

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RONALD N. MCDONALD,

Claimant,

vs.

EZ PAYROLL & STAFFING
SOLUTIONS, LLC,

Employer,

and

ZURICH AMERICAN INS. CO.,

Insurance Carrier,
Defendants.

FILED

JAN 14 2016

WORKERS COMPENSATION

File Nos. 5043916; 5048386

ARBITRATION DECISION

Head Note Nos.: 1802; 1803; 2500

STATEMENT OF THE CASE

Ronald McDonald, claimant, filed a petition in arbitration seeking workers' compensation benefits from EZ Payroll Staffing Solutions and its insurer Zurich American Insurance Company, as a result of an alleged injury he sustained on August 27, 2012 and September 3, 2012 that allegedly arose out of and in the course of his employment. This case was heard in Des Moines Iowa and fully submitted on August 18, 2015. The evidence in this case consists of the testimony of claimant and claimant's exhibits 1 through 4 for File No. 5043916 (date of injury August 27, 2012) and claimant's exhibits 1 through 13 for File No. 5048386 (date of injury September 3, 2012). For clarity's sake, I will cite to exhibits 1 - 4 for File No. 5043916 as (CLEX. *, p. *). For claimant's exhibit 1 - 13 for File No. 5048386, I will cite to those exhibits as (Ex. *, p. *). Defendants' exhibits A through K were admitted as evidence. All parties submitted briefs. Claimant will be referred to as Ronald and the defendants will be referred to as EZ Payroll.

The claimant filed a claim in File No. 5043916 (date of injury August 27, 2012), against the Second injury Fund of Iowa. That claim was settled and is not part of this decision.

ISSUES

For File No. 5043916 (date of injury August 27, 2012):

The extent of temporary benefits;

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

Whether claimant is entitled to payment of medical expenses;

Payment of an independent medical examination; and

Assessment of costs.

The stipulations contained in the hearing report are accepted and incorporated into this decision as if fully set forth. Defendants stipulated that they would pay half the cost of the independent medical examination and the medical expenses related to the left hand issue. (Transcript, pages 8, 9)

For File No. 5048386 (date of injury September 3, 2012):

Whether claimant sustained an injury on September 3, 2012, which arose out of and in the course of employment;

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

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

The extent of claimant's disability;

Whether claimant is entitled to payment of medical expenses;

Payment of an independent medical examination; and

Assessment of costs.

FINDINGS OF FACT

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

Ronald McDonald, claimant, was 49 years old at the time of the hearing. He graduated high school in Chicago. The only other formal training Ronald has post-high school is his CNA training and certification. His work history is set forth in two exhibits, Defendants' Exhibit E, pages 5 and 6 and Claimant's Exhibit 6, page 123. (The vocational report, Ex. E, incorrectly states he was a manager at McDonald's. Ronald

was a fry cook and was around 19 years old when he worked for McDonald's.) (Transcript p. 22) Claimant testified he worked as a security officer in Chicago before moving to Iowa in 2002. Ronald obtained work through temporary work agencies. He worked in a natural food warehouse and then for General Mills. At General Mills he was third shift lead worker. (Tr. p. 27) He had a number of other factory, janitorial and security jobs as contract/temp employers around the Iowa City area. He worked for Systems Unlimited as an aide/counselor helping adult individuals with disabilities with their activities of daily living (ADL) skills. He also worked as an aide in a nursing home. (See also, Ex. A, pp. 2 – 10)

Ronald obtained a job through EZ Payroll and Staffing Solution, LLC working for ALPLA on August 20, 2012. (Tr. p. 40) Ronald's job at ALPLA was to disassemble molds, clean them and reassemble the molds and check for leaks. (Tr. p. 41) While performing this work, Ronald was exposed to water while cleaning and testing the molds. (Tr. p. 43) He would use a presser washer and wire brushes. (Ex. A, p. 11) He would spray into the molds and would be exposed to a water mist. (Ex. A, p. 12) He worked with two other co-workers in the mold department. The claimant testified that the molds were only cleaned on his shift and he was the person using water. (Ex. A, p. 17) His co-workers were working with dry molds and not exposed to water vapor. (Tr. p. 78) Ronald would clean the molds near the sink and the other two would calibrate the molds. (Tr. p. 78) Ronald testified that the temperature of the water he was using was neither hot nor cold, just the temperature that comes out of a faucet. (Tr. p. 89)

On Monday August 27, 2012 Ronald was moving a mold using a hoist when a blade fell and Ronald tried to catch it with his left hand. Ronald's hand was bleeding and a co-worker helped him and contacted some First Responders. He was taken by cab to the emergency room at Mercy Hospital in Iowa City. Ronald was told at the hospital that he was to have surgery to fix his hand on Friday, August 31, 2012. Ronald reported for surgery on August 31, 2012. At that time, he was running a fever and surgery was postponed. (Tr. p. 50) Ronald went back home. A neighbor checked on him on September 3, 2012 and called for medical assistance. The ambulance report states that family members reported that Ronald was not acting like himself for the last two days. (Ex. 1, p.1) He was taken by ambulance to Mercy Hospital Iowa City. (Ex. 2, p. 1) Andrew Ashby, M. D. wrote, "I think it is likely that [the] pneumonia is severe and he had a significant inflammatory response and had the stroke as a result of this." (Ex. 2, p. 6) Dr. Ashby found that Ronald had a corpus callosum stroke and acute kidney injury and low-grade rhabdomyolysis. (Ex. 2, p. 14) The discharge note from Mercy Hospital stated the primary diagnosis was Legionella pneumonia and the secondary diagnosis was CNS (central nervous system) infection with Legionella, acute delirium, respiratory failure and HIV positive. (Ex. 2, p. 4; Ex. K, p.59)

Ronald was transferred to the University of Iowa Hospital and Clinics (UIHC) on September 4, 2012. Ronald was in UIHC from September 4 through September 12, 2012. (Tr. p. 52) While at the UIHC Ronald learned he was HIV positive. Ronald was

treated for Legionnaires' disease and a lesion in his brain at UIHC. (Tr. p. 53) Ronald testified that the lesion is gone, but he still has difficulty speaking and memory issues. (Tr. p. 54) When he was discharged from UIHC he went to a rehabilitation facility.

The discharge summary from the UIHC of September 12, 2012 reflected that the neurology department considered Ronald to have a Legionella lesion. The report noted Ronald's neurologic symptoms included aphasia and ataxia, with difficulty with gait. (Ex. 3, p. 19) Ronald was discharged to inpatient rehabilitation.

Ronald was sent to St. Luke's in Cedar Rapids, Iowa on September 13, 2012. He was discharged on September 20, 2012. (Ex. K, pp. 63 – 67)

Stanley Mathew, M.D., said that Ronald should not return for work for approximately two weeks from his discharge. (Ex. 4, p. 116)

At the time of the hearing, Ronald was still receiving treatment at UIHC for psychological care, cognitive difficulties, depression and for his HIV. (Tr. pp. 55, 56)

Ronald returned to ALPLA around Thanksgiving and was provided a different job, on the line, checking bottles. Ronald performed this work until he resigned on January 23, 2013. He submitted a resignation letter that stated he was quitting to help his mother, but testified that he resigned for concerns about his ability to continue work at ALPLA. (Tr. pp. 61, 62; Ex. I, p. 18) I found this testimony convincing as to why he was no longer working for ALPLA. Ronald's testimony is consistent with the medical and vocational evidence that he has significant deficits in his cognitive abilities as well as some limitation in using his left hand. Ronald attempted to work on a cleaning crew at a department store but quit when he could not handle the cleaning machine. (Tr. p. 63) Ronald was able to obtain employment at a Super 8 motel. He was working at the Super 8 at the time of the hearing. He cleans rooms and does laundry. He works about 20 hours per week. (Tr. p. 64) Ronald was receiving Social Security Disability benefits at the time of the hearing. He started receiving it in April 2013, with an onset date of August 27, 2012. (Ex. J, p. 12) Ronald stated that he is limited in the amount of money he can earn and still be eligible for Social Security Disability and also maintain his health coverage. (Tr. pp. 101, 102)

On August 27, 2012 Mark Mysnyk, M.D. of Mercy Hospital, Iowa City, provided treatment for Ronald's left hand laceration. Dr. Mysnyk stopped the bleeding and cleaned out the wound. (CLEX. 2, p. 19) He referred Ronald to Brian Wills, M.D., for additional hand surgery. (CLEX. 3, p. 20) Dr. Wills examined claimant on August 29, 2012 and recommended surgery, which was scheduled for August 31, 2012. (CLEX. 4, p. 38) Ronald presented himself to Dr. Wills on August 31, 2012. He was running a fever at that time, so Dr. Wills decided to postpone surgery until September 4, 2012. On September 4, 2012, Ronald was admitted to the hospital for pneumonia and stroke. On September 10, 2012, Dr. Wills wrote to a case manager for Zurich American Insurance, that had the surgery proceeded he would have been off work for 10 – 14

days and then could have returned to one-handed work. He opined that he would have had unrestricted work within 3 months and would be at maximum medical improvement (MMI) within 9 months. (CLEX. 3, p. 23) On September 10, 2012, Dr. Wills stated that a decision was made not to surgically repair his hand and that Ronald could be on accommodated light work. (CLEX. 3, p. 24)

On October 1, 2012, Dr. Wills noted that, given the time from his injury, he did not believe he should attempt to repair the tendons or nerves in his left hand. He returned Ronald to work for his hand injury with no restrictions and recommended occupational therapy. He was not sure when Ronald would reach MMI. (CLEX. 3, p. 27) On January 11, 2013, Dr. Wills recommended Ronald use his hand as much as he could and that he had no restrictions. On April 4, 2014, Dr. Wills noted Ronald had been doing relatively well. Ronald continued to note numbness in the palm and also in the distribution of the common digital nerve to the ring and small fingers on the left hand. Ronald also had some hypersensitivity in this area. (CLEX. 3, p. 33) Dr. Wills stated,

At this point in time he is nearly a year and a half out from his injury, and I feel that he has reached maximum medical improvement. In my opinion, it is impossible to determine how much of the loss of function to the left hand is related to his injury sustained on 8/27/12 versus the stroke that he subsequently sustained. This is in terms of the loss of range of motion and use of the hand. The loss of sensation, in my opinion, is clearly attributable to the laceration.

(CLEX. 3, p. 35) On May 4, 2014, Dr. Wills provided an 18 percent rating to the hand. (CLEX. 3, p. 36; Ex. F, p. 1)

On April 24, 2014, Peter Pardubsky, M.D., performed an independent medical examination (IME) of Ronald's hand. He stated that, based upon the fact that he did not have detailed range of motion data, he could not put Ronald at MMI until the day of his exam — April 24, 2014. (Ex. C, p. 3) He provided a 16 percent impairment to the hand. The only restriction was to avoid exposure to excessive heat or cold. (Ex. 6, pp. 6, 7)

On September 27, 2012, Nealy Neukrich, PA-C, wrote that he would not release claimant for work until he had a neurology examination on October 17, 2012. (Ex. K, p. 8) On November 5, 2012, Ronald was released to return to work. (Ex. K, p. 12)

The UIHC released Ronald to return to work on November 4, 2015. (Ex. K, p. 12; Ex. 3, p. 50) On November 17, 2012, Ronald reported to Patricia Davis, M.D., a professor in the department of neurology, that he felt his speech had improved 85 percent and that his walking/ataxia had improved by 95 percent. (Ex. 3, p. 46) Dr. Davis reported,

Overall, it appeared that this lesion [*sic*] secondary to his Legionella pneumonia. There are numerous case studies describing ataxia and delirium with corpus callosum splenium lesions associated with Legionella, which was felt to be due to cytotoxic edema and hypoperfusion. We anticipated gradual improvement of his symptoms with the treatment of the underlying illness.

(Ex. 3, p. 46) Dr. Davis said, on November 17, 2012, that Ronald could return to light duty work, in the office and not around heavy machinery. (Ex. 3, pp. 48, 49)

On December 6, 2012, Ronald was seen by Jack Stapleton, M.D., due to an increase in his ataxia and anxiety. Dr. Stapleton adjusted medication he was taken for his HIV condition. (Ex. 3, pp. 53, 54; Ex. K, 14, 15) Ronald testified that after the medication was changed he was no longer having problems due to side-effects of his HIV medication. (Tr. p. 77)

Ronald was seen at the Neurology Department of UIHC on February 27, 2013. The note of the visit recorded that Ronald returned to work in a different department and was having some difficulties and was no longer working. Ronald was still having problems with speech slurring when he was tired or tried to talk quickly. (Ex. 3, p. 54)

On October 23, 2013, a psychiatric clinic note from the UIHC reported Ronald had, "Cognitive changes following CNS Legionella involvement associated with his HIV." (Ex. 3, p. 67) On February 5, 2015, Susan Duffy, M.D., of the psychiatry department at UIHC examined Ronald. She wrote,

In sum this is a 49 y/o single male who presents with cognitive, physical and associated mood changes related to CNS Legionella. He is currently treated with Lexapro 10mg daily. Pertinent psychosocial factors include: Mood reduced over winter holidays. Improved with increased support and no medication changes. Continues to struggle with cognitive deficits including reduced attention, language, memory as well as physical challenges including gait changes.

(Ex. 3, pp. 85, 86)

On February 17, 2015 and March 4, 2015, David Moser, Ph.D., conducted a neuropsychological examination. Ronald described that he had a poor memory, that he loses his train of thought and sometimes has difficulty in finding the right words. Ronald reported that he stopped driving because he had difficulty finding his way and he felt he was a danger. (Ex. 3, p. 92) After testing, Dr. Moser's impression was,

IMPRESSION: Mr. McDonald meets criteria for the diagnosis of Major Neurocognitive Disorder (i.e. Dementia). As noted above, he has HIV but his cognitive decline reportedly began abruptly at the time of his

Legionella infection and associated CNS involvement. His current level of cognitive functioning certainly represents a major decline relative to his estimated premorbid abilities.

During today's assessment an indicator of global cognitive functioning placed Mr. McDonald in the impaired range. More specifically, he showed impairment in aspects of verbal and visual memory, attention, processing speed, and visuconstructional ability. Additional areas of weakness, but not frank impairment, are described above. Areas of relative strength included basic reading skill, abstract thinking and problem-solving ability, visuospatial perception, basic naming ability, and verbal fluency. Mr. McDonald reported symptoms of moderate depression without recent suicidal ideation. He is quite distressed regarding the cognitive and physical changes he has experienced and the stigma surrounding these problems and his medical conditions.

(Ex. 3, p. 94) Dr. Moser recommended Ronald remain cognitively and physically active. Ronald is able to do his work at the motel, especially when alone and quiet, and that it was very difficult to do if others were around talking or if there was agitation or drama. (Ex.3, p. 97) His supervisor at work is supportive of his work, helps keep track of his hours and assigns work that he can be successful at. (Ex. 3, p. 101) Ronald's insight is fair, but he minimizes his deficits. (Ex. 3, p. 102) I agree with this April 29, 2015 note from the UIHC that Ronald minimized his deficits. He also minimized his deficits in his testimony.

On December 23, 2014, Dr. Stapleton signed off on a letter prepared by claimant's counsel. (Ex. 5, Deposition Ex. 2) In this letter, Dr. Stapleton stated he is a specialist in infectious diseases who provided treatment to Ronald. Dr. Stapleton wrote,

2. Mr. McDonald was hospitalized on September 3, 2012 for Legionnaire's [*sic*] Disease which manifested in his central nervous system, liver and lungs. It is my opinion that Mr. McDonald was exposed to the Legionella bacterium and contracted Legionella pneumonia during his work at ALPLA while spraying molds during the latter part of August 2012.

3. As a result of the Legionella infection Mr. McDonald sustained a lesion in his brain in the splenium of the corpus callous extending into the white matter of both occipital lobes consistent with an acute ischemic injury.

4. This Legionella-related brain injury has caused multiple permanent issues for Mr. McDonald, including speech, gait and neurocognitive problems.

(Ex. 5, Depo. Ex. 2)

On May 3, 2015, Dr. Stapleton was deposed. (Ex. 5, pp. 5 – 54) Dr. Stapleton is board certified in infectious diseases. (Ex. 5, p. 9) He is a full professor of microbiology at the University of Iowa and teaches at the medical school. (Ex. 5, p. 10) Dr. Stapleton said that the severity of Legionella is influenced by the host's defenses. Immune defects or HIV do not make someone more at risk, but it does make you more at risk at having a more severe disease. (Ex. 5, pp. 16, 17) The incubation period for Legionnaires' disease is between 2 and 14 days, depending on the exposure. (Ex. 5, p. 17) Dr. Stapleton stated that the lesion of the corpus callosum is a recognized complication of Legionella pneumonia. (Ex. 5, p. 23) Dr. Stapleton stated that, within a reasonable degree of medical certainty, Ronald's neurological symptoms were causally related to his Legionnaires' disease. (Ex. 5, p. 27) When asked as to his opinion as to how Ronald contracted Legionnaires' disease he stated,

Based on the history and the epidemiology and given the exposure to mists -- sprays and mists of water, water mist at his employment the week prior to his first fever and the Monday prior to his first fever on Friday before Labor Day, and then diagnosis on -- ten days later, the epidemiology strongly supports that the most likely source is from the spray at work.

(Ex. 5, p. 30) Dr. Stapleton did not believe that Ronald's cognitive problems would get better. (Ex. 5, pp. 33) Dr. Stapleton stated that the brain damage was likely to be permanent; those items included balance, speech, cognition and memory problems. (Ex. 5, p. 49)

I find that Ronald's neurological symptoms are causally related to his Legionnaires' disease.

On January 9, 2015, Sunil Bansal, M.D., performed an independent medical examination (IME). (Ex. 9, pp. 155 – 183) Dr. Bansal placed Ronald at MMI as of April 24, 2014 for his left hand injury. He placed Ronald at MMI for his Legionnaires' disease as of December 18, 2013. (Ex. 9, p. 180) Dr. Bansal opined that Ronald's work cleaning the molds at ALPLA that exposed him to water was the cause of his Legionnaires' disease. (Ex. 9, pp. 180, 181) Dr. Bansal provided a 17 percent upper extremity, 10 percent impairment to the whole body for his left hand injury. He provided a 9 percent of the whole body rating for the neurological impairments. (Ex. 9, p. 182) Dr. Bansal recommend the following restrictions,

I would place a restriction of no lifting greater than 10 pounds occasionally, or 5 pounds frequently with the right arm, and no lifting greater than 10 pounds occasionally, 5 pounds frequently with the left arm.

No frequent turning or twisting with the right arm.

No frequent squeezing, pinching, or grasping with the left hand to keep pain levels in check.

Avoid tasks that require sustained concentration or memory.

Avoid exposure to industrial water systems.

(Ex. 9, p. 183) I find that these are Ronald's restrictions.

Kent Jayne, M.A., M.B.A., C.R.C., C.L.C.P., C.C.M., prepared a preliminary vocational assessment on February 26, 2015. (Ex. 6, pp. 118 -135) Mr. Jayne concluded that if you consider the restrictions recommended by Drs. Pardubsky, Stapleton and Bansal, Ronald would be limited to sedentary work and with his neurological limitations his work would be further restricted. With his poor clerical perception scores, he would be precluded from entry level clerical work as well. (Ex. 6, p. 127) Mr. Jayne opined that if Ronald were to lose his current part-time position he most likely would not be competitively employable. (Ex. 6, pp. 128, 129) On March 16, 2015, Mr. Jayne supplemented his report after reviewing the neuropsychological testing by Dr. Moser. Mr. Jayne said the testing was consistent with his opinions and that Ronald was not capable of full time competitive employment in any reasonable, stable branch of the labor market. (Ex. 7, p. 136)

On May 11, 2015, David McKinsey, M.D., provided a report to defendants based upon a review of records. (Ex. D, pp. 1 - 6) Dr. McKinsey is board certified in infectious diseases. (Ex. D, p. 8) Dr. McKinsey wrote,

Mr. McDonald had confirmed Legionnaire's [sic] Disease which was diagnosed on 9/2/12. The infection was complicated by transient rhabdomyolysis and by encephalitis with a corpus callosum lesion that later resolved. At the same time a new diagnosis of human immunodeficiency virus infection, with modest immunodeficiency, was established.

In retrospect the first symptom that could be attributed to Legionnaire's [sic] Disease was the history of sweats he reported on 8/29. His high fever on 8/31 almost certainly was secondary to Legionnaire's [sic] Disease. When Mr. McDonald presented for medical care on 9/2 he had an extensive pulmonary infiltrate and a brain lesion; these findings would not have been observed until after his infection had progressed for several days.

Human immunodeficiency virus infection is not a risk factor for Legionnaire's [sic] Disease and these two diagnoses are unrelated.

Mr. McDonald's pneumonia responded promptly to treatment but he had residual ataxia which improved substantially over a period of two months. He has had ongoing dysarthria which has improved. He has had ongoing residual memory lapses.

(Ex. D. p. 3) He noted that human immunodeficiency virus is not a risk factor for Legionnaires' disease. He noted that it was likely that Ronald was exposed to Legionnaires' disease sometime between August 19, 2012 and August 27, 2012.

(Ex. D, p. 4) Dr. McKinsey said the source of Ronald's exposure could not be identified; that 60 – 95 percent of Legionnaires' disease is sporadic and not related to an epidemic. He noted that had Ronald had work place exposure to Legionnaires' disease other co-workers would have developed the disease. Ronald testified that his exposure to water was different than others working in his department. He worked primarily with water and the two other workers in his department worked in a drier area.

Dr. McKinsey opined that Ronald's symptoms of encephalitis secondary to Legionnaires' disease have resolved. And that his current medical problems are related to HIV infection and depression, neither one is related to his Legionnaires' disease.

(Ex. D, p. 5) Dr. McKinsey stated the Legionnaires' disease was not work related and that other workers would have been exposed as well as the fact that ALPLA practices with water markedly reduced the likelihood of Legionnaires' disease. (Ex. D. p. 5) He said Ronald reached MMI as of April 27, 2013 and that he has no permanent impairment caused by the Legionnaires' disease. (Ex. D, p. 5)

Richard Aiken, environmental health and safety manager for ALPLA, submitted an affidavit. (Ex. H, pp. 1, 2) In this affidavit, he stated that ALPLA used water supplied by the City of Iowa City and also uses a "closed circuit water system which is highly controlled and is treated using a product called 'ChemAqua'." (Ex. H, p. 1) Mr. Aiken said the water used by Ronald was chilled to below 68 degrees. Mr. Aiken affirmed that there was no record of any other employee suffering any health issues related to the water at ALPLA. (Ex. H, p. 2)

On May 15, 2015, Lana Sellner, M.S., C.R.C., prepared a vocational assessment. (Ex. E, pp. 1 – 19) The assessment was based upon the documents she received. Her conclusion was that Ronald continues to be employable. She identified a number of employment opportunities in the Iowa City and Cedar Rapids area that she believed Ronald was capable of performing. (Ex. E, pp. 16) She reached her conclusion based upon the physical restrictions recommended by Drs. Bansal, Pardubsky and Wills. She also considered the cognitive deficits that were identified by Dr. Moser and recommend certain reasonable accommodations. (Ex. E, pp. 16, 17)

Ronald was off work from August 27, 2012 through November 27, 2012 due to his hand injury. He returned to work in a different position, but was unsuccessful due to his work injuries and he resigned.

Defendants submitted records that show that they paid temporary total/healing period benefits from August 8, 2012 through August 31, 2012 and September 2, 2013 through September 24, 2014. (Ex. G, p. 1) From the defendants' records, temporary total benefits were not paid for September 1, 2012.

On May 29, 2015, Lenora Pfeiffer was deposed. Ms. Pfeiffer is the general manager of the Super 8 motel in Coralville, Iowa. She is Ronald's supervisor. (Ex. 12, p. 7) Ronald works as a housekeeper. He refreshes the rooms for the next guest to use. (Ex. 12, p. 8) The work includes changing linens, dusting, vacuuming, cleaning and bathrooms. Ronald lets other employees know where the dirty linens go and where the clean linens are and what a finished room should look like. (Ex. 12, p. 8) Ronald will also do laundry from time to time and coach new employees. (Ex. 12, p. 16) Ms. Pfeiffer always follows up on the coaching Ronald does to make sure information was relayed correctly. (Ex. 12, p. 17) Ronald works about 20 hours per week. (Ex. 12, p. 9) Ms. Pfeiffer allows Ronald extra time to complete his tasks. (Ex. 12, pp. 11, 18) She described Ronald at work as,

He seems to get confused. He seems to -- he needs time to process even sentences when he's trying to relay messages to myself and other people. He is not able to maintain as fast as maybe other people on a busy workday. His speed just isn't quite there.

(Ex. 12, p. 11) When asked if she thought Ronald could obtain employment in another motel she stated, "I believe it would be very difficult for him." (Ex. 12, p. 15) I find that claimant is currently in accommodated work. While certainly the work he is doing has value, it is not competitive work in the labor market. The limited coaching he does is followed up by his supervisor. Ronald is not in a state of absolute helplessness. He is able to work 20 hours a week, and sometimes more. His work is not competitive. I find that Ronald has a 100 percent loss of earning capacity in the relevant competitive labor market.

Ronald has requested medical expenses in the amount of \$192,916.23 for his treatment at Mercy Hospital in Iowa City, UIHC Johnson County Ambulance and St. Luke's Hospital in Cedar Rapids. (Ex. 13, p. 1) I find these expenses to be a direct result of his Legionnaires' disease.

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. Cihra, 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.

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).

Treating physicians' opinions are not to be given greater weight as a matter of law, when compared with non-treating physicians. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994).

Dr. McKinsey did not examine Ronald. Dr. Stapleton had significant contact with Ronald. He provided treatment as well as conferred with other persons within the UIHC department of infectious diseases concerning Ronald's conditions. He testified and was cross-examined, which in this case is more convincing than a written report.

I find Dr. Stapleton's conclusions concerning causation of the Legionnaires' disease was due to his workplace exposure the most convincing. While Dr. Bansal supports this conclusion as well, it is primarily Dr. Stapleton's expertise and his in-depth knowledge of Ronald's medical conditions that are persuasive. Dr. Stapleton was not hired by either side to provide his opinions in this case, which adds to his credibility.

Dr. McKinsey noted that Ronald would have been exposed to Legionnaires' disease between August 19, 2012 and August 27, 2012. Ronald was hired to work on August 17, 2012. (Ex. I, p. 4) Ronald's work exposure coincides with the incubation period for Legionnaires' disease. Dr. McKinsey stated that other co-workers would likely have been exposed Legionnaires' disease if there was a workplace exposure. The claimant testified that the molds were only cleaned on his shift and he was the person using water. His co-workers were working with dry molds. Ronald was working around a sink and drain and had significantly more contact with water than his other co-workers. Claimant also testified he was not working with chilled water, but the temperature was that of regular (cold) tap water. (Tr. p. 89) Ronald is able to work 20 hours per week doing laundry and some room cleaning. He has difficulty dealing with others and works best alone. Ms. Sellner acknowledged that Ronald would need some accommodations at work due to his cognitive impairments. I did not find Ms. Sellner's report as convincing as Mr. Jayne's report. I do not believe her report adequately takes into consideration Ronald's cognitive abilities and the fact that his work, as testified to by his current supervisor, is significantly slower than other workers.

Ronald has proven by a preponderance of the evidence that his Legionnaires' disease arose out of and in the course of his work for EZ Payroll. Ronald has also proven that he had permanent impairment due to neurological damage caused by Legionnaires' disease.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits, including whether claimant is an odd-lot employee.

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.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Ronald is 49 years old. This is not positive for his outlook for employment. Ronald minimizes his impairments. According to neurological testing, Ronald has some dementia. Dr. Stapleton did not believe that there would be improvement in his cognitive functioning. He has limitations as outlined in Dr. Bansal's IME.

He has only a high school diploma. His med aide certification has expired and given his cognitive abilities, it is not certain if he could be recertified or whether it would be wise to recertified him in the healthcare fields. The limited work he does now is accommodated. While he "coaches" other employee at the Super 8, his supervisor follows up on his coaching to correct information. He works slower than the other employees. He has right elbow and left hand limitations. As I found above, he has a 100 percent loss of competitive employment. This entitled clamant to a finding that he has 100 percent industrial disability. Ronald is entitled to permanent total disability benefits for so long as he remains permanently disabled.

Permanent total disability benefits commence from the date of the injury.
Permanent total benefits commence on September 3, 2012.

The parties stipulated in both hearing reports that credit issues are not in dispute, so no decision is made to any credit issue.

Defendants are liable for healing period benefits for the August 27, 2012 hand injury, from August 27 until such time as Ronald was eligible for permanent total benefits, September 3, 2012. Based upon the evidence submitted, the defendants paid healing period benefits for each day but September 1, 2012. Defendants shall pay the healing period for the day that they missed, September 1, 2012.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

I found that the medical expenses submitted by Ronald in the amount of \$192,916.23 were as a result of Ronald's work injury. As such, defendants shall pay these costs. Defendants shall reimburse any out-of-pocket money claimant has spent directly to him.

Iowa Code section 86.40 states:

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

Iowa Administrative Code Rule 876—4.33(86) states:

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is

taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. Dec. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. Dec. December 8, 2010). The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to rule 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. Dec. July 21, 2009). The entire cost of an IME may not be assessed if a claimant is not entitled to reimbursement under Iowa Code section 85.39. DART v. Young, 867 N.W.2d 839 (Iowa 2015).

I award the filing fees and service cost to Ronald in the amount of \$212.98. I award the transcription cost for the deposition of Dr. Stapleton and Ronald in the amount of \$458.00.

Ronald has requested \$5,980.00 for the report of Mr. Jayne. While the report was used for both claims, I do not see in the record a justification of this high of a fee. Mr. Jayne did some testing of Ronald that is not always performed in a vocational assessment which could justify a somewhat higher rate; it does not justify the nearly \$6,000.00 charge by Mr. Jayne. Considering similar claims seen by this agency and using agency experience pursuant to Iowa Code section 17A.14(5), I award \$3,000.00 for Mr. Jayne's evaluation and report.

Iowa Code section 622.72 provides the following concerning expert witness fees:

Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed one hundred fifty dollars per day while so employed.

Ronald requested \$700.00 for fees he incurred for Dr. Stapleton's deposition. By rule 876 IAC 4.33(5), the amount that I can award is \$150.00 dollars. Claimant is awarded \$150.00 dollars for this cost.

Dr. Bansal charged claimant \$3,795.00 for his February 20, 2015 IME. (Ex. 11, p. 186) Defendants obtained a rating by a physician of their choosing, Dr. Pardubsky, on April 25, 2015. Dr. Pardubsky's IME concerned Ronald's left hand injury. On May 11, 2015 defendants obtained an IME by Dr. McKinsey concerning the Legionnaires' disease. I find that Ronald is entitled to one-half of Dr. Bansal's IME fees. The portion concerning the Legionnaires' disease for File No. 5048386 was performed before defendants obtained a rating. Defendants shall pay \$1,897.50 for Dr. Bansal's IME. This is the amount defendants stipulated at the hearing they would pay.

ORDER

For File No. 5043916 (date of injury August 27, 2012):

Defendants shall pay healing period benefits from August 27, 2012 through September 2, 2012. Defendants previously paid all but one (1) day of these benefits.

Defendants shall pay one thousand eight hundred ninety-seven and 50/100 dollars (\$1,897.50) for Dr. Bansal's IME.

Defendants shall pay one hundred twelve and 98/100 dollars (\$112.98) for filing and service fees.

For File No. 5048386 (date of injury September 3, 2012):

Defendants shall pay claimant permanent total disability benefits at the rate of two hundred eighty-nine and 44/100 dollars (\$289.44) per week commencing September 3, 2012 and during the time claimant remains permanently and totally disabled.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall pay the claimant's medical expenses submitted by claimant at the hearing in the amount one hundred ninety-two thousand nine hundred sixteen and 23/100 dollars (\$192,916.23).

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

Defendants shall pay one hundred fifty and 00/100 dollars (\$150.00) for the deposition appearance of Dr. Stapleton.

Defendants shall pay one hundred and 00/100 dollars (\$100.00) for filing fees.

For both files:

Defendant shall pay three thousand and 00/100 dollars (\$3,000.00) for the evaluation and report of Mr. Jayne.

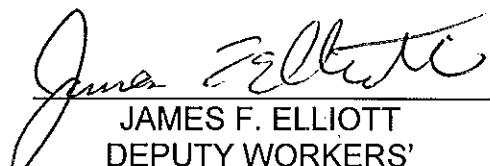
Defendants shall pay four hundred fifty-eight and 00/100 dollars (\$458.00) for transcription costs.

Defendants shall pay accrued weekly benefits in a lump sum.

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

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

Signed and filed this 14th day of January, 2016.


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/srs

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.