

- A. Permanent disability, if any, should be compensated by the industrial method (loss of earning capacity).
- A. The correct rate of weekly compensation is \$481.58.
- A. Disputed medical treatment was reasonable, necessary, and, with the exception of chiropractic care, causally related to the medical conditions upon which Woods bases his claim. In addition, providers would, if called, testify that the costs are fair and reasonable; defendants offer no contrary proof.
- A. Defendants have paid 10 weeks of benefits at the rate of \$508.00.

ISSUES FOR RESOLUTION:

1. Extent of temporary disability.
2. Whether the injury caused permanent disability and, if so, the extent and commencement date.
3. Entitlement to medical benefits.
4. Whether penalty benefits should be awarded.

FINDINGS OF FACT

Roy Woods, age 65 at hearing, has worked as a farmer and over-the-road truck driver since age 18. He began driving for Werner Enterprises in 1989 and was so employed on the date of injury, January 7, 2001. Woods has not worked since that date and is now receiving social security retirement benefits.

Woods sustained head trauma when he slipped and fell on ice while getting out of his truck. He was taken to Iowa Methodist Medical Center in Des Moines, where emergency room records describe him as confused and "not quite appropriate," but neurologically intact and not appearing to have a significant head injury. (Exhibit 1, p. 2) An MRI scan of the head was normal.

After an overnight stay in the hospital for observation, Woods was subsequently treated by his family physician, Eric Cheung, M.D. Dr. Cheung saw Woods on January 8, January 9, January 18 and January 19, at which time Woods' chest complaints led to a cardiac workup and eventual coronary bypass surgery. Prior to the bypass, Woods underwent an evaluation of his head injury by neurologist Lynn M. Rankin, M.D., on February 12, 2001. Dr. Rankin noted bilateral hearing loss, worse on the left, but offered the following positive impression:

My impression is that Roy is recovering nicely from a concussion suffered on January 7, 2001. It appears that he truly did just slip on the step as he was exiting his truck rather than suffering a syncopal or seizure event as the cause of

the fall. He had initial confusion which seems to have dissipated greatly, and at this point he really only has a little bit of dysequilibrium with position changes as well as a few lingering, mild, right-sided headaches.

(Ex. G, p. 16)

Dr. Rankin cleared Woods for bypass surgery, but suggested that “he really does need hearing aids” which would help improve conversational ability. (Ex. G, p. 17)

According to Woods, his hearing became “a little worse” approximately one week after his fall, but Dr. Cheung’s chart notes record no mention of this symptom. Three months later, however, Woods’ hearing suddenly and seriously deteriorated. On April 4, Woods returned to Dr. Cheung, who recorded the following:

64-year-old gentleman presents with new symptoms of bilateral hearing loss. His wife states that this has been quite pronounced over the last 3 days almost of sudden onset. He has had some problems in the past noted by Dr. Rankin his neurologist in Des Moines. She recommended the use of hearing aid. However the patient and his family did not adhere to these instructions.

(Ex. 3, p. 11)

Dr. Cheung referred Woods to board-certified otorhinolaryngologist William J. McMillan, M.D. Dr. McMillan’s deposition testimony of August 15, 2002, is in the record as Exhibit 6. According to Dr. McMillan, Woods has a neurosensory hearing loss consistent with his age and history of farming that “possibly” could bear a causal relationship to his fall, but not “probably.” (Ex. 6, p. 18) Dr. McMillan in particular relies upon the history given by his patient that he had experienced hearing loss one week after his fall, but cautioned:

A. If he didn’t report his hearing loss [to Dr. Cheung], that itself is not consistent with an acute hearing loss caused by a traumatic event.

(Ex. 6, p. 35)

Defendants handled Woods’ claim under Nebraska law until the petition was filed in this litigation on April 23, 2001. Prior to that date (March 18), workers’ compensation benefits had been terminated pursuant to Dr. Cheung’s report of January 18, limiting driving for one month. (Ex. 7, p. 24) On March 26, Dr. Cheung issued a new restriction against work, but on the basis of his coronary bypass surgery without mention of the original work injury.

Woods has never returned to work for Werner Enterprises, but disputes why that is. According to his wife, Phyllis Woods, she was told in a telephone conversation with a Werner representative that Woods could not return to work “as long as he can’t hear with his own ears.” However, it is found that Ms. Woods misunderstood. She admits, for example, that Werner subsequently called to inquire whether Woods had yet

obtained hearing aids – which is inconsistent with a requirement that he “hear with his own ears,” and, according to Werner’s workers’ compensation manager David Williams, Werner has no such requirement and actually has a number of drivers who use hearing aids. Federal regulations require minimum hearing, but permit assistive devices. In any event, Woods did not contact Werner after eventually obtaining hearing aids and has not made a single job application elsewhere. Other than some self-employment furniture refinishing, he is clearly retired.

Defendants repeatedly tried to have Woods evaluated relative a possible return to work following his coronary bypass. He rescheduled, cancelled or failed to appear for three appointments with one Dr. Boarini and another with Wesley R. Brown, M.D. He finally saw Dr. Brown on October 5, 2001, at which time he was declared at maximum medical improvement and released to full duty work without restriction. (Ex. 9, p. 28) Dr. Brown, who also holds certification as a master of public health, is apparently an occupational physician. Dr. Brown reported:

Assuming his vision and hearing with a hearing aid meet DOT standards and his report of a normal treadmill in May is accurate, I see no reason why the patient could not be driving commercially. I am unable to state when he would have been able to return to full duty as it relates to his fall in January were it not for the non work related heart surgery, I assume that he probably would have been able to return to driving within a month or two of the fall. He certainly seemed to have been doing quite well by the time Dr. Rankin saw him one month later.

(Ex. J, p. 23)

Allen E. Peterson, M.D., apparently a family physician (his report is identified as an exhibit from “Family Medical Center”), evaluated Woods at the request of his attorney on August 6, 2002. Dr. Peterson offered no opinion as to the etiology of Woods’ hearing problems, but did suggest:

POST CONCUSSION HEADACHES. Patient states that the headaches have been what have kept him from returning to work. He has to take Tylenol with Codeine on a regular basis. I do not think that it would be appropriate for him to return to his usual occupation of driving a semi tractor/[trailer] with his current headache situation. He also feels that he is not as mentally sharp having difficulty remembering all the details of conversations compared to before his head injury.

(Ex. 10, p. 30)

By the time of his appointment with Dr. Peterson, Woods reported daily headaches, a frequency apparently much greater than at the time of his evaluation by Dr. Rankin over a year earlier. Woods’ family members, wife Phyllis, son-in-law, Randy

Richardson, and stepdaughter, Elissa Richardson agree that he is now forgetful and somewhat easily confused.

CONCLUSIONS OF LAW

Healing period entitlement is governed by Iowa Code section 85.34(1). If a work injury causes permanent partial disability, healing period benefits are payable from the date of injury until the worker has returned to work, it is medically indicated that significant improvement is not anticipated, or the worker is medically capable of returning to employment substantially similar to that in which engaged at the time of injury, whichever first occurs. Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The imposition of a rating of permanent impairment is equivalent to an opinion that further significant improvement from the injury is not expected. Absent a showing that further improvement was expected, healing period ends when a permanent rating is given. Brown v. Weitz Co., Appeal Decision, March 13, 1990; Miller v. Hallett Materials, Appeal Decision, Nov. 23, 1992. The persistence of pain does not prevent a finding that the healing period is over, provided the underlying condition is stable. Pitzer v. Rowley Interstate, 507 N.W.2d 389 (Iowa 1993). Stability is gauged in terms of industrial disability; if it is unlikely that further treatment of pain will decrease the extent of permanent industrial disability, continued pain management will not prolong healing period. Id. At 392.

Determination of healing period in this case is complicated by the overlapping period of temporary disability brought about by Woods' coronary bypass surgery. Woods now claims entitlement through the date he was finally declared at maximum medical improvement by Dr. Brown, but defendants quite properly point out that this date was unduly delayed by Woods' own conduct in repeatedly failing to honor earlier appointments. A claimant should not be able to prolong compensable healing period by this simple expedient. Dr. Brown suggests that Woods should have been able to return to work within a month or two of the fall, and notes that he was doing well at the time of his appointment with Dr. Rankin. This is the best evidence of when Woods realistically reached maximum medical improvement. Since this is, essentially, when defendants terminated healing period under Nebraska law, it is found that Woods has no further entitlement to healing period benefits.

However, Woods also claims entitlement to penalty benefits under Iowa Code section 86.13 because defendants failed to give 30 days notice of the termination of benefits. His point would be well taken if the payment of weekly benefits had been commenced under Iowa law, but such is not the case. Benefits were paid under Nebraska law, and there has been no showing in this case that the determination to do so was in any way improper. In agency experience, it is often arguable that jurisdiction over a work injury may exist in multiple states. Entitlement to penalty benefits has not been established.

As claimant, Woods has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability upon which his claim of permanent disability 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. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296 (Iowa 1974).

The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (Iowa 1960). The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. The weight to be given to any expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974); Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (Iowa 1974).

Woods' claim for permanency benefits is based on two conditions: hearing loss and headaches/loss of cognitive function. As to the hearing loss claim, the opinion of Dr. McMillan, a board-certified specialist, is convincing. Woods' failure to report early hearing loss to Dr. Cheung is not consistent with trauma-induced neurosensory hearing loss. There is only a mere possibility that some causal nexus exists, which is insufficient to meet Wood's burden of proof on the issue.

However, Woods has no history of pre-injury headaches, and his family members confirm that he now suffers headaches and some general confusion. These symptoms are consistent with a closed head injury. Dr. Peterson appears to causally relate them to the injury, and that view is accepted.

Permanent partial disability that is not limited to a scheduled member is compensated industrially under section 85.34(2)(u). Industrial disability compensates loss of earning capacity as determined by an evaluation of the injured employee's functional impairment, age, intelligence, education, qualifications, experience and ability to engage in employment for which the employee is suited. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994), Guyton v. Irving Jensen Co., 373 N.W.2d 101, 104 (Iowa 1985), Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935). The concept is quite similar to the element of tort damage known as loss of future earning capacity even though the outcome in tort is expressed in dollars rather than as a percentage of loss. The focus is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995), Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Impairment of physical capacity creates an inference of lessened earning capacity. Changes in actual earnings are a factor to be considered but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines,

Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4 Larson's Workers' Compensation Law, §§ 57.21(a) and 57.31(a) (1997). The loss is not measured in a vacuum. The worker's personal characteristics which affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Earning capacity is measured by the employee's own ability to compete in the labor market. An award is not to be reduced as a result of the employer's largess or accommodations. U.S. West v. Overholser, 566 N.W.2d 873, 876 (Iowa 1997), Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

The opinion of occupational physician Brown as to Woods' ability to return to work as a truck driver is entitled to more weight than the contrary opinion of family doctor Peterson. Woods himself agrees that he would have returned to driving after May 2001 except for his hearing loss. Headaches can be disruptive to daily routine, but it is clear that many, many workers continue to perform their jobs even in the presence of headache. Nonetheless, that history of headaches and mild cognitive dysfunction does justify at least a small award of industrial disability. It is found, on this record, that Woods has sustained loss of earning capacity on the order of five percent of the body as a whole, or the equivalent of 25 weeks of permanent partial disability.

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. Iowa Code section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-reopening, 1975).

Claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. See, Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc. (File No. 1020226 (App. February 27, 1995)).

Defendants stipulate that the cost of disputed treatment is reasonable and that, if called, providers would testify the treatment was necessary. Causal nexus to the conditions claimed as injury-related is admitted, except for chiropractic treatment. As there is no evidence causally relating Woods' disputed chiropractic treatment to the injury, defendants prevail on that cost. Dr. Dickens offered treatment for headaches, which have been found causally related to the work injury. Ear, Nose & Throat Surgical Associates billings and those of the University of Iowa Hospitals and Clinics have not been shown related to headache treatment, which is compensable, as opposed to hearing loss treatment, which is not.

Defendants continue to dispute "authorization" of disputed medical treatment even though the defense was ruled invalid at hearing. The contention is frivolous. In the prehearing conference report filed with this agency on August 24, 2001, defendants clearly and unequivocally denied liability on this claim. Having done so, they cannot now assert authorization as a defense. Dr. Dickens' bill of \$225 is compensable.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay twenty-five (25) weeks of permanent partial disability benefits at the rate of four hundred eighty-one and 58/100 dollars (\$481.58) commencing March 18, 2001.

Accrued weekly benefits shall be paid in a lump sum together with statutory interest.

Defendants shall pay Dr. Dickens' bill totaling two hundred twenty-five dollars (\$225).

Defendants shall file subsequent reports as required by this agency.

Costs are taxed to defendants.

Signed and filed this _____19th_____ day of November, 2002.

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DEPUTY WORKERS'
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