BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEPHEN CORBIN,

Claimant,

vs.

PRO PLATINUM CONSTRUCTION & REMODELING LLC,

Employer,

and

LE MARS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED
FEB 28 2019
WORKERS' COMPENSATION

File No. 5059031

ARBITRATION

DECISION

Head Note Nos.: 1402.10, 2002

STATEMENT OF THE CASE

Stephen Corbin, claimant, filed a petition in arbitration seeking workers' compensation benefits from Pro Platinum Construction & Remolding LLC. (Pro Platinum) and its insurer, Le Mars Insurance Company as a result of an injury he sustained on May 31, 2017 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa, and fully submitted on October 1, 2018. The evidence in this case consists of the testimony of claimant, Michael Moulds, Joint Exhibits 1 - 4, Defendants' Exhibits A – E, and Claimant's Exhibits 1 - 4. Both parties submitted briefs.

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.

ISSUES

1. Whether an employer-employee relationship existed at the time of the alleged injury;

2. The extent of healing period benefits;

3. The extent of permanent disability.

4. Whether claimant is entitled to payment of an independent medical examination.

5. Whether claimant is entitled to payment of medical expenses.

6. Assessment of costs.

## FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Stephen Corbin, claimant, was 35 years old at the time of the hearing. He graduated high school. Prior to his work for Pro Platinum claimant has performed lawn care, manual labor of setting up stores and some retail work. (Transcript page 10)

Claimant began working for Pro Platinum in July 2016. Claimant's brother was working for Pro Platinum. Claimant asked Mike Moulds, owner of Pro Platinum, if he was hiring and was told yes. (Tr. pp. 11, Ex. D, p. 18) Claimant said in his deposition that Mr. Moulds told him he was entitled to a week's vacation while working at Pro Platinum. (Ex. D, p. 21)

Claimant was offered work at $12.00 per hour and told he would work 40 hours and more. (Tr. p. 12) Claimant described his work as:

> A. A variety of tasks; we would be setting mobile homes, working subcontracting with – he had a deal with ServiceMaster here in Cedar Rapids, if they needed help we would go and help them. We did some demo work, a little bit of everything.

(Tr. p. 12) Claimant had not performed this type of work previously. (Tr. p. 13) Claimant did not have any employees working for him while he worked for Pro Platinum. (Tr. p. 13) When claimant was hired, he does not recall signing an independent contractor agreement. (Tr. p. 13)

Claimant was told to report at 7:30 a.m., the day after he was hired. (Tr. p. 13) When he and other workers appeared at that time Mr. Moulds would assign work and let the workers take materials, trucks and equipment they would need for the day. (Tr. p. 14) Claimant did provide his own hammer, plyers and tool belt. (Tr. p. 14; Ex. D, p. 23) Claimant was provided with a credit card in the name of Pro Platinum. (Tr. p. 21: Ex. 4, p. 1) Claimant would use the credit card to purchased materials for jobs. Usually Mr. Moulds told him what to purchase. (Tr. p. 22) Claimant was also given keys for Pro Platinum's shop. (Tr. p.23) Claimant was provided the key because the tools were located there. (Tr. p. 78)

Claimant was supervised by Mr. Moulds and his schedule was set by Mr. Moulds. (Tr. p. 15) Claimant was paid every two weeks. Claimant did not receive overtime (one and one half) pay. (Tr. pp. 16, 59) No taxes were taken out of his checks. (Tr. p. 19) Claimant was aware he could stop working at Pro Platinum at any time. (Tr. p. 60)

Claimant would fill out a time sheet on Monday so that he could get paid by the end of the week. (Tr. p. 16; Exhibit 3, pp. 181 - 74) Claimant was given a week's vacation a year. (Tr. pp. 18, 19; Ex. 3, p. 45)

Part of what claimant did for Pro Platinum was to help set up mobile homes. Claimant would haul block and was being shown how to set the blocks level. He also put anchors and skirting on the mobile homes. Claimant also performed demo. This work involved demolition of mobile homes and taking the materials to the land fill. (Tr. p. 24) Claimant would generally clean up the demo materials by hand and put them in a Pro Platinum dump truck. Occasionally, Pro Platinum's mini-hoe was used. (Tr. p. 25)

Claimant was also assigned to do work with Service Master on occasion. Pro Platinum had a contract with Service Master and claimant was assigned by Mr. Moulds to go to jobs and do demo work. (Tr. p. 26)

Claimant agreed that it was his signature on page 9 of the Independent Contractor Agreement (ICA). (Tr. pp. 28, 47) Claimant said that that he and others were told that they need to sign the ICA and turn it back in the day they were provided. (Tr. pp. 28, 29) Claimant testified that he did not receive a copy of the ICA. (Tr. p. 48) Mr. Moulds testified that claimant would have received a copy. (Tr. p. 70) Claimant signed a W-9 tax form on July 18, 2016. (Ex. B, p. 10; Tr. p. 49) Claimant acknowledged that he knew that when he was being paid by Pro Platinum no taxes were being withheld. (Tr. p. 52) Claimant did not file his income tax for 2016 and 2017 at the time of the hearing. (Tr. p. 55) Claimant did not provide any supplies or equipment for the work he performed for Pro Platinum. (Tr. p. 62)

The ICA that was submitted into evidence is dated as January 4, 2017. (Ex. A, p. 1) The ICA clearly identifies the document as an ICA. The ICA states that the contractor (claimant is responsible for any taxes and workers' compensation). (Ex. A, p. 1) The work assigned is to be discussed daily and that claimant is to be paid an hourly rate. (Ex. A, p. 2)

On May 31, 2017, claimant was working for Pro Platinum at Five Seasons Mobile Home Park in Cedar Rapids, Iowa. There were several mobile homes that needed to be set in place. Claimant was helping get block under homes and getting the homes in place. (Tr. p. 29) Claimant arrived at the work site in a Pro Platinum truck. Mr. Moulds provided instructions to the workers. Claimant and others on the crew had finished setting up a home and claimant was sitting on a Trans Lift as it was being moved down the street. A Trans Lift is a device that is used to move mobile homes. It moves on

steel tracks. (Tr. pp. 31, 32) Claimant was riding on a Trans Lift and his leg got caught under a steel track. The Trans Lift was stopped and taken off of claimant's right lower leg. (Tr. p. 33)

Claimant has proven that he was injured while performing work for Pro Platinum.

Claimant was taken by ambulance to the emergency department at St. Luke's Hospital. (Tr. p. 33) Claimant had surgery that day on his leg. (Tr. p. 33) Claimant had a rod implanted in his right leg and was not released from the hospital until June 2, 2017. (Tr. p. 34) Claimant had a number of doctor appointments and physical therapy treatments. On September 12, 2017, claimant was provided a return to work slip for sedentary work. (Tr. p. 37)

Claimant went to Pro Platinum with the return to work slip and spoke to Mr. Moulds. Mr. Moulds told him he was not an employee and put the return to work slip through a paper shredder. (Tr. p. 37) Claimant was released to work with no restrictions as of November 28, 2017. (Tr. p. 38; JEx. 2, p. 18) Claimant has not received any indemnity payments from Pro Platinum nor has Pro Platinum paid any medical bills as a result of his May 31, 2017 injury. (Tr. p. 46) Claimant has incurred significant medical bills as a result of his May 31, 2017 injury including over $41,000 to St. Luke's Hospital, over $6,000.00 to Dr. Scott, over $3,000.00 for physical therapy. The bills are summarized in Exhibit 2, page1.

I find the medical expenses identified in Exhibits 2 through 2k are causally related to his injury on May 31. 2017. I find the care was reasonable and necessary and the costs reasonable.

Claimant testified that he cannot kneel without pain in his right knee. Stooping and squatting is painful and his leg swells daily if he is up on it. Claimant said that he cannot kneel with his right leg. (Tr. p. 42) Due to swelling in his foot, claimant has to by loose fitting shoes and keeps it untied. (Tr. p. 43) Claimant was not working at the time of the hearing and was looking for work that did not require him to be on his feet all the time. (Tr. p. 45)

Mr. Moulds was called by the defendants to testify. He and his wife own Pro Platinum. (Tr. p. 64) Mr. Moulds stated that Pro Platinum use to do more construction and contracts with Service Master, but in 2015 started transitioning to set up mobile homes. (Tr. p. 65)

Mr. Moulds said in the year 2017 Pro Platinum did not have any employees. (Tr. p.65) Mr. Moulds said that he switched to having no employees due to costs. In 2016, when claimant first started working, Mr. Moulds said he would have had the claimant sign an ICA. (Tr. p. 67) Mr. Moulds testified that claimant was issued a 1099 form for the tax year 2017, however it was retuned in the mail and sitting in his office. (Tr. pp. 68, 69)

Mr. Moulds testified that he was audited by the State of Iowa and provided the inspector with the ICA and the 1099 forms. The State did not raise any concerns with him about the employee status. (Tr. pp 70 - 72) Mr. Moulds testified he does not pay vacation and does not put vacation on any check; however he would provide bonuses as incentives. (Tr. p. 72)

Based upon the time sheet of December 26, 2016 – December 30, 2016 and claimant's credible testimony I find that claimant was paid vacation by Pro Platinum.

Mr. Moulds testified that he considered claimant an independent contractor. He said that he has had an insurance representative tell the workers they can purchase their own workers' compensation or liability insurance and that they are free to work anywhere else. (Tr. p. 74)

Mr. Moulds described the type of work claimant performed as.

> A. As in my work terms, I put it as a laborer, grunt guy. There's no skills. That's why he did a lot of the running around or picked up lots, or maybe even pass out block, as he mentioned earlier and stuff.

(Tr. p. 76) Mr. Moulds agreed that there were no specific responsibilities identified in the ICA as far as claimant's work duties. (Tr. p. 80) Mr. Moulds agreed he provided all supplies and all major tools. (Tr. p. 80) Mr. Moulds agreed that he assigned work orders to the claimant for all the work claimant performed. (Tr. p. 88)

On May 31, 2017, claimant was admitted to St. Luke's Hospital after his injury at work. He was assessed with a right open tibial fracture. (JEx. 1, p. 4) Surgery was performed including stabilization with an intramedullary rod. (Ex. 1, p. 4) The post-operative diagnosis was, "Right grade 2 open tibia and fibula fracture." (JEx. 1, p. 5)

Claimant received care from Physician's Clinic of Iowa, PC. A note of June 13, 2017 stated.

> Employer is Pro-Platinum Construction and Remodeling Phone: 319-***-****. Spoke with a gentleman at this office and he said that they don't have WC because they technically don't have employees since everyone is an independent contractor. I spoke with patient who now has a lawyer hired. He will put this under his regular insurance for the time being.

(JEx. 2, p. 1)

On July 16, 2018, John Kuhnlein issued an independent medical examination (IME report. (Ex. 1, pp. 1 – 10) Dr. Kuhnlein's diagnosis was:

Diagnoses

1. Open type III right tibia and fibular fracture with May 31, 2017, debridement of the open tibial fracture and intramedullary nailing of the right tibial fracture with closed reduction of the fibular shaft fracture (Ekroth)

a. Delayed healing right fibular fracture

b. Persistent pain and swelling in the right lower extremity below the knee.

c. Noted sensory deficit in the saphenous nerve of the right calf and lateral sural cutaneous nerve distribution near the tibial rod insertion site.

d. Subcutaneous proximal screw head extending through the tibial cortex.

2. Pre-existing bilateral carpal tunnel syndrome.

3. Ingrown right great toenail with November 30, 2017 avulsion (Berry – Stoelzle).

(Ex. 1, p. 6) Dr. Kuhnlein provided a 12 percent impairment rating to the claimant's lower right extremity. (Ex. 1, p. 8) Dr. Kuhnlein billed the claimant $3,482.00 for the IME. Of the total cost $1,250 was for the exam, $124.50 was for an x-ray, $1,357.00 was for the report and $750.00 was a rush fee. (Attached to Hearing Report)

## CONCLUSIONS OF LAW

The first issue to determine is whether the claimant is an independent contractor or an employee.

The workers' compensation act provides coverage for "all personal injuries sustained by an employee arising out of and in the course of the employment." Iowa Code § 85.3(1):

> The act defines an employee as "a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer...." Iowa Code § 85.61(11). The act also lists certain people who do not meet this broad definition, including independent contractors. See id. § 85.61(11)(c)(2).

Stark Const. v. Lauterwasser, 847 N.W.2d 612 (Iowa Ct. App. 2014) (Table).

Section 85.61(11) provides in part:

> "Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . .

It is claimant's duty to prove, by a preponderance of the evidence, that claimant was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (Iowa 1967).

The claimant has proven he was performing work for Pro Platinum at the time of his injury on May 31, 2017. The burden of going forward with evidence to show that claimant was an independent contractor is then upon the defendants.

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed.

Pro Platinum had the right of selection. Pro Platinum had the responsibility to pay wages. Pro Platinum had the right to terminate the relationship. While the ICA did have provisions for notice of discontinuing the relationship, Pro Platinum controlled the work assignments and Pro Platinum did not allow claimant to return to work when his doctor released him to work. Pro Platinum controlled the work of the claimant. And claimant performed work on behalf of Pro Platinum.

The test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

In Stark Const. v. Lauterwasser, 847 N.W.2d 612 (Iowa Ct. App. 2014) (Table), the Iowa Court of Appeals expounded on legal standard to apply in workers' compensation cases to determine if a claimant is an employee or self-employed contractor. The court held,

The workers' compensation act provides coverage for "all personal injuries sustained by an employee arising out of and in the course of the employment." Iowa Code § 85.3(1); Meyer, 710 N.W.2d at 220. The act defines an employee as "a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer . . . ." Iowa Code § 85.61(11). The act also lists certain people who do not meet this broad definition, including independent contractors. See id. § 85.61(11)(c)(2). In construing these legislative definitions, our courts have indulged a "measure of liberality" and "doubt as to whether a claimant was an employee or independent contractor is resolved in favor of the former status." See Daggett v. Nebraska-Eastern Exp., Inc., 107 N.W.2d 102, 105 (Iowa 1961); see also Usgaard v. Silver Crest Golf Club, 127 N.W.2d 636, 639 (Iowa 1964) (noting act is "liberally construed to extend its beneficent purpose to every employee who can fairly be brought within it"). Furthermore, the workers' compensation statute is "intended to cast upon the industry in which the worker is employed a share of the burden resulting from industrial accidents." Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 506 (Iowa 1981) (explaining theory that ultimate cost is born by the consumer as the cost of the production).

Initially, Lauterwasser, as claimant, must establish that at the time of his injury he was rendering services for Stark. See Everts v. Jorgensen, 289 N.W. 11, 13 (Iowa 1939). The burden then shifts to Stark to prove Lauterwasser was an independent contractor and not an employee. Daggett, 107 N.W.2d at 106.

. . . .

When the issue is an individual's status as an employee versus an independent contractor, many factors are relevant. See Nelson v. Cities Serv. Oil Co., 146 N.W.2d 261, 265 (Iowa 1966). In determining the existence of an employer-employee relationship, the Nelson court pointed to the following five factors:

> (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) the identity of the employer as the authority in charge of the work or for whose benefit it is performed.

Id.

The Nelson court described an independent contractor as "one who carries on an independent business and contracts to do a piece of work

according to his own methods, subject to the employer's control only as to results" and endorsed the following eight-factor test:

> (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.
>
> Id. at 264-65.

Stark, pp. 4, 5.

The parties' intent to establish an employee employer relationship is not a mandatory factor that must be established by the claimant. The subjective standard of the parties' intent *may* be considered by the trier of fact "to the extent it serves to shed light upon the true status of the parties concerned." Nelson, 146 N.W.2d at 265.

But the most important consideration in determining if a person is an employee or independent contractor is "the right to control the physical conduct of the person giving service. Id. "If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the person giving service [that person] is an independent contractor, if it is vested in the employer, such person is an employee." Id. (quoting Schlotter v. Leudt, 123 N.W.2d 434, 436 (Iowa 1963)(internal quotations omitted)). Only if that control is debatable, does the trier of fact need to consider the parties' intention or community customs. See id.

Stark Const. v. Lauterwasser, 847 N.W.2d 612 (Iowa Ct. App. 2014) (Table).

There is no doubt that Mr. Moulds, on behalf of Pro Platinum, exercised the right of control. Claimant would show up at work and receive his assignment each day. Claimant would work under the direct control of Pro Platinum.

I apply the eight Nelson factors as follows:

1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price.

There was a written contract. The contract (ICA) provides claimant will be paid an hourly rate. Mr. Moulds told claimant it was $12.00 per hour and paid him at that rate.

Claimant did not have the opportunity to profit by bidding for his work and doing the work in an independent manner. He was hired as an hourly worker.

This factor leads to finding an employee/employer relationship.

2) Independent nature of his business or of his distinct calling.

Claimant was assigned work to do. Mr. Moulds described that claimant was performing "grunt" work. Claimant had no prior skills or training on setting up mobile homes. He was assigned specific work each day by Pro Platinum.

This factor leads to finding an employee/employer relationship.

(3) His employment of assistants, with the right to supervise their activities.

Claimant did not hire assistants. The ICA did provide claimant with the "right" to hire assistance, but given the fact Mr. Moulds assigned all work and paid claimant an hourly rate of $12.00 per hour the right to hire was illusorily.

This factor leads to finding an employee/employer relationship.

(4) His obligation to furnish necessary tools, supplies, and materials.

Claimant used some hand tools, a hammer, plyers and a tool belt. All other tools and supplies were provided by Pro Platinum.

This factor leads to finding an employee/employer relationship.

(5) His right to control the progress of the work, except as to final results.

Claimant did not control the progress of the work. While claimant could take some time off to coach or when he did not want to work, he had no control on scheduling the projects he was working on and when to complete any project.

Claimant was not hired for a particular job, but was hired to report to work and receive assigned work.

This factor leads to a finding of an independent contractor relationship.

(6) The time for which the workman is employed.

Claimant was employed from July 18, 2016 through May 31, 2017 by the Pro Platinum. Claimant was not engaged in any substantial work for anyone else during this time.

This factor leads to finding an employee/employer relationship.

(7) The method of payment, whether by time or by job.

Claimant was paid by the hour. Claimant received vacation pay in December 2016.

This factor leads to finding an employee/employer relationship.

(8) Whether the work is part of the regular business of the employer.

Claimant was doing the regular work for the Pro Platinum. Claimant was working installing/leveling mobile homes, demolishing mobile homes and clean up for Pro Platinum under and Pro Platinum's contract with Service Master.

This factor leads to finding an employee/employer relationship.

The defendants assert that claimant was an independent contractor .

The defendants substantially rely upon the ICA and the W- 9 signed by the claimant and the fact that claimant knew that no taxes were being withheld from his pay. Claimant did know that no taxes were being withheld from his check, although there is not convincing evidence that he wanted this done.

The Lauterwasser court cited 3 Larson, § 61.05, at 61–8 noting.

> The treatise further states: "But, even without the imputation of such an evasive intent, the contractual designation of the relationship as employment or contractorship may be so plainly and completely at odds with the undisputed facts that the contractual designation must be disregarded." Id.

Stark Const. v. Lauterwasser, 847 N.W.2d 612 (Iowa Ct. App. 2014) (Table).

I do not find that the ICA reflects the reality of the employment relationship.

Iowa Code section 85.18 (2017) provides:

> No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided.

There are many legitimate independent contract relationships in the workforce, this is not one of them. Pro Platinum has devised a business model that has no employees to perform the day to day work of this organization. Workers are paid by the hour. Work is assigned by Pro Platinum. Pro Platinum controlled the work. All supplies and most tools were provided by Pro Platinum. There is no indication that claimant had any skills other than that of a simple laborer. No evidence was provided that any of the workers who were deemed independent contractors hired any others to perform work for Pro Platinum. Even if Pro Platinum did not pay vacation, I would find Pro Platinum to be the employer of claimant.

Defendants have not met the burden of proof to show claimant was an independent contractor.

Claimant was an employee of Pro Platinum for workers' compensation purposes at the time of his injury.

Defendants are liable for indemnity and medical cost that arose out of claimant's May 31, 2017 injury.

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

The courts have repeatedly stated that for those injuries limited to the schedules in Iowa Code section 85.34(2)(a-t), this agency must only consider the functional loss of the particular scheduled member involved and not the other factors which constitute an "industrial disability." Iowa Supreme Court decisions over the years have repeatedly cited favorably the following language in the 83-year-old case of Soukup v. Shores Co., 222 Iowa 272, 277; 268 N.W. 598, 601 (1936):

> The legislature has definitely fixed the amount of compensation that shall be paid for specific injuries . . . and that, regardless of the education or qualifications or nature of the particular individual, or of his inability . . . to engage in employment . . . the compensation payable . . . is limited to the amount therein fixed.

Our court has even specifically upheld the constitutionality of the scheduled member compensation scheme. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404 (Iowa 1994). Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Graves, 331 N.W.2d 116; Simbro v. DeLong's Sportswear 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). Pursuant to Iowa Code section 85.34(2)(u) the workers' compensation commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of

difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup, 222 Iowa 272, 268 N.W. 598. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

In this case, I find that the rating of 12 percent to the left leg provided by Dr. Kuhnlein is the most convincing evidence of functional loss.

Defendants shall pay claimant 26.4 weeks of permanent partial disability commencing February 1, 2018.

Defendants shall pay claimant healing period benefits from May 31, 2017 through January 31, 2018.

Claimant has requested payment of Dr. Kuhnlein's IME expenses of $3,482.00.

Iowa Code section 85.39(2) states the following, in pertinent part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall . . . be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

(Iowa Code section 85.39(2))

In, Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, (Iowa 2015), the Iowa Supreme Court held that reimbursement for an IME under section 85.39 is available only if an assessment of permanent disability has already been made by an employer-retained physician when the claimant-selected IME takes place. In this case, there is no evidence that the employer requested a rating of the claimant by a physician. Therefore claimant is not entitled to reimbursement under Iowa Code section 85.39. However, claimant is entitled to the cost of the report submitted. I do not award costs of

the exam or the x-ray. I award claimant costs for the report of $2,107.50 and $100.00 for the filing fee for a total of $2,207.50.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

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

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008)("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See Also: Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015) (Table).

I found that claimant's medical expenses set forth in Exhibits 2 through 2k are causally related to his work injury. Defendants shall pay these expenses and medical expenses in the future that are causally related to claimant's May 31, 2017 work injury.

## ORDER

Defendants shall pay claimant healing period benefits from May 31, 2017 through January 31, 2018 at the weekly rate of three hundred thirty-five and 26/100 dollars ($335.26).

Defendants shall pay claimant twenty-six point four (26.4) weeks of permanent partial disability benefits at the weekly rate of three hundred thirty-five and 26/100 dollars ($335.26) commencing February 1, 2018.

Defendant shall pay medical expenses as set forth in this decision. Defendants shall directly pay claimant the expenses he incurred and paid.

Defendants shall pay claimant costs of two thousand two hundred seven and 50/100 dollars ($2,207.50).

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. Apr. 24, 2018)

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 28th day of February, 2019.

James F. Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.