnes noted that the pinching on the nerve did not follow the normal nerve anatomy. Claimant also received no relief after a lateral femoral cutaneous nerve block. Claimant's EMG testing was normal as was the MRI of his lumbar spine. Even after making the tentative diagnosis of a pinched nerve, Dr. Brooks stated that he was confused and referred claimant to a neurologist who adopted the pinched nerve diagnosis. While claimant was found to be not credible, he did have a consistent complaint of decreased sensation and localized in the left thigh that was verified in more than one test. Thus, the greater weight of the evidence supports a finding that the injury claimant sustained on February 19, 2015, was meralgia paresthetica. Claimant states that this type of injury is one that extends from the spinal column to the thigh since lateral femoral cutaneous nerve itself begins in the lumbar spine. This is consistent with past appellate court decisions. When there is a permanent impairment to the nervous system, such as an injury to the lateral femoral cutaneous nerve, it is a body as a whole impairment. First Fleet Corporation v. Hannam, No. 14-1254, (Iowa Ct. App. 2015, July 9, 2015).

Thus, it is determined claimant has sustained an industrial disability arising out of his accepted work injury.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant suggests that he has sustained an industrial loss of 10-15 percent based on the vocational expert's report. However, the medical records reveal an individual with a very minor injury. He is able to walk with a normal gait and has little to no restriction. His professed pains that he asserts makes him incapable of returning even to a sedentary work position is not credible. Further, even his own expert witness did not recommend any work restrictions. Dr. McGuire suggested a 4 percent impairment of the whole person was appropriate based on the left thigh pain and decreased sensation. Dr. Morrisson found no impairment. Claimant has the experience to work sales and marketing and other positions similar to the one he had worked in the past. Based on the review of the medical records as a well as the examinations in those medical records, it is determined that claimant has sustained a 2 percent industrial loss.

Claimant also seeks reimbursement of the independent medical examination. Iowa Code section 85.39 is the sole method for reimbursement of an exam by a physician of the employee's choice. If an injured worker seeks reimbursement for an IME, the provisions established by the legislature, under Iowa Code section 85.39, must be followed. Only the examination is assessed under Iowa Code section 85.39. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015).

There is no evidence of the cost of the IME. Pursuant to Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015) and as further applied by the Commissioner in Sainz v. Tyson Fresh Meats, Inc., File. No. 5053964 (App. September 28, 2018), claimant is entitled to reimbursement of the examination portion of the independent medical examination under Iowa Code section 85.39. The report, however, can only be awarded via 876 IAC 4.33. However, since there is no delineation between the report and the examination, neither can be awarded. See Sainz, at *3.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant ten (10) weeks of permanent partial disability benefits at the rate of one hundred ninety-nine and 47/100 dollars ($199.47) per week from December 17, 2015.

Defendants 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 Technology, File No. 5054686 (App. April 24, 2018).

That defendants are to be given credit for benefits previously paid.

Signed and filed this 16th day of November, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Laura Pattermann
Attorney at Law
300 W. Broadway, Ste. 145
Council Bluffs, IA 51503
lpattermann@sgallnerlaw.com

Abigail Wenninghoff
Attorney at Law
17021 Lakeside Hills Plaza
Suite 202
Omaha, NE 68130
wenninghoff@lkwfirm.com

JGL/kjw

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.