BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOUGLAS DAVID DAVIS, SR., Claimant, vs. BOWLING MOTORS AND RV SALES, Employer, and FIRSTCOMP UNDERWRITERS Insurance Carrier, Defendants.	File No. 5051704 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1803; 2501

STATEMENT OF THE CASE

Douglas David Davis, Sr., the claimant, seeks workers' compensation benefits from defendants, Bowling Motors and RV Sales, the alleged employer, and its insurer, FirstComp Underwriters, as a result of an alleged injury on December 22, 2012. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on March 21, 2017, but the matter was not fully submitted until the receipt of the parties' briefs and argument on March 28, 2017. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. Joint exhibits were marked numerically. References in this decision to page numbers of an exhibit shall be made by citing the exhibit number or letter followed by a dash and then the page number(s). For example, a citation to exhibit A, pages 88 through 89 will be cited as, "EA-88:89." Citations to the hearing transcript of testimony such as "Tr-4:5," or to a deposition transcript such as "E14-4" shall be to the actual page number(s) of the original transcript, not to page number of a copy the transcript containing multiple pages or to a page number of an exhibit package.

It should be noted after hearing, the parties jointly moved to replace claimant's exhibit 7, page 4. This exhibit contains a listing of requested medical expenses and dates of service. The motion was sustained.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On December 22, 1012, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional healing period benefits.

3. The stipulated injury is a cause of some degree of permanent, industrial disability to the body as a whole, the extent of which remains in dispute.

4. At the time of the stipulated injury, claimant's gross rate of weekly compensation was $1,713.25. Also, at that time, he was married and entitled to 4 exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $1,075.96 according to the workers' compensation commissioner's published rate book for this injury on the agency website.

5. The parties stipulated that the providers of the requested medical expenses (Ex. 7) would testify as to their reasonableness and defendants are not offering contrary evidence. The parties also agreed these expenses are causally connected to the medical condition(s) upon which the claim herein is based, but their causal connection to any work injury remains an issue to be decided herein.

6. At the time of hearing, defendants voluntarily paid 68.2857 weeks of permanent disability benefits for this work injury and these benefits were to continue after hearing.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to permanent disability benefits; and,

II. The extent of claimant's entitlement to medical benefits.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Douglas, and to the defendant employer as Bowling Motors.

From my observation of his demeanor at hearing including body movements, vocal characteristics, eye contact and facial mannerisms while testifying in addition to consideration of the other evidence, I found Douglas credible.

Douglas, age 47 at the time of hearing, currently lives in Irvin, California where he was born and raised. He graduated from high school in 1988. He attended a community college in Irvin for about a year, but received no degree. He then served in

the Army for two years. Following his honorable discharge, he worked as a salesman and later as a finance manager for an auto dealership in Irvin for 6-7 years. When that dealership was sold, Douglas moved to Iowa in 1998. For the next 2-3 years, he was employed as a laborer and later as a salesman for a heating and cooling business. He then took a job as a shipping associate for a pipe company. Following that job, he returned to auto sales. He started as a parts desk clerk at Bowling Motors in 2001. He later on moved into sales and eventually became a sales manager prior to his work injury. Douglas testified that he earned $70-75 thousand annually while working for Bowling Motors. He left his job at Bowling Motors to undergo surgery for the work injury on December 24, 2014. He has not been employed in any capacity since leaving Bowling Motors. (See generally EC & ED)

Douglas testified that at the time of his work injury in this case, he lived on a small farm/acreage and raised horses, cattle, chickens and hogs and received some income from such activity. He also participated in team rodeo roping as a hobby for a couple of years while working at Bowling Motors.

Douglas admits to prior surgeries for a shoulder rotator cuff tear, a torn ACL and a vasectomy and then a vasectomy reversal. He testified that he fully recovered from these surgeries and had no physical limitations prior to his injury in this case. There is no evidence in the record to suggest otherwise. Douglas admits to prior mental health difficulties of anxiety and OCD for which he received medications prior to his injury in this case. However, Douglas added that these conditions did not adversely impact his job and he had not been hospitalized for such problems before the work injury. Douglas denied any headache or migraine problems before his work injury. Douglas asserts he was healthy before his injury and active at home. He exercised daily by running in the morning and evenings. There is also no evidence in the record to suggest otherwise.

The stipulated injury of December 22, 2012 occurred when Douglas slipped on ice and fell, striking his head on a concrete surface. He suffered a C5 fracture in the neck as a result of that fall. Douglas was primarily treated at the University of Iowa Hospitals and Clinics, by the neurosurgical staff and Patrick Hitchon, M.D. Following treatment which included use of a C-collar, Douglas was returned to full duty work on February 6, 2013. Dr. Hitchon placed Douglas at maximum medical improvement (MMI) on December 16, 2013. (JE1-1, EA-1) Dr. Hitchon assigned an 8 percent whole person impairment and opined that no surgical treatment was needed. (EA-1) The doctor re-affirmed these opinions on April 8, 2016. (EA-2) Douglas testified that he told Dr. Hitchon when we was released that he continued to have head and neck pain, but the doctor told him there was nothing further he could offer and that he would have to live with his pain. Defendants then paid Douglas weekly permanent disability benefits based upon this doctor's rating.

After being released, Douglas returned to work at Bowling Motors, but continued to have headaches, difficulty sleeping and finger numbness. Authorized treatment resumed with Michael Pogel, M.D., a neurologist. (JE2). Dr. Pogel's initial assessment on May 22, 2014, was posttraumatic headaches, migraines, sleep apnea and history of

cervical fracture. (JE2-3) He prescribed additional medications for the headaches. (JE2-3) Dr. Pogel later added occipital neuralgia and OCD to his assessment and performed a left occipital nerve block in September 2014 which Douglas later reported reduced his headaches. (JE2-9,13:14)

At the request of defendants, Douglas was evaluated by Chad Abernathey, M.D., another neurosurgeon, on December 15, 2014. Although Dr. Abernathey told Douglas that there was only a 50-50 chance that surgery would improve his condition, Douglas chose surgery because his pain was intolerable. Upon authorization by defendants, a two level fusion surgery at C5-6 and C6-7 was performed by Dr. Abernathey on December 24, 2014 and Douglas was taken off work for 6-8 weeks following surgery (JE3-2)

Douglas testified that after surgery, his finger and hand numbness subsided, but his neck pain and headaches continued. He said he then began having bad dreams and sleep problems. About 1½ weeks after surgery claimant sought treatment at a local hospital emergency room following a fainting (syncopal) spell while running away from friends and falling into a ditch injuring his shoulder. (JE 4-1) This event was deemed to be a possible suicide attempt as he left a note for his fiancé giving instructions for his funeral. Douglas was admitted for further observation, testing and management. Douglas was transferred to a hospital in Waterloo for further psychiatric care and told to follow-up with his family doctor for his shoulder. (JE4-6) There are no records of further treatment of the shoulder in evidence. Douglas told providers at the Waterloo hospital that he started having worsened depression after his fall injury and has had several fainting spells. He had been receiving anti-depressants from his family doctor. He also reported high anxiety for which he self-treats with cannabis. The medical assessment was: "Major Depressive Disorder, moderate, recurrent. Cannabis abuse versus dependence." (JE7-2) Douglas was admitted and put on suicide precautions. He then was placed on Prozac for depression, Trazodone for sleep, and Vistaril for migraines. (Id.) A day later, hospital staff found Douglas improved. Douglas reported to them that he had neck surgery, but he was still having pain and headaches and was overwhelmed. (JE7-5) On January 6, 2015, Douglas was discharged and was directed to schedule a follow-up with a psychiatrist and counselor at Southern Iowa Mental Health Center in one to two weeks. (JE7-6) However, Douglas said that he could not get a follow-up appointment with a psychiatrist for at least 40 days in Iowa. His brother then convinced Douglas to return to Irvin, California where he could likely get more prompt mental health treatment.

After returning to California, Douglas was seen by Dan Tzuang, M.D., a psychiatrist, on January 20, 2015. Upon a diagnosis of major depressive disorder, Dr. Tzuang prescribed anti-depressant medications and mental health therapy. (JE8) Douglas testified that upon moving to California he continued, and completed, physical therapy at the direction of Dr. Abernathey. Douglas returned to see Dr. Abernathey on July 1, 2015 and at that time he was placed at MMI. (JE 3-3) Dr. Abernathy reported in his notes that Douglas had "excellent relief of his pre-operative pain syndrome" and that he was "quite pleased with his surgical result." (Id.) The doctor told Douglas to return to

usual activities from a neurosurgical standpoint and he was to contact Dr. Abernathey with any further difficulty. (Id.) Dr. Abernathey causally relates his treatment to the work injury and assigned an 11 percent whole person impairment rating and benefits further were paid. (E1-2). Dr. Abernathey continues today to believe Douglas should have no permanent restrictions from the work injury. (EB-3) Dr. Abernathey did observe a tremor involving both arms at the July 1, 2015 visit. The doctor believed this to be a central tremor, but also felt it could be Parkinson's disease. He suggested that Douglas speak to his neurologist, Dr. Pogel, on this and he noted that Dr. Pogel had been treating Douglas with injections for occipital nerve injury. (JE 3-3) Upon receipt of Dr. Abernathey's report, defendants did not authorize further treatment of the injury. (E8-6:7)

Douglas testified that he traveled from California to see Dr. Abernathey in Cedar Rapids in an effort to see if he could provide additional treatment to reduce his ongoing pain and headache symptoms. He denies that he reported excellent relief from his pain.

Given defendants' denial of care, Douglas sought care on his own in the summer of 2015 from Robert Jennings, M.D., and Rafael Penunrui, M.D. with Superior Family Medical Group, Inc. in Newport Beach, California. (E4-1) Both of these doctors are family practice physicians. Dr. Penunrui referred Douglas to Martin Backman, M.D. a neurologist, for evaluation by his ongoing cervical pain and headaches. (JE9-1) Following his testing and imaging, Dr. Backman ultimately diagnosed bilateral ulnar neuropathy at the elbow regions and mild chronic left C6 radiculopathy. (JE9-10) Dr. Penunrui took Douglas off work indefinitely in November 2015. (E2-1) Dr. Jennings referred Douglas to providers at Pain Management Associates in Laguna Hills, California in November 2015. He was initially seen by Theresa DiFabrizio, PA-C and Keyvan Zavarei, M.D. from that group. Their assessment was occipital neuralgia, fusion of spine and radiculopathy, cervical region and cervicalgia. (JE13-4) An occipital block injection was scheduled and gabapentin and an opiate medication were prescribed for pain. (Id.) Amir Pouradib, M.D, a pain management physician, also from that group has followed Douglas since November 2015. (E5-1) In addition to medications, Dr. Pouradib's treatment has included occipital nerve blocks which provide relief from pain, but these injections had to be repeated every 3-4 months. (Id.) This doctor has also provided epidural steroid injections (ESI) to address the cervical radiculopathy, but they did not provide long term relief. (Id.) Dr. Jennings prescribed Lexapro to address Douglas's depression which he attributes to Douglas's chronic pain from the work injury. (E4-1) Both Dr. Jennings and Dr. Pouradib state that they have attempted other referrals in 2015 to address Douglas's medical condition, but their attempts to do so was frustrated the medical care system in the state of California. (E4-1, E5-1)

In late 2015, the defendants authorized medical care with Dr. Pouradib at Pain Management Associates for ongoing cervical pain and headaches. The defendants also authorized Shoreline Mental Health to evaluate and treat Douglas's mental health condition. (JE13, JE14)

At the request of his attorney, Douglas was evaluated on January 5, 2016 by David Segal, M.D., a board certified neurosurgeon in Cedar Rapids, Iowa. Dr. Segal opines in his letter report dated January 11, 2016 that the original C5 fracture has not fully healed causing further problems including aggravation of disc pathology at C5-6 and C6-7 vertebral levels. The doctor explained that while it is difficult to say whether or not the herniations at those levels pre-existed the work injury of December 22, 2012, the entire pain syndrome, including the involvement of his arms, the radiculopathy and peripheral neuropathies all stem from that work injury. (E3-5) Dr. Segal listed Douglas' injuries from the December 22, 2012 fall include: 1) compound compression fracture displaced with only partial healing; 2) herniated disc with cervical radiculopathy; 3) spinal cord injury; 4) occipital neuralgia, 5) ulnar neuropathy, 6) bilateral carpal tunnel syndrome (CTS), 7) post concussive syndrome (which the doctor did not believe had been adequately addressed); and, 8) failed surgery syndrome. (E3-5:6) Dr. Segal recommended permanent restrictions of no lifting more than 5 pounds; no bending more than one or twice every 15 minutes; no walking more than 10 minutes every hour; and only occasional reaching and grasping. Also, Dr. Segal states that Douglas will have difficulty with complex tasks due to his post-concussive symptomatology. (E3-6:7) The doctor recommends further workup for additional surgery options; ulnar and CTS release surgeries; and a neuropsychological evaluation.

On October 5, 2016, a neurosurgeon at Neurological Surgery Medical Associates evaluated Douglas. The record does not identify the name of the physician who performed this evaluation. This physician did not recommend surgery and noted that claimant was temporarily totally disabled. (JE11-4:5)

Both Dr. Jennings and Dr. Pouradib causally relate chronic cervical spine pain and occipital headaches to the work injury of December 22, 2012. (E4-1, E5-1, JE13-11:12) Both of these doctors where continuing treatment at the time of the hearing. Douglas's current medications prescribed by Dr. Pouradib are gabapentin (300mg 3x daily) and the opioid, Hydrocod-acet 5 (325 mg 2x daily). (E6-1)

Since September 2016, Douglas has been treated with psychotherapy and medications by John Tholen, Ph.D, a licensed clinical psychologist, and Jessica Pagano Brooks, M.D., a board certified psychiatrist, upon a diagnosis of major depressive disorder and generalized anxiety disorder. Both causally connect these diagnoses and treatment to the work injury of December 22, 2012. In his written report dated September 19, 2016, Dr. Tholen opined as follows:

> Although the evidence suggests that Mr. Davis may have been a psychiatrically fragile individual even prior to the 12-21-13 industrial cervical spine injury, the evidence also suggests that both the Major Depressive Disorder and the Generalized Anxiety Disorder have been predominantly precipitated by that injury and its direct sequelae (e.g. pain, impairment, and prolonged occupational disability). Mr. Davis reports that, prior to the 12-21-12 industrial cervical spine injury, his history of mental health treatment was limited to the only nine sessions of marital

> counseling in 2011 prior to the end of his second marriage. I have not observed any evidence contradicting the history reported by Mr. Davis, and any attempt to diagnose a pre-existing psychiatric condition would be entirely an reasonable speculative.

(JE14-25)

> The evidence strongly supports a reasonable medical probability that Mr. Davis's 12-21-12 industrial cervical spine injury has represented the predominate cause of the Major Depressive Disorder and Generalized Anxiety Disorder that he displays upon examination today, and which resulted in his brief psychiatric hospitalization at the beginning of 2015.

(JE14-29)

This opinion was subsequently re-affirmed by Dr. Tholen and endorsed by Dr. Brook in later reports dated November 2, 2016 and February 1, 2017. (JE12-53, JE12-69) Treatment by the clinic then began and it continues to the present time. In the November 2, 2016 report, these doctors stated that although maximum medical improvement (MMI) level of psychiatric occupational disability is unlikely to be significantly altered by further treatment, Douglas requires further conservative mental health treatment including medications. (JE12-53) The providers reported the same thing in the February 1, 2017 report. (JE12-69) In addition to the medications prescribed by Dr. Pouradib, Dr. Brooks is prescribing three additional medications for his mental health problems: Escitalopram (Lexapro) for depression, Trazodone (Desyrel) for sleep; and Hydroxyine (Vistaril) for anxiety. (JE12-67) While these providers have indicated that claimant is unable to work, they defer to the neurologist and orthopedists for physical restrictions. (JE12-56)

Douglas testified that he continues to experience headaches in the base of his skull that are at a pain level of 5/10 (10 being the highest) on a constant basis. Douglas indicates that he suffers from occipital headaches that are behind his eyes that vary in intensity from a pain level of 5 /10 to 7-9/10 at other times. He testified that he continues to have chronic pain and burning in his left arm which is made worse with activity. He continues to have difficulty sleeping due to his pain. He states that his mental health condition is also significantly disabling. There are times when he simply sits in his room and cries. As evidenced during the hearing, he has times when he breaks down and cries and becomes very tearful. Douglas described a typical day for him consists of getting up in the morning and to try and stretch and use the hot tub at his apartment. He then has to lie down for a little bit in the hopes of being able to function during the day. Four out of seven days a week he stays at his home in his bedroom because of the chronic headaches and neck pain. Every day he ends up taking naps as a result of the significant use of medication.

Douglas admits that he has not looked for employment since leaving Bowling Motors. Dr. Jennings opined that Douglas is not physically capable for working anything other than in a sedentary position with careful ergonomics so as to minimize his pain. (E4-1) Dr. Pouradib states Douglas would be limited to sedentary type of work two hours a day as a result of his work injury and the effects from his many medications significantly impair his ability to work. (E5-1)

Defendants retained Ted Stricklett, M.S., a vocational rehabilitation consultant, to evaluate Douglas's ability to return to the workforce. Stricklett provided three opinions depending upon which doctor's activity restrictions are considered. Given the views of Drs. Segal and Pouradib, limiting lifting to 5 pounds and only two hours of sedentary work daily, Douglas is not employable in the open labor market. (EC-7) If you consider only the view of Dr. Jennings that Douglas is limited to sedentary work, Douglas would sustain a 75 percent loss of earning capacity. (EC-8) If we use only the view of Dr. Abernathey that claimant has no restrictions, then Douglas would have no loss of earning capacity. (EC-9)

I find the work injury of December 22, 2012 is a cause of a very significant permanent physical and mental impairment to the body as a whole. This is based on the causation views of Drs. Jennings, Dr. Penunuri, Dr. Backman, Dr. Segal, Dr. Pouradib, Dr. Tholen and Dr. Brook. I find that the work injury resulted in the injuries identified by Dr. Jensen: specifically a compound compression fracture displaced with only partial healing; a herniated disc with cervical radiculopathy; spinal cord injury; occipital neuralgia, ulnar neuropathy, bilateral carpal tunnel syndrome (CTS), post concussive syndrome (which the doctor did not believe had been adequately addressed) and failed surgery syndrome. I did not find convincing the views of Dr. Abernathey. His report that claimant told him in June 2015 that he was pain free makes no sense as no other physician before or after that visit reports such a history. There also has been no verification of Dr. Abernathey's suggestion that Douglas suffers from Parkinson's disease. Indeed, all of the neurologists disagree with that suggestion. Lastly, Dr. Abernathey has not seen Douglas since June 2015. Finally, the causation views by Drs. Tholen and Brook linking claimant's mental conditions of major depressive disorder and anxiety disorder to the work injury are uncontroverted. These doctors' references to an injury date one day prior to the stipulated fall injury is not considered to be significant.

I find that the work injury of December 22, 2012 to be a cause of the restrictions recommend by Dr. Pouradib. This doctor is the primary treating neurologist and is most familiar clinically with Douglas' clinical presentations. Due to his work injury, Douglas is unable to work more than two hours a day of sedentary labor. Given the uncontroverted views of Stricklett, Douglas is not employable in the competitive labor market.

I find that the work injury of December 22, 2012 is a cause of a 100 percent or total loss of earning capacity.

Defendants denied the work relatedness of the cervical spine and headache condition after Douglas last visit with Dr. Abernathey until they authorized Dr. Pouradib's treatment in the summer of 2015.

Defendants denied the work relatedness of the mental health condition until Douglas began treating with Drs. Tholen and Brook.

I find that treatment claimant received from the Ottumwa Health Center, Radiology Associates and Apogee Medical Group from January 2, 2015 through January 3, 2015 (E7-2:3), the costs of which totaled $28,140.46, $1,192.50 and $552.44 respectively, to constitute reasonable and necessary treatment of the work injury of December 22, 2012. This is based on the uncontroverted views of Drs. Tholen and Brooks.

I find that treatment claimant received at the Convenant Clinic and from January 4, 2015 through January 3, 2015 (E7-2:3), the costs of which totaled $769.00, to constitute reasonable and necessary treatment of the work injury of December 22, 2012. This is based on the uncontroverted views of Drs. Tholen and Brooks.

I find that services of Dr. Tzuang from January 20, 2015 through June 16, 2015 (E7-3), the cost of which totaled $850.00, to constitute reasonable and necessary treatment of the work injury of December 22, 2012. This is based on the uncontroverted views of Drs. Tholen and Brooks.

I find that services of Superior Medical Group from July 17, 2015 through November 23, 2015 (E7-3), the cost of which totaled $1,100.00, to constitute reasonable and necessary treatment of the work injury of December 22, 2012. This is based on the views of Dr. Jennings, Dr. Penunuri, Dr. Backman, Dr. Segal, Dr. Pouradib. Also, at that time, defendants were denying responsibility for the conditions treated.

I find that services of Dr. Backman and Orange Coast Imaging from August 21, 2015 through March 2, 2016, (E7-4), the cost of which totaled $2,000 and $16,601.00 respectively, to constitute reasonable and necessary treatment of the work injury of December 22, 2012. This is based on the views of Dr. Jennings, Dr. Penunuri, Dr. Backman, Dr. Segal, Dr. Pouradib. Also, at that time, defendants were denying responsibility for the conditions treated.

I find that services of Dr. Pouradib from November 16, 2015 through December 18, 2015 (E7-3), the cost of which totaled $5,115.00, to constitute reasonable and necessary treatment of the work injury of December 22, 2012. This is based on the views of Dr. Jennings, Dr. Penunuri, Dr. Backman, Dr. Segal, Dr. Pouradib. Also, at that time, defendants were denying responsibility for the conditions treated.

CONCLUSIONS OF LAW

I. 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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Iowa Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133; 106 N.W.2d 95, 98 (1960).

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 worker's qualifications intellectually, emotionally and physically; the worker's earnings 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).

The parties agreed that the work injury is a cause of permanent impairment to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment.

Pursuant to Iowa Code section 85.34(2)(u) , Iowa has adopted the so-called "fresh start rule." Industrial loss now is no longer a measure of claimant's disability from all causes after which we then apportion out non-work causes and leave in work related causes under the full responsibility rule. The percentage of industrial loss now is the loss of earnings capacity from what existed immediately prior to the work injury. This means that an already severely disabled person before a work injury can have a high industrial loss because the loss is calculated in all cases from what ever his earning capacity was just before the injury and what it was after the injury, not the loss as compared to a healthy non-disabled person. In other words, all persons, start with a 100 percent earning capacity regardless of any prior health or disability conditions. The rationale for this approach is that an employer's liability for workers' compensation benefits is dependent upon that person's wages or salary. Consequently, the impact, if any, of any prior mental or physical disability upon earning capacity is automatically factored into a person's wages or salary by operation of the competitive labor market and there is no need to further apportion out that impact from any workers' compensation award. Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015); Steffan v. Hawkeye Truck & Trailer, File No. 5022821 (App. September 9, 2009).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa 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 (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). Ending a prior accommodation is not a change of condition warranting a review-reopening of a past settlement or award. U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997). However, an employer's special accommodation for an injured worker can be factored into an award determination to the limited extent the work in the newly created job discloses that the worker has a discerned earning capacity. To qualify as discernible, employers must show that the new job is not just "make work" but is also available to the injured worker in the competitive market. Murillo v. Blackhawk Foundry, 571 N.W.2d 16 (Iowa 1997).

In the case sub judice, I found that claimant suffered a 100 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to permanent total disability benefits as a matter of law under Iowa Code section 85.34(2)(u), during the period of disability. In other words, claimant is entitled to the stipulated weekly benefit rate from the date of injury and for an indefinite period of time thereafter. Absent a change of condition, such benefits last a lifetime.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

Defendants denied causation of the requested medical expenses identified in bold type in Exhibit 7. I found that all of those expenses constituted reasonable and medical treatment of the work injury. They were either incurred at times when

defendants were denying care or during emergency hospital stays. Also, claimant had to move to California to obtain the prompt mental health care that was directed by initial mental health providers at the Waterloo Covenant Clinic. Claimant had to wait over a month to get into see a mental health provider in Iowa which would violate the orders at the hospital to follow-up with a mental health provider within one or two weeks. It is well known that Iowa ranks very low when compared to other States on availability of mental health care. Claimant is entitled to all of the requested medical expenses.

ORDER

THEREFORE, IT IS ORDERED:

1. Defendants shall pay to claimant permanent total disability benefits at the stipulated weekly rate of one thousand seventy-five and 96/100 dollars ($1,075.96) from December 22, 2012. Credit shall be given for the times claimant was paid permanent disability benefits as stipulated in the hearing report.

2. Defendants shall pay the medical expenses identified in Exhibit 7 that remain unpaid. Defendants shall reimburse claimant for her out-of-pocket medical expenses and shall hold claimant harmless from the remainder of those expenses.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

5. Defendants shall file subsequent reports of injury (SROI) as required by our administrative rule 876 IAC 3.1(2).

Signed and filed this 27th day of April, 2017.

LARRY WALSHIRE
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.