BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT CLARK,

Claimant,

vs.

BEN SHINN TRUCKING, INC.,

Employer,

and

BERKSHIRE HATHAWAY HOMESTATE CO.,

Insurance Carrier,
Defendants.

File No. 5065327

ARBITRATION

DECISION

Head Note Nos.: 1803, 3001

STATEMENT OF THE CASE

Robert Clark, claimant, filed a petition in arbitration seeking workers' compensation benefits from his employer, Ben Shinn Trucking, Inc., and Berkshire Hathaway, the workers' compensation insurance carrier. The matter proceeded to hearing on December 4, 2018. The parties submitted post-hearing briefs and the matter was considered fully submitted on February 19, 2019.

The evidentiary record includes: Joint Exhibit JE1; Claimant's Exhibits 2 and 3; and Defendants' Exhibits A through L. Claimant provided testimony at hearing.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Extent of Industrial Disability.

2. Rate: Gross Weekly Earnings.

3. IME Reimbursement, Iowa Code section 85.39.

4. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Robert Clark was 64 years old at the time of the hearing. (Tr. p. 24) He graduated from high school in 1972. (Tr. p. 32, 111; Ex. I-39) He did not have any additional formal education. He acquired skills in the areas of construction, electrical and plumbing over the years. He built the house he now lives in using those skills, doing the work himself. However, he has no certifications or licenses in any skilled trade. (Tr. pp. 95-96) Claimant also has skills in auto body repair and mechanical work, but he has no formal education or certifications in these areas either. (Tr. pp. 52-53)

Work History

During high school, claimant worked on farms doing manual labor, such as harvesting hay. After high school, claimant had jobs building cabinets, and operating farm machinery and heavy equipment. He was self-employed from about 1998 or 1999 through 2008 rebuilding damaged automobiles.

Claimant initially worked for the defendant employer from 1984 through 1998 or 1999 as a truck driver hauling coal. (Ex. I-40; Ex. J, pp. 11-13) He returned to work for the defendant employer in approximately the spring of 2011 and worked as a dump truck driver. (Ex. J-13) Driving a dump truck required that claimant, from time to time, climb into and out of the dump box to clean out excess material using a shovel or scraper. He would also swing the tailgate hard against the box to knock material off that was stuck to the tailgate. (Tr. pp. 43-48) The tailgate weighed several hundred pounds. (Tr. p. 45)

The Injury and Subsequent Medical Treatment

On August 10, 2015, claimant sustained a stipulated work injury while hauling "cake batter," which is a slurry/soup like material that was produced from drilling pilings at a construction site. While driving his dump truck at about 50 miles per hour, he hit some broken concrete in the road causing him to bounce up and hit his head on the ceiling of the cab and land hard on his buttocks in the seat. (Tr. p. 61, 65) Claimant reported that the broken concrete he hit appeared to have fallen out of another truck. The pieces varied in size from a few inches to a few feet long. Claimant submitted photographs and testified that the chunks of concrete in the photos were similar to the ones he had hit. (Tr. pp. 64, 113; Ex. 4, pp. 110-112)

Claimant testified that immediately after the impact his legs felt numb and then about 30 second later he felt pain. Claimant continued on with his job of dumping the load. He knew that if he did not empty the material in his truck, it would eventually

harden like concrete. It therefore needed to be removed from the box in a timely manner. (Tr. p. 65)

Claimant reported the injury and was sent for medical care by the employer. (Tr. p. 69) He was referred by the initial medical provider to Anthony Stark, D.O., at Iowa Ortho who recommended an epidural steroid injection. Claimant's pain was in his low back and radiated into his buttock and legs. (Ex. JE1-10) Dr. Stark stated that surgery may be required in the future. (Ex. JE1-8) Claimant was placed on restrictions of no lifting over 10 pounds and no driving. (Ex. JE1-9)

Due to the severity of his ongoing pain, Dr. Stark recommended nerve blocks. If the nerve blocks were substantially helpful, then radiofrequency ablations would be considered. (Ex. JE1-10)

On April 27, 2016, Dr. Stark referred claimant to Todd Harbach, M.D., for a surgical consultation. (Ex. JE1-14)

Dr. Harbach noted that claimant failed months of conservative therapy including multiple injections and three months of physical therapy. He recommended surgical decompression and fusion. (Ex. JE1-16)

On August 10, 2016, Dr. Harbach performed surgery including an L4-5 fusion, with instrumentation and a structural allograft. (Ex. JE1-86)

Post-surgery, claimant reported initial relief of his radicular pain, but felt that his legs would give out after walking about one mile. (Ex. JE1-18) Prior to the work injury, claimant had enjoyed walking for exercise. Claimant was placed on restrictions that included no commercial driving and no lifting over 5 pounds. (Ex. JE1-20)

In November 2016, claimant began receiving Social Security Disability benefits in the approximate amount of $750.00 per month. (Ex. C-17)

Claimant continued to report a sense of his legs giving out and Dr. Harbach referred claimant to Dr. Holt for a right sided L4-5 and L5-S1 transforaminal injection. (Ex. JE1-23) Dr. Holt provided epidural steroid injections on January 3, 2017 and January 17, 2017. (Ex. JE1, pp. 25, 27)

By January 23, 2017, claimant was experiencing intractable lower extremity pain. (Ex. JE1-28)

Dr. Holt reported that the injections did not help, but claimant had not yet had facet blocks. Dr. Holt stated that "In my opinion he has plateaued and feels that he is unable to work. A functional capacity evaluation [FCE] may ba [sic] a good idea [sic], but it also may be a good idea to try facet blocks in the pain clinic first." (Ex. JE1-30) He also suggested that claimant may need a spinal cord stimulator.

On May 16, 2017, claimant was seen by John Rayburn, M.D., who performed a right L2-L5 medial branch radiofrequency ablation with fluoroscopic guidance. (Ex. JE1-37) On May 23, 2017, he performed a similar ablation on the left L2-L5 medial branch. (Ex. JE1-39)

Dr. Rayburn noted very clearly in the patient status report, "This physician does not provide restrictions." (Ex. JE1-38) This is consistent with claimant's testimony that Dr. Rayburn told him that he does not assign restrictions to his patients, and relies on other physicians to address restrictions. (Tr. pp. 84-85)

Claimant's pain persisted. On August 14, 2017, Dr. Rayburn gave claimant a right ischial bursa injection. (Ex. JE1-44) On December 11, 2017, Dr. Rayburn administered a right piriformis injection. (Ex. JE1-50)

On January 18, 2018, Dr. Harbach reported that claimant was "hurting so badly he is talking about suicide." (Ex. JE1-54) Claimant was continued on restrictions of lifting no more than 15 pounds and a request for office work and no commercial driving. (Ex. JE1-55) No such work was available with the defendant employer.

On March 2, 2018, Dr. Harbach noted claimant's intractable pain in his low back and right lower extremity. He also noted that EMG testing was normal and the lumbar MRI no longer showed any neural compression at L4-5. Claimant was referred to the pain clinic for consideration of a spinal cord stimulator as a "salvage procedure/option." (Ex. JE1-60)

On March 26, 2018, Dr. Rayburn administered a right L5-S3 medial and lateral branch block with no relief. (Ex. JE1-68) On April 26, 2018, Dr. Rayburn performed a right sacroiliac joint injection, and claimant had relief for about 8 to 10 days. (Ex. JE1, pp. 68, 72)

On July 5, 2018, claimant was seen for an independent medical evaluation (IME) by Sunil Bansal, M.D., at the request of claimant's counsel. (Ex. 2-89) Dr. Bansal reviewed medical records, discussed claimant's subjective complaints, the nature of the injury, and claimant's prior temporary complaints of back pain. Dr. Bansal conducted a physical examination and found claimant to be at maximum medical improvement (MMI) on January 18, 2018, at his appointment with Dr. Harbach. However, I note that claimant saw Dr. Harbach again on July 27, 2018 after Dr. Bansal's IME. Dr. Bansal placed claimant in the DRE Category IV in Table 15-3 at page 384 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides), for his lumbar spine condition. This is the same category placement used by Dr. Harbach below. However, Dr. Bansal assigned 22 percent permanent partial disability to the whole person, as opposed to Dr. Harbach's 20 percent assigned below. Dr. Bansal also assigned permanent restrictions of no lifting over 20 pounds occasionally and 10 pounds frequently, and no frequent bending, twisting, prolonged standing or walking greater than 60 minutes.

On July 23, 2018, Dr. Rayburn placed claimant at MMI from a pain management standpoint and encouraged claimant to engage in a home exercise program. This was the last time claimant saw Dr. Rayburn. (Ex. JE1-77)

On July 27, 2018, Dr. Harbach considered claimant to be at MMI, assuming a spinal cord stimulator was not going to be pursued. This was the last time claimant saw Dr. Harbach. (Ex. JE1-79) He released claimant from his care on this date with restrictions that were marked as "temporary." (Ex. JE1-81) The restrictions included: no lifting above 10 pounds; avoid repetitive lifting, pushing/pulling, bending/twisting, and climbing. (Ex. JE1-81) It is odd to the undersigned that Dr. Harbach refers to these restrictions as "temporary" on the same date that he released claimant from his care and placed him at MMI, which according to (AMA Guides) means that although some anticipated change may occur, generally "further recovery or deterioration is not anticipated." (AMA Guides, p. 19) Given that Dr. Harbach released claimant from his care and placed him at MMI, the restrictions are understood by the undersigned to be "temporary" only to the extent that a spinal cord stimulator might be pursued by another physician at a later date.

On August 30, 2018, Dr. Rayburn, who did not see claimant on this date, opined that a spinal cord stimulator would not be appropriate for claimant. (Ex. E-1) Also, despite having never previously assigned restrictions for claimant and having stated in general to claimant that he does not assign restrictions, Dr. Rayburn stated that no permanent restrictions were needed in this case. This was done via a "check the box" letter from defense counsel with no explanation or rational provided by Dr. Rayburn to support his opinion. I give Dr. Rayburn's assessment of no restrictions little weight given his lack of any discussion in support of this conclusion.

On August 2, 2018, claimant had a telephone discussion with Lana Sellner who prepared a vocational assessment at defendants' request. (Ex. C) Ms. Sellner relied on Dr. Bansal's restrictions. She noted that claimant reported being unable to sit upright or stand in one position more than 15 minutes. He reported being unable to ride in a car more than 20 minutes or walk more than one-half mile. He reported that reclining after activity helped his symptoms and he did housework and yard work in small increments, taking frequent breaks. Claimant reported that he no longer goes boating, canoeing, camping, hiking or fishing. (Ex. C-17) Ms. Sellner described claimant's work history as showing a capacity to work in the "medium to heavy" categories, including his truck driving jobs. (Ex. C-19) Ms. Sellner identified 8 possible jobs for claimant including "no touch" driving. However, this assumes that claimant would pass the D.O.T. physical to regain his Class "A" CDL, which is unknown because claimant has not sought a D.O.T. physical since the work injury. Ms. Sellner recommended that claimant seek services from Iowa Workforce Center and Advance Services. There was no evidence that claimant attempted to utilize these services. There was also no evidence that claimant applied for any of the jobs described by Ms. Sellner, or that he made any attempt to seek employment outside of the defendant employer.

Ms. Sellner opines that claimant can return to commercial driving and that he could perform no-touch or drop-and-hook driving jobs. However, I note that many of the other jobs listed do not have information concerning the physical requirements, such that one cannot determine whether they fit within claimant's restrictions. I also note that the job of Security Officer, suggested by Ms. Sellner requires occasional lifting in excess of the amount assigned by Dr. Bansal. It also exceeds the initial restrictions of Dr. Harbach and the restrictions assigned by Dr. Rondinelli described below. (Ex. C-21)

On November 1, 2018, claimant was seen by Robert Rondinelli, M.D. at the request of defense counsel. (Ex. A-1) Dr. Rondinelli reviewed medical records, discussed claimant's prior temporary back pain and conducted a physical examination. The exam included assessment of range of motion. He placed claimant at MMI as of the date that Dr. Rayburn recommended no further medical treatment, which was August 30, 2018.

Dr. Rondinelli acknowledged that the DRE method was the preferred method for assessing disability, but chose to use the range of motion method and opined that claimant sustained 16 percent permanent partial disability to the whole person. (Ex. A-8) He agreed that claimant "has suffered a significant reduction in his activity tolerance due to residual pain in his right low back, posterior hip and thigh areas." (Ex. A-8) He assigned permanent restrictions of light work with occasional lifting up to 20 pounds and frequent lifting up to 10 pounds.

Dr. Rondinelli characterized claimant's prior truck driving job as "sedentary." (Ex. A-8) This is contrary to defendants' vocational expert, Lana Sellner, who stated that claimant's work as a truck driver required strength in the "medium" category, which requires lifting or exerting force from 20 to 50 pounds occasionally and 10 to 25 pounds frequently. (Ex. C, pp. 18, 20) Ms. Sellner described in her report that sedentary work requires occasional force of only 10 pounds. (Ex. C, p. 19) Also, Dr. Rondinelli may not have been aware of the requirement that claimant climb in and out of the dump truck box and scrape excess material out of the box, or swing the tailgate weighing several hundred pounds against the box to knock off excess material. This would also seem to not fit within a sedentary job description.

Dr. Rondinelli opined that claimant could return to his old truck driving job, but would require "shifting of position on a frequent basis, perhaps 4 to 6 times per hour, and he would require frequent breaks to allow him to stretch out or assume a semi-recumbent position." (Ex. A-8) It seems highly unlikely to the undersigned that claimant could sustain meaningful employment as a truck driver and simultaneously shift positions 4 to 6 times per hour and stop frequently to get out and stretch or sit in a semi-recumbent position.

On November 5, 2018, Dr. Harbach assessed claimant's permanent impairment and placed claimant in DRE Category IV for his lumbar spine, based on Table 15-3, page 384 of the AMA Guides. This is the same category used by Dr. Bansal above. Dr. Harbach assigned 20 percent permanent partial disability to the whole person. He also

assigned restrictions of lifting no more than 50 pounds. Dr. Harbach does not provide any discussion or rational for his change of restrictions. He did not see claimant when this option was issued nor did he discuss any improvements or changes in claimant's condition that might support this change. I give Dr. Harbach's change in restrictions less weight given his lack of a re-examination of claimant or explanation.

On November 26, 2018, Lana Sellner provided an addendum to her initial report after she reviewed Dr. Rondinelli's IME report. She maintained her prior opinions and suggested that claimant could do no-touch or drop-and-hook driving positions and that claimant has sustained "no vocational impact as he can return [to] his occupation." (Ex. C-25) I find it very hard to believe that Dr. Rondinelli's restrictions of "shifting of position on a frequent basis, perhaps 4 to 6 times per hour," and taking "frequent breaks to allow him to stretch out or assume a semi-recumbent position," would allow claimant to remain employable as a truck driver, regardless of whether or not it is a no-touch driving position. Potentially stopping the truck on a frequent basis and stretching or sitting in a semi-recumbent position for an unspecified period of time until his pain sufficiently relents, would likely keep him from obtaining and/or maintaining a truck driving job. (Ex. A-8)

Additional Findings

Concerning permanent partial disability, I note that the AMA Guides provide that the DRE method is the preferred method for assessing disability and Category IV was utilized by Dr. Harbach and Dr. Bansal. Category IV provides for a range of impairment from 20 to 23 percent. (AMA Guides, p. 384). Evaluators are instructed in the Guides to utilize the higher range when "residual symptoms or objective findings impact the ability to perform ADL [activities of daily living] despite treatment," or when claimant "was asymptomatic, and now – at MMI – has symptoms that impact the ability to perform activities of daily living, the higher rate may also be used." (AMA Guides, p. 381).

In this case, claimant has testified that he can operate a riding lawn mower for about 15 to 20 minutes at a time. (Tr. pp. 96-97) He typically only leaves the house to go to the grocery store and to pick up medication. (Tr. p. 100) He has trouble sleeping because he struggles to find a comfortable position. (Tr. pp. 99-100) Dr. Rondinelli has stated that claimant "suffered a significant reduction in his activity tolerance due to residual pain." (Ex. A-8) I find that claimant was asymptomatic in the relevant time prior to the work injury and now at MMI, he has symptoms that are impacting his activities of daily living.

Therefore, considering the impairment ratings assigned, I find the opinion of Dr. Bansal to be the most thorough and consistent with claimant's testimony, medical history and the AMA Guides. I find the higher rating assigned by Dr. Bansal is appropriate compared to the lower rating assigned by Dr. Harbach, based on claimant's ongoing symptoms impacting his activities of daily living. Based on Dr. Bansal's

opinion, I find that claimant has sustained 22 percent permanent partial disability to the whole person as a result of the stipulated August 10, 2015 work injury.

Considering permanent work restrictions, I find that the lifting restrictions assigned by Dr. Bansal and Dr. Rondinelli are the same. They both assigned a lifting restriction of 20 pounds occasionally and 10 pounds frequently. Dr. Harbach initially assigned a lifting restriction of 10 pounds and noted that it was temporary. However, he assigned this restriction on the same day that he placed claimant at MMI and released him from care. These would typically be the circumstances that would relate to assignment of permanent restrictions, not temporary restrictions. Several months later, Dr. Harbach checked a box in a letter prepared by defense counsel that claimant's lifting requirement should be 50 pounds. Dr. Harbach did not reexamine claimant or refer to any change in circumstances or provide any discussion to support this change in restrictions. Nor did he address his other restrictions he previously assigned of avoiding repetitive lifting, pushing/pulling, bending/twisting, and climbing. (Ex. JE1-81) I have given Dr. Harbach's change in restrictions less weight.

Dr. Rayburn noted early during his treatment of claimant that he did not provide restrictions and claimant credibly testified that Dr. Rayburn told him, that he relied on other physicians to handle the assignment of restrictions. (Ex. JE1-38; Tr. pp. 84-85) Nevertheless, on August 30, 2018, Dr. Rayburn, checked a box in a letter from defense counsel that no permanent restrictions were needed. There was no discussion or rationale provided. I have given this opinion little weight as noted above.

I accept the restrictions assigned by Dr. Bansal which are substantially supported by Dr. Rondinelli. Those restrictions are: no lifting over 20 pounds occasionally; 10 pounds frequently; no frequent bending or twisting; and no prolonged standing or walking greater than 60 minutes. I also agree with Dr. Rondinelli that claimant would require "shifting of position on a frequent basis, perhaps 4 to 6 times per hour, and he would require frequent breaks to allow him to stretch out or assume a semi-recumbent position." (Ex. A-8)

Claimant stated that he would return to work at the defendant employer if he was physically able to do so and that he still has a good relationship with the company. (Tr. p. 100) The employer told him to return when he is fixed, but that given his current condition, they do not have any work available for him. (Tr. p. 101)

While the lifting restrictions are significant, the restrictions on standing, walking and frequently shifting positions/stretching or sitting recumbently provide very real problems for maintaining a truck driving job, which has been claimant's primary occupation for a significant part of his career. I find that these restrictions would make it difficult, if not impossible, for claimant to return to truck driving, even in a no-touch or drop-and-hook job, despite the opinion of Lana Sellner. This is because claimant may need to stop the truck and possibly exit the vehicle several times per hour for indefinite periods of time to stretch or recline. It seems wholly impracticable to the undersigned that an employer would accommodate such a restriction. In support of this conclusion, I

note that claimant has not been able to return to work for the defendant employer with whom he has a good relationship, as a truck driver with these restrictions.

Claimant held a class "A" commercial driver's license (CDL) at the time of the work injury, which required claimant to pass an Iowa Department of Transportation approved physical examination. (Tr. p. 56) Claimant testified that he now has a Class "B" CDL because his physical is no longer current. The Class "B" license allows him to drive a school bus, but he does not believe he could sit long enough to do that job. (Tr. p. 105) Given his restrictions and the time schedule required for a school bus route, it seems very unlikely that claimant could stop a bus full of children and take time to stretch as needed, several times per hour. Claimant has not had a current physical for a Class "A" CDL since 2015, the year of the work injury. (Tr. p. 106) However, he has not attempted a D.O.T. physical since then, so it is unknown whether he would pass in his current condition. (Tr. p. 112)

Claimant testified that he had a large garden before his work injury and he has reduced it to just 12 tomato plants. (Tr. p. 97-98) He now only operates his riding mower for about 15 to 20 minutes at a time. (Tr. p. 96-97) Claimant no longer sells rebuilt cars. (Tr. p. 98) He testified that his social life has been reduced significantly and now most of his outings involve going to the grocery store or picking up medication. (Tr. p. 100) Claimant has difficulty sleeping because he has a hard time getting into a comfortable position. (Tr. p. 99-100)

Clearly, claimant has informally gained a number of other skills beyond truck driving, such as construction, electrical, plumbing, auto repair and body work. Although his restrictions may prevent him physically doing the labor involved in these areas, it is unknown whether claimant could work as a clerk in a lumber yard or at a parts counter in an automobile dealership or retail store because claimant has made no effort to seek such employment.

Claimant has made virtually no effort whatsoever to return to work. (Tr. p. 104) He has not tested his ability and endurance in a real world employment situation. He did not attempt to utilize the employment services identified by Lana Sellner, nor did he apply for the jobs that she recommended.

I find that claimant is not motivated to return to work.

Claimant owns a computer, but he has limited computer skills. (Tr. p. 102) He does not use social media and only uses his cell phone to place calls in an emergency. (Tr. pp. 103-104)

Claimant was no longer on any prescription pain medication for his work injury at the time of the hearing. (Tr. p. 111) He did report taking a pill to help him sleep at night that was prescribed by his family physician. (Tr. p. 125)

The parties stipulated that any disability that may be awarded would be an industrial disability, and any benefits related thereto would commence on July 28, 2018. (Hearing Report)

Considering the extent of industrial disability, claimant's age, his functional impairment of 22 percent of the body as a whole, his permanent restrictions, as found above, the nature of his lumbar fusion and continuing symptoms, along with his work history and limited education, I find that all of these would support a finding of a higher industrial disability. However, claimant's lack of any effort whatsoever to make a reasonable attempt to return to work and his lack of any attempt to seek services identified by Lana Sellner would tend to support a lower finding of industrial disability. Considering the above and all other appropriate factors for assessment of industrial disability, I find claimant sustained 80 percent industrial disability, which is 400 weeks.

The parties agree that defendant has been paying permanent partial disability benefits to claimant at defendant's calculated rate of $398.34 from July 28, 2018 through the time of the hearing. (Hearing Report).

Concerning the issue of rate, the parties disagree on the correct gross earnings. Both parties agree that claimant's rate calculation should be based on the prior 13 weeks of customary earnings. Defendant's include the 13 weeks prior to the week of the work injury and arrive at a gross weekly earning amount of $643.71. (Ex. L-1) Claimant seeks to exclude the weeks of May 22, 2015 and June 5, 2015, which were $387.97 and $328.13, respectively. (Ex. 3-107) Claimant argues these two weeks are unrepresentative of claimant's customary weekly earnings. They then substitute the weeks of May 1, 2015 and May 8, 2015 to arrive at a gross weekly earning amount of $710.23. (Ex. 3-107) The remaining weeks used by claimant and defendant range from a low of $459.38 to a high of $911.72. (Ex. 3-107; Ex. L1) The parties agree that the correct exemption status is S-1.

Claimant seeks reimbursement via Iowa Code section 85.39 of his IME with Dr. Bansal on July 5, 2018 in the amount of $2,536.00, which is included with his statement of costs. Dr. Bansal's invoice discloses that he charged $546.00 for the physical examination and $1,990.00 for the report.

I find that there was no opinion of permanent disability provided by an employer retained physician that pre-dated Dr. Bansal's IME.

CONCLUSIONS OF LAW

1) Extent of Industrial Disability

The primary disputed issue in this case is the extent of industrial disability.

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 Ry. 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 workers' qualifications intellectually, emotionally and physically; the worker's earning 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).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

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

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

As stated above and for the reasons there given, and particularly considering claimant's significant impairment and his lack of effort to return to work, I have determined that claimant has sustained 80 percent industrial disability.

2) Rate

The next issue is rate.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The statute expressly provides the determination is made using the last 13 consecutive calendar weeks immediately preceding the injury. Iowa Code § 85.36(6). Under the statute,

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
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> . . . .
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> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. The statute defines "gross earnings" as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits," and "pay period" as "that period of employment for which the employer customarily or regularly makes payments to

employees for work performed or services rendered." Iowa Code section 85.36(6), 85.61(3), (5).

Since claimant suffers a loss at a lower benefit rate, it is the claimant's burden to prove that the winter premium was part of the customary and regular payments. John Deere Des Moines Works, (Iowa Workers' Comp. Comm'r, Declaratory Order, July 12, 2017). It is claimant's burden to prove entitlement to the higher rate he asserts.

The parties disagree on the correct gross earnings. As stated above, claimant seeks to exclude the weeks of May 22, 2015 and June 5, 2015, which are $387.97 and $328.13, respectively as non-customary and unrepresentative weeks.

Claimant testified that he earned money per load hauled and if the truck was not moving, he was not making money. (Tr. p. 119-120) At hearing, claimant could not recall why these weeks were lower than other weeks, but he believed it was likely due to poor weather or because his truck was broken down. (Tr. p. 93) Considering the weeks with higher income, claimant believed that he was likely driving six or seven days per week. (Tr. p. 94)

Claimant agreed that there was no guarantee as to the number of loads he would get in a week. (Tr. p. 120)

I conclude that claimant failed to carry his burden of proof that the weeks he seeks to exclude were due to absences from employment for reasons personal to the employee, or were otherwise not customary or not representative of the available work to other similarly situated employees in a similar occupation.

I conclude that the gross weekly earnings of $643.71 and weekly rate of $398.34 identified by the employer in Exhibit L-1 are correct and I adopt the same.

3) IME Reimbursement

Claimant seeks reimbursement via Iowa Code section 85.39 of his IME with Dr. Bansal on July 5, 2018 in the amount of $2,536.00.

Section 85.39 permits an employee to be reimbursed for a 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. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

I have found above that there was no opinion of permanent disability provided by an employer retained physician that pre-dated Dr. Bansal's IME. Therefore, I conclude that claimant failed to meet the condition precedent to IME reimbursement and has failed to carry his burden of proof that he is entitled to reimbursement under Iowa Code section 85.39.

4) Costs

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter.

Claimant's statement of costs set forth costs related to the: filing fee - $100.00; the service fee - $6.47; and Dr. Bansal's IME expense of $2,536.00.

Under Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015), it is not allowable to award the examination expense of an IME as a cost. Dr. Bansal's invoice shows that $546.00 was charged for the examination and $1,990.00 was charged for the report. Therefore, only $1,990.00, the amount charged for the report is appropriately awarded as a cost.

Defendant shall pay costs for the: filing fee - $100.00; service fee - $6.47; and the report from Dr. Bansal - $1,990.00, in the total amount of $2,096.47.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant industrial disability benefits of four hundred (400) weeks, beginning on the stipulated commencement date of July 28, 2018, until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated that defendants are entitled to a credit of weekly benefits from July 28, 2018 through the time of the hearing.

All weekly benefits shall be paid at the rate of three hundred ninety eight and 34/100 dollars ($398.34) per week.

All accrued benefits shall be paid in a lump sum, if any.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

Defendants shall pay costs in the amount of two thousand ninety six and 47/100 dollars ($2,096.47).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 10th day of April, 2019.

TOBY J. GORDON
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.