

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TROY PHILLIPS,

Claimant,

VS.

CITY OF DES MOINES,

Employer,
Self-Insured,
Defendant.

File No. 5063826

ARBITRATION

DECISION

Head Note Nos.: 1402.20, 1402.40, 1803

On December 17, 2018, Claimant Troy Phillips, filed a petition in arbitration against Defendant City of Des Moines (“City”), alleging he sustained injuries to his low back, right shoulder, and cervical spine with radiculopathy, while working for the City on March 13, 2017. The City filed an answer on December 27, 2018.

An arbitration hearing was held on July 18, 2019, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Nicholas Shaull represented Phillips. Phillips appeared and testified. Attorney Luke DeSmet represented the City. Joint Exhibits ("JE") 1 through 8, and Exhibits 1 through 7 and A through H were admitted into the record. The record was held open until August 16, 2019, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

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

STIPULATIONS

1. An employer-employee relationship existed between Phillips and the City at the time of the alleged injury.
2. Phillips sustained an injury on March 13, 2017, which arose out of and in the course of his employment with the City.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The alleged injury is a cause of permanent disability.
5. Temporary benefits are no longer in dispute.
6. If the injury is found to be the cause of permanent disability, the disability is

an industrial disability.

7. At the time of the alleged injury, Phillips's gross earnings were \$1,098.97 per week, he was married and entitled to two exemptions, and the parties believe the weekly rate is \$689.38.
8. Medical benefits are no longer in dispute.
9. The City has agreed to authorize a pain management referral.
10. Prior to the hearing Phillips was paid ten weeks of compensation at the rate of \$689.38 per week.
11. Costs have been paid.

ISSUES

1. What is the nature of the injury?
2. What is the proper rate?
3. What is the extent of disability?
4. What is the commencement date for permanency?
5. Should costs be assessed against either party?

FINDINGS OF FACT

Phillips is married and lives in Prole, Iowa with his wife. (Transcript, pages 5-9) Phillips attended East High School in Des Moines from 1983 to 1984, but he did not receive a high school diploma. (Exhibits 2, p. 2; C, p. 2; Tr., p. 9) In April 2011, Phillips earned a G.E.D. (Ex. D, p. 1; Tr., pp. 20-21) Phillips is right-hand dominant. (JE 5, p. 38; Tr., p. 30) At the time of the hearing he was forty-nine. (Tr., pp. 8, 77)

After leaving high school Phillips worked for a fast food restaurant, installed siding and windows for his uncle, and he worked in salvage yards, removing motors, gas tanks, tires, and wheels from cars before crushing. (Ex. C, p. 3; Tr., pp. 11-13) His work in construction and in salvage yards required him to lift more than one hundred pounds. (Tr., pp. 11-14) From 1993 through 2000 and 2001 through 2004 Phillips worked for Namasco as a crane operator, truck loader, floor supervisor, and shift foreman in the warehouse where he loaded flatbed semis, ran a flame cutter and band saw, operated a forklift, and ran overhead cranes. (Exs. D, p. 1; 2, p. 3; C, p. 3) His work for Namasco required Phillips to lift up to 200 pounds. (Tr., p. 16) From 2000 through 2001 he worked as a tree trimmer. (Exs. C, pp. 3-4; D, p. 1; Tr., p. 17-20) Beginning in 2004 Phillips worked as a foreman for tree companies. (Exs. D, p. 1; 2, p. 3; C, pp. 3-4) Phillips's work as a tree trimmer required him to perform overhead work with extended saws weighing forty pounds. (Tr., pp. 17-18)

In October 2012, Phillips became an ISA certified arborist after passing an examination. (Exs. B, pp. 1-2; Tr., pp. 21, 74) Phillips is trained to manage and diagnose tree diseases. (Tr., p. 21)

The City hired Phillips in 2012 to work as an arborist/tree trimmer. Phillips underwent a pre-employment physical for the City with Von Miller, PA-C, with Methodist Occupational Health and Wellness on December 19, 2012. (Tr., p. 46; Ex. 1, p. 1) Miller found Phillips was medically qualified to perform the essential functions of the job. (Ex. 1, p. 1; Tr., p. 46) Phillips testified at the time of his hiring he did not have any problems with his right shoulder, low back, or neck. (Tr., p. 46)

In the winter months Phillips drives a snowplow for the City removing snow from the streets. (Tr., p. 25) Phillips has a CDL for operating the snowplow. (Tr., p. 25) Phillips has received regular performance reviews from the City, and the City has documented his work habits and relationships with people are outstanding. (Ex. 1)

The City has assigned Phillips to drive snowplow Unit 601 for the past five years. (Tr., pp. 25-26) Phillips reported Unit 601 has a severe lean to it when the wing plow is down due to the weight of the wing plow. (Tr., p. 26) The City has altered Phillips's controls in the truck to help with the leaning, but it continues to lean. (Tr., p. 27) Phillips testified he believes the tilt of Unit 601 has contributed to his shoulder and low back injuries because "[j]ust having to keep my arm pinned in the lean, pushing up to run the control." (Tr., pp. 27-28)

Phillips testified on March 13, 2017,

[w]e was assigned to plow. It was the last snowfall of the year. They had us out plowing. I was going up Euclid Avenue and I was lead truck against the median. I had a motor grader and another wing plow following me to keep the road blocked off so cars wouldn't go in and out of us.

We're constantly having to look in our mirrors because the motor graders can only run 20 mile-an-hour. We're constantly trying to keep our eye on the mirrors, and stuff like that, because we don't want the gap to get too big so cars try to skirt around us.

When I was looking in my mirror to see where he was at in context to me, my front plow caught a broken out chunk of the median. And when it did, when the plow hit it, it was set at an angle like this. When it hit it snapped the blade, but in the meantime it threw the truck off to the side, bounced me off the window. And then once it settled down it bounced me off my console with all my controls, and everything.

(Tr., pp. 24-25) Phillips testified he started stiffening up at work and he finished his route that day and noticed pain when he exited his truck. (Tr., pp. 28-29)

Phillips went home and the next day he could “hardly get out of bed.” (Tr., p. 29) Phillips took some ibuprofen and stretched to try to “limber up” before he went to work on March 14, 2017. (Tr., p. 29) Phillips was able to work the day after his injury. (Tr., p. 29) Phillips enjoyed bowling for twenty years. (Tr., p. 29) That evening Phillips tried to go bowling and he could not bowl. (Tr., pp. 29-30) Phillips has not been able to bowl since his work injury. (Tr., p. 30)

Phillips continued to experience back pain. (Tr., p. 30) When Phillips was working on his race car he balled up and felt pain in his left side. (Tr., p. 31) On March 25, 2017, Phillips went to the Madison County Memorial Hospital complaining of back pain for two weeks. (JE 2, p. 1) Phillips reported he initially thought he had “pulled something” and he experienced generalized low back pain, but his pain now felt like someone was “pushing their fist into his flank.” (JE 2, pp. 1, 3) Hospital staff listed an impression of right flank pain and directed Phillips to follow up with Dr. Smith. (JE 2, pp. 4-5)

On March 29, 2017, Phillips attended an appointment with David Smith, D.O., his family practice physician, complaining of acute back pain. (JE 1, p. 8) Dr. Smith assessed Phillips with back pain with left-sided radiculopathy, and documented the “condition occurred without any known injury” and the “[s]ymptoms are located in the midline lower back.” (JE 1, pp. 8-9)

Phillips returned to Dr. Smith on May 24, 2017, complaining of back pain with left-sided radiculopathy and hip pain. (JE 1, p. 10) Dr. Smith documented Phillips’s symptoms were located in the right lower back with pain radiating into his lower leg and foot. (JE 1, p. 10) Dr. Smith listed an impression of chronic back pain with “worsening radicular” and now with right leg weakness, and ordered magnetic resonance imaging. (JE 1, p. 11) Following the imaging Dr. Smith referred Phillips to Matthew Biggerstaff, D.O., an anesthesiologist specializing in pain management. (JE 1, p. 13)

Phillips testified after the emergency room visit he told his boss he was having issues with his back. (Tr., p. 32) Phillips reported “I told him I know it’s coming from the plow because I didn’t feel right after getting out of it that night” and the two agreed they would wait to see what the magnetic resonance imaging would show. (Tr., p. 32)

Phillips underwent lumbar spine magnetic resonance imaging on May 30, 2017. (JE 4, p. 1) The reviewing radiologist listed an impression of:

[m]ultilevel disc desiccation changes. Multilevel hypertrophic articular facet changes, some associated with ligamentum flavum hypertrophy. Some of the articular facet joints contain small amounts of fluid or inflammation. Spondylosis at the T12-L1 level with some central right paracentral annular bulge.

Spondylosis with mild annular bulge at the L1-L2 level.

Spondylosis with some annular bulge at the L2-L3 level.

Spondylosis with some annular bulge at the L3-L4 level slightly more pronounced posterolaterally to the left.

Spondylosis with annular bulge and posterior degenerative annular fissure at the L4-L5 level.

Spondylosis with focal central annular bulge and posterior degenerative annular fissure at the L5-S1 level. Some thecal sac flattening anteriorly posterior to the L5-S1 disc space.

(JE 4, p. 1)

On June 2, 2017, Jason Dix, Phillips's supervisor, completed a report of employee injury form, listing an injury date of March 13, 2017, noting Phillips reported he "had [a] stiff back from plowing" while operating plow truck Unit 610. (Ex. 1, p. 13) Dix documented the driver's seat of the plow truck "has severe lean towards passenger seat." (Ex. 1, p. 13)

On June 20, 2017, Phillips attended an appointment with Miller complaining of low back pain with radicular symptoms down his inner thigh into his foot on the right side. (JE 3, p. 2) Miller documented Phillips relayed he was injured while "he was driving a plow truck with a heavy lean, bounced the blade off the curb and he had back pain ever since." (JE 3, p. 2) Miller noted magnetic resonance imaging showed Phillips had spondylosis with an annular bulge and a posterior degenerative annular fissure at L5-S1 with some thecal sac flattening to the L5 disc space. (JE 3, p. 2) Miller relayed he told Phillips he did not believe his condition was caused by the snow plow hitting the curb, but was "probably more of a lifelong type of activity he has been doing and this would be more of an aggravation of a pre-existing condition." (JE 3, p. 2) Phillips responded he used to be a tree trimmer and he would cut a lot of heavy logs that he would carry on his shoulder. (JE 3, p. 2) Miller documented Phillips ambulated slowly with a slight limp, assessed him with low back pain with spondylosis throughout the lumbar spine, imposed restrictions of sitting, standing, and walking as tolerated, and referred him for an orthopedic evaluation. (JE 3, pp. 2-3)

Phillips attended an appointment with Trevor Schmitz, M.D., an orthopedic surgeon, on June 26, 2017, regarding his low back pain. (JE 5, p. 3) Dr. Schmitz examined Phillips, reviewed his imaging, assessed him with dorsalgia, low back pain at multiple sites, and lumbar degenerative disc disease, recommended smoking cessation, advised him to take Aleve, and ordered physical therapy. (JE 5, p. 5)

On July 25, 2017, Phillips returned to Dr. Schmitz complaining of worsening and persistent low back pain radiating into his left thigh and right thigh he described as aching, stabbing, and throbbing. (JE 5, p. 7) Phillips relayed his symptoms were aggravated by sitting, standing, and walking, and relieved by rest. (JE 5, p. 7) Phillips reported physical therapy had relieved some of his pain, but he was still having pain in his lower back and hips, with the left greater than the right, and increased right shoulder pain. (JE 5, p. 7) Dr. Schmitz diagnosed Phillips with dorsalgia, low back pain at

multiple sites, and lumbar degenerative disc disease, recommended Phillips continue with physical therapy, ordered a left sacroiliac joint injection, and told Phillips to discuss his right shoulder pain with the workers' compensation carrier. (JE 5, p. 9)

Phillips works for the City in the Department of Public Works. (Ex. 1, p. 16) During a Labor/Management Safety Committee meeting on August 2, 2017, the committee documented after investigation by Bruce Braun, "[i]t was determined that [Phillips's] injury was work related due to an existing condition being aggravated by the plowing operation" and that the injury could have been preventable with mitigation, noting "[t]he mitigating factor was the lean of the truck he was operating with a wing plow." (Ex. 1, p. 16)

Phillips underwent a left sacroiliac joint injection with John W. Rayburn, M.D., on August 3, 2017. (JE 5, p. 10) Phillips attended a follow-up appointment with Dr. Schmitz on August 16, 2017, reporting he felt much better following the injection and stating his primary complaint was his shoulder. (JE 5, p. 12) Dr. Schmitz noted Phillips had minimal to no low back pain following the injection and he placed him at maximum medical improvement for his low back. (JE 5, p. 13)

On August 30, 2017, Phillips attended an appointment with Kyle Galles, M.D., an orthopedic surgeon, regarding his right shoulder pain. (JE 5, p. 15) Phillips relayed he had been experiencing occasional, aching, fluctuating, and sharp right shoulder pain since March 13, 2017. (JE 5, p. 15) Dr. Galles examined Phillips, assessed him with rotator cuff impingement syndrome, right shoulder adhesive capsulitis, and pain in an unspecified limb, recommended and performed a subacromial cortisone injection, ordered physical therapy, and imposed a restriction of minimizing work over shoulder height. (JE 5, pp. 15-16)

Dr. Schmitz issued an impairment rating for Phillips on September 14, 2017. (Ex. E, p. 1) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Schmitz opined,

using Table 15-3 on page 384, I would place Mr. Phillips at DRE lumbar category I, 0% impairment of the whole person. He had no significant clinical findings, no observed muscle guarding or spasm, no documented neurologic impairment, no documented alteration of structural integrity, and no other indication of impairment-related injury or illness, and no fractures.

(Ex. E, p. 1)

On October 4, 2017, Phillips attended a follow-up appointment with Dr. Galles complaining of right shoulder pain with popping in the shoulder blade and some pain radiating from the right side of his neck down his arm. (JE 5, p. 17) Dr. Galles assessed Phillips with a right shoulder strain, ordered right shoulder magnetic resonance imaging, and continued his work restriction of minimizing work over shoulder height. (JE 5, p. 17) Following the imaging Phillips returned to Dr. Galles. (JE 5, p. 18)

Dr. Galles noted the imaging was fairly unremarkable with cuff tendinosis and no evidence of a rotator cuff tear. (JE 5, p. 19) Dr. Galles documented he had little more to offer Phillips, and recommended a referral to Kirk Smith, D.O., a physiatrist. (JE 5, p. 19)

On October 27, 2017, Phillips attended an appointment with Dr. Schmitz complaining of left sided low back pain and leg pain with prolonged standing and walking and posterior thigh pain that does not extend below the knee except when walking on uneven terrain. (JE 5, p. 20) Dr. Schmitz recommended another sacroiliac joint injection and released Phillips to return to work without restrictions. (JE 5, pp. 21-22)

On November 6, 2017, Dr. Smith examined Phillips and reviewed his imaging. (JE 5, p. 23) Dr. Smith documented Phillips reported pain symptoms in the interscapular region, assessed him with dorsalgia, and recommended thoracic spine magnetic resonance imaging. (JE 5, p. 23)

Following the sacroiliac joint injection Phillips returned to Dr. Schmitz reporting he did not notice shooting leg pain for about three weeks after the injection. (JE 5, p. 27) Dr. Schmitz assessed Phillips with low back pain at multiple sites, lumbar degenerative disc disease, and sacroiliitis, documented Phillips's relief from the injection was short-lived, noted he did not have anything else to offer him to eliminate his low back pain, and found Phillips had reached maximum medical improvement. (JE 5, p. 27)

On November 30, 2017, Phillips attended an appointment with Dr. Smith, complaining of upper and middle back pain. (JE 5, p. 29) Dr. Smith documented thoracic spine magnetic resonance imaging showed degenerative changes and dextroscoliosis that in his opinion would have been present prior to the work injury noting the "injury may have exacerbated underlying degenerative changes," diagnosed Phillips with spondylosis of thoracic region without myelopathy or radiculopathy and dextroscoliosis, found Phillips had reached maximum medical improvement, and ordered a functional capacity evaluation to determine if Phillips needed restrictions. (JE 5, p. 30)

Dr. Galles issued an impairment rating for Phillips regarding his shoulder on December 7, 2017. (Ex. F) Dr. Galles diagnosed Phillips with a shoulder strain and released him with a restriction of minimizing repetitive work over shoulder height. (Ex. F, p. 1) Using the AMA Guides, Dr. Galles opined under

page 476, Figure 16-40 he would have a 1% upper extremity impairment for flexion to 160 degrees. Page 477, Figure 16-43 a 1% upper extremity impairment for abduction 150 degrees. Page 479, Figure 16-46 a 0% upper extremity impairment for 80 degrees of external rotation and 1% upper extremity impairment for internal rotation of 70 degrees. Total upper extremity impairment, therefore, would equate to 3%.

(Ex. F, p. 1)

The job description for arborist with the City requires the ability to lift and carry up to fifty pounds, and sufficient manual dexterity, without or without reasonable accommodation, which permits the employee to climb, balance, stoop, kneel, crouch, reach, stand, walk, push, pull, lift, grasp, and feel, in addition to other requirements. (Ex. A) On January 29, 2018, Phillips underwent a functional capacity evaluation with Sarah Brown, D.P.T. (JE 7) Brown found Phillips demonstrated the ability to function in the medium physical demand category, but he did not demonstrate the ability to meet the physical demand requirements of a tree trimmer based on the job description provided by the City. (JE 7, p. 1) Brown found Phillips:

demonstrated the ability to occasionally lift up to 50 lbs, Floor to Waist, 40 lbs. Waist to Shoulder, carry up to 50 lbs., push 50 lbs. of force, and pull 50 lbs. of force. He does not demonstrate the ability to safely perform required job duties of a tree trimmer, which include frequently lifting 50 pounds at shoulder height. Troy Phillips demonstrated frequent sitting, occasional standing, frequent walking and frequent reach at waist, occasional reaching at shoulder and overhead. He does not demonstrate the ability to safely perform required job duties as a tree trimmer which include frequent reaching, holding of chainsaw and other equipment. Troy Phillips completed a single stage treadmill test at 2.9 mph and 5% grade. This was sufficient to predict Troy Phillips's functional aerobic capacity at 4.48 METS for an 8 hour time period.

(JE 7, p. 1) Dr. Smith found the functional capacity evaluation was valid, noted the evaluation showed Phillips could perform work in the medium category, and he adopted the permanent restrictions set forth in the functional capacity evaluation. (JE 5, p. 31) Phillips testified he can no longer perform the tree trimmer requirement of being able to lift up to fifty pounds. (Tr., p. 43)

Phillips attended a follow-up appointment with Dr. Smith on February 28, 2018 regarding his back pain. (JE 5, p. 32) Dr. Smith assessed Phillips with spondylosis of the thoracic region without myelopathy or radiculopathy and right shoulder pain, found Phillips had reached maximum medical improvement, adopted the work restrictions in the functional capacity evaluation, and permanent restrictions no lifting over forty pounds from waist to shoulder level, and to avoid reaching above head and working above shoulder level with the right upper extremity. (JE 5, pp. 32-34)

Phillips returned to Miller on April 5, 2018, and Miller imposed a permanent restrictions of no lifting over forty pounds and no overhead work for a work-related right shoulder strain. (JE 3, p. 4)

Phillips testified before his work injury he was helping Dix in the office with computer work, picking up supplies and running other errands, looking at trees and hazardous situations, and interacting with customers. (Tr., pp. 46-47) Phillips reported after his work injury the City did not return him to the office work with Dix and placed

him back in the field. (Tr., p. 47) Phillips relayed the arborists who work for the City now work with Dix in a six month rotation in the office. (Tr., pp. 47-48)

On June 13, 2018, Robin Sassman, M.D., an occupational medicine physician, conducted an independent medical examination of Phillips and issued her report on August 2, 2018. (Ex. 5) Dr. Sassman reviewed Phillips's medical records and examined him. (Ex. 5) Dr. Sassman diagnosed Phillips with right shoulder impingement syndrome and adhesive capsulitis, cervical pain with radicular symptoms, and low back pain and left sacroiliac joint pain with radicular symptoms. (Ex. 5, p. 9) Dr. Sassman noted prior to the work injury Phillips denied having any low back, cervical, or right shoulder symptoms, and that the mechanism of working in a plow that was leaning and being violently thrown about the cab after the plow hit the median was consistent with the injury, supporting causation. (Ex. 5, p. 9)

Using the AMA Guides, Dr. Sassman opined:

[t]he impairment due to range of motion of the right shoulder was calculated based on Figures 16-40, 16-43 and 16-46 on page 476-479. These are as follows: He can be assigned 4% upper extremity impairment for loss of flexion, 1% upper extremity impairment for loss of extension, 4% upper extremity impairment for loss of abduction, 0% upper extremity impairment for loss of adduction, 1% upper extremity impairment for loss of internal rotation, and 0% upper extremity impairment for loss of external rotation. I am instructed to add these values together for a total of 10% upper extremity impairment. Using Table 16-3 on page 439, this is converted to a 6% whole person impairment.

For the lumbar spine, using Section 15.2 on page 379, the most appropriate method for assessment of the lumbar spine is the DRE Method. Turning to Table 15-3, on page 384, he will be placed into DRE Lumbar Category II with 7% impairment of the whole person.

I will not assign impairment for the cervical spine yet at this time until it can be fully evaluated. I would be happy to revisit this issue, however, once an MRI of the cervical spine is obtained.

Using the Combined Values Chart on page 604, 7% whole person impairment (for the lumbar spine) is combined with 6% whole person impairment (for the right shoulder) for a total of 13% whole person impairment relative to the injury date of March 12, 2017.

(Ex. 5, p. 10) Dr. Sassman recommended restrictions of limiting lifting, pushing, pulling, and carrying to ten pounds from floor to waist, limiting lifting to thirty pounds from waist to shoulder level, and no lifting, pushing, pulling, or carrying above shoulder height. (Ex. 5, p. 10)

On June 19, 2018, Jonathan Gano, the Public Works Director for the City sent Phillips a letter notifying him after receiving his permanent restrictions including “a 40lb limit for lifting from [his] waist to shoulder level and to avoid repetitive reaching with right upper extremity above [his] head and repetitive work above [his] shoulder level with [his] right upper extremity,” it had been determined Phillips could perform the essential functions of the arborist position within his restrictions and Phillips “will seek assistance from [his] co-workers for any tasks that will exceed [his] restrictions or notify [his] supervisor if assistance isn’t available.” (Ex. 1, p. 18)

Phillips underwent cervical magnetic resonance imaging on September 13, 2018. (JE 8, p. 1) The reviewing radiologist listed an impression of no acute cervical spine fracture, and a “C5-6 disc bulge slightly exaggerated towards the right of unknown chronicity. It indents the ventral thecal sac and contributes to mild right neural foraminal narrowing.” (JE 8, p. 1)

On September 19, 2018, Phillips returned to Miller regarding his neck and upper back pain following magnetic resonance imaging. (JE 3, p. 6) Miller noted the imaging showed a C5-C6 disc bulge “slightly exaggerated towards the right of unknown chronicity. It indents the ventral thecal sac and contributes to mild right neural foraminal narrowing.” (JE 3, p. 6) Miller assessed Phillips with neck pain and upper back pain with a C5-C6 disc bulge, referred him to an orthopedic specialist for his cervical spine, and continued his permanent restrictions. (JE 3, p. 6)

Phillips attended an appointment with Dr. Schmitz on October 3, 2018, complaining of worsening and constant neck pain. (JE 5, p. 35) Dr. Schmitz examined Phillips, reviewed his cervical spine magnetic resonance imaging, and found he could see no evidence of cervical disc degeneration at any level other than C5-C6, with “an extremely small disk bulge that is slightly to the RIGHT” that could be causing right-sided foraminal narrowing, but he saw no evidence of C5 nerve root impingement. (JE 5, p. 37) Dr. Schmitz recommended electromyography of the right upper extremity and noted he had nothing further to offer Phillips from a cervical perspective. (JE 5, p. 37)

On November 7, 2018, Phillips returned to Dr. Schmitz complaining of low back pain aggravated by putting on his shoes and socks. (JE 5, p. 38) Dr. Schmitz reviewed electromyography results, which he found demonstrated right-sided carpal tunnel syndrome and right-sided cubital tunnel syndrome, and found from a neck perspective he did not believe Phillips had any pathology causing his symptoms. (JE 5, pp. 39-40)

On May 23, 2019, Dr. Galles issued an opinion letter to the City’s representative as follows:

[w]ith regard to Troy Phillips and your letter to me dated May 16, 2019, I have reviewed the report by Dr. Sassman, which gives Mr. Phillips a 10% upper extremity impairment. The difference between her impairment and mine seems to be a fairly substantial loss of range of motion. My rating was based on examination of him on October 18, 2017. Her examination was done on June 13, 2018. I do not have a good explanation as to why

he would have lost such significant range of motion during that period of time. It is my opinion that any loss of range of motion more likely would not be related to the incident that he had described driving a snowplow truck.

(Ex. G, p. 1)

Dr. Schmitz also reviewed Dr. Sassman's independent medical examination and issued an opinion letter on June 5, 2019, as follows:

I should note that in that letter with Dr. Sassman, he stated that Mr. Phillips was a DRE lumbar category II, 7% impairment of the whole person, with regard to his lumbar spine. He [sic] did state that he [sic] would not assign an impairment rating for the cervical spine as he had not had an MRI of the cervical spine. He [sic] did give him restrictions of limiting lifting, pushing, pulling, carrying to 10 pounds from floor to waist level and 30 pounds from waist to shoulder level. He should not lift, push, pull, or carry above shoulder height.

I would first address the restrictions. It appears as though Dr. Sassman is giving arbitrary restrictions and has no objective basis for these restrictions. Mr. Phillips has a functional capacity examination, which states that Mr. Phillips would be within a medium demand category. This was a valid FCE. I personally find it extremely difficult to give somebody permanent work restrictions for the remainder of their life using arbitrary measurements, particularly when you have only examined individuals for a short period of time. I feel as though an FCE is a much more objective test with regards to restrictions, and thus I would agree with Dr. Smith's assessment of his permanent work restrictions going forward and avoid placing him in a medium physical demand category. I do not think there was any role for arbitrary work restrictions, particularly in Workers' Compensation cases. I do think Mr. Phillips has a stable spine and from my perspective, he can do anything and everything he wanted to do, both personally and professionally, in life. His spine would be able and capable of performing any load placed on it. However, I think given his pain, I do think that medium physical demand categories are not unreasonable and that is what I would give him for permanent work restrictions.

All of his lumbar spine findings are consistent with age-related changes. He certainly has no documented alteration in the structural integrity. No other indication of impairment-related injury or illness. No fractures, no documentable neurological impairment and no significant observed muscle guarding or spasm on my examination. Thus, overall I would stand by my DRE lumbar category I, 0% impairment of the whole person.

(Ex. H, p. 1)

On June 6, 2019, Carma Mitchell prepared a vocational evaluation report for Phillips. (Ex. 6) Mitchell found Phillips's past relevant work required heavy to very heavy lifting, at minimum frequent lifting of fifty pounds, climbing, and frequent reaching overhead, and that he had been working modified duty and is limited to the range of medium work, which results in a twenty-five percent loss of access to the labor market given he cannot perform jobs in the very heavy, heavy, and half of the jobs in the medium category of work. (Ex. 6, p. 5) Mitchell opined if Phillips were unable to continue his job as an arborist he would have a significant loss of earnings, noting the mean wage for positions consistent with his restrictions is \$13.56 per hour, or fifty-five percent less than the \$29.94 per hour he earns from the City. (Ex. 6, p. 5)

On July 17, 2019, Phillips attended a follow-up appointment with Dr. Schmitz regarding his neck pain. (JE 5, p. 41) Phillips reported his neck pain had increased since returning to work, and that he was experiencing tingling and numbness in his chest when looking down. (JE 5, p. 41) Dr. Schmitz assessed Phillips with neck pain and documented he did not believe Phillips's anterior chest numbness and tingling was coming from his neck. (JE 5, p. 42)

Phillips reported he still has popping in his right shoulder. (Tr., p. 62) Phillips used to play fetch with his dogs with a tennis ball, and he can no longer tolerate making a throwing motion because "[i]t feels like somebody is shoving a knife through my ribcage." (Tr., p. 62)

Phillips has enjoyed auto racing for twenty years. (Tr., p. 58) Since his work injury he has had to give up racing in addition to bowling. (Tr., p. 58) Phillips does his own yard work, which he said is "tough." (Tr., p. 58) Phillips could not use his weed eater, so he had to purchase a lighter weed eater, which he uses sparingly. (Tr., p. 58)

CONCLUSIONS OF LAW

I. Nature of the Injury

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

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's

premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties agree Phillips sustained an injury while working for the City on March 13, 2017, which arose out of and in the course of his employment with the City, and that the alleged injury is a cause of both temporary and permanent disability, but disagreed on the nature and extent of disability.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

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

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

Phillips alleges he sustained permanent impairments to his low back and shoulder while working for the City. The City acknowledges Phillips has sustained a permanent impairment to his shoulder, but not to his low back. Three physicians have

provided impairment ratings in this case, Dr. Schmitz, a treating orthopedic surgeon for the low back injury, Dr. Galles, a treating orthopedic surgeon for the shoulder injury, and Dr. Sassman, an occupational medicine physician who conducted an independent medical examination for Phillips.

With respect to the shoulder, Dr. Galles assigned three percent upper extremity impairment based on his examination. (Ex. F, p. 1) Dr. Sassman assigned a ten percent upper extremity impairment. (Ex. 5, p. 10) I find Dr. Galles's opinion most persuasive.

As an orthopedic surgeon, Dr. Galles has superior training and education to that of Dr. Sassman. He also treated Phillips over a period of time. Dr. Sassman examined him on one occasion for purposes of conducting an independent medical examination only. Dr. Sassman's restrictions are not consistent with the valid functional capacity evaluation performed on January 29, 2018. Dr. Smith, the treating pain specialist, ordered the functional capacity evaluation, which he found was valid, finding Phillips is capable of medium work, and adopting the restrictions set forth in the evaluation. (JE 5, p. 31; JE 7, p. 1) Dr. Sassman's report following her June 13, 2018 examination, less than six months later, notes the functional capacity evaluation "results were considered accurate," yet she does not explain what findings she made on examination that differ from the functional capacity evaluation to support the restrictions she recommended. (Ex. 5, pp. 5, 10) I do not find her opinion persuasive. Phillips has established he sustained a permanent impairment to his shoulder caused by the work injury.

On September 14, 2017, Dr. Schmitz assigned a zero percent permanent impairment rating for Phillips's back, finding Phillips "had no significant clinical findings, no observed muscle guarding or spasm, no documented neurologic impairment, no documented alteration of structural integrity, and no other indication of impairment-related injury or illness, and no fractures." (Ex. E, p. 1) Using Table 15-3 on page 384, Dr. Sassman placed Phillips into DRE Lumbar Category II and assigned a seven percent whole person impairment. (Ex. 5, p. 10) Her report does not discuss or attempt to distinguish the findings made by Dr. Schmitz, or explain her own bare conclusion. Her report makes no finding of significant clinical findings, observed muscle guarding or spasm, fracture, alternation of structural integrity. She did find decreased sensation in the left lower extremity and right lower extremity laterally and noted straight leg raising was positive on the left. (Ex. 5, pp. 8-9) Dr. Schmitz examined Phillips four times after he provided his impairment rating, and the last two times he examined Phillips occurred after Dr. Sassman conducted her independent medical examination. Dr. Schmitz's conclusions concerning the nature of Phillips's condition have remained constant. For these reasons and the reasons noted above concerning restrictions, I do not find Dr. Sassman's opinion persuasive. Phillips has not established he sustained a permanent impairment to his lumbar spine caused by the work injury.

II. Rate

The parties stipulated at the time of the alleged injury Phillips's gross earnings were \$1,098.97 per week, he was married and entitled to two exemptions and allege the

proper rate is \$689.38. In calculating the date, it appears the parties rounded down the gross earnings. Iowa Code section 85.34 requires rounding up. Under the ratebook at the time of Phillips's work injury the correct rate is \$689.95.

<https://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/Ratebook%20Cover%202016-2017.pdf>.

III. Extent of Disability

The parties stipulated Phillips has sustained an industrial disability. They disagree on the extent of industrial disability. The City avers Phillips has sustained a fifteen percent industrial disability and Phillips contends he has sustained a twenty-five percent industrial disability.

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

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

At the time of the hearing Phillips was forty-nine. (Tr., pp. 8, 77) Phillips did not graduate from high school, but he has completed a G.E.D. (Ex. D, p. 1; Tr., pp. 20-21) Phillips obtained an ISA arborist certification after passing an examination. (Exs. B, pp. 1-2) I found Phillips to be articulate at hearing. I do think he is capable of retraining.

I do not find the report of Mitchell helpful, or persuasive. Mitchell opined Phillips has sustained a twenty-five percent loss of earning capacity, relying on the restrictions adopted by Dr. Sassman. Phillips continues to work for the City as an arborist/tree trimmer. Phillips has assisted his supervisor with other activities involving the public and he has received positive personnel reviews. According to the valid functional capacity evaluation ordered by Dr. Smith, Phillips "does not demonstrate the ability to safely perform required job duties of a tree trimmer, which include frequently lifting 50 pounds at shoulder height." (JE 7, p. 1) Phillips's past relevant work exceeds his permanent restrictions. Given Phillips continues to work full-time for the City, and considering all of the factors of industrial disability, I find Phillips has sustained a twenty percent industrial disability.

The City did not address the commencement date issue in his post-hearing brief. Phillips returned to work the day after his work injury. Phillips avers the permanency

benefits commence from the date of the injury under Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360 (Iowa 2016). Phillips did not have a subsequent return to work. Therefore, the commencement date for permanency is March 14, 2017.

IV. Costs

Phillips seeks to recover the \$100.00 filing fee, \$62.70 for the June 19, 2019 deposition transcript, \$108.25 for medical records, and \$325.00 for Carma Mitchell's vocational rehabilitation report. (Ex. 7) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides,

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

The rule does not allow for the recovery of the cost of medical records. Using my discretion I find the City should be assessed the \$100.00 filing fee, \$62.70 for the June 19, 2019 deposition transcript, and \$325.00 for Carma Mitchell's vocational rehabilitation report.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant one hundred (100) weeks of permanent partial disability benefits at the stipulated weekly rate of six hundred eighty-nine and 95/100 dollars (\$689.95), commencing on March 14, 2017.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Sanchez v. Tyson, File No. 5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue).

Defendant shall receive a credit for all benefits paid to date.

Defendant shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, sixty-two and 70/100 dollars (\$62.70) for the June 19, 2019 deposition transcript, and three hundred twenty-five and 00/100 dollars (\$325.00) for Carma Mitchell's vocational rehabilitation report.

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

So Ordered.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Delivered by WCES to all parties of record.