BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALFRED GATEWOOD, Claimant, vs. INNKEEPER HOSPITALITY SERVICES, LLC, Employer, and BERKSHIRE HATHAWAY HOMESTATE COMPANY, Insurance Carrier, Defendants.	File Nos. 19007309.01 20000508.01 ARBITRATION DECISION Headnotes: 1803; 1804; 4100

STATEMENT OF THE CASE

Claimant, Alfred Gatewood, filed two petitions in arbitration seeking workers' compensation benefits from defendants Innkeeper Hospitality Services, LLC, employer, and Berkshire Hathaway Homestate Company, insurer. The hearing occurred before the undersigned on November 19, 2021, via CourtCall.

The parties filed a hearing report at the commencement of the arbitration hearing. In 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 evidentiary record consists of: Joint Exhibits 1 through 15; Claimant's Exhibits 1 through 10; and Defendants' Exhibits A through I. Claimant testified on his own behalf. Marc Bilyeu also testified. The evidentiary record closed at the conclusion of the evidentiary hearing. The case was considered fully submitted upon receipt of the parties' briefs on December 28, 2021.

ISSUES

1. The extent of claimant's entitlement to permanent disability benefits, including a claim for permanent total disability benefits and/or odd-lot status;

2. Costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Alfred Gatewood sustained work-related injuries to his low back on May 19, 2019, and November 17, 2019. The sole issue to be addressed in this arbitration decision is the extent of Mr. Gatewood's permanent disability.

At the time of the evidentiary hearing, Mr. Gatewood was 55 years of age and living in Davenport, Iowa. (Exhibit I, Deposition Transcript page 5; Hearing Transcript, page 20) He is a high school graduate who attended one year of post-secondary education at Hamilton Technical College. (Hr. Tr., p. 27) He did not obtain a certificate or degree. Mr. Gatewood does not possess a driver's license; he has commuted to and from work by public transportation since approximately 2001. (Hr. Tr., p. 46) At times, he utilizes rideshare applications such as Uber and Lyft. (Hr. Tr., p. 64)

Mr. Gatewood has held a number of jobs since graduating from high school. (Ex. E, pp. 28-29) His employment history for the last 20 years has largely consisted of working in the restaurant industry. (Id.) From approximately 2000 to 2001, claimant worked as a manager at Savitris. (Ex. E, p. 28) In this role, claimant performed inventory checks, managed servers, and handled scheduling. (Id.) Claimant next worked as a server and manager at The Outing Club between 2001 and 2015. (See Ex. D, p. 15) As a manager, Mr. Gatewood testified to performing data entry for weddings at The Outing Club. (Ex. I, Depo. p. 10) Between 2012 and 2017, claimant also worked part-time as a sales associate at Zales. (Ex. 5, p. 51)

In 2015, Mr. Gatewood started supplementing his income by working as a caregiver to his father and one of his neighbors. Mr. Gatewood was paid on a monthly basis through Iowa Total Care. (Hr. Tr., pp. 44-45) As a caregiver, Mr. Gatewood managed medications, prepared meals, and cleaned. (See Hr. Tr., p. 43) He worked in this capacity until his father passed away in April 2021. (Hr. Tr., p. 43)

Mr. Gatewood's medical history is relevant for an injury he sustained approximately two months prior to the May 19, 2019, date of injury. On March 4, 2019, Mr. Gatewood tripped over a cat and fell down the stairs in his home. (Hr. Tr., p. 33; JE13, p. 82) During the fall, Mr. Gatewood hyperflexed and fractured his right great toe. (JE13, p. 82) Mr. Gatewood testified that he experienced some low back pain and soreness after he slid down his stairs at home; however, the contemporaneous medical records do not describe an injury to the low back. (Hr. Tr., pp. 34-35; JE13, pp. 82-85) Mr. Gatewood was prescribed a walking boot, which he wore for approximately eight weeks. (Hr. Tr., p. 33)

Mr. Gatewood commenced employment as a server and supervisor with Hotel Blackhawk shortly after the March 4, 2019, incident. (Hr. Tr., pp. 29, 34) He worked approximately 30 hours per week and his job duties included carrying trays, moving tables, setting up chairs, ensuring meals were prepared and delivered on time, and

managing staff. (See Hr. Tr., p. 30) Despite having to wear a boot, Mr. Gatewood testified he did not have any issues completing his job duties between his date of hire and the May 19, 2019, work injury. (Hr. Tr., p. 34)

On May 19, 2019, while working as a banquet supervisor, Mr. Gatewood felt and heard a "pop" in his low back when he bent down and attempted to pick up a tub of silverware from the floor. (Hr. Tr., pp. 30-31) Mr. Gatewood estimated that the tub of silverware weighed between 50 and 75 pounds. (Hr. Tr., p. 31)

After reporting the injury to his supervisor, Mr. Gatewood left work and presented to the Emergency Department at Genesis Medical Center. (Joint Exhibit 14, page 86) On examination, Mr. Gatewood complained of low back pain that radiated into his left leg. (Id.) The record provides that Mr. Gatewood's symptoms "started when he fractured his L toe on 03/04/19[.]" (Id.) He was ultimately diagnosed with left lumbar back pain and left-sided sciatica. (JE14, p. 90)

An MRI of the lumbar spine, dated May 22, 2019, revealed a herniated disc at L5-S1 and left L4-5 lateral recess stenosis. (JE6, pp. 16-17) Mr. Gatewood was subsequently diagnosed with left lumbar radiculopathy, lumbar spondylosis, lumbar stenosis, herniated nucleus pulposus at L4-5, and herniation of intervertebral disc between L5 and S1. (JE11, p. 72) Epidural steroid injections were recommended and administered on June 5, 2019, and June 27, 2019. (JE11, pp. 73, 76) Shortly thereafter, defendants directed claimant's care to Todd Ridenour, M.D. (JE7)

Dr. Ridenour first examined claimant on July 17, 2019. (JE7, p. 18) On examination, claimant reported intermittent low back pain, and constant paresthesias of the left calf and foot. (Id.) Dr. Ridenour diagnosed claimant with degenerative disc disease, lumbar disc herniation, and lumbar spondylosis. (JE7, p. 22) Dr. Ridenour recommended surgical intervention in the form of a left L4-5 and L5-S1 discectomy.

Dr. Ridenour ultimately performed a left-sided L5-S1 hemi-laminectomy, left-sided partial medial facetectomies at L4-5 and L5-S1, and an open left-sided microdiscectomy at L5-S1 on August 19, 2019. (JE4, pp. 11-13)

Unfortunately, claimant's symptoms persisted despite surgical intervention. (See Hr. Tr., p. 36) Mr. Gatewood testified that surgery did not relieve the symptoms in his low back and left leg. (Hr. Tr., p. 36) Physical therapy notes between August 19, 2019, and October 28, 2019, reveal claimant continued to exhibit weakness, numbness, and tingling in the left lower extremity. (JE3, pp. 5-10) Claimant did not feel physical therapy was beneficial and cancelled a number of appointments. (JE3, p. 8)

Mr. Gatewood returned to work for the defendant employer ten days after the August 19, 2019, surgery. (Hr. Tr., pp. 37-38) At hearing, claimant asserted that he returned to work as a food and beverage supervisor because it was less physically demanding than his pre-injury position of banquet supervisor. (Hr. Tr., p. 38) Claimant asserts his hours were cut in half; however, his rate of pay remained the same. (Hr. Tr., pp. 38-39)

On the morning of November 17, 2019, claimant was working as a supervisor when a buffet table collapsed, causing hot water trays and candles to fall to the ground. (See Hr. Tr., p. 39) In the process of cleaning up the collapsed table, claimant slipped on some water and fell on his buttocks. (Hr. Tr., p. 39) Claimant did not immediately seek medical treatment on the date of injury. This is likely due to the fact he was already scheduled to present for a three-month follow-up appointment with Dr. Ridenour on November 18, 2019. (See JE7, p. 28) Claimant did not miss any additional work as a result of the November 17, 2019, work injury. (Hr. Tr., p. 42)

At the November 18, 2019, appointment with Dr. Ridenour, claimant described left-sided chronic low back pain, "2-3/10 with dull ache more sharp today after he fell at work[.]" (JE7, p. 28) The record indicates claimant was experiencing cramping of the left buttock, posterior thigh, and calf, with numbness and tingling in the left foot. (Id.) Dr. Ridenour prescribed prednisone and ordered an updated MRI of the lumbar spine. (JE7, p. 31)

The updated MRI, dated December 10, 2019, revealed post-operative laminectomy changes, significant improvement in the appearance of the previously demonstrated left paracentral disc extrusion. (JE5, pp. 14-15) It also revealed increasing edema involving the L5-S1 endplates, likely representing discogenic signal change and stress response. (Id.)

Despite ordering the updated MRI, there is no evidence Dr. Ridenour reviewed the diagnostic imaging or evaluated claimant after the November 18, 2019, appointment. Dr. Ridenour did not produce an opinion on maximum medical improvement, permanent impairment, or permanent restrictions.

Shortly after the November 17, 2019, work injury, claimant voluntarily terminated his employment with Hotel Blackhawk. (Hr. Tr., pp. 41-42) It is relatively unclear why claimant terminated his employment relationship with the employer. At hearing, claimant testified that he quit because of a lack of respect. (Hr. Tr., p. 42; see Ex. I, Depo. p. 24) However, claimant told his independent medical examiner that he quit because defendants, "put his Workers' Compensation on hold." (Ex. 1, p. 4) In any event, it does not appear as though claimant quit because of his low back issues. In fact, claimant testified that he could still physically handle the job duties of a food and beverage supervisor at the time of his resignation. (Ex. I, Depo. p. 24)

Mr. Gatewood did not immediately seek subsequent employment after quitting his position with Hotel Blackhawk. He did, however, continue to care for his father and neighbor. Claimant provided the same caretaker responsibilities to his father and neighbor until approximately April 2021, when his father passed away. (Hr. Tr., pp. 42-43, 63)

After his final appointment with Dr. Ridenour, Mr. Gatewood continued to present for treatment with Cynthia Lira, ARNP and Nathan Meloy, D.O. of Genesis Pain Management. On January 23, 2020, Mr. Gatewood continued to complain of constant left lower back pain, numbness in his left foot, and intermittent cramping in the distal left leg and thigh. (JE10, p. 49) Dr. Meloy recommended and performed L4-5 and L5-S1

facet joint injections on February 24, 2020. (JE10, pp. 51-52) According to Mr. Gatewood, the injections provided no relief. (See JE10, p. 53)

Given that the facet joint injections provided no relief, Ms. Lira did not recommend any further interventions outside of medication management. (JE10, p. 55) Ms. Lira refilled Mr. Gatewood's gabapentin prescription and instructed him to return in six months for a follow-up appointment. (Id.)

In August 2020, defendants had claimant evaluated by Rick Garrels, M.D. (Ex. A, p. 1) Dr. Garrels placed claimant at maximum medical improvement as of May 19, 2020, and assigned 10 percent whole person impairment based on the residual radiculopathy resulting in dermatomal pain, paresthesia and sensory loss. (Ex. A, p. 1) Dr. Garrels later opined that based on claimant's clinical history and examination, he was capable of performing regular duty work without restrictions. (Ex. A, p. 5)

Mr. Gatewood reported a flare-up of his low back pain while shoveling at a January 26, 2021, appointment with his primary care provider, Christel Seeman, D.O. (JE9, p. 41)

An EMG/NCV of claimant's left lower extremity, dated March 26, 2021, revealed evidence of left chronic L5 radiculopathy, but no evidence of peripheral neuropathy or entrapment neuropathy in the lower extremities. (JE12, p. 79)

In May 2021, claimant approached his landlord about issues he was having with paying his rent and other bills. (See Ex. E, p. 26) The landlord apparently had a number of projects to complete and agreed to subtract $10.00 from claimant's rent for every hour of work claimant performed. Claimant briefly worked for his landlord, "painting and applying mud to drywall" on May 17, 2021. (Ex. E, p. 26)

Then, on May 25, 2021, claimant secured alternative employment with Hy-Vee as a cook in the Market Grille restaurant. (Hr. Tr., pp. 65-66; see Ex. F, p. 34) Claimant worked six-hour shifts, cooking breakfast. (Hr. Tr., p. 49; Ex. I, Depo. p. 38)

Defendants submitted a job description for the Market Grille Cook into evidence. (Ex. F) The job description provides that Market Grille cooks must be physically able to exert up to 50 pounds of force, occasionally, and up to 20 pounds, frequently. (Ex. F, p. 32) The job description also provides that the Market Grille is a fast-paced work environment, where cooks must be able to climb, balance, stoop, kneel, reach, stand, walk, push, pull, and lift. (Ex. F, pp. 32-33) According to claimant, Hy-Vee knew of, and agreed to accommodate, his restrictions during the interview process. (Hr. Tr., pp. 65-66) Claimant testified that Hy-Vee hired him on the spot. (Hr. Tr., p. 66)

Unfortunately, claimant's employment with Hy-Vee lasted less than one week. (Ex. E, p. 30) According to claimant, his supervisor asked him to wear a NASCAR shirt on or about May 30, 2021. When claimant refused, the supervisor told claimant he could either wear the shirt or leave. Claimant decided to leave. (Id.)

Mr. Gatewood sustained a slip and fall injury while working for Hy-Vee on May 30, 2021. (Ex. E, p. 25; Ex. F, p. 34; JE8) He presented to the Emergency Department at Genesis West with 7/10 low back and right hip pain and tenderness. (JE8, pp. 33, 35)

Claimant reported the injury and described right low back pain to Ms. Lira in July 2021. He stated, "I fell on my ass, and I think it jarred everything." (JE10, p. 66) Mr. Gatewood complained of chronic back pain and "bad back pain" on the right and in the buttock. (Id.) Ms. Lira suspected right sacroiliitis due to the significant tenderness in claimant's sacroiliac joint. (JE10, p. 67) Mr. Gatewood declined Ms. Lira's recommendation for physical therapy. (JE10, p. 67) Sacroiliac joint injections were recommended and administered on July 28, 2021. (JE10, p. 68) The right SI joint injection helped claimant's right low back/hip pain. (JE10, p. 69)

Mr. Gatewood obtained employment with the Hilton DoubleTree hotel in late August, 2021. (See Ex. 6, pp. 63-64; Hr. Tr., pp. 22, 25) Mr. Gatewood asserts Justin Geurtsen, his former manager at the Davenport and Blackhawk hotels, helped him secure the job at DoubleTree. (Hr. Tr., pp. 21-22) Mr. Gatewood works as both a bartender and server, depending on the shift. (Hr. Tr., p. 25) He testified he is supposed to work 30 hours per week. (Hr. Tr., p. 23)

On August 31, 2021, claimant reported an increase in his chronic low back pain after working 6-7 hour shifts four days in a row. (JE10, p. 69) At the time, Ms. Lira was only prescribing claimant 10 hydrocodone pills each month. (Id.) Following the August 31, 2021, appointment, Ms. Lira prescribed an additional course of Flexeril. (JE10, p. 70)

In late September 2021, Mr. Gatewood presented to Dr. Seeman and requested a medical note limiting his ability to work to Fridays, Saturdays, and Sundays. Mr. Gatewood's request was granted. (JE2, p. 4; see Hr. Tr., p. 73) Dr. Seeman did not provide an explanation as to why she was limiting Mr. Gatewood to only working Fridays, Saturdays, and Sundays, presumably the busiest days of the week.

Claimant continues to treat his low back and left leg conditions. (Hr. Tr., p. 50) He has good days and bad days with respect to his ongoing symptoms. (Hr. Tr., p. 51) The pregabalin and hydrocodone medications help to mitigate his pain. (Id.) It is somewhat unclear just how much hydrocodone claimant is currently consuming. At the time of his June 2021 deposition, claimant testified that he only takes hydrocodone when his pain is really bad. (Ex. I, Depo. p. 29) He further testified that he was only prescribed 10 hydrocodone pills per month. (Id.) However, at the evidentiary hearing, claimant testified that he takes at least two hydrocodone pills per day. (Hr. Tr., p. 70) Initially, claimant testified that he has taken at least two hydrocodone pills each day "off and on" since he had surgery. (Id.) However, when defense counsel directed claimant's attention to his deposition testimony, claimant testified that his consumption increased when he started working at DoubleTree. (Hr. Tr., p. 71) The evidentiary record does not contain medical records to substantiate claimant's testimony. Medical records indicate claimant was still only being prescribed 10 pills per month as of August 31, 2021. (JE10, p. 69)

In terms of his functional abilities, claimant testified he is able to mow his lawn with a self-propelled lawn mower. (Ex. I, Depo. pp. 34-35; see Hr. Tr., p. 89) The evidentiary record also contains evidence that claimant was able to shovel in January 2021. (See JE9, p. 41)

Defendants introduced approximately 9 minutes of surveillance video taken on July 9, 2021. (Ex. G) Importantly, the video is not 9 minutes of continuous surveillance; rather, the video only depicts the periods in which claimant is not on public transportation. The video depicts claimant walking, dancing, and running without obvious loss of function or symptoms. (Id.) Throughout the video, claimant is carrying what appears to be a plastic grocery bag in his hand and a drawstring bag over his shoulder. (Id.) Claimant's symptoms appear to be well-controlled on the surveillance footage. At hearing, claimant admitted that he is capable of performing the various activities depicted in the surveillance video. (Hr. Tr., p. 59) Claimant testified he had taken pregabalin and hydrocodone on the morning of July 9, 2021. (Hr. Tr., p. 57) It is important to note that Dr. Seeman had not yet increased claimant's hydrocodone prescription on the date the surveillance footage was captured. Moreover, at the time of his deposition, Mr. Gatewood testified that he only took hydrocodone if his pain got really bad. (Ex. I, Depo. p. 29) I did not observe any specific activities on the surveillance footage that would clearly violate the medical restrictions recommended by Dr. Segal.

The undersigned had the opportunity to observe Mr. Gatewood at the evidentiary hearing, via CourtCall. Claimant presented as a pleasant, outgoing individual. Claimant testified he did not take his medications on the morning of the evidentiary hearing. (Hr. Tr., p. 76) While claimant shifted his position and stood up from his chair several times, he did not appear to be in significant pain. Claimant was not slow to rise or particularly cautious with his movement, and at one point in the hearing claimant stood up and demonstrated how he delivers plates of food at his current job. (See Hr. Tr., pp. 61-62)

The surveillance footage, combined with claimant's presentation at the evidentiary hearing do not reflect an individual that is significantly limited in function. That being said, the surveillance footage only shows claimant's functional abilities for a few minutes out of an entire day, and claimant correctly notes that the footage does not show him exceeding the limitations imposed by Dr. Segal. In this regard, the surveillance has seemingly little bearing on the question of whether claimant can return to work he performed prior to the May 19, 2019, work injury.

On the Hearing Report, the parties stipulated that claimant sustained injuries, which arose out of and in the course of employment on May 19, 2019, and November 17, 2019. (Hearing Report) The parties further stipulated that the injuries were a cause of permanent disability. (Id.) While claimant returned to work following both injuries, the employment relationship was terminated in late December 2019. Accordingly, I must determine the extent of claimant's entitlement to industrial disability benefits.

In total, four physicians have assessed claimant's permanent impairment relating to the stipulated work injuries.

Dr. Garrels assigned 10 percent whole person impairment based on claimant's residual radiculopathy resulting in dermatomal pain, paresthesia, and sensory loss. (Ex. A, p. 1) In reaching this impairment rating, Dr. Garrels relied on Table 15-3 on page 384 of the AMA Guides, Fifth Edition. (Id.)

Claimant sought an independent medical evaluation (IME) performed by David Segal, M.D. on December 10, 2020. (Ex. 1) Dr. Segal provided a comprehensive opinion. He assigned 39 percent whole person impairment as a result of claimant's injuries. Thirty-three percent impairment was attributed to the lumbar spine, while 9 percent impairment was attributed to RSD. (Ex. 1, p. 24)

Dr. Segal is the first and only physician to diagnose claimant with RSD. Dr. Segal noted that claimant developed RSD-type symptoms in the left lower leg after the May 2019 injury, and the symptoms increased after the fall in November 2019. The symptoms included burning pain in the foot, weakness and atrophy, swelling, color change and mottling of the foot, decreased hair pattern of the top of the left foot, temperature change, inability to flex his toes, trophic changes in left toenails, numbness and tingling in a stocking distribution, blistering and skin texture changes of the right foot, and hypersensitivity to touch. (Ex. 1, p. 15) Dr. Segal opined that such a diagnosis helps to explain why claimant's left lower extremity symptoms continued following a surgical intervention that typically provides good results. (Ex. 1, pp. 8, 16)

Dr. Segal recommended several permanent restrictions for Mr. Gatewood. The recommendations provide, in part:

- Sitting 60 minutes with shifting, 10 minutes without shifting: Frequently
- Standing 20 minutes consecutive, then change position, then stand again: Occasionally
- Walking 20 minutes consecutively, then stop and rest, then can walk again: Occasionally
- Lifting floor-to-waist: 30 lbs., rarely
- Lifting floor-to-waist: 20 lbs., Occasionally
- Lifting waist-to-overhead: 15 lbs., Occasionally
- Bilateral carrying, 25 feet: 15 lbs., Occasionally
- Pushing/Pulling with 30 pounds of force: Occasionally
- Stairs, 1 flight: Occasionally

(Ex. 1, p. 25) Dr. Segal opined it is unlikely Mr. Gatewood will be able to secure gainful, full-time employment given his condition. (Ex. 1, p. 24) He further opined, "Because he has substantial limitations in sitting and standing, he potentially would have a difficult time being productive at any type of occupation." (Id.) At this juncture, it is worth noting that Dr. Segal's evaluation occurred prior to claimant securing employment with Hy-Vee and DoubleTree.

Dr. Segal issued an updated report on September 17, 2021. (Ex. 2, p. 30) In the report, Dr. Segal opined that the May 30, 2021, injury at Hy-Vee was not an intervening cause, "that in any way changes the symptoms, impairments, restrictions, or future treatments discussed" in his initial IME report. (Ex. 2, p. 32) Dr. Segal did not address the fact claimant did not present with persistent right low back pain prior to the May 30, 2021, slip and fall at Hy-Vee.

Defendants obtained an IME report from Sanjay Sundar, M.D. (Ex. B, p. 6) Dr. Sundar's examination occurred on September 29, 2021. (Id.) Comparatively, Dr.

Sundar's report is significantly less thorough than Dr. Segal's report. Like Dr. Segal, Dr. Sundar noted that claimant was a marginal historian. (Ex. B, p. 9)

After summarizing claimant's medical records and performing a 36-minute physical examination, Dr. Sundar addressed several questions posed by defendants. (See Id.) Dr. Sundar diagnosed claimant with left L5-S1 disc herniation with radiculopathy, left L4-5 foraminal stenosis, and lumbar post-laminectomy syndrome. (Ex. B, p. 9) Dr. Sundar agreed with the May 19, 2020, MMI date originally assigned by Dr. Garrels. (Ex. B, p. 10) Dr. Sundar placed claimant's lumbar spine condition in DRE Category III and assigned 10 percent whole person impairment. (Id.) Importantly, Dr. Sundar believes claimant's condition initially stemmed from the unrelated March 4, 2019, fall at home, and that claimant's subsequent work injuries aggravated/exacerbated the pre-existing condition. In this respect, it appears Dr. Sundar limited or apportioned his impairment rating. (See Ex. B, p. 10) Dr. Sundar did not find the need to recommend any permanent work restrictions or additional medical treatment based on his physical examination of claimant. (Id.)

Dr. Sundar was also tasked with addressing Dr. Segal's RSD diagnosis. (Ex. B, p. 9) Dr. Sundar noted that his inspection of claimant's bilateral feet, ankles, and legs revealed no evidence of skin mottling, vasomotor changes, trophic changes, allodynia, visible swelling, or temperature changes. (Ex. B, pp. 8-9) Dr. Sundar concluded that claimant did not meet the Budapest Criteria for clinical diagnosis of CRPS. (Ex. B, p. 9)

Dr. Segal issued a supplemental report critiquing Dr. Sundar's opinions on October 20, 2021. (Ex. 3, pp. 35-39) In the supplemental report, Dr. Segal expanded upon his diagnosis of CRPS/RSD, revisited causation and the impact of claimant's March 4, 2019, injury at home, and disagreed with Dr. Sundar's impairment rating, recommendations regarding permanent restrictions, and recommendations for additional medical treatment. (Id.)

Notably, Dr. Segal is the only physician in the evidentiary record to diagnose Mr. Gatewood with RSD or CRPS. Mr. Gatewood provided no testimony to substantiate Dr. Segal's diagnosis of RSD or CRPS. His post-hearing brief asserts no argument with respect to the RSD or CRPS diagnosis. Dr. Sundar noted that inspection of claimant's bilateral feet, ankles, and legs revealed no evidence of skin mottling, vasomotor changes, trophic changes, allodynia, visible swelling, or temperature changes. I accept Dr. Sundar's observations and conclusions regarding the potential diagnosis of RSD or CRPS as convincing. As such, I find that claimant has not proven he has RSD or CRPS, and I find that claimant's injury is limited to his low back.

Defendants last sought an independent neurosurgical examination of claimant by Chad Abernathey, M.D. (Ex. C, p. 11) Dr. Abernathey's report is dated October 8, 2021. (Id.) It is short and to the point. Dr. Abernathey diagnosed claimant with chronic low back pain and primarily left L5 radiculopathy with ankle and "foot dorsiflexion weakness (foot drop) and sensory loss." (Id.) He assigned 25 percent whole person impairment; however, he did not explain his reasoning or provide that the impairment rating came from the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition. No specific analysis or reference to applicable

portions of the AMA Guides, Fifth Edition, is provided by Dr. Abernathey to support or justify his impairment rating. In terms of additional medical treatment, Dr. Abernathey opined that claimant could consider reconstructive surgery of the L4-5 degenerative and post-surgical findings. (Ex. C, p. 13)

Like Dr. Segal, Dr. Abernathey recommended permanent lifting restrictions. More specifically, Dr. Abernathey recommended a universal 30-pound lifting restriction. (Ex. C, p. 11) Dr. Abernathey's lifting restriction is similar to the lifting restriction assigned by Dr. Segal; however, Dr. Segal's restrictions are more detailed and supported by additional analysis. While the bending, twisting, and turning limitations give me some pause, I find that the restrictions outlined by Dr. Segal are reasonable and appropriate for claimant's condition when compared to the blanket recommendation of Dr. Abernathey. I accept Dr. Segal's restrictions and will utilize the same in determining a permanent disability award in this case.

When comparing the competing impairment ratings, I find that the opinions offered by Dr. Segal are significantly more comprehensive when compared to the opinions of Drs. Garrels, Sundar, and Abernathey. Dr. Garrels' and Dr. Sundar's opinions are comparatively outdated. The last medical records the two physicians reviewed are from December 13, 2019, and September 24, 2019, respectively. (Ex. A, p. 4; Ex. B, p. 8) While Dr. Abernathey's report is dated October 8, 2021, his report does not provide a medical records summary. Dr. Abernathey's report is also silent as to what medical records he reviewed prior to drafting his report. Moreover, unlike Dr. Abernathey's report, Dr. Segal's report includes a specific discussion of the AMA Guides, Fifth Edition, and references specific tables and methodologies. Dr. Segal's impairment rating appears to be consistent with the AMA Guides. For these reasons, I accept the 33 percent impairment rating offered by Dr. Segal. (Ex. 1, p. 24)

Claimant's entitlement to permanent partial disability benefits is not limited to Dr. Segal's functional impairment rating as his employment relationship with the defendant employer was terminated in December 2019. Given this finding, I must determine the extent of claimant's industrial disability.

Both parties submitted vocational reports that address claimant's ability to return to gainful employment.

Mr. Gatewood retained the services of Barbara Laughlin, M.A. (Ex. 5) Ms. Laughlin interviewed claimant and analyzed all pertinent medical records. (Ex. 5, p. 45) She was not tasked with obtaining employment for Mr. Gatewood. (Ex. 5, p. 56)

Utilizing the work restrictions offered by Dr. Segal, Ms. Laughlin opined claimant would have a 100 percent occupational loss of all semiskilled and skilled occupations in the "closest match" occupations post injury access, 92.6 percent loss in the "good match" occupations, and 95.1 percent loss of unskilled occupations. (Ex. 5, p. 55) Ms. Laughlin concluded her report by stating, "It is my opinion Mr. Gatewood is unlikely to find employment in any quality, quantity or dependability." (Ex. 5, p. 58) Notably, Mr. Gatewood obtained employment with the Hilton DoubleTree hotel shortly after Ms. Laughlin drafted her vocational report. (See Ex. 6, pp. 63-64; Hr. Tr., p. 22)

In reaching her final conclusion, Ms. Laughlin relied on her own vocational discretion and limited her employability assessment to sedentary positions only. She attributed her exclusion of light work positions to claimant's limitations on sitting, standing, and walking. (See Ex. 6, p. 68) She stated, "It is my opinion that Mr. Gatewood is more suited to sedentary exertional level occupations." (Ex. 5, p. 56) She further stated, "It is not likely that he would be able to perform light jobs if he needs to change position or take a rest break." (Ex. 5, p. 68) In this respect, Ms. Laughlin seems to overstate the significance of claimant's sitting, standing, and walking restrictions. According to Dr. Segal, Mr. Gatewood remains capable of lifting 20 pounds, occasionally, and 30 pounds, rarely. Limiting Mr. Gatewood to sedentary positions and ultimately opining he is unlikely to find employment in any quality, quantity, or dependability based in part on his need to change positions or take a brief break after standing for 20 minutes seems highly unreasonable. This is particularly true when considering Mr. Gatewood's demonstrated ability to find employment with two different employers, and the physical abilities documented in the surveillance footage.

Ms. Laughlin also relied on an inaccurate understanding of claimant's computer skills. Her report provides, "Mr. Gatewood lacks all computer skills often needed in sedentary and light exertional level occupations." (Ex. 5, p. 58) Claimant's own testimony and previously demonstrated abilities to learn and operate computer programs make it difficult to accept Ms. Laughlin's finding that claimant lacks basic computer skills. Claimant testified he can complete basic tasks on the computer, such as sending an e-mail and using search engines. (Hr. Tr., p. 28) He further testified that he had to operate a point-of-sale system and computers in the restaurant industry. (Ex. I, Depo. pp. 9-10) At his deposition, claimant testified to performing data entry for weddings at The Outing Club. (Ex. I, Depo. p. 10) Moreover, claimant told Ms. Sellner that the Hilton DoubleTree would be training him to work the front desk. (Ex. D, p. 15)

I find Ms. Laughlin's estimates of Mr. Gatewood's loss of access to be inflated and not convincing. Moreover, I find that claimant's loss of future earning capacity is not as severely impacted as Ms. Laughlin's estimates suggest.

Defendants offer the vocational opinions of Lana Sellner, M.S. (Ex. D) Ms. Sellner interviewed claimant on September 9, 2021, and performed a transferrable skills analysis and labor market survey. (Ex. D, p. 14) Ms. Sellner concluded that claimant can work in a full-time environment under the restrictions imposed by Dr. Segal. (Ex. D, p. 21)

Unlike Ms. Laughlin, Ms. Sellner opined claimant has access to the labor market for both selectively chosen sedentary and selectively chosen light work demand levels. (Ex. D, p. 21) Ms. Sellner explained, "Using light strength greatly increases the number of possible occupations that can be searched. Only about 11% of the DOT occupations are rated sedentary. Nearly 50% are rated light." (Ex. D, p. 18) After conducting a search with light work parameters, Ms. Sellner studied the search results to identify the best occupational alternatives. (Id.) I find Ms. Sellner's selective sedentary and light work approach is a much more reasonable approach to an employability assessment when compared to Ms. Laughlin's blanket exclusion of light work positions.

Ms. Sellner identified viable entry-level positions that Mr. Gatewood could pursue within his skills and within the imposed restrictions of Dr. Segal, with or without accommodations. (Ex. D, pp. 18-20) According to Ms. Sellner, the positions identified would not require intense computer knowledge as the employers would train claimant to use their proprietary software. (Ex. D, p. 19)

Ms. Laughlin produced a supplemental report addressing claimant's subsequent employment and critiquing the opinions of Ms. Sellner. (Ex. 6, pp. 63-77) Notably, Ms. Laughlin did not amend her initial opinions despite claimant's subsequent employment with Hilton DoubleTree. (Ex. 6, p. 64) Ms. Laughlin's failure to reconsider her position in any meaningful way despite the introduction of new evidence is concerning to the undersigned.

Ms. Laughlin contacted several of the potential employers discussed in Ms. Sellner's report. (See Ex. 6, pp. 68-71) After contacting the potential employers, Ms. Laughlin concluded that claimant could not perform any of the jobs outlined by Ms. Sellner. (Ex. 6, pp. 68-71) I do not find the explanations provided by Ms. Laughlin to be particularly convincing. For example, Ms. Laughlin determined claimant could not work as a front desk receptionist or in similar position at Days Inn & Suites, Fairfield Inn & Suites, Comfort Inn, or the Radisson Hotel. (Id.) In reaching this finding, Ms. Laughlin consistently cited claimant's lack of computer skills as a significant barrier to employment. As previously discussed, I do not share Ms. Laughlin's opinion regarding claimant's computer skills or his inability to learn proprietary computer programs. Additionally, Ms. Laughlin routinely refers to employer preferences when discussing why Mr. Gatewood is unqualified or incapable of performing various jobs. An applicant's failure to meet a preference does not preclude employment.

Lastly, when critiquing Ms. Sellner's opinions, Ms. Laughlin makes several inaccurate statements of her own. Ms. Laughlin inaccurately provides that claimant had a connection for his job at Hy-Vee. (Ex. 6, p. 65) There is no evidence anyone helped claimant obtain employment with Hy-Vee. Ms. Laughlin also critiques Ms. Sellner for opining claimant is capable of performing medium exertional level work. (Id.) However, Ms. Sellner never provided such an opinion. (Ex. D, p. 17) Several of Ms. Laughlin's opinions in the addendum report advocate for Mr. Gatewood's claim as opposed to simply evaluating his vocational abilities and opportunities.

When comparing the two vocational reports, I find Ms. Sellner's opinions and recommendations to be reasonable and appropriate in the current matter. I also find her opinions to be more credible and convincing than those of Ms. Laughlin. As such, I find claimant remains employable within the competitive labor market.

That being said, I still find that Mr. Gatewood has proven a significant loss of future earning capacity as a result of his work injuries.

At the time of the evidentiary hearing, Mr. Gatewood was 55 years of age. He is a high school graduate who attended one year of post-secondary education. Claimant has no further specialized education or training. Mr. Gatewood does not possess a driver's license. His work experience consists almost entirely of semi-skilled work. Prior to the work injuries, Mr. Gatewood worked without restrictions as a server,

bartender, and supervisor for the defendant employer. Today, Mr. Gatewood continues to work in the hospitality industry; however, he is working in an accommodated position, with reduced hours, and he obtained the job through a long-time colleague.

Dr. Segal's impairment rating and restrictions are consistent with the nature of claimant's injury, his unsuccessful surgical intervention, and his ongoing symptoms. If Mr. Gatewood found it necessary to seek new employment, he would encounter substantial barriers to alternative employment because of his permanent restrictions and his ongoing pain. Realistically, Mr. Gatewood will be able to find employment moving forward; however, he is not capable of returning to physically demanding employment.

Considering Mr. Gatewood's age, educational background, employment history, the situs and severity of his injury, his permanent impairment ratings, his permanent work restrictions as stated by Dr. Segal, as well as all other relevant industrial disability factors outlined by the Iowa Supreme Court, I find that Mr. Gatewood has proven he sustained a 50 percent loss of future earning capacity as a combined result of his work injuries.

CONCLUSIONS OF LAW

Mr. Gatewood asserts he is permanently and totally disabled as a result of the May 19, 2019, work injury to his low back. Mr. Gatewood asserts this claim under both the traditional industrial disability analysis and claims that he is an odd-lot employee. The odd-lot claim will be evaluated first.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried,

and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

In this case, Mr. Gatewood failed to produce prima facie evidence to establish a claim for permanent total disability. Having found that claimant retains residual capabilities that would make him employable within the competitive labor market, I conclude that Mr. Gatewood failed to establish his odd-lot claim.

Having concluded that Mr. Gatewood did not establish a claim as an odd-lot employee, I must also evaluate his claim under the more traditional industrial disability analysis. Mr. Gatewood sustained a low back injury, which is an unscheduled injury compensated pursuant to Iowa Code section 85.34(2)(v). 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 Ry. 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.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W. 2d 614, 617 (Iowa 1995).

I found Mr. Gatewood failed to carry his burden of proving he is permanently and totally disabled. That being said, I found that Mr. Gatewood proved by a preponderance of the evidence that he sustained 50 percent loss of future earning capacity as a result of the May 19, 2019, and November 17, 2019, work injuries. As such, I conclude Mr. Gatewood is entitled to an award of 250 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v)

The parties stipulated that the commencement date for permanent partial disability benefits should be May 19, 2020. (Hearing Report) The parties also stipulated that the applicable weekly rate for permanent partial disability benefits is $254.74. (Hearing Report) The stipulations are accepted.

Lastly, Claimant seeks an assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Claimant established entitlement to workers' compensation benefits. Therefore, I conclude it is appropriate to assess claimant's costs in this action.

Claimant seeks reimbursement for his filing fees. These costs are appropriate and assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks the costs associated with Ms. Laughlin's vocational report(s), totaling $1,392.00. 876 IAC 4.33(6). In this case, I did not find Ms. Laughlin's report to be credible or particularly helpful. I found Ms. Laughlin's estimates overstated the permanent disability experienced by Mr. Gatewood. Having declined to accept Ms. Laughlin's opinions and having found them unhelpful in my determination of industrial disability, I also conclude it inappropriate to tax the cost of Ms. Laughlin's evaluation or report.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on May 19, 2020, at the stipulated weekly rate of two hundred fifty-four and 74/100 dollars ($254.74).

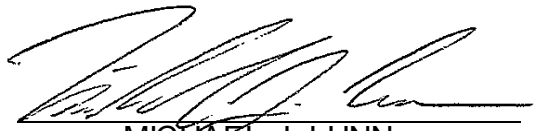
Defendants shall pay all accrued weekly benefits in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall be entitled to credit for any weekly benefits paid to date.

Costs are taxed to defendants pursuant to 876 IAC 4.33, as set forth in the decision.

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

Signed and filed this ____3rd____ day of June, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Kevin Halligan (via WCES)

Robert Gainer (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.