

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

---

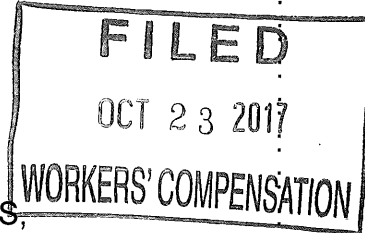
RONALD HUDNALL,

Claimant,

vs.

CITY OF DES MOINES,

Employer,  
Self-Insured,  
Defendant.



File Nos. 5061075, 5062055

ARBITRATION  
DECISION

Head Note Nos.: 1803; 1804; 4100

---

Claimant Ronald Hudnall filed a petition in arbitration on May 18, 2016, alleging he sustained an injury to his back and body as a whole while working for the defendant, City of Des Moines ("the City"), on August 25, 2014. The City filed an answer on May 25, 2016, admitting Hudnall sustained a work injury. Hudnall filed a second petition in arbitration on June 5, 2016, alleging he sustained an injury to his back and body as a whole while working for the City on October 5, 2015. The City filed an answer on August 9, 2016, admitting Hudnall sustained a work injury.

An arbitration hearing was held on June 7, 2017, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Nathaniel Boulton represented Hudnall. Hudnall appeared and testified. Assistant City Attorney John Haraldson represented the City. Joint Exhibits ("JE") 1 through 11 were admitted into the record. John Peek appeared on behalf of the City, but did not testify. The record was held open through July 7, 2017, for the receipt of post-hearing brief. 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 the City and Hudnall at the time of the alleged injuries.
2. Hudnall sustained injuries on August 25, 2014, and October 5, 2015, which arose out of an in the course of his employment with the City.
3. The alleged injuries each caused a temporary disability during a period of recovery.

4. The alleged injuries are a cause of permanent disability.
5. Temporary benefits are no longer in dispute.
6. The disability is an industrial disability.
7. The commencement date for permanent partial disability benefits, if any are awarded, is October 5, 2015.
8. At the time of the alleged injury, Hudnall's gross earnings were \$1,114.38 per week, he was married and entitled to two exemptions, and the parties believe his weekly rate is \$697.60.
9. Prior to the hearing Hudnall was paid thirteen weeks of compensation at the rate of \$697.60 per week.
10. Costs have been paid.

### **ISSUES**

1. What is the extent of disability?
2. Has Hudnall established he is permanently and totally disabled under the statute or alternatively, that he is an odd lot employee?
3. Is Hudnall entitled to recover the cost of an independent medical examination?
4. Should costs be assessed against either party?

### **FINDINGS OF FACT**

Hudnall lives in Des Moines with his wife. (Tr., p. 7) Hudnall is the father of five adult children. (Tr., p. 7) Hudnall graduated from high school in 1970. (Tr., p. 7) Hudnall later studied theology for two years at a bible college. (Tr., pp. 7-8) Hudnall has not received any certificates, licenses, or attended any other training. (Tr., p. 8) At the time of the hearing Hudnall was sixty-five. (Tr., pp. 6-7)

After graduating from high school Hudnall joined the United States Air Force. (Tr., p. 7) Hudnall performed inspections, maintenance, and testing on planes. (Tr., p. 35) Hudnall left the Air Force in July 1974, moved back to Des Moines, and accepted a position with a vending machine company servicing, repairing, and moving vending machines. (Tr., pp. 35-36)

Hudnall returned to California in 1977 or 1978 and he worked for a private sanitation company as a garbage collector for sixteen years. (Tr., p. 38) Hudnall initially worked with rear load trucks, until the company switched to automated, front

load trucks. (Tr., p. 38) Hudnall and his family relocated to Des Moines in 1991. (Tr., p. 39)

In April 1991, the City hired Hudnall to work as a collector in the sanitation department for public works. (Tr., p. 8) Hudnall worked in the sanitation department for twenty-five years. (Tr., p. 9) Hudnall worked full-time, and received health, dental, and vision benefits, retirement benefits through IPERS, a deferred compensation match, and at the time he retired from the City he had five weeks of paid vacation per year. (Tr., pp. 14-15)

Approximately ten years ago Hudnall worked part-time for Hy-Vee in the camera/video department and the garden center for two years, in addition to his work for the City. (Tr., p. 40) Hudnall had to lift items exceeding fifty pounds in the garden center and he had to stand on his feet in the camera/video department. (Tr., p. 40)

As a collector Hudnall assisted in the daily garbage route, picking up and collecting garbage off curbs. (Tr., p. 8) At the time of Hudnall's hiring, the City used rear-load trucks. (Tr., p. 8) Hudnall road in the back of the truck and dumped garbage cans, bags, boxes, and bundles of garbage into the rear of the truck. (Tr., pp. 8-9) Hudnall worked with a senior route collector who drove the truck. (Tr., p. 8) Every twenty to thirty minutes the collectors would rotate and one of the collectors would dump the garbage in the rear of the truck. (Tr., pp. 8-9) Each can, bag, box, or bundle was not to exceed fifty pounds, but some did. (Tr., p. 9) Hudnall also collected garbage from behind homes and garages referred to as "special considerations." (Tr., p. 9)

At the time of his first injury in August 2014, Hudnall was working as a senior collector, and he worked alone in his truck. (Tr., pp. 9, 16) The City had switched to automated garbage trucks at that point in time. (Tr., p. 9)

On a typical day Hudnall would begin by inspecting his vehicle, checking the oil, fluids, hydraulic lines, and tires, and then he would start his route collecting garbage. (Tr., pp. 9-10) Hudnall collected garbage curbside unless the residence was a special consideration. (Tr., p. 10) Hudnall operated a joystick to extend the arm to grab each toter and bring it back to the truck. (Tr., p. 10) The toters could hold up to 500 pounds, but on average weighed 100 pounds. (Tr., p. 13) The joystick was on the column to Hudnall's left, and he would have to watch the monitor and mirror. (Tr., p. 12) Occasionally Hudnall had to twist to look back to make sure he was not too close to a vehicle, tree, mailbox, or person while operating the joystick. (Tr., p. 12)

If a toter was behind a parked car Hudnall would exit the truck, move the toter, use the joystick to move and dump the toter, and manually put the toter back. (Tr., p. 10). If there were items next to the toter, Hudnall would use his joystick to dump the toter, and then fill it with the items and dump the items using the joystick. (Tr., p. 12) Hudnall also assisted with picking up yard waste or bundles occasionally. (Tr., p. 12) Hudnall reported that the bags, bundles, and boxes he lifted weighed up to fifty pounds

each. (Tr., p. 13) Hudnall estimated on an average day he would enter and exit the truck between twenty-five and fifty times per day. (Tr., p. 13)

If a stop included a special consideration Hudnall would walk up behind the residence and pick up the toter or marked bags and carry the toter or bags to his truck for disposal. (Tr., p. 10) When his truck was full Hudnall would drive to the transfer station, dump the garbage, and return to his route. (Tr., p. 11)

At the end of the day Hudnall would return the truck to the yard, walk around the truck to make sure it was in good condition, document any problems with the truck, and park it for the day. (Tr., p. 11) In the wintertime Hudnall also put chains on the tires of his truck. (Tr., pp. 11-12)

On the date of his first injury, on August 25, 2014, Hudnall traveled down 11th Street, a dead-end street north of Franklin. (Tr., p. 15) Hudnall relayed:

It had – well, all the street was hard top except for this dead-end I was going down had – or going down into, it was a dirt road that had been rocked, but it had been wet conditions and rainy conditions, and I was going down, and the third house that I was headed to, because I would stop, dump the toter and then proceed going down to the next house, my driver side front tire sunk in the ground. It had given out.

And I slammed on the brake. Of course, when the tire sunk, it kind of helped stopping me, but I was going down a decline on the hill. It catapulted me, the air seat, up into the air. I hit my head on the roof at that time; and when I came back down, the seat in the vehicle was a low-back seat, similar to what we have here, and my back came and hit the bar, a steel bar, that was in the top of that, causing a lot of sharp pain at that time.

I couldn't continue with the route because of the pain, so I called my foreman, and he came and got me and took me to the city clinic, which is on Penn Avenue.

(Tr., pp. 15-16) Hudnall reported he felt a stabbing, sharp pain in his middle back, and then an ache and tingling around his rib cage. (Tr., p. 16)

Hudnall went to Methodist Occupational Medicine complaining of pain in the middle of his back spreading around his ribs. (JE 2, p. 2) Hudnall relayed he had history of a right foot fracture as a teenager, and a history of a rotator cuff tear. (JE 2, p. 2)

On September 2, 2014, Richard McCaughey, D.O., with Methodist Occupational Health and Wellness, examined Hudnall and noted he had a back strain several years ago, which resolved with conservative treatment. (JE 2, p. 3) Dr. McCaughey assessed Hudnall with a midback strain, prescribed Skelaxin and stretching, and

imposed restrictions of lifting, limiting and pulling fifteen pounds, and occasional bending and twisting. (JE 2, pp. 3-4)

Hudnall attended a follow-up appointment with Dr. McCaughey on September 9, 2014. (JE 2, p. 5) Dr. McCaughey reported a thoracic spine x-ray showed generalized degenerative changes, but no acute bony abnormalities. (JE 2, p. 5) Dr. McCaughey prescribed Naprosyn and physical therapy, and continued Hudnall's restrictions. (JE 2, pp. 5-6) On October 3, 2014, Dr. McCaughey discharged Hudnall from physical therapy, discontinued his medication, found he could return to his normal duties, and discharged him from care. (JE 2, pp. 7-8)

Hudnall testified at the time of his work injury the truck he was driving had a low-back seat "that was not specs for our vehicles." (Tr., p. 18) Hudnall reported that when he returned to work the City had replaced the seat with a proper seat, and he was able to perform his full job with some discomfort. (Tr., p. 18)

Hudnall performed his normal job duties until he sustained a second injury on October 5, 2015. (Tr., p. 18) Hudnall testified on October 5, 2015, he was on 12th Street,

I was doing my route, and it was across the street from the Y, and there was two toters at this one house. And I had noticed – I mean there was some stuff in the toter, you could see that they were remodeling the home. The home was empty.

But we have a policy that when a toter is behind a vehicle, that you get out and pull it out to where you can access it and dump it.

So I did that. I got out, and the first toter was pretty heavy. It was overweight. It was pretty heavy, and as I was pulling it around to get around the vehicle on the parking, one of the wheels sunk down in the soft dirt, and it started to tip over. Well, I automatically grabbed it and jerked it back up. It was going to make a mess, and, you know, I didn't want to deal with the mess either.

But my back snapped. I felt a pop in the lower back, and I felt a pop again in the midback area.

And I had already had the toter where it was, so I dumped it and then went on a few houses. I mean, we're short-handed, and I figured it would come out of it. Well, it didn't. It got worse because the pain started going down my leg. And I called my supervisor at that time, and he came and got me, and we went to the city clinic.

(Tr., pp. 19-20)

Hudnall returned to Methodist Occupational Health complaining of pain in his low and mid back with numbness in his left buttocks and tingling down his leg. (JE 2, p. 10) Hudnall relayed he had experienced a transient ischemic attack in May 2015 and he was taking preventative blood thinner medication. (JE 2, p. 1) Richard Bratkiewicz, M.D., examined Hudnall and assessed him with a right thoracic and left lumbar strain injury. (JE 2, p. 11) Dr. Bratkiewicz administered a Depo-Medrol injection, prescribed Tramadol, and imposed restrictions of sedentary work only, no commercial driving, and a two pound lifting, pushing, and pulling restriction. (JE 2, pp. 11-12)

On October 12, 2015, Hudnall attended a follow-up appointment with Dr. Bratkiewicz. (JE 2, p. 13) Hudnall relayed that he was experiencing left sciatica, the injection and medication had not helped much, and he had pain with rotational movement. (JE 2, p. 13) Dr. Bratkiewicz observed Hudnall's mobility was "very slow" ordered magnetic resonance imaging, ordered home therapy of stretching, and continued is restrictions. (JE 2, p. 13)

Hudnall received lumbar spine magnetic resonance imaging on October 19, 2015. (JE 5, p. 22) The reviewing radiologist listed an impression of:

1. Disc degeneration at L1-L2, L2-L3.
2. Mild disc bulging through lumbar levels as described and facet disease greatest at L5-S1. However no central canal narrowing and no significant foraminal narrowing at any lumbar level.

(JE 5, p. 22)

On November 25, 2015, Hudnall attended an appointment with David Hatfield, M.D., an orthopedic surgeon. (JE 6, pp. 24, 26) Dr. Hatfield examined Hudnall and reviewed his imaging. (JE 6, pp. 24-27) Dr. Hatfield noted "[w]eakness in plantarflexion left" and the imaging reveals "mild diffuse change without significant neural compression." (JE 6, pp. 25, 27) Dr. Hatfield opined he did not find anything to suggest Hudnall would benefit from surgical intervention, and ordered additional imaging. (JE 6, pp. 25, 27)

Hudnall underwent thoracic spine magnetic resonance imaging on December 9, 2015. (JE 6, p. 28) The reviewing radiologist listed an impression of "[m]ild spondylitic changes. No findings of disc herniation, high grade central canal stenosis or foraminal narrowing." (JE 6, p. 28)

Hudnall attended an appointment with Von Miller, PA-C, with Methodist Occupational Health and Wellness, on December 18, 2015. (JE 2, p. 14) Miller assessed Hudnall with low back pain/strain, continued his restrictions, and referred him for an epidural steroid injection. (JE 2, p. 14)

On January 12, 2016, Hudnall returned to Miller. (JE 2, p. 15) Miller noted Hudnall was taking medication following a stroke, and before he could receive an

epidural steroid injection he would need to discontinue his medication for one week. (JE 2, p. 15) Miller documented Hudnall's neurologist advised Hudnall should not discontinue his medication. (JE 2, p. 15) Miller concurred with the neurologist and recommended physical therapy, work conditioning, and work hardening to see if Hudnall could return to his normal duties. (JE 2, p. 16) Miller noted Hudnall reported he wanted to work two more years before retiring. (JE 2, p. 16) Miller documented Hudnall ambulated slowly, he was still having quite a bit of back pain, but Hudnall denied experiencing pain radiating into his legs. (JE 2, p. 15) Miller prescribed physical therapy with work hardening, work conditioning, and iontophoresis, and continued Hudnall's restrictions. (JE 2, p. 15)

Daniel McGuire, M.D., an orthopedic surgeon, performed an independent medical examination for Hudnall on January 12, 2016. (JE 7) Dr. McGuire reviewed Hudnall's medical records and examined him. (JE 7) Dr. McGuire opined:

I believe his current symptoms are related to the aggravation that occurred during early October. A combination of things happened. The underlying lumbar spondylosis gets aggravated. Muscles, ligaments and tendons get aggravated. He has a little symptom of left sciatica, but really no severe pressure on the nerves.

(JE 7, p. 30) Dr. McGuire discouraged Hudnall from having epidural injections because of his history of a transient ischemic attack, and encouraged Hudnall to engage in an exercise program possibly with physical therapy. (JE 7, p. 30) Dr. McGuire found Hudnall reached maximum medical improvement on January 12, 2016, and opined:

He has an impairment. There is probably no impairment for the midback pain. There is really no impairment for the low back pain. He does have some sciatica that is not amenable to surgical intervention. With that in mind, I would give him 5% impairment to the body as a whole. This impairment is related to the work incident that occurred in October 2015.

He is not capable of doing his current job of running his garbage truck. He gets in and out of his truck 10, 20, 30 times a day and that will aggravate his back. The long hours will just make him absolutely miserable.

I talked to him and it does not really sound like they have alternative jobs. At age 63, I do not really know how much of a benefit putting him through months of physical therapy then an FCE and trying to get him a different job. So today I would not allow him to return to his job of driving the garbage truck.

(JE 7, p. 30)

Miller sent Hudnall to work hardening. (Tr., p. 23) Hudnall reported he could not complete the program because when he was lifting a box weighing thirty pounds up to his waist he felt something pop in his lower back again and he experienced a sharp pain that ran down his right leg and when he tried to step up on the ladder while lifting the weight the pain was so severe he had to stop. (Tr., pp. 23-24)

Hudnall returned to Miller on January 29, 2016. (JE 2, p. 16) Miller noted Hudnall had completed some work hardening/conditioning, but it appeared he had plateaued and he had experienced incidences with popping and increased pain in his low back and right knee. (JE 2, p. 16) Miller discontinued the therapy, continued Hudnall's restrictions, and referred Hudnall to physical medicine and rehabilitation. (JE 2, p. 16)

On February 17, 2016, Hudnall attended an appointment with Kurt Smith, D.O., a physiatrist. (JE 9, p. 53) Dr. Smith assessed Hudnall with a lumbar strain, thoracic myofascial strain, myalgia, and obesity, prescribed cyclobenzaprine, and ordered physical therapy. (JE 9, p. 55)

Hudnall attended a follow-up appointment with Dr. Smith on February 24, 2016. (JE 9, pp. 57, 64) Hudnall reported the cyclobenzaprine provided no relief, he did not like the side effects of the medication, and relayed he had received pain relief when using a TENS unit. (JE 9, pp. 57, 64) Dr. Smith discontinued the cyclobenzaprine, prescribed Medrol Dosepak, and ordered Hudnall continue physical therapy. (JE 9, pp. 59, 64)

On March 7, 2016, Hudnall returned to Dr. Smith and reported his symptoms were aggravated by bending, lifting, and twisting, and relieved by rest. (JE 9, pp. 61, 67) Hudnall relayed therapy had increased his pain, and he was not taking the Medrol because of potential risks to his kidneys. (JE 9, pp. 61, 67) Dr. Smith discontinued physical therapy and ordered a functional capacity evaluation. (JE 9, pp. 63, 67)

Dr. Smith issued an opinion letter on April 17, 2016, as follows:

The patient was placed at maximum medical improvement on March 7, 2016, with ongoing lower thoracic soft tissue muscular pain as well as lumbar muscular pain.

In regard to the lumbar spine, the patient has a 5% whole body impairment with ongoing muscular spasms and guarding present, which limits range of motion. In regard to the thoracic spine soft tissue injury, continued muscular spasms, muscular guarding. The patient has a 5% whole body impairment. Using the combined values table, the patient has a 10% impairment to the whole body as it relates to the injury of October 5, 2015.

(JE 9, p. 66)



Hudnall underwent a functional capacity evaluation on April 12, 2016 with Kevin Hejtmanek, PT. (JE 10, p. 79) Hejtmanek found Hudnall's performance was consistent with acceptable effort. (JE 10, p. 79) Hejtmanek concluded Hudnall demonstrated the physical capacity to function in the light physical demand determined by a two-hand occasional lift of twenty pounds from twelve inches to waist level, which was less than the physical demand level for his position with the City, in the medium physical demand. (JE 10, p. 79) On April 25, 2016, Hudnall attended an appointment with Dr. Smith. (JE 9, p. 69) Dr. Smith documented Hudnall's "low back symptoms continue to be variable." (JE 9, p. 69) Dr. Smith adopted the restrictions set forth in the functional capacity evaluation, and noted Hudnall could not take NSAIDs or undergo injections due to blood thinners, and that he had nothing additional to offer Hudnall. (JE 9, pp. 69-71, 73) Hudnall has not received any additional medical care for his back since the functional capacity evaluation. (Tr., p. 26)

Hudnall reported after his functional capacity evaluation there was nothing he could do at work because he was unable to twist or sit for a prolonged period, and he sat in the break room most of the time from October 6, 2015 through April 29, 2016. (Tr., pp. 27-28) Hudnall testified he assisted his foreman with putting new route sheets in books, but that required him to sit, which caused pain in his middle back. (Tr., p. 28)

On April 29, 2016, Hudnall retired from the City. (Tr., p. 28) Hudnall applied for and is receiving Social Security retirement benefits. (Tr., p. 45) Hudnall acknowledged he looked into retiring when he was sixty-two, but reported he decided not to, and again looked into retiring when he was sixty-three, but had decided not to retire. (Tr., p. 29) Hudnall testified one of his coworkers retired at age seventy and another coworker was still working at age sixty-eight. (Tr., p. 29) Hudnall has not looked for other work since he retired. (Tr., p. 50)

Robin Sassman, M.D., performed an independent medical examination for Hudnall on January 16, 2017, and issued her report in February 2017. (JE 11, p. 91) Dr. Sassman reviewed Hudnall's medical records and examined him. (JE 11) Dr. Sassman diagnosed Hudnall with thoracic pain with radicular symptoms and lumbar pain. (JE 11, pp. 91, 99) Dr. Sassman opined Hudnall's symptoms associated with the August 2014 work injury resolved until he sustained a second injury on October 5, 2015, noting at the time of his work injury:

Mr. Hudnall was moving a heavy garbage tote that began to tip over. As he tried to catch it he twisted his back and felt pain in the low back and mid back. Unfortunately, his low back was only addressed after this injury until he saw Dr. Hatfield in November of 2015, but he had pain in both areas. He states that it was at that time that he noted symptoms radiating from his mid back around to the front of his body. He also noted low back pain with left leg symptoms. He then had an incident in physical therapy when he had to lift a box with 30 pounds of weight in it and noted right leg symptoms. Because of the fact that the mechanism is consistent with his injuries, it is my opinion that the underlying degenerative changes in his

lumbar spine were substantially aggravated by the incident that occurred on October 5, 2015. Supporting this opinion is the fact that although he had prior injuries to his back, he was able to return to his job without restrictions after these injuries until the injury in question in October of 2015. (JE 11, p. 99) Dr. Sassman placed Hudnall at maximum medical improvement on April 26, 2016.

(JE 11, p. 99)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Sassman opined:

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 8% impairment of the whole person. The upper level of this category is chosen due to the impact this has had on his activities of daily living.

For the thoracic spine, using Section 15.2 on page 379, the most appropriate method of assessment of the thoracic spine is the DRE Method as well. Turning to Table 15-4, on page 389, he will be placed into DRE Thoracic Category III with 15% impairment of the whole person due to the radicular symptoms.

Using the Combined Values Chart on page 604, 15% impairment of the whole person is combined with 8% impairment of the whole person, for a total of 22% whole person impairment.

(JE 11, p. 100) Dr. Sassman noted her impairment rating differs from the ratings by Drs. Smith and McGuire because Dr. McGuire only took into account the lumbar spine, and Dr. Smith did not rate the radicular symptoms as related to the thoracic spine. (JE 11, p. 100) Dr. Sassman found the initial injury from August 2014 resolved, and attributed the impairment to the second injury of October 2015. (JE 11, p. 11) Dr. Sassman recommended restrictions of lifting, pushing, pulling, and carrying to ten pounds occasionally from floor to waist, twenty pounds occasionally from waist to shoulder, and ten pounds occasionally above shoulder height, sitting, standing, and walking occasionally, no use of ladders, not walking on uneven surfaces, to avoid using vibratory or power tools, and noted he should be able to change positions frequently. (JE 11, p. 110)

Hudnall reported he continues to have problems with prolonged sitting, maintaining his yard, and going up and down stairs. (Tr., pp. 29-30) Hudnall testified he wakes up several times in the middle of the night with sharp pain in the middle of his back after rolling in bed. (Tr., p. 30) Hudnall relayed there are times the only relief he receives is when he lies flat on the floor. (Tr., p. 30)

Hudnall is remodeling his home and reported that he is limited in what he can do. (Tr., p. 30) Hudnall reported he tried to paint the ceilings, and it “killed me” and he had to hire someone to re-side and paint the garage. (Tr., p. 30) Hudnall reported that he is limited even in his ability to carry groceries and experiences pain when carrying a couple of gallons of milk up the back step. (Tr., p. 30) Hudnall reported he cannot climb a ladder to clean out his gutters, and mowing his lawn is very painful. (Tr., p. 42) Hudnall enjoys photography and he used to take long trips, but now he is limited on how far he can walk on uneven ground. (Tr., p. 31)

## CONCLUSIONS OF LAW

### I. Extent of Disability

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

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

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

The Iowa Supreme Court has held, “it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury.” Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

Three physicians provided impairment ratings in this case, Dr. McGuire, an orthopedic surgeon retained to perform an independent medical examination for Hudnall, Dr. Smith, a physiatrist who briefly treated Hudnall, and Dr. Sassman, an occupational medicine physician retained by Hudnall to perform an independent medical examination. None of the physicians found Hudnall sustained a permanent impairment with respect to the August 2014 work injury. Hudnall returned to his normal duties without restrictions. Hudnall has not established he sustained a permanent impairment with respect to the August 2014 work injury.

With respect to the October 2015 work injury, Dr. McGuire opined the October 2015 work injury aggravated Hudnall's underlying lumbar spondylosis, found no impairment for his midback pain, no impairment for his low back pain, and found Hudnall had sustained a five percent impairment to the body as a whole based on his sciatica. (JE 7, p. 30) Dr. Smith opined Hudnall had ongoing lower thoracic soft tissue muscular pain and lumbar muscular pain and found Hudnall had sustained a five percent impairment the lumbar spine with ongoing muscle spasms and muscular guarding limiting his range of motion, and a five percent permanent to the thoracic spine with continued ongoing muscle spasms and muscular guarding, for a combined impairment of ten percent. (JE 7, p. 30) Using Table 15-3 of the AMA Guides, Dr. Sassman placed Hudnall into DRE Lumbar Category II, with an eight percent impairment of the whole person, and using Table 15-4, placed Hudnall into DRE Thoracic Category III, with a fifteen percent impairment of the whole person, for a combined impairment of twenty-two percent. (JE 11, p. 100)

I find the opinion of Dr. Smith to be the most persuasive. Dr. Smith is a treating physiatrist. Hudnall's medical records support he sustained permanent impairments to his thoracic and lumbar spine. Hudnall's medical records do not support Dr. Sassman's finding Hudnall fits within DRE Thoracic Category III. Dr. Bratkiewicz's records from October 2015 document Hudnall was experiencing low and mid back pain with numbness into the left buttocks and tingling down his leg, pain with rotational movement (JE 2, pp. 10-13) Miller's records from January 12, 2016, document Hudnall was experiencing quite a bit of back pain, but document Hudnall denied experiencing pain radiating into his legs. (JE 2, p. 15) The pain he experienced during work hardening was reported to be low back pain, not thoracic pain, into his right knee. (JE 2, p. 16) Dr. Smith has opined Hudnall sustained a ten percent impairment to the body as a whole and he adopted the restrictions set forth in the functional capacity evaluation. (JE 9, pp. 69-71, 73) The physical therapist found "[t]he physical demand level of [Hudnall's job with the City] is a **Medium** physical demand level," and concluded Hudnall "demonstrates the physical capabilities and tolerances to function at the **Light** physical demand level. The physical demand level was determined by a 2-hand occasional lift of 20 pounds from 12" to waist level." (JE 10, p. 79)

Hudnall contends he is permanently and totally disabled. The City disputes his contention. In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total

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

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

Hudnall has not established he is permanently and totally disabled under the statute. At the time of the hearing Hudnall was sixty-five. Hudnall has worked as a garbage collector for most of his life. Hudnall's prior work was in the medium physical demand level. (JE 10, p. 79) Since his work injury Hudnall is capable of work in the light physical demand level. (JE 10, p. 79) Hudnall is a high school graduate, and he successfully completed two years of bible college. (Tr., pp. 7-8) At hearing I observed Hudnall's memory is excellent and he is very articulate. Even though he is of advanced age, I believe he is capable of retraining given his residual cognitive and verbal capacities following the work injury. Moreover, I do not find Hudnall is motivated to look for work. At hearing, Hudnall testified he had not applied for any employment following his retirement from the City. Considering the factors of industrial disability, I conclude Hudnall has established he has sustained a sixty percent industrial disability.

Alternatively, Hudnall contends he is permanently and totally disabled under the common law odd-lot doctrine. A worker is totally disabled under the odd-lot doctrine if the services the worker can perform "are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985) (quoting Lee v. Minneapolis Street Railway Co., 230 Minn. 315, 320, 41 N.W.2d 433, 436 (1950)). This flows from the principle that a worker who has no reasonable prospect of securing employment has no material earning capacity. Id. The trier of fact considers whether there are jobs in the community the worker can realistically compete for. Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 198 (Iowa 2014). In establishing total disability, "an employee need not look for a position outside the employee's competitive labor market." Id.

Under the odd-lot doctrine, a worker must present a prima facie case of total disability "by producing substantial evidence that the worker is not employable in the competitive labor market." Guyton at 106. If the worker establishes a prima facie case, then the burden switches to the employer to present evidence of suitable employment.

Id. If the employer fails to produce evidence of suitable employment, and the deputy commissioner concludes the worker falls within the odd-lot category, the worker is entitled to a finding of total disability. Id.

Hudnall has not presented a prima facie case of total disability. Hudnall lives in an urban area, Des Moines, the capitol of Iowa. Neither party presented evidence concerning available jobs in the Des Moines market. Hudnall testified he has not applied for any jobs since he retired from the City. Hudnall has not established he is permanently and totally disabled under the odd-lot doctrine. Hudnall is awarded three hundred weeks of permanent partial disability benefits.

## **II. Independent Medical Examination**

Hudnall seeks to recover the \$3,112.50 cost of Dr. Sassman's independent medical examination and report. After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id. Dr. Sassman's examination occurred after Dr. Smith provided his impairment rating to the City.

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

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

867 N.W.2d 839, 846-47 (Iowa 2015). Dr. Sassman's bill is itemized. (JE 11, p. 104) Dr. Sassman charged \$1,312.50 for the examination, and \$1,800 for the report. (JE 11, p. 104) Under Young, and rule 876 IAC 4.33(6) Hudnall is entitled to recover the cost of Dr. Sassman's independent medical examination and report totaling \$3,112.50. Id.

## **III. Costs**

Hudnall also seeks to recover the \$100.00 filing fees for the petitions. 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 administrative rule expressly allows for the recovery of the costs Hudnall seeks to recover. Hudnall was not successful in proving he sustained a permanent impairment with respect to the August 2014 work injury, File Number 5061075. Using my discretion I award Hudnall the \$100.00 filing fee for the October 5, 2015 work injury, File Number 5062055.

### ORDER

IT IS THEREFORE ORDERED, THAT:

With respect to File Number 5061075, the Hudnall shall take nothing.

With respect to File Number 5062055, the City shall pay Hudnall three hundred fifty (350) weeks of permanent partial disability benefits, at the rate of six hundred ninety-seven and 60/100 dollars (\$697.60) per week, commencing on October 5, 2015.

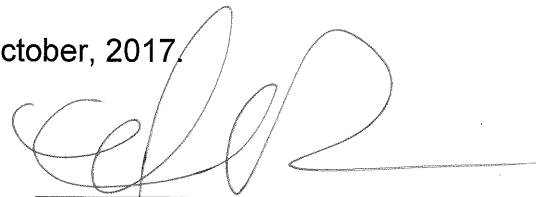
The City shall take credit for all benefits previously paid.

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

The City is assessed three thousand one hundred twelve and 50/100 dollars (\$3,112.50) for Dr. Sassmans's examination and report, and one hundred and 00/100 dollars (\$100.00) for the filing fee for File Number 5062055.

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

Signed and filed this 23<sup>rd</sup> day of October, 2017.



HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies To:

Nathaniel R. Boulton  
Attorney at Law  
100 Court Ave, Ste 425  
Des Moines, IA 50309  
[nboulton@hedberglaw.com](mailto:nboulton@hedberglaw.com)

John O. Haraldson  
Asst. City Attorney  
City Hall  
400 Robert D. Ray Dr.  
Des Moines, IA 50309  
[joharaldson@dmgov.org](mailto:joharaldson@dmgov.org)

HLP/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.