BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARK DITSWORTH,	FILED	
Claimant,	APR 04 2017	
vs.	WORKERS COMPENSATION	File No. 5054080
ICON AG,		ARBITRATION DECISION
Employer,		
and		
FEDERATED INSURANCE,		
Insurance Carrier, Defendants.		Head Note Nos.: 1108, 1803

STATEMENT OF THE CASE

Mark Ditsworth, the claimant, seeks workers' compensation benefits from defendants, Icon Ag Solutions, the alleged employer, and its insurer, Federated Mutual Insurance Co., as a result of an alleged injury on October 10, 2014. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on February 22, 2017, but the matter was not fully submitted until the receipt of the parties' briefs and argument on March 17, 2017. Oral testimony and written exhibits received into evidence at hearing are set forth in the hearing transcript.

This claim was consolidated for hearing with another claim by Mark Ditsworth against Icon Ag Solutions and another insurer, Nationwide, for an alleged work injury on April 29, 2013. Icon Ag changed insurers between the two alleged work injuries. The Nationwide claim was settled prior to hearing as a compromise settlement pursuant to Iowa Code section 85.35(3) in which claimant was paid a lump sum of about $64,000.00. This settlement was approved by this agency on April 7, 2016.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. Joint exhibits were marked numerically. All pages of defendants' and the joint exhibit packages were consecutively numbered. 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 joint exhibit 6, pages 88 through 89 will be cited as, "JEx. 6-88:89." Citations to the hearing transcript

of testimony such as "Tr-4:5," or to a deposition transcript such as "Ex. 14-4" shall be to the actual page number(s) of the original transcript, not to page numbers of a copy of the transcript containing multiple pages or to a page number of an exhibit package.

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

1. An employee-employer relationship existed between claimant and defendant employer at the time of the alleged injury.

2. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

3. If I award permanent partial disability benefits, they shall begin on December 18, 2015.

4. At the time of the alleged injury, claimant's gross rate of weekly compensation was $918.35. Also, at that time, he was married and entitled to four exemptions for income tax purposes. Therefore, claimant's weekly rate of compensation is $604.89 according to the workers' compensation commissioner's published rate book for this injury.

5. The fees and charges by medical providers for which claimant is seeking payment are fair and reasonable and causally connected to the medical condition(s) upon which the claim herein is based but that the issue of their causal connection to a work injury remains an issue to be decided herein.

ISSUES

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

I. Whether or not claimant suffered an injury on October 10, 2014 arising out of and in the course of his employment at Icon Ag Solutions.

II. The extent of claimant's entitlement to weekly permanent disability benefits;

III. The extent of claimant's entitlement to medical benefits; and,

IV. Claimant's entitlement to reimbursement for an independent medical evaluation (IME) by Sunil Bansal, M.D.

In the hearing report submitted at hearing, the claimant indicated an issue concerning temporary total/healing period benefits, but no such issue was described or asserted in the claimant's post-hearing brief. Therefore, I assume the hearing report was in error and no findings will be made as to such an issue.

The issue of claimant's entitlement to permanent disability benefits has a sub-issue of defendants' entitlement to either a credit for the amounts paid by Nationwide in the compromise settlement pursuant to Iowa Code section 85.34(7)(b) or apportionment pursuant to Iowa Code section 85.34(7)(a).

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Mark, and to the defendant employer as Icon Ag.

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 Mark credible. There was disagreement between Mark and the manager of Icon Ag at hearing as to the circumstances leading up to Mark's involuntary termination for having a bad attitude. The manager stated Mark was discharged for an overall bad attitude. Mark disagrees. Mark's application for unemployment benefits was successful despite being contested by Icon Ag. I did not find relevant the circumstances surrounding his discharge and no findings are made regarding the termination other than that it occurred.

Mark, at the time of the hearing, was 43 years of age. He graduated from high school in 1992. His only employment after high school before working at Icon Ag, was at his father's auto sales business. Mark testified over the 18 years he participated in this business, he performed all types of work including sales, mechanical and janitorial duties. He stated that when he left he was earning $350.00-400.00 per week and did not share in the profits of the business. On his application for a position in sales with Icon Ag in September 2014, Mark stated that he did all of the repair work and 80 percent of the sales work. (Exhibit B-7) In his original application for employment at Icon Ag, Mark stated that he earned $13.50 per hour, which would be $540.00 of weekly earnings for a 40 hour work week. (Ex. B-11) He also did part-time farm work for $12.50 per hour between 2007 and 2010. Mark left the family business in 2010 when his family moved to Orange City in 2010 to allow his wife to accept employment as a surgery technician. He then sought employment in the Orange City area.

On September 9, 2010, Mark began working for Icon Ag, a John Deere farm equipment sales and repair dealership. This company has five locations in Northwest Iowa and employs over 100 people. Mark's job at Icon Ag was to set up and recondition/repair farm equipment such as combines. Mark's description of his work activity at Icon Ag was not disputed. Mark stated that his work was very physical in nature involving a lot of climbing, lifting, crawling, twisting and bending. Mark estimated that his heaviest work would be 100-140 lbs., which would be wheel weights for a tractor. The starting wage was $13.00 per hour and his job description included a requirement that he be able to lift 75 lbs. at a minimum. Mark was discharged from Icon Ag in April 2016. When he was discharged, he was making $16.75 per hour working 45-47 hours a week.

Mark asserts that he suffered two low back injuries while employed at Icon Ag. Mark's assertion that he had no back problems before his first injury has not been disputed by defendants. Mark also has had chronic problems with Crohn's disease. The record does not show any work restrictions due to Crohn's, but it does limit the type of medications he can tolerate.

Mark testified that his first injury occurred on April 29, 2013 when he was lowering bean heads on a combine and had to remove dividers that weighed 50-60 lbs. (Transcript-12:13) During this process, he heard a pop and experienced instant pain in his back along with shooting pain down his right leg. (Id.) Mark initially saw a chiropractor for nine sessions that did not improve his condition. (Joint Ex.1) He was then referred by defendants to Douglas Martin, M.D., an authorized occupational medicine physician. Dr. Martin treated Mark from June 10, 2013 to September 11, 2013. (JEx. 2) The doctor's diagnosis was "rightward S1 radiculopathy." Treatment modalities provided by Dr. Martin consisted of pain medications, physical therapy and cortisone injections. When his symptoms failed to improve, Mark was referred to Wade Jensen, M.D., an authorized orthopedic surgeon.

At his first visit with Mark on October 2, 2013, Dr. Jensen recommended a microdiscectomy surgery at the L5-S1 vertebral level to address a herniated disc at that level. This surgery was performed by Dr. Jensen on December 5, 2013. (JEx. 4-25, JEx. 6) When Mark reported he was doing well following surgery on February 28, 2014, Dr. Jensen placed him at maximum medical improvement (MMI) and instructed Mark to increase his lifting restrictions by 5 pounds a week until he was up to full strength and to return only as needed. (JEx. 4-37) He had been on a 20 pound restriction. He advised Mark that when he was about to perform an activity that required too much strain on his back, he should ask for help before performing the activity. (Id.) Dr. Jensen later opined on April 7, 2014 that Mark suffered a 10 percent permanent partial impairment to the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition from his work injury. (JEx. 4-41:43)

Mark testified that in the spring of 2014, he was approached by Nationwide, Icon Ag's insurer for the April 29, 2013 injury, to discuss a possible settlement. Because he was experiencing a reoccurrence of some of his symptomology, he asked Nationwide to be returned to Dr. Jensen for a reassessment. This was approved and Mark saw Dr. Jensen on June 6, 2014. Mark told the doctor at that time that he was doing well until the last three weeks or so when he began to have increasing back pain and some right leg pain. Mark said that he felt a sensation like there was a ball in the bottom of his foot whenever he bears weight. (JEx. 4-44) Dr. Jensen ordered another MRI. According to Dr. Jensen, this MRI revealed a recurrent herniated disc. The doctor then discussed options with Mark such as an L5-S1 fusion surgery. The doctor reported that Mark did not want surgery and only wished to continue to do his normal activities with no restrictions. Dr. Jensen stated that this was reasonable, but that should his symptoms become more severe and he want to pursue something further, the doctor would be happy to re-evaluate. Further injections were also rejected as a treatment option. (JEx. 4-53)

Although Mark continued to work full duty without restrictions after seeing Dr. Jensen in June 2014, he did seek to find alternatives at work that would involve lighter work. He applied for a sales position at Icon Ag in September 2014 given his previous 18 years of sales experience at his father's auto sales business. The Icon Ag manager testified that he was reluctant to place him into a sales position dealing with customers because Mark had a negative attitude, but he did give Mark a written aptitude test. The manager stated that the score on the test was not high enough to overcome the bad attitude problem and Mark was rejected for the sales position. (Tr-81:82) Mark also inquired about a route delivery driver position, but the manager rejected Mark for that position as well because lifting was required and he would have to sit for prolonged periods of time. (Tr-82:83) Consequently, Mark continued in his setup and recondition job without restrictions until his asserted second back injury at Icon Ag. However, Mark said that many times he would refuse to perform certain tasks and asked for help as directed by Dr. Jensen. This accommodation was affirmed by Icon Ag's manager.

The asserted second back injury allegedly occurred on October 10, 2014. At that time, Mark testified that he and his supervisor were loading tires onto a trailer. When this was completed, Mark said he rolled his ankle after stepping off the back of the trailer. When he did so, he jarred his back and had to catch himself on the ramp on the back of the trailer to prevent a fall. (Tr-23) Mark said that after this incident, he immediately experienced pain in his back and down both legs. (Id.) Mark explained that this was different than the first injury due to the involvement of his left leg. (Id.)

Mark was returned to Dr. Jensen's office on October 17, 2014 and saw Douglas Block, PA. Mark reported a sudden onset of symptoms two weeks earlier and difficulty standing erect. (JEx. 4-57) He also reported two episodes of urinary incontinence over the last week. (Id.) Another MRI was done showing the recurrent L5-S1 disc herniation. PA Block referred Mark for an injection by a Dr. Shumaker, but that injection did not improve the symptoms. On November 21, 2014, PA Block reports that the MRI revealed a disc protrusion slightly more prominent than what was found on the previous MRI and that Mark is experiencing new right hip pain. (JEx. 4-66:67) He referred Mark back to Dr. Jensen. There is no mention of left leg pain in PA Block's notes, but a spine questionnaire filled out at this time in his records indicates bilateral leg/foot numbness. (JEx. 4-63)

Dr. Jensen saw Mark on November 24, 2014 and reported increasing back tightness and leg pain after stepping off the back of a trailer. (JEx. 4-70) Dr. Jensen noted that the MRI revealed the recurrent L5-S1 disc herniation with an additional finding of an encroachment on the right SI nerve root. (JEx. 4-71) Also, the new MRI revealed L4-5 level facet arthropathy and stenosis which the doctor stated was possibly contributing to his symptoms. (Id.) Dr. Jensen recommended proceeding with an L4 to S1 decompression and L5-S1 fusion surgery. (Id.)

Nationwide then sent Mark to William Boulden, M.D., another orthopedic surgeon, for an IME. In a report dated January 21, 2015, Dr. Boulden opined that

Mark's current symptomology and possible surgical repair is not due to the April 29, 2013 injury, but rather the new injury occurring on October 10, 2014. (JEx. 9-107) Dr. Boulden agreed with the ten percent impairment rating by Dr. Jensen for the April 29, 2013 injury. (JEx. 9-108) Nationwide then ended authorization of further treatment.

After the denial from Nationwide, Mark approached the HR Department to see what to do next. At that time an injury report was filled out for the October 10, 2014 alleged injury and the claim was presented to Federated Mutual Insurance. (Tr-26) Federated Mutual sent Mark to Paul Cederberg, M.D., an orthopedic surgeon, for an IME. In his report, dated April 23, 2015, Dr. Cederberg opined Mark's recurrent herniated disc was present before the alleged October 10, 2014 injury and although he does require additional back surgery at the L4-L5 and L5-S1 levels, it is due to his longstanding degenerative arthritis and the permanent work injury of April 29, 2013. (Ex. A-4) The doctor opined that there was no injury on October 10, 2014 and if he had symptoms after stepping off the trailer, it was a "manifestation" of his pre-existing condition. (Id.) Based on Dr. Cederberg's opinion, Federated Mutual denied the claim for an injury on October 10, 2014.

Due to the denial by both insurance carriers, Mark was forced to seek medical care on his own. Upon referral by his family doctor, Mark was seen on May 20, 2015 by Krista Seurer, PA, an assistant of Wilson Asfora, M.D., a neurosurgeon at the Sanford USD Medical Center in Sioux Falls, South Dakota. PA Seurer and Dr. Asfora recommended a bilateral decompression at L4-5 and L5-S1 with a PLIF and bilateral pedicle screw fixation with BMP. (JEx. 10-109:111) Surgery was performed on June 18, 2015. (JEx. 10-121:122)

Following the surgery, the staff at the Sanford clinic and Dr. Asfora followed Mark over the next several months. Mark was returned to work on August 10, 2015 and told he could increase lifting to 50 pounds. (JEx. 10-141) However, Mark continued to complain of low back and right leg pain after returning to work. (JEx. 10-142:166) After further testing and imaging, Dr. Asfora and his staff finally concluded on April 27, 2016 that they had no explanation for his continued complaints and released Mark from their care because they had nothing further to offer. (JEx. 10-167) Although Dr. Asfora and his staff indicated that Mark was free of restrictions at this time (JEx. 4-169), they referred Mark for a functional capacity evaluation (FCE). (JEx. 4-167) There is no formal written opinion in evidence from Dr. Asfora or his staff as to which injury, if any, was a cause of their treatment. However, it is apparent that Dr. Asfora and his staff considered their treatment work related given the information they provided to the group insurance carrier who was paying for the treatment. (JEx. 4-140) Apparently, based on this information, the group carrier has filed a lien against any proceeds from this proceeding. (Ex. 2)

An FCE was performed on May 17, 2016 by Timothy Saulsbury, PT, a therapist other than the one referred by Dr. Asfora's clinic. After testing, Saulsbury placed Mark in the light lifting physical demand category. (JEx. 12-170) Mark's left leg lift capability

was 35 pounds and back lift capability was 15 pounds, although back lifting increases his pain and is not recommended. (Id.) The FCE was considered valid at an 88 percent validity rate. (Id.)

At the request of his attorney, Mark was evaluated by Sunil Bansal, M.D., on October 14, 2016. In his report dated November 4, 2016, Dr. Bansal stated that Mark has constant aching low back pain which radiates down the right leg to his knee. (Ex. 1-11) He occasionally has sharp pain that shoots down his right leg to his foot. (Id.) He has constant numbness and tingling in both legs and feet. (Id.) Sitting more than an hour causes numbness and more pronounced pain. (Ex. 1-11:12) On long motor trips, he must stop every hour to stretch to relieve the leg discomfort. (Ex. 1-12) Dr. Bansal noted Mark purchased an adjustable bed after his fusion surgery because he could no longer lie flat in a bed. (Id.) The doctor also reports that Mark is able to stand for only an hour and walk 30 minutes, but must take breaks due to back pain. (Id.) Mark told the doctor that he believes he is able to lift 40 pounds from waist level occasionally, but has more difficulty lifting from the floor to waist level. (Id.) However, he added that he can no longer carry 40 pound softener salt bags. (Id.)

Dr. Bansal opines from his review of the medical records, his examination and discussion with Mark, that Mark suffered two work injuries at Icon Ag. The first injury on April 29, 2013 involved a herniated disc at the L5-S1 spinal level from lifting at work resulting in the discectomy performed by Dr. Jensen. (Ex. 1-14:15) The second injury on October 10, 2014 occurred when Mark stepped off a trailer resulting in a recurrent disc herniation and radiculopathy resulting in the surgery performed by Dr. Asfora. (Ex. 1-14:16) Dr. Bansal explained that the first injury contributed to the second injury in that there is a fairly high incidence of a recurrent herniation after an initial excision by Dr. Jensen. (Ex. 1-16) The doctor further explained that a simple jerk to the back on October 10, 2014 led to the recurrent herniated disc. (Id.) Dr. Bansal states that he recommends permanent restrictions on activity as outlined in the valid FCE. (Ex. 1-16:17) The doctor provided a permanent impairment rating using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, of 22 percent to the whole person and he recommended further maintenance treatment consisting of additional medications, epidural injections, physical therapy, and use of a TENS unit or other treatment by a pain specialist. (Ex. 1-17) The doctor added that an extension of the fusion is most likely needed in the future. (Id.) He stated that Mark's current functional loss was contributed to by both the first and second injury. (Id.) He did not offer an apportionment of his ratings or restrictions between the two injuries. Defendants provided a portion of a deposition of Dr. Bansal taken in another case on August 26, 2016 in which the doctor stated that his income from issuing IMEs in Iowa, almost exclusively for claimant's attorneys, is about 1 to 1 ½ million a year and that he recently raised his hourly rate from $300.00 to $500.00. (Ex. D-18:19) However, he also is employed full time as a doctor making about $300,000.00 in salary annually. (Ex. D-21) Dr. Bansal's fee in this case was $2,390.00. (Ex. 3-1)

Following his termination from Icon Ag, Mark received unemployment compensation for a period of time and made the required applications for employment.

The applications were for sales and light duty mechanic work at auto dealerships and shops. (Tr-43) Finally, he obtained a job as a rural mail carrier, receiving a wage of $17.65 per hour with substantial benefits. (Tr-40:43) He performed that job from July 22, 2016 and until the end of September 2016, at which time he resigned because his back and leg symptoms caused by prolonged sitting while driving required him to stop and stretch frequently, thereby extending his work hours into the evening hours each day. (Id.) Mark then worked about 25-30 hours week as a grain truck driver, but it did not involve climbing or tarping the load manually and involved only short trips. (Tr-43, 73-74) On December 12, 2016, Mark began full-time work for Rock Valley Hay Auction as a truck driver making $15.00 per hour. (Tr-44:45) This job also involves only short trips, hauling hay to and from various farms in the area. (Tr-45) Mark testified that prior to his employment with this employer, he did discuss his restrictions with the employer and the employer is accommodating his back condition. (Tr-45:46) He does not have to load or unload the hay and other workers are assigned to strap the loads. (Id.) Mark was still in his job at the time of hearing. (Id.)

Mark's testimony at hearing concerning his current condition was consistent with what he told Dr. Bansal. Mark also testified that his recreational and home activities have been limited since the second injury, including the fact that he no longer uses an ATV, which was a very active pastime for him. (Tr-46:47) He also testified he no longer bowls, golfs or plays sports activities with the kids like he used to. (Id.)

Mark testified that the hours of missed work at Icon Ag to attend medical appointments for treatment of his second injury and the mileage to those appointments contained in Exhibits 3, pages 2-3 are correct. Mark testified that he paid all of the medical bills he incurred for the October 10, 2014 injury listed in Exhibit 3, page 4.

Ultimate Findings:

For the purpose that will be explained in the Conclusions of Law section, I find that prior to the alleged injury of October 10, 2014, Mark had a 10 percent permanent partial impairment to the body as a whole. This is based on the uncontroverted views of Dr. Jensen. I also find that this functional loss was a cause of a 20 percent permanent loss of earning capacity. Although he had no physician-imposed restrictions, he had a recurrent herniated disc which placed him at risk of further injury. His prior disability is evidenced by his attempts to find different lighter duty work at Icon Ag before his second injury. On the other hand, he was still working full duty and earning his full wages as a mechanic at Icon Ag.

I find that Mark suffered an aggravation injury of a pre-existing low back condition on October 10, 2014 arising out of and in the course of his employment at Icon Ag. The injury consisted of more symptomatic recurrent herniated disc at the L5-S1 vertebral level of his lower spine and rendered symptomatic a pre-existing non-symptomatic arthritic condition at the L4-5 vertebral level. This injury was a significant factor, among others, causing the need for the multilevel surgery performed by Dr. Asfora and his staff. This finding is based on the views of Dr. Jensen, Dr. Boulden and Dr. Bansal. In

making this finding, I did not give any weight to the views of Dr. Cederberg. His description of Mark's symptoms after stepping off the trailer as a "manifestation" of a prior condition was an unconvincing, semantic method to avoid an obvious aggravation injury. Whether or not an aggravation injury is permanent is debatable, but it is unreasonable to state that no injury occurred at all when there is no dispute that Mark's symptoms increased after the trailer incident. Also, Dr. Cederberg overlooked the fact that claimant's numbness and tingling extended to the left leg after the October 10, 2014 which had not occurred before this incident. While the recurrent disc was found before this injury, it was not symptomatic enough to convince Mark and Dr. Jensen that fusion surgery should be performed. It was only after this trailer incident that both Mark and Dr. Jensen decided on immediate fusion surgery.

I further find that the work injury of October 10, 2014 was a cause of an additional 12 percent permanent partial impairment to the body as a whole. This injury is also a cause of the current restrictions set forth in the valid FCE. I find that after the successive injury of October 10, 2014, Mark's earning capacity was permanently reduced to 40 percent, this was a 40 percent reduction in earning capacity from his earning capacity of 80 percent immediately before the October 10, 2014 injury. These findings are based on the views of Dr. Bansal. The treating orthopedist who performed the fusion surgery, Dr. Asfora, did not provide an impairment rating and although he did not place restrictions on Mark, he clearly felt that restrictions could be identified by a valid FCE and referred Mark for such an evaluation. Dr. Bansal adopted those restrictions.

Mark's loss of earning capacity after his second injury is evidence by his inability to return to the type of mechanic work for which he is best suited given his age, education and work experience. Other than sales work, his only other significant work has been as a mechanic in medium to heavy work environments. While he may have continued his mechanic work at Icon Ag after the October 10, 2014 injury, his testimony that he refused to perform some of the heavier tasks at Icon Ag was uncontroverted. Possibly, this was a cause of a deteriorating relationship he had with Icon Ag's manger.

On the other hand, Mark has not shown an inability to return to sales work or other light duty types of employment.

I find that the work hours lost and the medical mileage listed in Exhibit 3, pages 2-3 are related to the work injury of October 10, 2014. I find that the medical expenses listed in Exhibit 3, page 3, constitute reasonable and necessary treatment of the work injury of October 10, 2014.

I find the opinion of Dr. Cederberg on April 23, 2015 to be an evaluation of disability concerning the October 10, 2014 injury in that he found that the disability was caused by another injury.

CONCLUSIONS OF LAW

I. 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 Elec. 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.

In the case sub judice, I found that claimant carried the burden of proof and demonstrated by the greater weight of the evidence that he suffered an injury on October 10, 2014 arising out of and in the course of employment with defendant employer in the form of an aggravation of a pre-existing condition.

II. 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).

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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).

In this case, the parties agreed that if I found the October 10, 2014 injury is a cause of permanent disability, the disability is an industrial disability to the body as a whole, a nonscheduled loss of use. Consequently, this agency must measure claimant's loss of earning capacity.

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 earning 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 whatever 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).

However, the application of the fresh start rule has been modified legislatively by Iowa Code section 85.34(7). Defendants first argue for a credit against any award in this case for the amounts paid to claimant by Nationwide in settlement of his claim for the earlier injury on April 29, 2013. Defendants cite for authority subsection 85.34(7)(b)(2), which provides a credit when there has been a prior payment of weekly benefits by the same employer for a prior work injury. However, Nationwide's payments were pursuant to a compromise settlement pursuant to Iowa Code section 85.35(3) as a full and final disposition of the claim. Iowa Code section 85.35(9) provides that payments made pursuant to an agency approved compromise settlement shall not be construed as the payment of weekly compensation. Iowa Code section 85.34(7)(b)(2) only provides a credit for prior payments of workers' compensation weekly benefits when compensating the combined disability of all successive industrial injuries with the same employer. Consequently, there can be no credit given for the settlement proceeds from the Nationwide settlement.

Alternatively, defendants wish to utilize subsection 85.34(7)(a), which they assert mandates an apportionment of an award for a pre-existing disability caused by another employer or from causes unrelated to employment. Defendants cite as authority Warren Properties v. Stewart, 864 N.W.2d 307, 318-319 (Iowa 2015). In that case, the Court held that when there has been no return to the competitive labor market between the occurrence of a prior disability caused by employment with a different employer or the occurrence of a disability unrelated to employment and the occurrence of a successive injury or disability, there is no re-setting of the earning capacity to 100 percent under the fresh start rule immediately prior to the successive injury. Warren Properties v. Stewart, 864 N.W.2d 307, 318-319 (Iowa 2015). In such cases, the Court states the provisions of Iowa Code section 85.34(7)(a) apply and a prior disability must be apportioned out of the loss of earning capacity found after the successive injury in awarding industrial disability benefits pursuant to Iowa Code section 85.34(2)(u). (Id.)

This apportionment is done by dividing the percentage reduction in earning capacity caused by the successive injury by the percentage of the earning capacity immediately before the successive injury occurred. The result is then multiplied by 500 weeks to arrive at the apportioned award for the loss of earning capacity caused by the successive injury. Warren Properties, 864 N.W.2d at 318-319, & footnote 6 (Iowa 2015).

One could argue that the holding in Warren Properties is limited by the facts of that case in that the first injury occurred during concurrent employment with a different employer. However, the wording of the case does not appear to be limited to those facts.

The problem with applying Warren Properties to the facts of this case is that this agency must find that the prior disability was unrelated to employment because there was no change in employers between the two injuries in this case. One can then argue that this is not possible because a compromise settlement is a final disposition of the claimed disability and an approval of that settlement prohibits this agency from making any findings concerning the work-relatedness or lack of work relatedness of the disability. There are two problems with this argument. In awarding industrial benefits pursuant to Iowa Code section 85.34(2)(u) the statute requires this agency to determine the loss of earning capacity in relation to the earning capacity that the injured worker possessed when the injury occurred. Also, Federated Mutual, the insurance company in this claim, was not a party to the compromise settlement and is not bound by it. Although a finding concerning the work-relatedness of a prior disability may be inconsistent with a compromise settlement, we do not compel a non-party to settlements to be bound by them whether or not further action by this agency may be inconsistent with that settlement. Grahovic v. Second Injury Fund of Iowa, File No. 5021995 (App., October 9, 2009).

Finally, one can argue that absent a collective bargaining agreement or some other employment contract stating otherwise, all employees in Iowa are viewed as "at will," meaning they can be fired for any reason that does not violate constitutional or statutory discrimination rights. Consequently, an employer is free to terminate the employment of any worker if that employment exceeds what is competitive in the labor market. However, again the worker involved in Warren Properties was at will and the Court still held that the claimant had not returned to the labor market before the successive injury to re-start her earning capacity.

Therefore, I am compelled to apply the holding in Warren Properties. In the Findings of Fact, I found that claimant's earning capacity immediately prior to the October 10, 2015 injury was reduced to 80 percent and after the successive injury, claimant's earning capacity was reduced to 40 percent, the percentage reduction in earning capacity was 40 percent. Dividing 40 percent by the earning capacity before the successive injury, 80 percent, results in a quotient of .5 or 50 percent. Fifty (50) percent of 500 weeks is 250 weeks, which constitutes the apportioned award for the successive injury of October 10, 2014 pursuant to Iowa Code section 85.34(7)(a).

III. 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 or 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. Krohn v. State, 420 N.W.2d 463 (Iowa 1988). An employee who leaves work for one day or less to receive medical services to treat a work injury, shall be paid an amount equivalent to the wages lost at the employee's regular rate of pay. Iowa Code section 85.27(7). Claimant is entitled to reimbursement for use of a private auto to receive treatment services for a work injury. The mileage rate shall be the same as determined by the IRS for income tax purposes. 876 IAC 8.1(2).

Given my findings, I shall award the hours of lost work, medical mileage and medical expenses accordingly.

IV. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. I found that the opinions of Dr. Cedarberg constituted a prior evaluation of permanent disability for the October 10, 2014 injury by a physician retained by defendants. Consequently, claimant is entitled to an IME at defendants' expense. However, Dr. Bansal evaluated not only the October 10, 2014 injury, but also the April 29, 2013 injury. Dr. Bansal did not apportion his fee between the two injuries. For lack of a better means of apportionment, I will only order defendants as insured by Federated Mutual to pay one-half of Dr. Bansal's fee or the sum of $1,195.00

ORDER

1. Defendants shall pay to claimant two hundred fifty (250) weeks of permanent partial disability benefits at the stipulated rate of six hundred four and 89/100 dollars ($604.89) per week from the stipulated date of December 18, 2015. Defendants shall pay accrued weekly benefits in a lump sum.

2. Defendants shall pay claimant for the forty-eight (48) hours of lost wages to attend medical appointments at his hourly rate of sixteen and 75/100 dollars ($16.75) per hour, a total of eight hundred four and 00/100 dollars ($804.00). Defendants shall reimburse claimant for his medical mileage in the amount of one thousand six hundred ninety-six and 54/100 dollars ($1,696.54). Also, defendants shall reimburse claimant for the medical expenses he paid in the amount of eleven thousand seven hundred sixty and 70/100 dollars ($11,760.70). Defendants shall hold claimant harmless from the lien filed for his medical expenses as set forth in Exhibit 2.

3. Defendants shall reimburse claimant in the amount of one thousand one hundred ninety-five and 00/100 dollars ($1,195.00) for a portion of Dr. Bansal's IME fee.

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

5. 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.

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

Signed and filed this 4th 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.