BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CLETUS HEIM,	File Nos. 5044264, 5052066
Claimant,	ARBITRATION
vs.	DECISION
A.Y. MCDONALD MFG. CO.,	
Self-Insured, Employer, Defendant.	Head Note Nos.: 1803, 2500

STATEMENT OF THE CASE

Cletus Heim, claimant, filed petitions in arbitration seeking workers' compensation benefits from A.Y. McDonald, as a result of injuries he allegedly sustained on August 1, 2013 and December 29, 2011 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on September 1, 2015. The evidence in this case consists of the testimony of claimant, Chad Huntington and claimant's exhibits 1A through 6A, claimant's exhibits 1 through 19 and defendant's exhibits A through R. In this decision I will refer to the claimant as Mr. Heim and defendant A.Y. McDonald Manufacturing Company as A.Y. McDonald, employer or respondent. Both parties submitted briefs which were considered along with the testimony and exhibits.

ISSUES

For File No. 5044264 (Date of Injury December 29, 2011):

1. Whether claimant sustained an injury on December 29, 2011 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of permanent disability and, if so;
3. The extent of claimant's disability.
4. Whether claimant is entitled to alternate medical care.
5. Whether claimant is entitled to payment of medical expenses.
6. Whether claimant is entitled to payment of medical mileage.

7. Whether a credit is available to the employer under Iowa Code section 85.34(7)(a).

8. Assessment of costs.

For this file, the parties agreed that if Mr. Heim is found to have a permanent disability it is an industrial disability with a commencement date of December 30, 2011 and that his weekly rate is $566.19. The parties also stipulated that the medical providers would testify as to the reasonableness of their fees and treatment and that the treatment was related to the claim of work injury. The parties agreed that the medical expenses attached to the hearing report for Elements Acupuncture from June 25, 2012 through May 29, 2013 had been resolved and that only the dates of service of June 10, 2013 through from June 10, 2015 continued to be in dispute. The amount of any temporary benefits is not in dispute.

For File No. 5052066 (Date of Injury August 1, 2013):

1. The extent of claimant's disability.

2. Whether claimant is entitled to alternate medical care.

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

4. Whether claimant is entitled to payment of medical mileage.

5. Whether a credit is available to the employer under Iowa Code section 85.34(7)(a).

6. Assessment of costs.

For this file, the parties agreed that if Mr. Heim is found to have a permanent disability it is an industrial disability with a commencement date of June 6, 2014 and that his weekly rate is $610.38. The parties agreed that at the time of the hearing the employer had paid 55 weeks of benefits and benefits were continuing. The parties agree that A.Y. McDonald shall receive a credit for the payments made. The parties also stipulated that the medical providers would testify as to the reasonableness of their fees and treatment and that the treatment was related to the claim of work injury. The parties agree that if medical benefits in File No. 5044264 are awarded for the same provider and time period in File No. 5052066 the claimant is not entitled to a double recovery and only one award for such expense shall be granted.

For both files the respondent agreed in the hearing to provide prolotherapy.

FINDINGS OF FACT

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

Cletus Heim, claimant, was 63 years old at the time of the arbitration hearing. He graduated from high school. He has no other formal education. Mr. Heim's vocational history is found in Exhibit 13. Mr. Heim's work post high school generally has been physically demanding. (Transcript pages 14 – 18) In September 1981 Mr. Heim was first hired by A.Y. McDonald. He worked for about eight months and was laid off. He was re-hired in November 1982. (Tr. p. 18) Mr. Heim continued working for A.Y. McDonald until he retired on November 7, 2014. (Tr. p. 19)

While working full time for A.Y. McDonald he also worked at a plumbing and heating company. The plumbing and heating company went out of business, and in 1985 Mr. Heim started his own part-time business doing home repair. (Tr. p. 20) In 1985 Mr. Heim switched his part-time business to a different type of repair work, installing home vacuum systems and some home repairs and continued in this part-time job until 2004. (Tr. p. 22)

While working for A.Y. McDonald Mr. Heim performed a number of different jobs including Laborer, Core Maker, Rough Cast Finisher, Utility Worker, Auto Mold Machine Operator and Cast Inspector. (Ex. 15, p. 2) In 1990 Mr. Heim worked as a Cast Inspector. The job description for this position listed lifting regularly up to 10 pounds. (Ex. 12, p. 1) Mr. Heim testified that the requirements were greater than 10 pounds, and the empty tote pans weighed 15 pounds. A training manual for the position states that lifting of up to 65 pounds is required. (Ex. 12, p. 19) I find that the Cast Inspector position required lifting over 25 pounds on some occasions. As a Cast Inspector Mr. Heim was required to work 50 hours per week. In the weeks before his alleged December 29, 2011 and his August 1, 2013 injuries he was generally working over 40 hours. (Tr. p. 35; Ex. 19. pp. 1 – 15)

Mr. Heim discussed a number of incidents and procedures he had concerning his back before his alleged injury in December 2011. He said that in 1997 or 1998 he had back surgery on some bulging disks. Mr. Heim stated that after a short time he returned to work without restrictions. (Tr. pp. 28, 29) Mr. Heim agreed that throughout the years he had treatment on and off for left and right leg pain and pain in his lower back. He has had injections, a number of MRIs and physical therapy. (Tr. p. 29)

Mr. Heim's medical history is relevant to his claim. A summary of treatments is found in Exhibit 1A pages 1 through 3. Erin Kennedy, M.D. went through a chronological examination of the records before the December 29, 2011 injury so most of it will not be reported in depth in this decision. (Ex. A, pp. 1 - 4) In 1997 Michael Chapman, M.D. performed back surgery. Mr. Heim returned work without restrictions. (Tr. p. 91) In November 2008 Mr. Heim fell and injured his back. He was hospitalized a few days. On January 6, 2009 Dr. Chapman performed spinal fusion surgery. (Tr. p. 31; Ex. 5A, p. 50; Ex. A, p. 3) He performed a two-level fusion. (Tr. 93) Mr. Heim was released to return to work without restriction on March 2, 2009. (Ex. 2A, p. 42) On January 14, 2010 Dr. Chapman reported left thigh numbness and improved level of pain after an SI injection. (Ex. A, p. 3) In March 2011 Peggy Mulderig, M.D. performed a radiofrequency ablation, and Mr. Heim reported improvement. (Ex. A, p. 4;

Ex. 6A, p. 61) On October 26, 2011 Dr. Mulderig provided paperwork for a handicap car permit for Mr. Heim's knee and back impairments. She refilled his prescriptions on December 1, 2011. (Ex. 2A, pp. 102, 104)

Mr. Heim stated that prior to his December 29, 2011 injury he had no permanent restrictions. (Tr. p. 33)

Mr. Heim said that on December 29, 2011 he was picking up a tote pan at work, felt a pop in his back and then felt pain in his lower back and down to his right toes. (Tr. p. 36) He reported this injury to his supervisor and was taken by ambulance to Dubuque Industrial Medicine. Mr. Heim returned to work with a five-pound lifting restriction. A.Y. McDonald accommodated his restrictions by having another inspector perform any lifting. (Tr. p. 38) Mr. Heim continued in his inspector position with an accommodation up until his work injury of August 1, 2013. (Tr. p. 38)

After his December 2011 injury Mr. Heim had a discussion with Chad Huntington, A.Y. McDonald's human resources director, about looking at alternative medicine such as acupuncture and chiropractic care. (Tr. p. 39) At that time Mr. Heim was treating with Dr. Chapman. Dr. Chapman did not recommend surgery, but recommended acupuncture. (Tr. p. 40) On February 23, 2012 Dr. Chapman wrote to the workers' compensation claims administrator concerning Mr. Heim's injury. In this letter he stated:

> Mr. Heim has continued to have issues ever since his surgery for his original work comp claim. He had been getting along reasonably well until he bent over to pick up a pan at work and has had a substantial flare-up ever since.
>
> Therefore, I think any intervention for this current flare-up is work related.

(Ex. 5, p. 11)

Mr. Heim went to Elements Acupuncture and received treatment from Joel Thielen. The acupuncture would reduce his pain for three to four days. For a time period the acupuncture helped Mr. Heim to stop taking morphine. (Tr. p. 42)

On March 19, 2012, Dr. Mulderig declined to just be a provider for Mr. Heim's December 29, 2011 injury, as she explained she had been providing treatment for some time and was not comfortable treating his work exacerbation, as it was difficult to differentiate between chronic and acute pain. (Ex. 5, p. 34)

On August 24, 2012 Howard Kim, M.D. increased Mr. Heim's lifting restrictions from 5 to 15 pounds. (Ex. 2, p. 32) On September 22, 2012, Dr. Kim increased Mr. Heim's restrictions to up to 50 pounds and allowed him to finish several more weeks of acupuncture treatment. (Ex. 2, p. 33) Claimant testified that his pain level increased with the new lifting restriction. (Tr. p. 43) On November 15, 2012 Dr. Chapman noted Mr. Heim's pain had increased when he worked above 20 pounds. He recommended

continuation of acupuncture. (Ex. 5, p. 13) On January 9, 2013 Dr. Chapman declared Mr. Heim to be at maximum medical improvement (MMI), provided a permanent 20 pound lifting restriction and stated "To stay functional, it looks like he will require probably weekly acupuncture treatments to try to keep working at the same level." (Ex. 5, p. 16) I find this to be the date that Mr. Heim was at MMI for his December 29, 2011 injury.

A.Y. McDonald provided work within Mr. Heim's 20-pound restriction. (Tr. p. 44) Dr. Kim provided a permanent impairment rating on March 6, 2013 of 13 percent to the whole body. (Ex. 2, p. 38) Dr. Kim was asked by a case manager for respondents to re-examine the case and write an addendum. (Ex. 2, p. 39) Dr. Kim declined to change his opinions. (Ex. 2, p. 40)

On August 1, 2013 Mr. Heim was at work, reached for a pan that was falling, felt a snap in his back and pain that went down to his right foot. Mr. Heim testified that the pain was so severe it caused him to vomit. (Tr. p. 46) Mr. Heim was taken by his supervisor, Jeff Garber, for medical care. He was seen by Julie Muenster, ARNP, prescribed medication and asked to see Erin Kennedy, M. D. the next day. (Ex. 6, p. 19) Dr. Kennedy's assessment was that he has a work-related exacerbation of the underlying degenerative condition. (Ex. 6, p. 22) On August 8, 2013 her assessment was, "Low back pain and SI joint pain, radiating to the right lower extremity, paresthesias of the toes. This is in the setting of chronic degenerative spine and disk disease. This is in the setting of a chronic and substantial back history." (Ex. 6, p. 31) Dr. Kennedy noted that Mr. Heim had some success with acupuncture and could consider acupuncture if the epidural and SI joint injection are not appropriate or do not improve his condition. (Ex. 6, p. 41) Dr. Kennedy released Mr. Heim to return to work on August 21, 2013 with restrictions on weight, bending and the number of hours he could work. He was to work four hours Monday, Wednesday and Friday and two hours Tuesday and Thursday. (Tr. p. 48; Ex. 6, p. 43) On October 18, 2013 Dr. Kennedy had a discussion with Dr. Mulderig about a third ESI. Dr. Kennedy noted that Dr. Mulderig believed Mr. Heim was nearing a work-disabled state. (Ex. 6, p. 55) On March 30, 2013 Dr. Kennedy opined that Mr. Heim would not very likely sustain an 8-hour day at work. She noted that his spine condition "...which is largely not the result of this particular incident in the workplace." (Ex. 6, p. 59)

Dr. Kennedy referred Mr. Heim to Eugene Collins, M.D. for an evaluation as to whether back surgery was an option. Dr. Collins saw Mr. Heim on November 22, 2013. Dr. Collins recommended against additional spine surgery given Mr. Heim's symptoms and the fact that he has had two previous spinal surgeries. He recommended possible injections at S1 and conservative treatment including acupuncture for a limited time. (Ex. 10, p. 3) On December 10, 2013 Dr. Kennedy reviewed Dr. Collins' report. Dr. Kennedy recommended a course of acupuncture. (Tr. p. 51; Ex. 6, p. 70) Mr. Heim returned to Mr. Thielen for more acupuncture.

Mr. Heim would generally carpool to work. Due to his need to attend medical appointments he was not able to carpool, and he incurred medical mileage expenses.

(Tr. pp. 76, 77) Dr. Kennedy also recommended the IMRS device (magnetic mat). (Ex. 6, p. 73) A.Y. McDonald purchased the IMRS device for Mr. Heim. (Tr. p. 53) On March 14, 2014 Dr. Kennedy increased the amount of time Mr. Heim could work to four hours a day for five days a week, with limited bending and twisting and lifting up to 20 pounds. (Ex. 6, p. 80) On May 9, 2014 his lifting limitation was decreased to 15 pounds. (Ex. 6, p. 81) On June 6, 2014 Mr. Heim reported to Dr. Kennedy that his pain had increased. He also reported he was going to retire. Dr. Kennedy provided permanent restrictions of work limited to three hours per day and a 20-pound lifting limitation. She found Mr. Heim to be at MMI on that day. Dr. Kennedy closed out Mr. Heim's case at that time with a referral to Dr. Mulderig. (Ex. 6, p. 85; Tr. p. 86)

Mr. Heim acknowledged that Dr. Kennedy on April 24, 2013 did not believe that the December 29, 2011 work incident caused any permanent impairment. (Tr. p. 78; Ex. A, p. 8) He also acknowledged that his care for the December 29, 2011 injury was coming to an end. (Tr. p. 79) Dr. Kennedy recommended acupuncture on December 10, 2013. (Tr. p. 79) Mr. Heim has had 88 acupuncture treatments. He said that he received temporary relief from those treatments. (Tr. 81) From May 16, 2014 through March 15, 2015 Mr. Heim did not receive acupuncture treatment, as treatment was no longer authorized by A.Y. McDonald. As of June 6, 2014 Mr. Heim understood that his acupuncture would no longer be considered a covered expense. (Tr. p. 83)

Mr. Heim retired on November 7, 2014. (Tr. p. 58) Mr. Heim said that it was a monetary decision that made him decide to retire; with working three hours a day it was not economically feasible to continue to work. (Tr. p. 57) Mr. Heim was eligible for a pension and social security when he retired. (Tr. p. 58) I find that but for the injury of August 1, 2013 and the restriction of working three or four hours per day, Mr. Heim would not have retired. Mr. Heim has not looked for any work since he retired. (Tr. p. 103)

Dr. Mulderig suggested that Mr. Heim consider a referral to the University of Wisconsin to see if prolotherapy was appropriate for his spine. (Tr. p. 60) Mr. Heim stated that Dr. Mulderig has indicated that acupuncture is an appropriate treatment. Dr. Mulderig was prescribing Diclofenac and Hydrocodone for Mr. Heim's back condition. The Diclofenac was prescribed before the December 2001 injury. (Tr. p. 74)

On March 16, 2015 Mr. Heim informed Dr. Mulderig that he would like to be considered for prolotherapy. (Ex. 5, p. 60) Dr. Mulderig wrote that Mr. Heim could do acupuncture, if allowed by workers' compensation. (Ex. 5, p. 61) On April 7, 2015 Dr. Mulderig referred Mr. Heim to the University of Wisconsin, Madison, for prolotherapy. On May 12, 2015 Dr. Mulderig, in response to a letter from Mr. Heim's attorney, wrote "Acupuncture and prolotherapy are both treatments that can be helpful for his diagnosis." (Ex. 5, p. 67) She noted that other treatments had failed. (Ex. 5, pp. 67, 68)

At the time of the hearing Mr. Heim could stand for up to 15 minutes. He could walk short distance, but used a cane when walking up to two blocks. Mr. Heim would ride in a carpool to work when he did not have a medical appointment. (Tr. p.78)

The respondent has authorized prolotherapy. (Tr. p. 90) The respondent had questions as to whether the prolotherapy should take place at the same time as Mr. Heim is receiving acupuncture. (Tr. p. 90)

Chad Huntington, Vice President of Human Resources testified. Mr. Huntington was not asked by Mr. Heim as to whether there was a safe (lead free) area that Mr. Heim could use the IMRS mat. He believed that he could have worked out something. Mr. Huntington confirmed that he requested that Mr. Heim not retire and that he continue his work with A.Y. McDonald. (Tr. p. 114)

On March 27, 2013 Dr. Kennedy was requested to take over the care for Mr. Heim. In the letter sent by Sara Palmer, R.N., she stated "Dr. Kim provided a rating which the adjuster feels was grossly over-rated and not for the work injury. She doesn't feel he took into consideration his prior back history as it relates all to the 12/29/11 date." (Ex. 6, p. 1)

On April 24, 2013 Dr. Kennedy performed an impairment rating at the requests of the respondents for the December 29, 2011 injury. (Ex. A, pp. 1 – 9; Ex. 6, pp. 3 – 11)

Dr. Kennedy wrote,

> I strongly question causation in this case. Mr. Heim reported an event at work requiring lifting of 16 pounds. This is certainly not expected to cause derangement of the spine in a normal individual; however, Mr. Heim is an individual with chronic degenerative spinal condition. It is possible that this amount of lifting could have caused a derangement; however, it must be determined whether or not it did cause a derangement. It does not appear that MRI findings taken after this injury revealed acute changes consistent with the reported injury. A practitioner could also attempt to determine causation based on subjective symptoms. Mr. Heim reported a baseline level of pain of 1/10 compared to the 6/10 he reported after the injury. This baseline level of pain is not consistent with the need for MORPHINE SULFATE: therefore, I am highly suspicious that his baseline level of pain was very similar to the 6/10 that was reported after injury. I also consider that he was seen less than 1 month prior to this injury for back pain that was similar in description and location to that which was reported after the injury; therefore, assuming information provided through the medical record is true and correct, I have no reason to believe that the work event contributed substantially to the back injury. Instead, it is my opinion that this gentleman is manifesting a clinical presentation that is consistent with his chronic degenerative and progressive condition.

(Ex. A, p.8; Ex. 6, pp. 9, 10) She stated that the MMI date would be January 9, 2013. Dr. Kennedy recommended a functional capacity evaluation to determine his physical restrictions. At that time she held that his back condition was a personal condition and not a workers' compensation injury.

On August 2, 2013 Dr. Kennedy examined Mr. Heim for an injury that occurred on August 1, 2013. Her assessment was that he has a work-related exacerbation of the underlying degenerative condition. (Ex. 6, p. 22) On August 8, 2013 her assessment was, "Low back pain and Si joint pain, radiating to the right lower extremity, paresthesias of the toes. This is in the setting of chronic spine and disk disease. This is in the setting of chronic and substantial back history." (Ex. 6, p. 31) Dr. Kennedy provided a restriction of working four hours per day and lifting up to 15 pounds. (Ex. 6, p. 33) On August 21, 2013 Dr. Kennedy noted that an MRI showed a marked change at the L4 to L5. (Ex. 6, p. 40) Dr. Kennedy noted that Mr. Heim had some success with acupuncture and could consider acupuncture if the epidural and SI joint injection are not appropriate or do not improve his condition. (Ex. 6, p. 41)

On December 22, 2014 Mark Taylor, M.D. performed an IME. (Ex. 11, pp. 1 – 20) As to whether Mr. Heim's December 2011 injury aggravated any prior back condition, his answer was somewhat equivocal. He stated,

> Based on the history provided, and the currently available medical records, it is my opinion that, at a minimum, Mr. Heim sustained a work-related exacerbation of a pre-existing chronic condition; however, I will again point out that many of his (previous) symptoms were generally left-sided, whereas the injury on December 29, 2011 focused on the right side and the injections and procedures related to the work injury were also on the right side. It is difficult to offer an opinion as to whether the injury led to an exacerbation versus an aggravation since he was apparently still awaiting additional evaluation and there was no additional follow-up after the appointment with Dr. Kennedy on May 31, 2013 until after the injury on August 1, 2013. Because it is difficult to determine whether this was an exacerbation versus an aggravation, I will simply note that the work injury worsened his condition due to the fact that he was experiencing pain that was more pronounced on the right side and into the right lower extremity, and the focus had switched to the right side. Furthermore, his pain levels were higher.

(Ex. 11, p. 13) Dr. Taylor was not able to determine if the December 2011 injury was a (permanent) aggravation or a (temporary) exacerbation. Dr. Taylor stated that Mr. Heim's acupuncture treatments appeared reasonable and necessary. (Ex. 11, p. 14)

As to the August 1, 2013 injury Dr. Taylor found that it was an aggravation of his pre-existing condition. (Ex. 11, p. 5) He provided a 10 percent whole person impairment rating for this injury. (Ex. 11, p. 16) He provided lifting restrictions of

20 pounds from waist to chest on a rare to occasional basis, 5-10 pounds between knee and waist and avoid lifting below the knee. He said no ladder climbing and to only climb stairs rarely. (Ex. 11, p. 17)

I find that Mr. Heim is not able to work eight hours. He is limited in lifting limitation set forth by Dr. Taylor. He can rarely climb stairs, never climb ladders and engage in repetitive twisting, bending or crawling. Mr. Heim has lost all reasonable access to the labor market. He was limited to working three hours a day at the time of his retirement. While A.Y. McDonald did and was willing to provide accommodated work the evidence is clear that Mr. Heim has lost 100 percent of his earning capacity in the relevant labor market.

REASONING AND CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

December 29, 2011 injury.

The evidence concerning the causation of permanent impairment for the December 11, 2011 work injury is conflicting. Dr. Kennedy is firm in her opinion that the work injury did not cause a permanent injury. Dr. Taylor was somewhat equivocal about whether there was a permanent aggravation. Having considered all of the evidence I find that Mr. Heim has not met his burden of proof as to permanent injury due to his December 29, 2011 injury.

August 1, 2013 injury.

I find Mr. Heim has met his burden to prove that he has a permanent impairment due to the August 1, 2013 injury. The evidence from Dr. Taylor and Dr. Kennedy show that Mr. Heim's pre-existing back condition was permanently aggravated by the August 1, 2013 work injury. Dr. Kennedy opined on October 30, 2013 that the condition of Mr. Heim's spine was largely not the result of any particular work incident. (Ex. 6, p. 59) Dr. Kennedy seems to acknowledge that the work incident did contribute some to his back condition. Mr. Heim's testimony was credible that after his August 1, 2013 injury he never returned to baseline and was not able to return to full-time employment once he went to four-hour work days. I find Dr. Taylor's opinion of permanent aggravation to be most convincing, considering the evidence.

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. Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982). The Iowa Supreme Court has adopted the full-responsibility rule. Under that rule, where there are successive work-related injuries, the employer liable for the current injury also is liable for the preexisting disability caused by any earlier work-related injury if the former disability when combined with the disability caused by the later injury produces a greater overall industrial disability. Venegas v. IBP, Inc., 638 N.W.2d 699 (Iowa 2002); Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995); Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995). The full-responsibility rule does not apply in cases of successive, scheduled member injuries, however. Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id. Mr. Heim testified that he was going to work until at least age 65. He also mentions to Dr. Kennedy he was thinking of retiring e when he was 65. While Mr. Heim may have retired when he reached age 65 if was not certain.

Mr. Heim is presently disabled for work, and his work injury totally disabled him at the time of the arbitration hearing from performing work with his experience, training, and physical capacity. I previously found that Mr. Heim has a 100 percent loss of earning capacity. This entitles him to a finding that he is permanently and totally disabled. Certainly Mr. Heim's back conditions predate his December 2011 and August 2013 injuries. However, the pre-existing condition was materially aggravated by his August 1, 2013 injury.

Payment for medical care.

Iowa Code section 85.27 provides in relevant parts,

1. The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

. . . .

4. For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization. An employer is not liable for the cost of care that the employer arranges in response to a sudden emergency if the employee's condition, for which care was arranged, is not related to the employment. 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. In an emergency, the employee may choose the employee's care at the employer's expense, provided the employer or the employer's agent cannot be reached immediately. An application made under this subsection shall be considered an original proceeding for purposes of commencement and contested case proceedings under section 85.26. The hearing shall be conducted pursuant to chapter 17A. Before a hearing is scheduled, the parties may choose a telephone hearing or an in-person hearing. A request for an in-person hearing shall be approved unless the in-person hearing would be impractical because of the distance between the parties to the hearing. The workers' compensation commissioner shall issue a decision within ten working days of receipt of an application for alternate care made pursuant to a telephone hearing or within fourteen working days of receipt of an application for alternate care made pursuant to an in-person hearing. The

> employer shall notify an injured employee of the employee's ability to contest the employer's choice of care pursuant to this subsection.

The Iowa Supreme Court analyzed the payment of medical expenses under Iowa Code section 85.27 in Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

> 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. The allocation of this significant burden to the claimant maintains the employer's statutory right to choose the care under section 85.27(4), while permitting a claimant to obtain reimbursement for alternative medical care upon proof by a preponderance of the evidence that such care was reasonable and beneficial. Nevertheless, the employer's right to choose medical care does not prevent the employee from choosing his or her own medical care at his or her own expense under two circumstances. Both of these circumstances normally arise when a dispute occurs between the parties.

Under Iowa Code section 85.27, the employer has the right to choose medical care as long as it is offered promptly and is reasonably suited to treat the injury without undue inconvenience to the employee. An employer is not responsible for the cost of medical care not authorized by section 85.27, with an important exception. A claimant can seek payment of unauthorized medical care by proving by a preponderance of the evidence that the unauthorized care was reasonable and beneficial. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). To be beneficial, the medical care must provide a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. at 206. The claimant has a significant burden to prove the care was reasonable and beneficial. Id. at 206.

In this case there is a dispute for acupuncture of June 13, 2013 through September 12, 2013 and March 12, 2015 through June 10, 2015.

Mr. Heim was found to be at MMI as of January 9, 2013 for his December 29, 2011 injury. I find he was at MMI as of that date. As such, I find that the care he received from January 10, 2013 through July 31, 2013 was not related to a work injury, and the respondent is not responsible for the acupuncture costs or the medical mileage for these expenses.

The acupuncture expenses incurred after August 1, 2013 are related to his work-related injury. A number of physicians stated that the acupuncture was beneficial to Mr. Heim. Mr. Heim credibly testified the acupuncture helped his pain. I find that Mr. Heim has shown the acupuncture was beneficial and provided a more favorable outcome than the authorized treatment provided by the employer. A.Y. McDonald is responsible for the acupuncture cost and medical mileage from March 12, 2015 through June 10, 2015.

A.Y. McDonald is responsible for medical mileage for the times from December 29, 2011 through January 9, 2013 and August 1, 2013 through the hearing date.

Credit under Iowa Code section 85.34(7).

As I have not awarded any permanent partial benefits for the December 29, 2011 injury there are no credits to award the respondent. (See also: Drake University v. Davis 769 N.W.2d 176, p. 183, 184 (Iowa 2009)).

Alternate care

The respondent has agreed to provide an evaluation at the University of Wisconsin as to whether to proceed with prolotherapy. As the respondent stated on the record, they will provide such a referral. The statement was accepted by the undersigned. It was unknown at the time of the hearing as to whether there would be a recommendation to proceed with prolotherapy. If the recommendation is made after evaluation to proceed with prolotherapy, the respondents shall provide such care.

If it is the recommendation from the medical providers that acupuncture be suspended during the prolotherapy, then the respondent does not need to pay or provide acupuncture during the time period recommended by the medical personnel performing the prolotherapy. A.Y. McDonald shall also provide continued acupuncture care to Mr. Heim. Certainly there should be coordination between the provider of the prolotherapy and acupuncture, so that the care can be coordinated and Mr. Heim is not harmed.

Costs.

Iowa Code section 86.40 states:

All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Claimant has requested filing fees in the amount of $100.00 for each file; I award this cost.

ORDER

For File No. 5044264 (Date of Injury December 29, 2011):

Mr. Heim shall take no permanent partial disability benefits.

A.Y. McDonald shall pay medical mileage as set forth in this decision.

A.Y. McDonald shall pay costs of one hundred and 00/100 dollars ($100.00).

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

For File No. 5052066 (Date of injury August 1, 2013):

Respondent shall pay claimant permanent total disability benefits at the rate of six hundred ten and 38/100 dollars ($610.38) per week commencing June 6, 2014, and during the time claimant remains permanently and totally disabled.

A.Y. McDonald shall pay accrued weekly benefits in a lump sum.

A.Y. McDonald shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

A.Y. McDonald shall pay the future medical expenses of the claimant necessitated by the work injury.

A.Y. McDonald shall pay one hundred and 00/100 dollars ($100.00) for filing fees.

A.Y. McDonald shall pay medical mileage as set forth in this decision.

A.Y. McDonald shall provide medical care as set forth in this decision.

A.Y. McDonald shall pay costs of one hundred and 00/100 dollars ($100.00).

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

Signed and filed this 8th day of February, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Mark J. Sullivan
Attorney at Law
PO Box 239
Dubuque, IA 52004-0239
sullivan@rkenline.com

David L. Jenkins
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309
Jenkins.david@bradshawlaw.com

JFE/sam

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.