

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SAM SCOTT,

Claimant,

vs.

CITY OF WEST DES MOINES,

Self-Insured,
Employer,
Defendant.

FILED

JAN 09 2019

File No. 5059103

WORKERS COMPENSATION

ARBITRATION

DECISION

Head Note Nos.: 1803, 2501, 2502

STATEMENT OF THE CASE

Claimant, Sam Scott, filed a petition in arbitration seeking workers' compensation benefits from City of West Des Moines, self-insured employer, as defendant. This matter was heard in Des Moines, Iowa on October 9, 2018, with a final submission date of November 14, 2018.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibits 1-9, Defendant's Exhibits A-M, and the testimony of claimant and Brian Maydwell.

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

Whether the injury is a cause of permanent disability; and if so,

The extent of claimant's entitlement to permanent partial disability benefits;

The date of commencement of permanent partial disability benefits;

Whether claimant's benefits should be suspended for a failure to attend an independent medical evaluation (IME) under Iowa Code section 85.39;

Whether there is a causal connection between the injury and the claimed medical expenses; and,

Whether claimant is entitled to reimbursement for an IME under Iowa Code section 85.39.

FINDINGS OF FACT

Claimant was 44 years old at the time of hearing. Claimant graduated from high school. Claimant attended Hawkeye Community College but did not receive a degree.

Claimant worked as a groundskeeper for public parks. He worked for fast food restaurants. Claimant also worked as a security guard. Claimant worked as a security dispatcher for a Des Moines insurance company.

In 2000, claimant began employment with West Des Moines as a city dispatcher. Claimant's job duties as a city dispatcher included, but were not limited to, dispatching police, fire, and ambulance services. Claimant testified that when he was hired, his dispatching job only included the City of West Des Moines. He said that shortly after he was hired, West Des Moines consolidated to provide services for Clive and Urbandale. This consolidated operation was called WestCom. Claimant said WestCom also added Norwalk and Waukee. He testified that the addition of these four municipalities increased his work load.

He testified his workstation consisted of five monitors, several computer mice, a camera, and a hospital board. Claimant's job routinely required multi-tasking with several different callers and several different monitor screens.

Claimant testified that on or about March 4, 2015, he told his employer he was having numbness and tingling in his upper extremities. (Exhibit D, page 35)

On May 22, 2015, claimant was evaluated by Sara Glover, PA-C, at Mercy Occupational Health. Claimant had complaints of bilateral hand paresthesias. He was told to take ibuprofen and do home exercises. (Joint Ex. 1, pp. 1-2)

Claimant returned to Physician's Assistant Glover on May 11, 2015. Claimant still had symptoms of bilateral hand paresthesias. EMG/NCV studies were recommended. (Jt. Ex. 1, p. 3)

On May 7, 2015, claimant underwent EMG/NCV studies. Testing showed that claimant had bilateral carpal tunnel and cubital tunnel syndrome. (Jt. Ex. 2, pp. 7-8)

Claimant was seen by Jeffrey Rodgers, M.D., on June 19, 2015, for numbness in both hands. Claimant's diagnostic testing was consistent with bilateral carpal tunnel and cubital tunnel syndrome. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 3, pp. 9-11)

On August 6, 2015, claimant underwent a right carpal tunnel release and a right ulnar nerve release. Surgery was performed by Dr. Rodgers. (Jt. Ex. 3, pp. 12-13)

On or about November 17, 2015, claimant was returned to work by Dr. Rodgers to unrestricted duty. (Jt. Ex. 3, p. 21)

On February 29, 2016, claimant was evaluated by Teck Khoo, M.D., for diabetes. Claimant has a long history of diabetic retinopathy. (Jt. Ex. 4, pp. 47-48)

Claimant returned to Dr. Rodgers on April 27, 2016. Claimant had right thumb pain. Surgery to claimant's left upper extremity was discussed and chosen as a treatment option. (Jt. Ex. 3, pp. 26-27)

On June 7, 2016, claimant underwent a left ulnar nerve release. Surgery was performed by Dr. Rodgers. (Jt. Ex. 3, p. 28)

On July 18, 2016, claimant underwent a left carpal tunnel release. Surgery was performed by Dr. Rodgers. (Jt. Ex. 3, pp. 32-33)

Claimant testified at the hearing he believes his symptoms in his upper extremity became worse after his surgeries. (Transcript, p. 20)

On February 22, 2017, Dr. Rodgers found claimant had maximum medical improvement (MMI) and claimant was released from care with no permanent restrictions. (Jt. Ex. 3, pp. 36-38)

In a March 14, 2017 note, Dr. Rodgers found claimant had no permanent impairment to either upper extremity based on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 3, pp. 39-40)

On June 2, 2017, claimant was evaluated by Thomas Woodard, D.O. Claimant had pain in the fifth finger and difficulty with gripping in the right hand. Claimant was referred to UnityPoint Neurology. (Jt. Ex. 5, pp. 71-72)

On August 22, 2017, claimant was evaluated by Lynn Rankin, M.D., neurologist, for bilateral hand and arm pain. Dr. Rankin opined claimant had hand pain with increased pain, weakness without atrophy, and coldness in his fourth and fifth digits. His clinical picture was consistent with complex regional pain syndrome (CRPS). (Jt. Ex. 6, pp. 84-93)

On September 20, 2017, claimant returned to Dr. Woodard. Claimant was assessed, based on Dr. Rankin's report, as having CRPS in the right upper extremity. Claimant was referred to an orthopedist for evaluation of CRPS. Claimant was prescribed medication. (Jt. Ex. 5, p. 75)

Claimant returned in follow up with Dr. Rodgers on October 13, 2017. Claimant had pain in both upper extremities, right worse than left. Claimant had no dystrophic changes to his skin in his upper extremities. Claimant had some joint stiffness consistent with diabetic hand syndrome. Claimant was assessed as having disproportionate pain and disability and diabetic hand syndrome. Claimant was told his condition would improve with diligent hand therapy. (Jt. Ex. 3, pp. 44-46)

Claimant returned to Dr. Woodard on November 22, 2017, and requested to be certified for disability. Claimant was assessed as having CRPS, right hand worse than left and diabetic retinopathy. (Jt. Ex. 5, pp. 79-81)

In a December 27, 2017 letter, written by defense counsel, Dr. Rankin agreed that claimant's diabetes may be a contributor to his symptom complaints. He also indicated that while he identified claimant as having CRPS as a working diagnosis, Dr. Rankin could not state within a reasonable degree of medical certainty that claimant had CRPS. (Jt. Ex. 6, pp. 98-99)

Following a January 3, 2018 exam, Robin Sassman, M.D., gave her opinions of claimant's condition in a September 4, 2018 report. There is no explanation in the records why Dr. Sassman evaluated claimant in early January of 2018, but yet did not issue a report until nine months later. Hearing was held in this matter on October 9, 2018. The timing of Dr. Sassman's report suggests that issuance of the report was delayed to potentially put defendant at a disadvantage to rebut Dr. Sassman's opinions.

As of January 3, 2018, claimant had constant pain in his hands. Activity aggravated claimant's symptoms. Dr. Sassman opined claimant fulfilled the criteria for CRPS under the AMA Guides. Dr. Sassman found claimant had a change of skin color on the fourth and fifth digits. Claimant's skin was dry on his hand. Trophic changes were noted on the third and fourth digits. EMG studies revealed bilateral median neuropathy. Dr. Sassman recommended claimant have a second opinion from an orthopedic surgeon. (Claimant's Ex. 1)

Dr. Sassman found that claimant had a 26 percent permanent impairment to the right upper extremity, converting to a 21 percent permanent impairment to the body as a whole. She found that claimant had 24 percent permanent impairment to the left upper extremity, converting to a 14 percent permanent impairment to the body as a whole, using the combined values chart in the Guides. Dr. Sassman found that claimant had a 32 percent permanent impairment to the body as a whole. She limited claimant to avoid repetitive, forceful gripping, and to avoid vibratory tools. (Cl. Ex. 1)

In a January 19, 2018 note, written by defense counsel, Dr. Woodard indicated that he had not reached a diagnosis of CRPS for claimant and would defer to other providers if claimant had CRPS. Dr. Woodard also indicated he would not issue a permanent impairment rating for claimant. (Ex. F, p. 39)

Claimant had an IME appointment scheduled for February 13, 2018 with Kurt Smith, M.D. Prior to the exam, claimant was given paperwork to complete. Claimant testified his wife and supervisor helped him complete the paperwork. Claimant testified that due to pain in his hands, he had difficulty completing the paperwork.

On February 13, 2018, claimant left work to attend the IME. Claimant testified that when he arrived at Iowa Orthopedics, he was directed to a suite A. Claimant said that when he finally found suite A, he stood in line and waited for a receptionist. He said that when he came to the receptionist, he was then directed to a suite C. Claimant said

he got in line and waited for a receptionist at suite C. He said that when he spoke to a receptionist, he was told that he had the wrong paperwork and that he was late. Claimant began filling out the new paperwork. Claimant testified that after 10 to 15 minutes, the receptionist told him the IME doctor did not have time to see him. Claimant was asked to make another appointment. Claimant said he was told by the receptionist that he needed to make another appointment through his attorney.

In a February 14, 2018 letter, defendant's counsel informed claimant's counsel a second IME appointment was set for February 27, 2018. (Ex. F, p. 40) Claimant testified he did not receive notification from his attorney regarding the second appointment.

In a February 28, 2018 letter, defendant's counsel again wrote to claimant's counsel indicating claimant failed to show up for his February 27, 2018 appointment with Dr. Smith. The letter asked for an explanation as to why claimant failed to appear at the February 27, 2018 appointment. The letter also indicated the defendant did not intend to seek a third appointment for claimant with Dr. Smith. (Ex. F, p. 41)

Claimant testified his attorney did not make him aware of defendant's correspondence. (Ex. F, pp. 40-41)

The record suggests the letters found in Exhibit F, pages 40-41 were sent to claimant's counsel. The record suggests that contents of the letters were not communicated to claimant by his attorney.

Claimant testified he did not refuse to attend an IME and had tried to attend his first IME appointment.

On March 8, 2018, claimant had an EMG/NCV study. Testing was consistent with a bilateral median neuropathy at the wrists and bilateral ulnar neuropathy at the elbow. (Jt. Ex. 9)

In a March 16, 2018 report, Dr. Smith gave his opinions of claimant's condition following a records review. Dr. Smith opined claimant did not have CRPS and that claimant's symptoms were the result of a diabetic neuropathy related to his diabetes. He opined claimant had no permanent impairment. He indicated claimant required ongoing care for his diabetes, but not for his work injury. He did not believe claimant required any permanent restrictions as it related to the work injury. (Ex. A)

Claimant testified that on April 18, 2018, he missed something on the monitor at work due to his poor eyesight. (Tr., p. 63)

Documents from West Des Moines indicate that effective May 1, 2018, claimant resigned from his job as a dispatcher. Claimant was recommended for rehiring. (Ex. C, p. 34)

Claimant testified at hearing, he did not resign, but was terminated. Claimant did not file for unemployment insurance. Claimant did receive long-term disability (LTD) benefits. (Tr., pp. 64-65, 99-100)

Brian Maydwell, testified he worked as an assistant chief of operations for WestCom for the City of West Des Moines. In that capacity, Mr. Maydwell is familiar with claimant, claimant's job duties, and claimant's workers' compensation claim. Mr. Maydwell testified claimant resigned from West Des Moines. He testified he understood the resignation occurred because claimant missed something visually on a screen. He said that claimant was concerned his error could have potentially impacted the safety of an officer. Mr. Maydwell testified that if claimant had been terminated, claimant would have gone through a long program of progressive discipline. Mr. Maydwell testified that while he did not recall claimant saying the word "resignation," based upon the fact that claimant had received LTD benefits, and his review of claimant's resignation records with the city, he believed claimant had resigned. (Tr., pp. 104-107)

In an August 27, 2018 letter, written by claimant's counsel, Tech Khoo, M.D., indicated he specialized in endocrinology and diabetes. He indicated that claimant was one of his patients. Dr. Khoo indicated that it would be highly unusual for a person with diabetes to have diabetic neuropathy in the hands prior to experiencing neuropathy in the feet. He also indicated that regionalized neuropathy is more consistent with a diagnosis of carpal tunnel syndrome. (Jt. Ex. 4, pp. 64-65)

In a September 6, 2018 report, Phil Davis, M.S., gave his opinions of claimant's vocational opportunities. He opined that claimant was unable to physically perform the essential job functions of his prior employment activities. He opined that claimant had lost access to 90 percent of the general labor market. (Cl. Ex. 2)

In a September 24, 2018 report, Ronald Schmidt, M.S., CRC, LPC, gave his opinions of claimant's vocational opportunities. Mr. Schmidt opined that given the opinions of Drs. Rodgers, Woodard, Smith, and Rankin, claimant had no loss of earning capacity. He indicated that if Dr. Sassman's opinions regarding causation and impairment were considered, claimant would have a 28 percent loss of access to the labor market. (Ex. B)

In a September 6, 2018 note, written by defense counsel, Dr. Khoo noted that he did not specialize in orthopedics. He indicated that diabetic neuropathy is a type of nerve damage for a person who has diabetes. He indicated that he did not assess claimant as having CRPS and would not issue a permanent impairment rating for claimant. (Jt. Ex. 4, pp. 66-68)

Claimant testified that typing and grasping objects aggravates his symptoms. He said that he has pain and limited range of motion in his ring finger and pinky finger in both hands. Claimant testified he has difficulty performing activities of daily living such as brushing his teeth and buttoning his shirts. Claimant said his son and wife help him

perform chores at home. Claimant said his symptoms have decreased since he left his job with West Des Moines.

Claimant testified that he has difficulty with eyesight due to diabetes. He said he had difficulty seeing monitors at work due to his vision impairment. He said that to help with his vision issues, the city purchased two sets of magnifying glasses for monitors. Claimant said that these magnifying glasses did not help him. He said that his issues with eyesight made it difficult for him to work as a dispatcher with West Des Moines.

Claimant testified he has not applied for any jobs since leaving West Des Moines. He said he has not made an attempt to find work.

Mr. Maydwell testified that he is familiar with the difficulties claimant had with working as a dispatcher for West Des Moines. He said that Exhibit C, page 32 is a timeline of accommodations West Des Moines made for claimant. He said that most of the accommodations West Des Moines made for claimant had to do with claimant's vision problems.

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant's injury resulted in a permanent disability.

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Claimant credibly testified he has continued problems and pain in both upper extremities. He credibly testified he continues to experience loss of strength and range of motion in his fingers and hands. Claimant's hands at hearing appeared swollen. Photos of claimant's hands found at Claimant's Exhibit 9 also seem to show claimant's hands are swollen.

Several experts have opined regarding whether or not claimant has a permanent disability from his work injury. Dr. Rodgers treated claimant for an extended period of time and performed claimant's surgeries. In an October 2017 note, he found claimant had no permanent impairment. (Jt. Ex. 3, pp. 39-40)

I respect the opinions of Dr. Rodgers. However, the record indicates Dr. Rodgers gave his opinions regarding permanent impairment in October 2017. Dr. Rodgers' opinions do not address diagnostic testing done in March of 2018, showing claimant had a continued neuropathy at the wrists and elbows. Dr. Rodgers also offered no opinions regarding claimant's diagnosis of CRPS. Based on this, it is found that Dr. Rodgers' opinions regarding permanent impairment are found unconvincing.

Dr. Smith performed a records review. He opined that claimant had no permanent impairment from the work injury. He opined that any permanent impairment claimant might have was caused by diabetic neuropathy. (Ex. A)

There are several problems with Dr. Smith's opinions. The record indicates that claimant does have diabetes but does not have neuropathy in his feet. Claimant's symptoms in his upper extremities are largely based upon his lack of strength and range of motion in his ring and pinky finger. Dr. Khoo has treated claimant for his diabetes for several years. Dr. Khoo opined that it was highly unusual for claimant to have no neuropathy in his feet, yet experience neuropathy in his hands. He also opined it was highly unlikely that if claimant had neuropathy in his hands, that it would only affect certain digits. (Jt. Ex. 4, p. 64)

Second, as diagnostic testing from March of 2018 indicates, claimant has bilateral neuropathy at the wrists and elbows. (Jt. Ex. 9)

Dr. Smith opined that claimant's current problems are caused by diabetic neuropathy. Dr. Smith's March 16, 2018 report makes no reference to the March of 2018 diagnostic testing, and it appears he did not have this testing made available to him. (Ex. A, p. 3) It appears Dr. Smith's opinion is based upon incomplete evidence. Dr. Smith's opinion regarding diabetic neuropathy is contrary to the opinions of Dr. Khoo regarding claimant's diabetic neuropathy. Based upon these inconsistencies, it is found that Dr. Smith's opinion regarding permanent impairment and causation are found not convincing.

Dr. Sassman evaluated claimant once for an IME. The record indicates she spent over an hour examining claimant. Dr. Sassman's analysis and reports are more detailed than those of Dr. Rodgers or Dr. Smith. Dr. Sassman found claimant had eight of the necessary criteria for finding CRPS based on the Guides. (Cl. Ex. 1, pp. 12-13) I

am able to understand Dr. Sassman's analysis and I can follow her findings of permanent impairment for claimant. Dr. Sassman's opinions corroborate the credible testimony of claimant regarding continued symptoms in his hands. Given this record, it is found the opinions of Dr. Sassman regarding permanent impairment are more convincing than the opinions of Drs. Smith and Rodgers.

Claimant had three surgeries to his upper extremities. Claimant credibly testified that three years after his date of injury, he continues to experience symptoms bilaterally in his upper extremities. The opinions of Drs. Rodgers and Smith regarding permanent impairment are found not convincing. The opinions of Dr. Sassman regarding permanent impairment are found convincing. Given this record, claimant has carried his burden of proof that his March 4, 2015 injury resulted in a permanent impairment.

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

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

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

An injury to a scheduled member that involves a sympathetic system, such as CRPS, is assessed as an industrial disability, Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa App. 1995).

Industrial disability can be equal to, less than, or greater than functional impairment. Taylor v. Hummel Insurance Agency, Inc., 2-2, Iowa Industrial Comm'r Dec. 736 (1985); Kroll v. Iowa Utilities, 1-4, Iowa Industrial Comm'r Dec. 937 (App. 1985); Birmingham v. Firestone Tire & Rubber Company, II, Iowa Industrial Comm'r Rep., 39, (App. 1981).

Claimant was 44 years old at the time of the hearing. Claimant graduated from high school. Claimant has worked as a groundskeeper. He has worked in fast food restaurants, and as a security guard.

Claimant was assessed by Dr. Sassman as having CRPS. As noted above, the opinions of Dr. Sassman regarding causation and permanent impairment are found to be more convincing than the opinions of other experts. Dr. Sassman opined that claimant had a 32 percent permanent impairment to the body as a whole. (Cl. Ex. 1, p. 14)

Dr. Sassman restricted claimant to avoid repetitive and forceful gripping. She also restricted claimant to avoid vibratory and power tools. No expert has opined that claimant cannot return to work as a dispatcher due to problems with his upper extremities.

The record indicates that claimant has had difficulty in his last several years in his dispatcher position due to issues with vision. Claimant's vision problems are caused by his diabetes and are not related to his March of 2015 work injury.

Claimant testified he believed he was fired from his job as dispatcher. Documents from the city indicate that claimant resigned from his job. Mr. Maydwell credibly testified that claimant resigned from his job. He said that if claimant had been terminated, claimant would have undergone a long, multi-step disciplinary process. There is no evidence that claimant went through that process. Given this record, it is found that claimant resigned from his job with the city.

Claimant has not applied for a job since leaving the city in May of 2017. Claimant has not looked for work.

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Rus v. Bradley Puhmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007). Copeland v. Boone Book and Bible Store, File No. 1059319 (App. November 6, 1997). See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989) (no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

Two experts have opined regarding claimant's vocational opportunities. Mr. Davis suggests that claimant has a 90 percent loss of access to the labor market. It is unclear how Mr. Davis arrived at this percentage. It is noted above, no doctor has restricted claimant from returning to work as a dispatcher. Dr. Sassman has given claimant minimal work restrictions. Those limitations restrict claimant from repetitive gripping and using vibratory tools. Given these limitations, and given that no expert has said that claimant cannot return to work as a dispatcher, it is unclear how Mr. Davis arrived at such a high percentage of loss of access to the labor market.

Mr. Schmidt opines that using Dr. Sassman's permanent restrictions, claimant would have a loss of 28 percent to the job market. (Ex. B, p. 11) As is the case with Mr. Davis's figure, it is unclear how Mr. Schmidt arrived at this figure of loss of access.

While there are issues with both vocational reports, it is found that both vocational reports have some benefit, as they indicate the type of problems claimant may have if he was looking for work.

Claimant has a 32 percent permanent impairment to the body as a whole. He has restrictions that limit his ability to repetitively grip. Claimant resigned from his job with West Des Moines. He has not looked for work since May of 2017. When all relevant factors are considered, it is found that claimant has a 30 percent industrial disability or loss of earning capacity.

The next issue to be determined is the commencement date for benefits. Dr. Sassman found claimant at MMI as of November 22, 2017. (Cl. Ex. 1, p. 16) As noted above, the opinions of Dr. Sassman regarding permanent impairment and causation are more convincing than those of Dr. Rodgers and Dr. Smith. Permanent partial disability benefits should commence as of November 22, 2017.

The next issue to be determined is should claimant's benefits be suspended for an alleged refusal to attend an IME.

Iowa Code section 85.39 provides in pertinent part that a claimant:

[S]hall submit for examination at some reasonable time and place . . . without cost to the employee . . . and the employee shall be furnished transportation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of refusal. Compensation shall not be payable for the period of refusal.

The record indicates claimant made an effort to attend the first IME with Dr. Smith. Due to some misunderstandings, claimant was told that he was late for the IME and sent home. Claimant tried to reschedule his IME with the receptionist, but was told he needed to work through his attorney.

The record indicates defendant's counsel wrote to claimant's counsel, giving notice of a second IME. (Ex. F, p. 40)

Claimant credibly testified that he was not made aware of this appointment by his attorney. Eventually, defendant sent claimant a third letter indicating they did not intend to seek a third appointment for an IME. (Ex. F, p. 41) Claimant credibly testified that he was not made aware, by his attorney, of either letter found in Exhibit F, pages 40-41. Claimant testified that he was not trying to avoid an IME, and would have attended an IME.

Claimant tried to attend the first IME. The record suggests that claimant's attorney did not notify claimant regarding his second IME. Defendant made no effort to compel claimant to attend a third IME. While it may be the case that claimant's counsel failed to notify his client of the second IME, the record does not indicate claimant refused to attend an IME. Based on this record, it is found claimant's benefits should not be suspended for an alleged failure to attend an IME under Iowa Code section 85.39.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

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 16, 1975).

Claimant seeks payment of bills from two providers. Copies of those bills were attached to the hearing report. One bill is for a date of service of August 22, 2017 with Dr. Rankin. The other bill was for a date of service of October 27, 2017. Dr. Rankin evaluated claimant for his CRPS, which is found to have been caused by claimant's work injury. The October 27, 2017 date of service consists of physical therapy treatments recommended by the authorized treating physician, Dr. Rodgers. (Jt. Ex. 7, p. 100) Given this record, defendant is liable for all medical bills attached to the hearing report.

The final issue to be determined is whether defendant is liable for an IME performed by Dr. Sassman. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Dr. Rodgers, the employer-retained expert, opined regarding claimant's permanent impairment on March 14, 2017. (Jt. 3, pp. 39-40) Dr. Sassman, the

employee-retained expert gave her opinions of claimant's permanent impairment in a report dated September 4, 2018. Given the chronology of the evaluation of permanent impairment, defendant is liable for all expenses, including mileage, associated with the IME with Dr. Sassman.

ORDER

THEREFORE, IT IS ORDERED:

That defendant shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of seven hundred eighteen and 45/100 dollars (\$718.45) per week, commencing on November 22, 2017.

That defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. 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. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

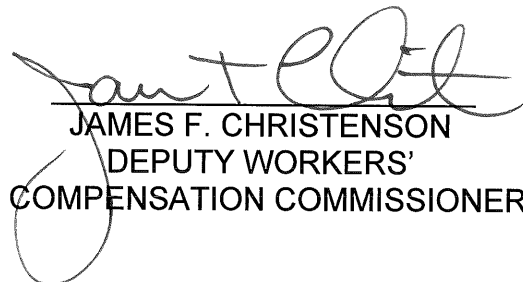
The defendant shall pay medical bills as detailed above.

The defendant shall reimburse claimant for Dr. Sassman's IME.

The defendant shall pay costs.

The defendant shall file subsequent reports of injury (SROI) as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 9th day of January, 2019.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.