

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE LOZANO,

Claimant,

vs.

MEADOWVALE DAIRY, LLC,

Employer,

and

TRAVELERS INDEMNITY,

Insurance Carrier,  
Defendants.

**FILED**

JUN 24 2016

WORKERS COMPENSATION

File No. 5052386

ARBITRATION DECISION

Head Note Nos.: 1803; 3000

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Jose Lozano, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on March 23, 2015. Claimant alleged he sustained a work-related injury on June 29, 2014. (Original notice and petition.)

Meadowvale Dairy, L.L.C. is located in rural Rock Valley, Iowa. For purposes of Workers' Compensation, the dairy is insured by Travelers Indemnity, L.L.C. A first report of injury was filed on July 18, 2014.

The hearing administrator scheduled the case for hearing on February 24, 2016 at 8:00 a.m. The hearing took place in Sioux City, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Teri Lea Autry as the certified shorthand reporter. She is the official custodian of the records and notes. Mr. Frank Gonzalez was sworn in as the Spanish interpreter.

Claimant testified on his own behalf. Defendants elected not to call any witnesses.

The parties offered exhibits. Claimant offered exhibits marked 101 through 110. Defendants offered exhibits marked A through C. The parties jointly offered exhibits marked 1 through 6. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on March 21, 2016. The case was deemed fully submitted on that date.

### STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on June 29, 2014, which arose out of and in the course of his employment;
3. The injury is a cause of both temporary and permanent disability;
4. The parties agree the permanency is an industrial disability;
5. The parties agree claimant reached maximum medical improvement on April 22, 2016;
6. Defendants have waived all affirmative defenses they may have had available to them;
7. Prior to the hearing, defendants paid 30 weeks of permanent partial disability benefits to claimant at the rate of \$556.10 per week;
8. Defendants agree to compensate claimant for the independent medical examination performed by C. Robert Adams, M.D., in the amount of \$1,700.00; and
9. The parties agree certain costs that are detailed were paid by claimant and are not in dispute.

### ISSUES

The issues presented are:

1. There is an issue as to the extent of permanent partial disability to which claimant is entitled;
2. There is an issue as to the weekly benefit rate to be paid to claimant: defendant maintains claimant is entitled to single with one dependent and a rate of \$556.10; claimant says the rate is single with two dependents and the weekly benefit rate is \$573.46 per week; and;

3. There is an issue whether defendants are responsible for translator fees incurred with Dr. Cho.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is now 30 years old and right-hand dominant. He is single. Claimant was born in California and is a citizen of the United States. However, he was raised and educated in Mexico. As a result, claimant's command of the English language is very poor. He did graduate from secondary school in Mexico, but it is not the equivalent of graduating from high school in the United States. Claimant returned to the United States at the age of 20. He does not have a GED or any other specialized training. His only field of expertise is in dairy farming.

Claimant worked on the family farm in Mexico. From 2008 through 2012, claimant worked on Boch Dairy in Ontario, California. Then claimant returned to Mexico for 1 ½ years and worked for his family on their farm. Claimant commenced his employment with Meadowvale Dairy on March 28, 2013. He remained employed until he was terminated by the company.

Claimant's job description as a "milking technician" is detailed in claimant's Exhibit 106. It is adopted as though fully set out herein. A few of the requirements were for claimant to stand up to 12 hours per shift and to lift 70 pounds frequently and up to 100 pounds on occasion. (Ex. 106)

Claimant sustained his work injury on June 29, 2014 when he was struck from behind by a bull. Claimant was knocked off his feet. He landed on his left wrist, left buttocks, and his thoracic spine. Claimant was transported to Hegg Memorial Health Center in Rock Valley, Iowa. (Exhibit 1, page 2)

Diagnostic testing showed:

X-ray shows that he has a distal radius fracture, but it is nondisplaced and the skin is intact and it looks like a Smith type 1 fracture and then when you look at one of the views of the wrist it looks like he has a trapezium fracture and then when you look at the thoracic spine x-rays they actually look pretty good, but I am not a radiologist, so that will be overread by a radiologist. The films were sent up to McKennan.

ASSESSMENT:

1. Distal radius fracture of the left wrist.
2. Left trapezium fracture of the left wrist.
3. Thoracic paraspinous muscle strain.

(Ex. 1, p. 3)

On July 1, 2014, Scott McPherson, M.D., an orthopedic surgeon, examined claimant for the first time. (Ex. 2, p. 1) Dr. McPherson diagnosed claimant with:

PLAN: The patient has a nondisplaced distal radius fracture that appears to be in good position, not requiring intervention. He will be placed into an EXOS type splint for protection. This is to be worn full time, except for hygiene. He is not to start working on range of motion as of yet. I would plan on immobilizing this for a period of five weeks before initiating motion. The patient will follow up in two weeks with x-rays, three views of the left wrist, to monitor progress. If position still looks satisfactory, I would continue immobilization for an additional three weeks. If there has been a change in position or unclear as to the overall fracture position, [sic] could get a CT scan or did [sic] discuss the possibility of surgical treatment, again, if there is some displacement or change in position.

IMPRESSION: Left distal radius fracture.

ADDENDUM: This is a Worker's [sic] Compensation injury, and the patient will be placed in a no-work status pending his re-evaluation in two weeks. He will be seen in therapy today for his splint fabrication and also will start working on digital range of motion.

(Ex. 2, p. 1)

Dr. McPherson ordered occupational hand therapy for the left distal radial fracture commencing July 1, 2014. The occupational therapy was scheduled in Rock Valley for the convenience of claimant. (Ex. 3, p. 1) Claimant worked with Stephen Kulzer, OT. (Ex. 3, p.2)

On July 15, 2014, claimant returned to the Hegg Medical Clinic with complaints of bilateral back complaints in the mid spinal area. (Ex. 5, p. 4) Jonathan H. Engbers, M.D., examined claimant. Dr. Engbers found tenderness over the thoracic spinal area. (Ex. 5, p. 4) Dr. Engbers diagnosed claimant with "Thoracic back sprain." (Ex. 5, p. 4) Flexeril and Aleve were prescribed. (Ex. 5, p. 4) Claimant returned to Bradley Kamstra, D.O., on August 26, 2014 with the same pain complaints. (Ex. 5, p. 6)

Dr. Kamstra ordered MRI testing of the thoracic spine. (Ex. 5, p. 7) The results showed a T7 and T10 wedge compression fracture. (Ex. 5, p. 10) Dr. Kamstra opined **the fractures were very minimal in nature**. (Emphasis added.) (Ex. 5, p. 10) Drug therapy was ordered. (Ex. 5, p. 10) The physician opined work restrictions were appropriate. (Ex. 5, p. 10)

Claimant saw Dr. McPherson on September 23, 2014. (Ex. 2, p. 18) Dr. McPherson noted claimant had been making excellent progress with respect to his left distal radius fracture. (Ex. 2, p. 18) Claimant had excellent wrist mobility. He was nontender to palpation, and his distal neurovascular status was intact. (Ex. 2, p. 18) Dr. McPherson returned claimant to light duty work with respect to the left distal radius fracture. (Ex. 2, p. 18) Claimant could return to work so long as he did not lift more than ten pounds with his left upper extremity; he did not engage in repetitive activities with his left upper extremity; and he did not grasp, grip or torque with his left upper extremity. (Ex. 2, p. 21) Dr. McPherson opined claimant could return to full duty work with regard to his left distal fracture on October 20, 2014. (Ex. 2, p. 21)

Claimant was discharged from occupational hand therapy on September 26, 2014. (Ex. 1, pp. 25-26) He had attended all 11 scheduled sessions. The therapist opined the strength in the left upper extremity was approximate to the strength in the dominant right upper extremity. (Ex. 1, p. 25)

On October 9, 2014, claimant returned to see Dr. Kamstra. (Ex. 5, pp. 13-15) Claimant reported he was unable to find work due to his restricted duty. (Ex. 5, p. 14) Claimant reported taking pain pills only at night. Dr. Kamstra noted claimant had:

O- He has normal flexion. Extension you can tell is uncomfortable to him. Side bending is not too bad. He has tenderness at the T10 area. Otherwise he appears to be in no distress.

- A- 1. Compression fractures.
- 2. [B]ack pain.
- 3. Recent past history of wrist fracture.

P- For now we are going to wait 2 more weeks. We will start PT up again. I tried to warn him that it will be uncomfortable. There would be some things that would not be as comfortable for him, but I think we will start to get his strength back.

(Ex. 5, p. 14)

Dr. Kamstra examined claimant again on November 11, 2014. (Ex. 5, pp. 16-18) Claimant reported some back pain but his condition was improving. Range of motion seemed appropriate. Claimant was able to sleep at night. He could flex and bend.

Dr. Kamstra continued physical therapy for claimant. The orthopedist hoped to begin work hardening for claimant in December 2014. Dr. Kamstra opined claimant did not seem particularly excited about a work hardening program. The orthopedist explained to claimant it would take time for claimant to become reconditioned. (Ex. 5, p. 17)

Dr. McPherson examined claimant on November 24, 2014 with respect to the left distal radius fracture. (Ex. 2, p. 22) The examination showed:

Examination of his left wrist shows no synovitis, no swelling. He has excellent mobility. At maximum dorsiflexion, he does get some mild pain over the snuffbox region and has some slight tenderness there to palpation. He had a negative Watson shift test. His skin is clear. He has intact distal neurovascular status.

(Ex. 2, p. 22)

Dr. McPherson ordered additional x-rays of the left wrist. The x-rays showed the fractures to be healed and in good alignment. (Ex. 2, p. 22) Claimant was continued on full duty status. (Ex. 2, p. 22) Claimant reported, "some residual dorsal radial type pain with loading." (Ex. 2, p. 22)

On December 3, 2014, claimant again presented to Dr. Kamstra. (Ex. 5, pp. 26-28) Claimant complained of back pain when he had to lift something heavy. Dr. Kamstra noted:

O- I had him flex, extend, sidebend. It seemed like he could [sic] most of those ranges of motion without difficulties. But until there is a load put on his back, is what bothers him. He showed me a video of the floor where he works with the cows. Most of the time it's getting a lot of the hoses and things hooked up to the cows. It's a lot of moving quickly and a lot of physical activity. Not a lot of heavy lifting but he said sometimes if they get bad milk, they have to lift some containers that are pretty heavy. Did show another video of a guy that had to climb up and try to get a cow lined up into position and that was quite a bit of maneuvering. I think that has him concerned. So really looking at the last couple of mos, [sic] he really has not had much improvement. I would have anticipated things going better now. I'm not sure if he's just nervous about getting back to work causing more problems or if he really has that much trouble.

(Ex. 5, p. 27) Dr. Kamstra referred claimant to Gregory F. Alvine, M.D., for a second opinion. (Ex. 5, p. 27)

Dr. Alvine examined claimant on February 17, 2015. (Ex. 2, p. 15) According to Dr. Alvine, the August 29, 2014 MRI showed: "very subtle edema in the right side along

the superior endplate of T7. He has as Schmorl node at T10, most likely chronic.” (Ex. 2, p. 25)

Additionally, Dr. Alvine ordered and reviewed new x-rays. The x-rays demonstrated a straight spine with no subluxation or significant kyphosis. (Ex. 2, p. 25)

The orthopedist diagnosed claimant with:

1. Mid thoracic back pain after an injury where he sustained a subtle T7 superior endplate compression fracture.
2. Incidental finding of a T10 Schmorl node.

(Ex. 2, p. 25)

Dr. Alvine opined claimant's back would heal eventually and claimant could return to his regular duties. The orthopedist imposed a restriction for the back of no lifting greater than 50 pounds.

On the same date, claimant returned to Dr. McPherson for a follow-up examination of the left distal radius fracture. (Ex. 2, p. 27) Claimant reported he was doing well with respect to his left wrist. Dr. McPherson ordered new radiographs. They showed:

RADIOLOGICAL EXAMINATION: I ordered and reviewed AP, lateral and oblique and comparison AP stress views. These are within normal limits showing that the fracture is completely healed in an excellent position. Also the stress view showed no signs of any widening at the scapholunate junction and no signs of any carpal instability.

(Ex. 2, p. 27)

Claimant was released to full duty work with respect to his left wrist. Dr. McPherson opined claimant was at maximum medical improvement regarding the left wrist. (Ex. 2, p. 27)

Per a request from a claims adjuster at the insurance company, Dr. McPherson performed a permanent impairment rating for the left wrist. (Ex. 2, p. 34) The authorized treating orthopedist opined:

Mr. Lozano had sustained a left distal radius fracture that was treated closed. Date of injury was 06-29-14. At his last evaluation his fracture was well healed with no signs of any residual type problems. He had excellent mobility noting full range of motion.

He was at MMI as of February 17, 2015 and his permanent partial disability rating would be zero percent.

(Ex. 2, p. 34)

On April 22, 2015, claimant returned to Dr. Alvine for a follow-up appointment for the thoracic spine. (Ex. 2, pp. 36-37) The orthopedist ordered and reviewed new radiographs. Repeat testing showed no significant kyphosis and interval healing. (Ex. 2, p. 36) Claimant was deemed ready to be released from physical therapy. Dr. Alvine opined claimant was at maximum medical improvement and claimant could return to work without any work restrictions on April 23, 2015. (Ex. 2, pp. 36-37) Dr. Alvine referred claimant to a physiatrist for an independent medical examination. This was the last examination claimant had with Dr. Alvine.

On June 5, 2015, claimant presented to his family physician, Kevin J. Post, D.O., for a health matter unrelated to the workers' compensation claim. (Ex. 1, pp. 71-74) While Dr. Post was examining claimant, claimant related he was having ongoing problems with his thoracic back. Dr. Post diagnosed claimant with thoracic back strain. Claimant reported he had back pain whenever he worked a 12 hour shift. He thought it would be much better for him to work only 10 hours per day. Dr. Post wrote a work note for claimant. The note restricted claimant from working more than 10 hours per day. (Ex. 5, p. 30) Claimant reported taking Tylenol and ibuprofen on an intermittent basis. (Ex. 1, pp. 71-74)

Because claimant could not work a 12 hour shift, his employer removed him from the position of milking technician. Claimant was reassigned to a lawn care worker. He worked 9 hours per day; 5 days per week; at \$12.00 per hour. Claimant was not eligible for bonus pay. The employer terminated claimant in August of 2015. There was no longer a need for a landscaper.

Bruce Elkins, M.D., MPH, conducted an independent medical examination per the request of defense counsel. The examination occurred on July 9, 2015. (Ex. 4) Dr. Elkins rated both the left wrist and the thoracic spine for the purpose of rendering a permanent impairment rating. Dr. Elkins opined:

#### **Discussion/Impairment Calculation:**

According to the AMA Guides, 5<sup>th</sup> Edition, Mr. Lozano has the follow [sic] permanent partial impairments related to the 06/29/14 work incident:

##### *Left Wrist*

Range of motion deficits, per Figure 16-28, page 467 are 2% of the upper extremity. Using Table 16-3, page 439, 2% of the upper extremity converts to 1% of the whole person.



*Thoracic Spine*

Table 15-4, page 389: DRE Thoracic Category II, Less than 25% compression fracture of one vertebral body: 5-8% of the whole person. No objective basis for limitation of ADLs, therefore 5% of the whole person.

*Total Impairment*

Combining: 5% and 1% of the whole person yields a 6% of the whole person total impairment.

(Ex. 4, p. 7)

Dr. Elkins agreed with Dr. Alvine; no work restrictions were necessary. (Ex. 4, p. 7) Dr. Elkins opined, "Mr. Lozano's current limitations seem to stem from fear of re-injury, rather than any anatomic/physiologic barrier to unrestricted work." (Ex. 4, p. 7) Dr. Elkins opined no additional medical treatment was warranted. (Ex. 4, p. 8)

On December 21, 2015, Dr. Post issued a work restriction for claimant. The note provided, "Please limit back strain to lifting <20 lbs. due to medical condition." (Ex. 5, p. 31) There was no corresponding report or record in evidence from Dr. Post to explain why Dr. Post issued the lifting restriction.

Claimant sought his own independent medical examination pursuant to Iowa Code section 85.39. Dr. Adams, evaluated claimant on December 11, 2015 and then issued a report on December 23, 2015. Claimant described his symptoms to Dr. Adams as:

He has had pain in his back with stiffness in his middle back below the level of his shoulder blades. This is worse when he twists, turns, bends, or stoops. He has pain and discomfort when he sits in one place for any prolonged period of time. He has trouble getting comfortable at night as it disturbs his sleep and makes him continuously restless through the night. Lifting and even doing simple household chores such as vacuuming, etc., all bring out the pain as he tries to twist and turn. He states he is not as flexible as he used to be and cannot tolerate bending over as he did before and cannot tolerate rotating or twisting at the waist as all of this brings out the pain. He states when he bends over it feels as if bones are rubbing together in a discrete area around 2 inches long in his back.

He has a different issue with pain in his left wrist. It feels sore and tender when he uses it. His left wrist and hand feel as if they could give away when he is holding on to objects. He has some numbness of his hand, but the pain, stiffness, and weakness and the exacerbation of these symptoms with activities are what bother him the most. He is

right-handed, and he does not have problems with his right hand. He has noticed that flexing, twisting, and moving his wrist and hand from side to side bring out the pain. Laying or leaning on his hand also brings out the pain.

(Ex. 6, pp. 1-2)

Dr. Adams discussed the need for permanent work restrictions. He opined:

Restrictions:

This gentleman has significant limitations and restrictions with regard to his thoracic back injury. He would not tolerate repetitive bending, stooping, or extreme flexion of lifting over 20 pounds on an occasional but not regular basis. He is not going to tolerate lifting 40 pounds, which is about the weight of a sack of salt, not even on an occasional basis. He is not going to lift this safely and not without having marked discomfort, possibly further injuring his back. This gentleman would not be safe to be lifting awkwardly in precarious places or at heights as he would be prone to falls in the setting of the unpredictability [*sic*] but fairly frequent character of his mid-thoracic back pain.

With regard to his left lower arm and hand injuries, he is not going to tolerate repetitive gripping and pulling. He is going to have problems holding on to objects heavier than 10 pounds on an occasional but not regular basis. He should not be lifting over 20 pounds with his left hand as that would not be safe and reliable. This gentleman would not be safe with regard to operating power tools or heavy equipment with the left hand.

Recommendations:

Carpal tunnel syndrome may be a secondary phenomenon affecting his left hand and should be investigated with nerve conduction and EMGs. Otherwise, this gentleman needs to maintain a stretching regimen for his back and palliative chronic pain management for his back and left arm and hand pain. Common sense measures with chondroitin, glucosamine and vitamin D sometimes slow the process of arthritic change in the spine and in the extremities and would be helpful. Otherwise, anti-inflammatory medication, muscle relaxants, and/or nighttime hypnotics or sedatives could be helpful as far as facilitating better sleep.

(Ex. 6, p. 6)

Dr. Adams provided permanent impairment ratings for claimant. The evaluating physician opined:

Permanent Impairment:

Permanent impairment if calculated at this time with regard to his thoracic back injury, thoracic back fractures, and subsequent ongoing pain and limitations with motion, movement, bending, twisting, and lifting would have to be at least 8% impairment of his whole person per Table 15-4, Criteria for Rating Permanent Impairment Due to Thoracic Spine Injury and other examples and suggestions given in The American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition. He does appear to be at maximum medical improvement or MMI with regard to his thoracic back injuries, although he needs ongoing, continuing treatment as outlined above.

Permanent impairment with regard to his left wrist, hand, and arm injury would have to take in to account the fact that he has posttraumatic arthritis, stiffness and weakness as well as possible aseptic necrosis or ongoing carpal bone problems of worsening character that might need further orthopedic evaluation. Carpal tunnel syndrome can also be a secondary contributing phenomenon accentuating and worsening the decreased grip and discomfort in his left hand. This does merit further workup as mentioned. In the setting of these abnormalities and with documented moderately depressed and very decreased grip strength on the left as compared to the right, he would have at least 8% impairment of his hand or 7% impairment of the left upper extremity or 4% impairment of his whole person per Table 16-2 and 16-3 and other examples and suggestions given in The American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition. This is also taking in to [sic] account the fact that he undoubtedly has some degree of untreated and, in fact, unevaluated carpal tunnel syndrome on the left. That would be further delineated by doing the nerve conduction and EMG studies. Table 16-15 with regard to Evaluation of Motor and Sensory Deficits would be further pertinent here, again, per The American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition.

(Ex. 6, pp. 6-7)

At the arbitration hearing, claimant testified he was receiving unemployment insurance benefits. He stated he had not been employed since he was terminated by management at Meadowvale Dairy. Claimant testified during cross-examination that he had only been applying for two jobs per week as required by law to receive weekly unemployment benefits.

## RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

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.

Claimant resides in Rock Valley, Iowa. It is a very small community of approximately 2,700 residents in northwest Iowa. Claimant's entire work experience has been in the dairy industry. He is a United States citizen, but was educated in Mexico. Unfortunately, claimant does not have a good command of the English language. His poor understanding of English may be an impediment to claimant obtaining other lucrative employment opportunities.

Claimant is a young man. He just turned 30 years old. There is nothing to indicate he is incapable of retraining or securing other employment.

There is a huge discrepancy whether claimant should be working under restrictions. The two authorized treating orthopedists did not impose work restrictions for either the left upper extremity or the thoracic spine. The treating orthopedists examined claimant on numerous occasions. They had many occasions to observe claimant.

Dr. Elkins, the independent medical examiner obtained by defendants, did not believe restrictions were warranted. Dr. Elkins opined claimant had a fear of re-injury rather than a need for restrictions.

Claimant's independent medical examiner, Dr. Adams, saw claimant on one occasion only. Dr. Adams imposed work restrictions as detailed earlier in the body of this decision.

Then there were the restrictions imposed by claimant's personal physician, Dr. Post. Claimant had been treating with Dr. Post for conditions unrelated to the workers' compensation claim. Dr. Post was not authorized to treat claimant for the left wrist or the thoracic spine. However, claimant brought a myriad of complaints to Dr. Post. When Dr. Post wrote the note, "Please limit work to 10-hour work days due to medical condition," it was never clear which medical condition Dr. Post was referencing.

Claimant testified in his deposition the ten hour work day was for his work injury, his damaged kidneys, his diabetes, his intestines, and the fact he was taking medication every three to four hours. Claimant also discussed surgery on his stomach as a condition he experienced at the same time. (Ex. A, pp. 4-5) The undersigned deputy cannot determine whether Dr. Post's work restrictions were provided in whole or in part for claimant's June 29, 2014 work injury.

Because claimant could not work 12 hours per day, he lost his job as a milking technician. He was demoted to a lawn attendant with a reduction in pay. At the end of the summer, claimant was terminated. He had an actual loss of earnings.

This deputy does acknowledge claimant has some functional impairment in both his left upper extremity and his thoracic spine. Claimant testified he asks for assistance when he is lifting heavy objects or if he has to engage in certain activities around the home. Claimant testified he is unable to participate in certain sporting activities now.

After considering all of the factors involved in assessing industrial disability; it is the determination of the undersigned; claimant has a permanent partial disability in the amount of thirty-five (35) percent. Defendants shall pay unto claimant 175 weeks of permanent partial disability benefits commencing from April 22, 2015. Accrued benefits

shall be paid in a lump sum. Defendants shall take credit for 30 weeks of permanent partial disability benefits previously paid at the rate of \$556.10 per week.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is the proper weekly benefit rate. The parties agree claimant's gross earnings were \$936.00 per week. The issue is whether claimant is single and entitled to 1 exemption or single and entitled to 2 exemptions. Claimant contends the weekly benefit rate should be \$573.46 per week. Defendants maintain the weekly benefit rate should be \$556.10 per week.

Claimant testified he had been helping to support his brother who lived in California. He claimed his brother as a qualifying dependent resident on his income tax records in 2013 and 2014. Claimant attached an IRS publication, Personal Exemptions and Dependents/Qualifying Relative/Relationship Text to its brief. According to the document, a relationship test for dependency is met if a person:

1. Lives with claimant all year as a member of his household; or
2. Is related to claimant in one of the ways listed under Relatives who did not live with claimant. (The relative included a brother or sister of claimant's mother or father.)

Iowa Code section 85.61(6)a) provides in relevant portion:

6. "*Payroll taxes*" means an amount, determined by tables adopted by the workers' compensation commissioner pursuant to chapter 17A, equal to the sum of the following:

- a. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness and old age to which the employee is entitled on the date on which the employee was injured.

It is the determination of the undersigned; claimant has established by a preponderance of the evidence, his brother is a qualifying dependent relative. Therefore, claimant is entitled to an exemption of single with two exemptions. As a result, claimant's weekly benefit rate in this case is \$573.46.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the weekly benefit rate of five hundred seventy-three and 46/100 dollars (\$573.46) per week and commencing from April 22, 2015.

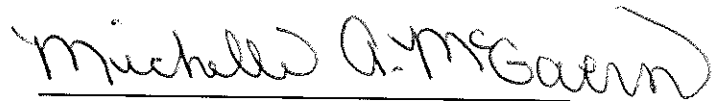
Accrued benefits shall be paid in a lump sum, together with interest, as allowed by law.

Defendants shall take credit for all benefits paid prior to the filing of this decision.

Costs are assessed to defendants with the exception of the translator bill for Nelcy Anguiano in the amount of one hundred ten and 00/100 dollars (\$110.00). Claimant is responsible for Ms. Anguiano's bill.

Defendants shall file all requisite reports in a timely manner.

Signed and filed this 24th day of June, 2016.



MICHELLE A. MCGOVERN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies to:

Judy C. Freking  
Attorney at Law  
PO Box 1208  
Le Mars, IA 51031  
judycfreking@gmail.com

Bryan J. Arneson  
Attorney at Law  
PO Box 1678  
Sioux City, IA 51102-1678  
barneson@maynelaw.com

Timothy A. Clausen  
Attorney at Law  
4280 Sergeant Rd., Ste. 290  
Sioux City, IA 51106-4647  
clausen@klasslaw.com

MAM/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.