BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LOUIS D. ANDERS, Claimant, vs. FARNER-BOCKEN CO., Employer, AMERICAN ZURICH INSURANCE CO., Insurance Carrier, Defendants.	File No. 5054508 ARBITRATION DECISION Head Note No.: 1803, 2500, 2700

FILED
AUG - 2 2017
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Louis Anders, claimant, filed a petition in arbitration seeking workers' compensation benefits from the employer, Farner-Bocken Company and the insurance carrier, American Zurich Insurance Co. The arbitration hearing was held on October 4, 2016. The parties filed post-hearing briefs on December 5, 2016 and the matter was considered fully submitted at that time.

The evidentiary record includes Claimant's Exhibits 1 through 10; and Defendant's Exhibits A through O. All of the exhibits were admitted without objection. At the hearing, claimant Louis Anders testified as did Amy Ross, the Human Resources Director at Farner-Bocken.

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

The parties submitted the following disputed issues for resolution:

1. The extent of permanent partial disability benefits, if any.

2. The appropriate date for the commencement of permanent partial disability benefits.

3. Whether claimant is entitled to payment of medical expenses as attached to the hearing report.

4. Whether claimant is entitled to additional care with Dr. Shumaker at CNOS.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 59 years old at the time of the hearing. (Transcript, page 9) He resides on an acreage near Lake City, Iowa, with his wife. (Id.) Claimant has no minor children living at home. (Tr. p. 10)

Claimant graduated from high school and attended one semester of college at Iowa Wesleyan. (Tr. p. 11)

Claimant's work experience includes truck driving for about 10 years. He worked both as an employee and as an owner-operator. (Tr. pp. 12, 56) Claimant agreed in his testimony that his work as a truck driver did not involve any lifting. (Tr. pp. 56-57) Claimant also worked at a farmers' co-op where he loaded and unloaded grain and did general manual labor. (Tr. p. 11; Exhibit O, p. 4) He was employed at IBP on the cattle kill floor where he started out doing general labor and was promoted to a trainer and a supervisor position, which was less physically demanding. (Tr. pp. 12, 57)

Claimant was hired by the defendant employer Farner-Bocken and worked full-time from 1990 through 2015. (Tr. p. 15)

Farner-Bocken is food wholesaler that sells food products to schools and convenience stores. (Tr. p. 14) In his 25 years at Farner-Bocken claimant held different positions, including: truck driving; working in the warehouse picking orders; working in receiving; and in "put away," which involved operating a forklift/reach truck and an order picker machine. (Tr. pp. 14, 16) Claimant agreed that these positions involved "fairly intense physical labor." (Tr. p. 16) In 2003, claimant had a low back injury and was off work for a period of time. When he returned to work full-time, he was given a training position. (Tr. p. 54) Claimant worked as a trainer for two to three years and then began working four hours per day in the training position and the remainder of his shift in

inventory management. (Tr. pp. 54, 57-58) The training position did not require any lifting and was not a physical job. (Tr. pp. 56, 58)

Claimant's last day of work at Farner-Bocken was July 6, 2015. (Tr. p. 10)

The parties stipulated in the hearing report that claimant sustained an injury that arose out of and in the course of his employment on November 20, 2013, while working for the defendant employer. On that date, claimant was lifting boxes and "felt a grab" in his lower right back. He reported the injury to his employer and an accident report was completed that day. (Tr. pp. 23-24)

Prior to the November 20, 2013 injury, claimant had a back injury with the same employer in 2003, as stated above. At that time, he lifted a box and felt a sharp pain in his back. (Tr. p. 17) An MRI was obtained on September 26, 2003, which showed a small disc protrusion at L5-S1 associated with an annular tear, and slight bulging at L4-5 with no evidence of compression or entrapment of the neural elements, and mild to moderate osteoarthritic changes throughout the lumbar spine, particularly at the L2-L3 level on the right. (Ex. D, p. 1) At that time, claimant did not experience any pain or numbness in his legs or feet. (Tr. pp. 18-20; Ex. J, p. 2) Claimant reported to Donald Skinner, M.D., of the McFarland Clinic, on December 22, 2004, that he had "been doing well," but that he "[s]till has some residual back pain but overall has been doing nicely." (Ex. F, p. 2) Claimant advised Robin Sassman, M.D., that after doing physical therapy related to this 2003 incident he noted improvement and did quite well. (Ex. J, p. 2)

Claimant advised Dr. Sassman that in January 2012, he picked up an electrical cord and felt pain in his back. (Ex. J, p. 2) He again advised that he did not have any leg symptoms at that time and after therapy, his symptoms resolved. (Id.)

On November 11, 2013, claimant was seen by his primary care provider, Donald Skinner, M.D., at McFarland Clinic, P.C. and noted right foot pain and "numbness of toes 3 and 4," and "pain in the ball of the foot." (Ex. F, p. 7)

After the stipulated work injury of November 20, 2013, claimant was sent to St. Anthony Medical Clinic and was seen by Brian Pratt, M.D. (Ex. D, pp. 3-5) At that time, he reported the sudden onset of a sharp pain that had become constant with associated right foot numbness. (Ex. D, p. 4) Claimant was taken off work for 42 hours and was to return to modified duty of no lifting over 5 to 10 pounds, no kneeling, stooping, squatting, bending, lifting or pulling for the following two weeks. (Ex. D, p. 5) However, on November 26, 2013, claimant was seen by Hope Jensen, ARNP at St. Anthony Medical Clinic "to see if he's able to return to work." (Ex. D, p. 11) The pain is noted to be across his entire low back, but it is becoming more focused on the right side. In addition claimant reported pain traveling down the right leg and that the pain feels too intense to return to work at this time. (Id.) Ms. Jensen concluded, "I feel it's very

obvious that the patient is not going to be able to return to work in his current condition," and he was taken off work until December 4, 2013, when he had a follow-up appointment scheduled with Dr. Pratt. (Ex. D, p. 12)

Also on November 26, 2013, claimant began physical therapy at Stewart Memorial Community Hospital. (Ex. H, p. 2) He continued in therapy through January 2, 2014. (Ex. H. p. 14) He had 16 treatments, and was noted to have slow, but steady improvement of his back pain. He was given a progressive home program upon discharge. (Id.)

On December 4, 2013, claimant had a follow-up appointment with Dr. Pratt. (Ex. D, pp. 14-16) Claimant was kept off work and was to return on December 9, 2013 with restrictions of: no lifting over 10 to 15 pounds; no work more than 4 hours per day; avoid repetitive kneeling, stooping, squatting, bending, lifting; and, no work below waist. (Ex. D, p. 17)

Claimant continued to follow-up with Dr. Pratt, reporting numbness in his right foot and toes. (Ex. D, pp. 19-26) He was noted to have decreased range of motion in his back and "some decreased right-sided knee reflexes as well." (Ex. D, p. 20) On December 19, 2013, the above restrictions were changed to lifting no more than 25 to 30 pounds and working up to 6 hours per day. The remaining restrictions were unchanged. (Ex. D, pp. 21-22) On December 27, 2013, Dr. Pratt ordered an MRI. (Ex. D, p. 25)

The MRI was obtained on December 30, 201, and showed a degenerative bulge at L4-5 and mild facet changes that contribute to bilateral lateral recess and mild bilateral foraminal narrowing, and no disc herniation and no compression of the traversing L5 or exiting L4 nerves. (Ex. D, p. 27)

On January 3, 2014, Dr. Pratt stated that the MRI did not provide any specific answers for the reason for claimant's "numb radiculopathy in his toes," and noted that claimant reported feeling "at least 75-80% improved from the time of his original injury." (Ex. D, p. 29) He had improved range of motion of his back. Dr. Pratt modified the work restrictions to lifting 45 to 50 pounds and working 8 hours per day. The remaining restrictions were continued. (Ex. D, p. 31) Claimant was referred to a neurologist to address the ongoing numbness in his foot. (Ex. D, p. 30)

On January 22, 2014, claimant was seen by Lee Hieb, M.D., of McCrary-Rost Clinic, Orthopedic and Spinal Surgery. (Ex. A, pp. 3-6) At that time, claimant reported numbness in the third and fourth toes, and feeling "as if a ball is underneath the plantar surface of his foot." (Ex. A, p. 3) It was also noted that "[t]he back is essentially resolved and is not limiting him," but the numbness continued and he sometimes feels he is stumbling, and "[h]e still has the occasional sharp, radiating pain down his leg."

(Id.) He also reported that he "cannot stay in one position long, and [w]alking is limited." (Id.) He stated that he can only stand for about 1 to 1 ½ hours before it is too painful, and that he experiences cramping in his leg and foot at night. (Id.) Dr. Hieb stated, "[a]t this point there is no operative treatment that I would recommend," and he was started on sublingual B12, B6 folate and recommended that "he stay in his current capacity since he is able to do the job and it does not require a lot of bending or twisting or heavy lifting." (Ex. A, p. 4) He was to follow-up in three months. (Id.)

On January 23, 2014, claimant returned to see Dr. Pratt and advised that he had been doing rather well. However, on that morning, he bent over to put on his socks and "had an abrupt and sharp pain shooting through his lower back. This time the numbness that he was feeling in his feet turn [sic] to pain in the toes and numbness all the way back to the heel." (Ex. D, p. 33) He was taken off work the rest of the week. (Ex. D. p. 35)

On January 27, 2014, claimant returned to Dr. Hieb and reported an increase in pain and back spasm with an episode of coughing. (Ex. A, p. 8) He was kept off work for three days and returned on light duty. (Ex. A, pp. 8-9)

Claimant returned to see Dr. Hieb on April 14, 2014, following a flare-up and was taken off work until April 17, 2014. (Ex. A, pp. 10-11)

On April 22, 2014, claimant returned to Dr. Hieb indicating that claimant had "gotten over" his last episode, but that there was concern about the "intermittent nature of his problem and the long-term issues." (Ex. A, p. 12) Dr. Hieb discussed with the workers' compensation nurse, claimant and claimant's spouse, modification of work and good body mechanics and stated that surgery was not likely to be helpful, but recommended a course of Celebrex. Dr. Hied also discussed the possibility of a facet injection and radiofrequency ablation, but stated that "I do not foresee that this is going to be completely remediated no matter what we do." (Id.) On this date Dr. Hieb recommended a lifting restriction of 50 pounds and no repeated lifting or bending for a period of three months. (Ex. A, p. 14)

On June 3, 2014, claimant stated to Dr. Hieb that he felt "he is basically back to baseline before this accident in November." (Ex. A, p. 15) It is noted that his job is 50 percent inventory managing and 50 percent training and that he is avoiding heavy lifting. Dr. Hieb also stated that "[H[e has not missed work this last 6 weeks," and "he has intermittent pain, which is nothing new." (Id.) Dr. Hieb determined that claimant had reached maximum medical improvement (MMI) and assigned a 5 percent whole person impairment rating based on range of motion and references table 15-7, and stated that "I would simply keep him at his same job that he is able to do now with a 50-pound max lifting. He should avoid repeated bending and lifting." (Id.) Dr. Hieb references table 15-7, but does not indicate the source for the table as the American Medical Association

for Evaluation of Permanent Impairment, Fifth Edition (AMA Guides). Dr. Hieb also said that "I think he can remain employed at his current job." (Id.)

On July 16, 2014, Dr. Hieb responded to a request to clarify whether the restriction was due to the "the back strain sustained at work or due to the chronic degenerative back condition." (Ex. A, p. 17) He stated that the "recent aggravation was clearly work related, the permanent restriction is due to the chronic degenerative back condition. This also, however, was apparently work-related at Farner-Bocken, but the apportionment would not change from that time." (Ex. A, p. 18)

On July 29, 2014, claimant returned to see Dr. Hieb and complained of back spasms. He was taken off work from July 28, 2014 through July 31, 2014, at which time he was to return to "permanent restricted status." (Ex. A, p. 20)

On August 11, 2014, claimant contacted McFarland Clinic seeking a referral to a back specialist, specifically he wanted to be seen by Donald Skinner, M.D., for ongoing back complaints from a work injury. Dr. Skinner advised that if he had an MRI, he would refer the claimant to the pain clinic. (Ex. F, p. 9)

On September 30, 2014, claimant again returned to see Dr. Hieb who noted that claimant had another flare up of back pain after heavy lifting, which was described as "the same garden variety flare ups he has had in the past. This is a temporary exacerbation of his ongoing problem. His status shouldn't change from this." (Ex. A, p. 21) He was taken off work until October 6, 2014. (Ex. A, p. 23)

On October 29, 2014, claimant was seen at Iowa Ortho, by Cassim Igram, M.D. (Ex. B, p. 4) Dr. Igram recorded that claimant's back pain had an onset of November 20, 2013, and is a "fluctuating" problem. (Id.) Dr. Igram described consistent back pain with intermittent right leg symptoms. (Id.) Dr. Igram was unable to state why claimant had right leg pain, and suggested an EMG to hopefully help pinpoint the origin of the leg pain, and stated that surgical intervention was not recommended at this time. (Id.) Claimant was restricted to lifting no more than 50 pounds for one third of his shift. (Ex. B, p. 6)

On November 21, 2014, the EMG/NCV was obtained and claimant returned to Dr. Igram to review the EMG results of the right leg. The study did not show any significant findings to explain the right leg symptoms. (Ex. B, p. 7) Dr. Igram also noted that neither the MRI nor the EMG suggested a nerve problem and he did not recommend surgery and he had nothing else to offer. (Ex. B, pp. 7-8, 9-10)

On December 31, 2014, claimant was seen by Dr. Skinner. It was noted than an MRI had been obtained but was not revealing. He had six weeks of physical therapy without relief and still has numbness and tingling in his right foot. (Ex. F, p. 10)

Claimant reported that concerning his job, he is doing 50 percent training and 50 percent inventory management, "which means he is doing repetitive motion with some twisting on a daily basis. He states he can only do this for about a half an hour and then he has pain that goes down his leg." (Id.) The plan was to "start back at the beginning and check for reversible metabolic abnormalities." (Id.)

On February 20, 2015, an MRI was obtained, which indicated minimal degenerative change at L4-5. (Ex. F, p. 11)

On March 10, 2015, claimant commenced physical therapy at McFarland Clinic, recommended by Dr. Skinner. (Ex. F, p. 15; Ex. G, p. 1)

On April 8, 2015, claimant was seen by Robin Sassman, M.D., of Medix for the purpose of an independent medical evaluation. Dr. Sassman prepared a report dated June 3, 2015. (Ex. J, p. 1) Dr. Sassman reviewed the medical history and conducted a physical examination. Her diagnosis was low back pain with radiculopathy. (Ex. J, p. 6) Dr. Sassman stated that the work injury of November 20, 2013, "was a substantial aggravating factor in Mr. Anders current complaints of low back pain with radiculopathy." (Id.) Dr. Sassman stated that although claimant had back pain dating back to 2003, he did not have symptoms in his legs until the work injury on November 20, 2013. (Id.) However, the records indicate that claimant did complain of numbness and tingling in his right foot to Mike Schleisman, D.C., on or about February 13, 2009. (Ex. I, p. 2) Claimant testified that this numbness went away in a day or two. (Tr. p. 58) Claimant also reported to his primary care physician on November 11, 2013, that he had right foot pain and "numbness of the toes 3 and 4," and "pain in the ball of the foot." (Ex. F, p. 7) This was just over a week before the date of the injury in this case. Claimant stated at hearing that he had just bought a new pair of shoes and "thought maybe there was something in the shoe. I had no idea it was related to my back." (Tr. p. 59) Dr. Sassman was apparently unaware of these prior complaints of numbness in his toes and foot pain.

Dr. Sassman recommended an evaluation by a pain management specialist, but stated that such treatment would not change the applicable rating or restrictions. She then assigned November 21, 2014 as the date that claimant reached MMI. This was the date that claimant received EMG/NCV testing and Dr. Igram did not recommend surgery and advised that he had no other medical care to offer. (Ex. J, p. 7) Dr. Sassman assigned a permanent impairment rating of 14 percent of the whole person, using the AMA Guides, Fifth Edition. (Ex. J, p. 8) The rating is based on loss of range of motion of the lumbar spine, utilizing figure 15-8 and table 15-9, as well as table 15-7 and for the spine disorder, using table 15-7. These ratings were combined using the combined values chart to arrive at the 14 percent whole person impairment. Dr. Sassman then contradicted her earlier statement that additional treatment would not

change his restrictions when she assigned restrictions, stating that they "may change with further treatment." (Id.) She recommended limits of:

> lifting, pushing, pulling and carrying to 30 pounds occasionally from floor to waist, 50 pounds occasionally from waist to shoulder, and 30 pounds occasionally over shoulder height. He may occasionally sit, stand and walk, but he will need to change positions frequently due to his symptoms. I would not recommend use of ladders. I would not recommend use of the right leg to operate a foot pedal. He may occasionally use stairs but should always employ the use of a handrail.

(Ex. J, p. 8)

On April 9, 2015, claimant was seen by Stephanie Bellcock, ARNP at McCrary-Rost Clinic, complaining of back pain. He denied any new injuries and the history of the injury is noted to be the November 20, 2013 work injury. Ms. Bellcock stated that since the injury, claimant's right leg is slightly weaker than his left and he has had right foot numbness. (Ex. A, p. 24) He rated his pain level as 8/10. He was taken off work for two days. (Ex. A, p. 25)

On April 23, 2015, claimant was seen at the pain clinic at Mary Greeley medical center. (Ex. E, p. 1) Claimant reported that "work comp is actually completed at this juncture," but that "he decided to get this looked at again." (Id.) A right SI joint injection was provided.

On May 7, 2015, claimant returned to see Ms. Bellcock advising that he had an epidural injection two weeks earlier. He was taken off work for two days. (Ex. A, pp. 26-27) Claimant declined physical therapy.

On May 19, 2015, claimant returned to McCrary-Rost Clinic and was seen by Danniele Anderson, PA. (Ex. A, p. 28) Claimant described severe pain in the lumbar spine with radiation into the right thigh. Claimant was given a note to be off work for an unstated period of time and was told to use ice and heat as needed. (Ex. A, p. 29)

On June 15, 2015, claimant was seen by Susan Hornback, D.O., at McCrary-Rost Clinic, struggling with low back pain that became worse over the previous 2-3 weeks. He needed a refill on medication, was given Flexeril and told to rest, ice and use ibuprofen. He was given a work excuse for an undisclosed period of time. (Ex. A, pp. 30-31)

On June 19, 2015, claimant was seen at Mary Greely Medical Center pain clinic by Arnold R. Parenteau, M.D. (Ex. E, p. 3) He indicated that he obtained no relief from

the SI joint injections. Median branch blocks and radiofrequency were discussed and claimant was to follow-up based on his desire for treatment. (Id.)

On June 24, 2015, claimant was seen by Ms. Anderson, PA, who noted that claimant "needs a note for work," and "[h]e is having another flare up." (Ex. A, p. 32) It is recorded that claimant is "worried he may never be able to perform the duties of his job." (Id.) He was given an excuse from work for an undisclosed period of time. The plan included consideration of nerve ablation. (Ex. A, p. 33)

Claimant's last day of work at Farner-Bocken was July 6, 2015. (Tr. p. 10)

On July 7, 2015, claimant was seen again by Ms. Anderson and advised that it is difficult for him to work due to pain and weakness. Claimant was referred to neurosurgery. (Ex. A, p. 35)

On July 30, 2015, claimant was seen at CNOS in Dakota Dunes, South Dakota, by Grant Shumaker, M.D., with complaints of right low back and right leg pain. (Ex. C, p. 1) The original injury was noted to date back to 2003 and a re-aggravation in 2013 with persistent right low back pain since that time. Dr. Shumaker stated that claimant has had 2 courses of physical therapy, and chiropractic care, without benefit. He was taking "Flexeril and Naprosyn for pain. He has been tried on gabapentin and amitriptyline without benefit." (Id.) Dr. Shumaker agreed with prior surgeons "that there is no clear surgical intervention options." (Ex. C, p. 2) Rather, the plan was to proceed with medial branch nerve blocks at L4-5 and L5-S1 right and then consider radiofrequency rhizotomy. (Ex. C, p. 3)

On August 21, 2015, Dr. Shumaker administered the medial branch nerve blocks. (Ex. C, p. 8)

On August 25, 2015, Dr. Shumaker stated that he had nothing surgical to offer, "[m]ay offer referral to pain clinic." (Ex. C, p. 9) Later that same day, it is noted as follows: "[c]an offer patient referral to neurology for weakness and numbness to evaluate further and or pain clinic for pain." (Id.) Claimant was advised of the possible referrals and to "let us know if he wants any of these referrals." (Id.)

On November 6, 2015, claimant returned to see Ms. Anderson at McCrary-Rost Clinic and advised that his back pain has been waxing and waning. The plan was to "[t]ake activities day by day," and "[d]o what your body allows you to do." (Ex. A, p. 37)

On August 10, 2016 Claimant was seen again by Dr. Sassman for a re-evaluation "in light of subsequent treatment he has undergone since my previous evaluation." (Ex. K, p. 1) Dr. Sassman issued a report on August 23, 2016. At the second evaluation, Dr. Sassman reviewed the medical history and conducted a physical

examination. It was noted that claimant was no longer working. (Ex. K, p. 5) Her diagnosis remained the same as it was following the initial IME of "low back pain with radiculopathy." (Ex. K. p. 7) Dr. Sassman also stated that "[m]y opinions with regard to causation have not changed." (Id.) She did however alter her opinion concerning MMI and assigned an MMI date of June 19, 2015, claimant's last visit with Dr. Parenteau. (Ex. E, p. 3) At that time, it was stated that there was no relief from the SI joint injections. (Id.) Dr. Sassman also revised her opinion of the applicable impairment rating and assigned 24 percent to the whole person based on the AMA Guides, Fifth Edition. This impairment rating was based on decreased range of motion, spinal disorder under table 15-7, and sensory deficits. Dr. Sassman found higher ratings at the time of her second evaluation associated with reduced lumbar range of motion and a ratable sensory deficit. (Ex. J, p. 7; Ex. K, p. 8) She assigned a revised final impairment rating of 24 percent to the whole person. (Ex. K, p. 9)

Dr. Sassman also revisited the restrictions and assigned restrictions of:

> lifting, pushing, pulling and carrying to 10 pounds occasionally from floor to waist, 20 pounds occasionally from waist to shoulder, and 10 pounds occasionally over shoulder height. He may occasionally sit, stand and walk, but he will need to change positions frequently due to his symptoms. I would not recommend the use of ladders. He should not use of [sic] the right leg to operate a foot pedal. He may occasionally use stairs but should always employ the use of a handrail.

(Ex. K, p. 9)

On July 9, 2015, Tom Audet of MVR Consulting Services, Inc. issued a report following a vocational evaluation on June 30, 2015. (Ex. 1, pp. 1, 4) At the time of the initial evaluation, claimant was still employed at Farner-Bocken. (Id.) Mr. Audet reviewed medical records and the functional limitations assigned by Dr. Sassman in her initial IME. Claimant advised that he "does not feel that he could work a full 8 hour workday. He feels he could work about 3 hours at most because of his back condition." (Ex. 1, p. 4) I note that no physician had restricted claimant to these limited hours of work. Mr. Anders also noted that he can drive for about an hour and a half before he needs a break. (Id.) Mr. Audet stated that claimant has been employed with Farner-Bocken since 1990 and was earning $19.80 per hour and worked about 33 to 34 hours per week, "but he has missed work because of his back injury," and before the work injury, he "typically worked 38 to 40 hours per week." (Id.) In his current position, claimant was working four hours per day in inventory management, which claimant advised can require lifting up to 100 pounds, but that "most of the day is spent scanning in boxes of inventory that come into the facility." (Id.) When he has to lift 50 pounds, he will get help from co-workers. The remainder of his work day is training others to operate a forklift, order pickers and double jacks, as well as a class on OSHA safety

regulations and he gives tests to co-workers. (Ex. 1, p. 5) Claimant is concerned about his prior suspension due to absenteeism and potential termination in the future for the same reason. (Id.)

Mr. Audet reviewed claimant's work history and education and discussed transferable skills. He concluded that in light of claimant's functional limitations he sustained about an 85 percent reduction in access to the labor market compared to his access prior to the 2013 work injury, but also indicated that the portion of the labor market to which claimant continues to have access include "just over 1500 positions," within 5 occupation classifications (Ex. 1, p. 7) He then determined that claimant would have a "loss of wage earning capacity" from "39% to 54%," based on the conclusion that "occupations that are likely to be compatible with his work restrictions outlined by Dr. Sassman would pay in the range of $9 per hour up to $12 per hour." (Ex. 1, p. 7) This conclusion is stated without any particular supporting information. Mr. Audet stated that based on an "average" for males of similar age and education "who have a work disability" he would expect that claimant would have a 48 percent reduction in work life expectancy. (Ex. 1, p. 7) No particular definition or frame work is detailed for a qualifying "work disability" and its correlation to claimant. Mr. Audet concluded that after combining claimant's various losses according to an unstated formula, that claimant would have "an overall loss of earning capacity ranging from 68% to 76%." (Ex. 1, p. 8)

On August 30, 2016, Mr. Audet issued a supplemental report after reviewing the updated IME of Dr. Sassman, dated August 23, 2016. Mr. Audet also spoke with claimant by phone and learned that he was no longer employed by Farner-Bocken and last worked in July, 2015. Although claimant indicated that he had been offered a position with Farner-Bocken as a dispatcher, "he didn't feel that he could work in this position because he is having ongoing back pain and he has significant flare-ups." (Ex. 2, p. 11) Claimant advised that these flare-ups occur several times per week. "He continues to have these flare-ups and for these reasons he didn't feel that he could work in the dispatcher position that was offered." (Id.) Mr. Audet reassessed claimant based on the updated restrictions from Dr. Sassman as described above and concluded that there would be just two occupational titles available within the revised restrictions, which contain about 70 positions. (Ex. 2, p. 10) Mr. Audet concluded that claimant's "loss of employability would increase to 94% in [sic] his loss of access to the labor market would increase to 99%." (Id.) Mr. Audet described claimant as "unemployable" and stated that he would have a "100% loss of earning capacity." (Id.) Mr. Audet provides this conclusion based on the assumption that claimant's back spasms would prevent him from maintaining a job, if he were offered a job. Mr. Audet does not address the dispatcher job that claimant was offered that would have complied with the revised restrictions from Dr. Sassman.

A position of Transportation Dispatcher was offered to claimant in late October, 2015, and required only light physical work and allowed for alternating positions. (Ex. L;

Ex. M) Claimant did not attempt the job and did not accept the position. Claimant testified that he did not want to take the position because he didn't feel that he could work full-time. (Tr. p. 48) Claimant stated that he believed that he would not be dependable as an employee due to flares of his back pain. (Tr. p. 49) Claimant testified that he tried to work for a year and a half after the injury of November 20, 2013 to July 6, 2015 and estimated that he was going home early about three days per week. (Tr. p. 50) He also stated that he missed over five weeks of work during a six month period and was suspended. (Id.) However, he had been in a position that required more physical effort than the Dispatcher position that was later offered. Claimant agreed at hearing that there were no restrictions assigned by any physician that would have kept him from accepting and performing the dispatcher position that he was offered. (Tr. p. 61)

Claimant was also concerned about taking the dispatcher position because the employer had a work rule that an employee was to call at least six hours prior to the start of the shift if he/she was not going to be able to come to work. Failure to do so was a "late call". (Tr. p. 48) When an employee calls in less than six hours before their shift, they are assigned disciplinary points, which can accumulate to written warning, a one week suspension and then termination. (Tr. p. 75) Each accumulated point drops off the employee's total number of points 90 days after the occurrence. (Id.) However, claimant testified that the flares of back pain are sometimes unknown to him until he wakes up in the morning and because the job was a day shift, he felt he would not be able to comply with the six hour call rule. (Id.)

The employer's response to claimant's concern regarding the six hour rule was expressed through Amy Ross, Human Resources Director at Farner-Bocken. She stated that it shouldn't be a problem because the job did not start until 8:30 a.m. (Tr. p. 72) However, this would mean that it would be necessary for claimant to call in before 2:30 a.m. apparently knowing that he would awake with a flare of back pain four or five hours later. Unless, he went to the authorized doctor and the doctor agreed that he should be off work that day, then the late call would be excused. (Tr. p. 73) This doctor excuse accommodation was expressed through a letter to claimant's attorney on November 2, 2015. (Ex. M, p. 4)

Amy Ross, Human Resources Director at Farner-Bocken, testified that the transportation dispatch position was a regularly occurring job in the normal course of business for this employer. (Tr. pp. 65-66) She stated that she believed claimant had relevant work experience at Farner-Bocken that may make him a good candidate for the job and that the position was "an office job" and did not require physical work. (Tr. pp. 67-69) Ms. Ross testified that the job would allow claimant to alternate between sitting and standing and he could walk as needed. The dispatcher position is not tied to a handset, but uses an ear set with "fairly decent range" for communication. (Tr. pp. 69-70)

Ms. Ross stated that the transportation dispatch position would have been a 25 cent per hour increase in pay from claimant's previous position. (Tr. pp. 70-71)

Claimant testified that his current symptoms included constant numbness in his toes. (Tr. p. 19) He further described his symptoms as "shots that go down the back of my right leg from time to time", varying pain, leg weakness "after I'm up for a while," that "varies from day to day," and if he continues to "push and keep going, then both legs get weak." (Id.) He also described an electrical sensation in his back. (Id.) He stated that the symptoms with his right leg did not exist in 2003, when he had a low back work injury. (Tr. p. 20)

Claimant responded in his answer to interrogatories that he had not applied for any jobs since the date of his injury, but continued with his self-employment, which consisted of about two to four hours per week and primarily involved doing chores related to calves and the sale of calves. (Ex. N, pp. 5, 6) Claimant reported that this self-employed farm income typically operated "at a loss." (Ex. N, p. 5)

Concerning claimant's unauthorized medical expenses from seeing Dr. Skinner in 2014, the MRI in February 2015, the physical therapy Dr. Skinner ordered, the referral to CNOS and Dr. Shumaker, and to Dr. Parenteau, the pain specialist, the following exchange occurred at hearing:

> Q: And as we sit here today, did that treatment that you pursued starting with Dr. Skinner and through those physicians offer you any long-term relief or better function than when you had last been seen by Dr. Hieb?
>
> A: No.

(Tr. p. 63)

As described above, Dr. Hieb assigned a 50 pound lifting restriction and on June 3, 2014, he assigned a 5 percent whole person impairment. (Ex. A, p.15) Dr. Igram did not assign an impairment rating, but on October 31, 2014, he did assign a work restriction of lifting no more than 50 pounds for one third of his shift. (Ex. B, p. 6) On August 23, 2016, Dr. Sassman assigned a final permanent impairment of 24 percent and restrictions including lifting between 10 to 20 pounds. She also included restrictions on sitting, standing and walking. (Ex. K., p. 9)

Defendants argue that Dr. Sassman's opinion is unreliable because she concludes that claimant did not have any symptoms down his right leg prior to the November 20, 2013, work injury. Dr. Sassman's conclusion in this regard is not

accurate. The records indicate that claimant did have prior right leg and foot numbness and tingling that he reported to his chiropractor in February 2009. (Ex. I, p. 2) The records also state that just nine days prior to the work injury, claimant complained of numbness in the toes in of his right foot. (Ex. F, p. 7) Claimant agreed that he did not advise Dr. Sassman of his prior right leg and foot symptoms. (Tr. pp. 59-60)

I find that the opinion of the treating physician, Dr. Hieb, who had the opportunity to see claimant over several appointments is the most persuasive. I further accept Dr. Hieb's lifting restriction of 50 pounds, which is consistent with the opinion of Dr. Igram.

I find that the defendant employer offered work to claimant within his restrictions, even the restrictions assigned by Dr. Sassman, in the form of the Transportation Dispatcher, which claimant refused to even attempt. I further find that claimant did not seek out other employment after his separation from employment with defendant. I find that claimant is not motivated to return to work.

I find that claimant has had previous supervisory work experience.

Considering claimant's age, education, prior work history, functional impairment, physical restrictions, lack of motivation to return to the work force, and all other factors appropriate for the consideration of industrial disability, I find that claimant has sustained 40 percent industrial disability.

Considering the appropriate date for the commencement of permanent partial disability benefits, I find that following the work injury, claimant was taken off work and was returned to modified work duty on December 9, 2013. (Ex. D, pp. 5, 13, 17)

Regarding claimant's entitlement to unauthorized medical expenses, he testified as noted above that the unauthorized treatment he received was not helpful.

Considering claimant's assertion for alternate medical care, it was asserted at hearing that claimant wanted a continuation of existing care, but more specifically, follow-up care with Dr. Shumaker. (Tr. pp. 6-7) On July 30, 2015, Dr. Shumaker noted that claimant had chiropractic care that provided no benefit, MRIs and two surgical consultations that concluded claimant was not a surgical candidate, trials of gabapentin and amitriptyline that were without benefit (he was taking Flexeril and Naprosyn at that time), and he had an SI injection that gave about 1 week of benefit, although claimant thought the improvement may have simply come from being off work for a week. (Ex. C, p. 1) He concluded that there was no clear surgical option. (Ex. C, p. 2) Rather, Dr. Shumaker recommended a diagnostic medial branch block at L4-5 and L5-S1, "and if patient responds x2, then consider radiofrequency rhizotomy." (Ex. C, p. 3) The medial branch block was not successful and Dr. Shumaker did not offer any additional treatment. (Ex. C, p. 9) The record indicates that Dr. Shumaker was willing to make a

"referral to neurology for weakness and numbness to evaluate further and or pain clinic for pain." (Id.) The same note indicates that claimant was advised of this and that "[h]e will let us know if he wants any of these referrals." (Id.) It does not appear to the undersigned that claimant asked Dr. Shumaker for the referral and it also does not appear that claimant presented any dissatisfaction to defendant of the current care.

Claimant testified that he last received medical treatment on December 4, 2015. However, the medical records presented at hearing indicate that on that date, he was seen by Danniele Anderson, PA-C, for an "annual wellness exam." (Ex. A, p. 38) There was no recommendation at that time for any particular treatment concerning his work injury. On November 6, 2015, claimant was seen by Ms. Anderson and reported waxing and waning of his symptoms and the plan was to "[t]ake activities day by day," and "[d]o what your body allows you to do." (Ex. A, p. 37) He was to follow-up as needed. (Id.) That was about one year prior to the hearing and the evidence does not support a finding that claimant has sought out any additional care, asked for additional care from the defendant or followed-up on the referral offers from Dr. Shumaker or returned to see Ms. Anderson.

If claimant seeks additional care from the last authorized treating provider and the same is denied, he remains free to file an Application for Alternate Medical Care, but under the current evidence presented, I cannot find that the current care being offered is unreasonable. Primarily, because it is not clear that claimant has sought authorized care that has been denied.

CONCLUSIONS OF LAW

The first issue in this case is the extent of industrial disability.

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, 593; 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-

On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); 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).

As stated above and for the reasons there given, I have determined that claimant has sustained 40 percent industrial disability.

The second issue is the appropriate date for the commencement of permanent partial disability benefits.

The Iowa Supreme Court determined in Evenson v. Winnebago Industries, Inc., 881 N.W.2d 3609 (Iowa 2016) that the claimant's return to work established the commencement of PPD benefits, which was not precluded by the fact that claimant was later entitled to additional TPD benefits when he was assigned restrictions that prevented claimant from working his regular hours. The court stated, "[T]he commencement of Winnebago's obligation to pay PPD benefits cannot be delayed until after the TPD benefits subsequently terminated under the plain meaning of section 85.34." Evenson v. Winnebago Ind., Inc., 881 N.W.2d at 374.

I have found above that claimant returned to work following the work injury on December 9, 2013. I now conclude that December 9, 2013 is the appropriate conversion date for permanent partial disability benefits.

The next issue is whether claimant is entitled to payment of medical expenses as attached to the hearing report.

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

The Iowa Supreme Court made it clear in R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (2003) that by seeking unauthorized medical care, claimant bears the burden of paying for those charges as they become due. Claimant may seek reimbursement for those unauthorized charges, but bears a certain evidentiary burden as explained by the Iowa Supreme Court in Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010) if it later determined that defendants possessed the legal right to select the authorized treating physician. Claimant should be cognizant of these rights and

corresponding duties and obligations should claimant choose to abandon the protections of Iowa Code section 85.27. Defendants may elect to assert an authorization defense should claimant refuse the treatment offered without an order of this agency transferring care.

"We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010)

I have found above that claimant testified that the unauthorized care did not provide him with any benefit. I cannot conclude under this evidence that the unauthorized care was beneficial and provided a more favorable medical outcome than would have likely been achieved by the authorized care. Claimant has failed to carry his burden of proof in this matter and the claim for medical reimbursement is denied.

The next issue is whether claimant is entitled to follow-up care with Dr. Shumaker at CNOS.

On August 21, 2015, Dr. Shumaker administered a diagnostic medial branch block. On August 25, 2015, Dr. Shumaker stated that he had nothing surgical to offer and indicated that a referral could be made to neurology for further evaluation and/or a pain clinic. Claimant was to let him know if he desired either referral. The records do not indicate that claimant requested such referrals at that time.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may,

> upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

I have found above that under the current evidence presented, I cannot find that the current care being offered is unreasonable, primarily because it is not clear that claimant has sought authorized care that has been denied.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant industrial disability benefits of two hundred (200) weeks, commencing on December 9, 2013, until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated in the hearing report that defendants are entitled to a credit of 25 weeks.

All weekly benefits shall be paid at the stipulated rate of four hundred seventy six and 87/100 dollars ($476.87) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

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

Signed and filed this 2 day of August, 2017.

TOBY J. GORDON
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.