BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEMAL LATIC, Claimant, vs. SEAMLESS EXTERIOR, L.L.C., Employer, and GRINNELL MUTUAL REINSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 5067423 ARBITRATION DECISION Head Note Nos.: 1402.10, 1403.30, 1504, 1802, 1803, 1808, 2001, 2002, 2501, 2502, 2801, 2907, 3001

STATEMENT OF THE CASE

Kemal Latic, claimant, filed a petition for arbitration against Seamless Exterior, L.L.C. and its workers' compensation insurance carrier, Grinnell Mutual Reinsurance Company. This case came before the undersigned for an arbitration hearing on November 6, 2020. Due to the ongoing pandemic in the state of Iowa and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried using the CourtCall videoconference platform.

The parties filed a hearing report before the scheduled hearing. On the hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 12, and Defendants' Exhibits A through L and N through P.

Claimant testified on his own behalf. No other witnesses testified at trial. The testimonial record closed on November 6, 2020. However, claimant requested and was granted an opportunity to file a supplemental exhibit. Claimant filed Claimant's Exhibit 13 after the hearing, on November 11, 2020. Upon receipt of Claimant's Exhibit 13, the evidentiary record closed.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on January 8, 2021. The case was considered fully submitted to the undersigned on that date.

STATEMENT OF THE ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant was an employee of Seamless Exterior, L.L.C., on the date of his injury.

2. Whether claimant sustained an injury, which arose out of and in the course of employment with Seamless Exterior, L.L.C.

3. Whether claimant gave timely notice of his alleged injury to the alleged employer.

4. Whether claimant is entitled to temporary total, temporary partial, or healing period benefits from July 16, 2017 through February 27, 2020 and/or a running healing period.

5. Whether claimant's injury involves a scheduled member disability or involves an unscheduled injury for which claimant should be compensated with industrial disability.

6. The extent of claimant's entitlement to permanent disability benefits, if any.

7. The proper commencement date for permanent disability benefits, if any.

8. The proper rate at which weekly benefits should be paid, including a dispute pertaining to claimant's average gross weekly wages.

9. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses.

10. Whether claimant is entitled to reimbursement of his independent medical evaluation fee pursuant to Iowa Code section 85.39.

11. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Kemal Latic, claimant, is a 28-year-old gentleman, who lives in Waterloo, Iowa. Mr. Latic is a native of Bosnia, but moved to the United States in 1999. He is single, but has two children. Mr. Latic attended school in the United States and ultimately obtained his high school diploma via an on-line school out of Florida. He has no formal training or education beyond high school. (Claimant's testimony)

From the age of 12, Mr. Latic worked off and on for his father performing carpentry work. During high school, claimant also worked part-time as a line cook at a Long John Silver's restaurant. Since high school, Mr. Latic has worked at various fast food restaurants, as a tow truck driver, in part-time sales for an insurance company, as a call center representative, as well as in a loading position in a shipping department. None of Mr. Latic's prior work has involved extensive training or skills, other than perhaps his construction work. Claimant's answers to interrogatories in this case documented earning $8.00 to $12.51 per hour in prior positions. (Claimant's Exhibit 6)

Mr. Latic appears to have been a consistent and conscientious worker. He testified that he needed to work to pay bills, including paying for his child support. No specific evidence was offered on the topic, but it is reasonably anticipated that Mr. Latic had 30 or more years of work life remaining at the time of his injury.

In June 2017, claimant and his father went to Seamless Exterior seeking work. Claimant testified that he and his father asked for siding work, their primary means of earning a living prior to Seamless Exterior. Seamless Exterior did not have sufficient siding work for claimant and his father when they started. Instead, Seamless Exterior told claimant to start training on how to make and hang seamless gutters. The stated intention was that claimant and his father would learn how to make and hang these gutters so that Seamless Exterior could send one crew to a worksite to both hang siding and the gutters. (Claimant's testimony)

Claimant testified that he was paid by the hour for his work at Seamless Exterior. He drove a Seamless truck and used Seamless tools as he performed work for Seamless. Mr. Latic testified that he also wore Seamless apparel that was provided, at no charge, by Seamless while he worked for the company. Seamless also assigned one of its employees, Scott Stevens, to train and supervise claimant and his father. All work was assigned by Seamless' shop manager. (Claimant's testimony)

Mr. Latic and his father worked for Seamless Exterior for a period of four weeks. During that period of time, claimant and his father worked exclusively on a crew with Mr. Stevens. Mr. Stevens oversaw the work of claimant and his father, directed their work, and was teaching them how to hang seamless gutters. At the end of the fourth week, claimant's father inquired whether they would be given some siding work the next week. When he learned that siding work was not available, he quit working for Seamless. Claimant, however, elected to return to work the following Monday, July 17, 2017. (Claimant's testimony)

At the first job of the day on July 17, 2017, claimant was working on a roof attempting to remove some old gutters. As he removed those gutters, he lost his

balance, fell forward and off the roof. He ultimately landed on the ground and sustained significant fractures to both arms and his right knee. Mr. Latic recalls seeing his wrist dislocated and fractured. (Claimant's testimony)

Mr. Stevens was working on the roof with claimant at the other end of the gutters they were removing. He witnessed claimant's fall and called an ambulance for claimant. (Claimant's testimony) Mr. Stevens would have observed claimant's injured arms and knee while waiting with claimant for the ambulance to arrive, and Mr. Stevens would have known on the date of injury that Mr. Latic sustained significant injuries as a result of his fall off the roof while performing work duties for Seamless.

The ambulance transported Mr. Latic to a hospital in Waverly, Iowa. (Joint Exhibit 1) However, the emergency room physician recognized that claimant needed highly specialized treatment for his injuries. The local physician attempted to reduce claimant's left distal radius fracture. (Joint Ex. 2) A transfer via ambulance was arranged and claimant was transported to the University of Iowa Hospitals and Clinics (UIHC) for specialized orthopaedic care on the date of injury. (Claimant's testimony)

The day after the fall, Ericka Lawler, M.D. at UIHC took claimant to surgery and performed bilateral open reductions and fixation of distal radial fractures in both of claimant's arms. (Joint Ex. 3, p. 7) On July 19, 2017, Matthew D. Karam, M.D. at UIHC took claimant back to surgery and performed an open reduction of claimant's right patella fracture and repaired claimant's right patellar tendon rupture. (Joint Ex. 3, p. 8)

In August 2017, claimant remained in bilateral wrist splints and was using a wheelchair due to his knee injury. (Joint Ex. 3, p. 19) In fact, Mr. Latic testified that it took him 5-6 months to become weight bearing on his right leg and start to walk again. (Claimant's testimony) In November 2017, Dr. Lawler and Dr. Karam coordinated a return to surgery and removed hardware from claimant's right knee and wrists on the same date. Dr. Karam also performed a manipulation under anesthesia of claimant's right knee at that time. (Joint Ex. 3, pp. 31-35)

With respect to the right knee injury, Dr. Karam permitted a release to return to work on August 13, 2018. (Joint Ex. 3, p. 47) However, on May 21, 2019, Dr. Karam imposed permanent work restrictions for the right knee that included no use of ladders and no direct kneeling on the right knee. (Joint Ex. 3, p. 50) Dr. Karam declared maximum medical improvement (MMI) for the right knee on May 21, 2019 and assigned a 29 percent permanent impairment rating of the right lower extremity, which converts to a 17 percent impairment of the whole person as a result of the injuries to claimant's right knee and leg after his fall at work on July 17, 2017. (Joint Ex. 3, p. 51) Prior to May 21, 2019, Mr. Latic was not capable of performing substantially similar work with his right knee.

Mr. Latic returned for further evaluation of his arms by Dr. Lawler on October 1, 2019. At that evaluation, Dr. Lawler noted decreased sensation in both of claimant's arms at the ulnar nerve in both elbows. (Joint Ex. 3, p. 58) Dr. Lawler recommended cubital tunnel syndrome surgery bilaterally for the ulnar nerve impingements. (Joint Ex.

3, p. 59) On November 8, 2019, Dr. Lawler again took claimant to surgery and performed a right ulnar nerve transposition in the right elbow. (Joint Ex. 3, pp. 61-64) On December 17, 2019, Dr. Lawler again performed surgery on claimant. This time Dr. Lawler performed a left ulnar nerve transposition at the left elbow. (Joint Ex. 3, pp. 67-69)

Dr. Lawler declared MMI for claimant's arm injuries on February 27, 2020. At that point, Dr. Lawler imposed a 20-pound lifting restriction for claimant's right arm injuries. She also opined that claimant sustained a 27 percent permanent impairment of the right upper extremity and a 24 percent permanent impairment rating of the left arm. (Joint Ex. 3, p. 72) Prior to February 27, 2020, Mr. Latic was not capable of performing substantially similar employment activities as those performed on or immediately before the date of injury with his arms.

In addition to the obvious injuries to claimant's arms and his right knee, Mr. Latic also asserts a claim that he sustained an injury to his low back as a result of the fall on July 17, 2017. Mr. Latic has a pre-existing history of low back pain. Medical records in evidence demonstrate that claimant reported to a chiropractor in 2012 that he had experienced back pain for over a year. (Joint Ex. 7, p. 94) He sought treatment for low back pain at an emergency room in 2013, reporting back pain that persisted greater than a week. (Joint Ex. 6, p. 88) However, there is no medical documentation of ongoing pain or treatment for the low back near in time to the fall in July 2017.

The evidentiary record does contain chiropractic records demonstrating treatment for claimant's low back from October 2018 through April 2020. Mr. Latic asserts that he sustained an injury or material aggravation of his low back condition as a result of his fall and knee injury in July 2017. Mr. Latic produces the opinions of his treating chiropractor, Robert E. Ebert, D.C., who opines that claimant's low back condition is related to his work injury. Dr. Ebert recommended an orthopaedic evaluation for the low back. (Claimant's Ex. 4, p. 24)

Mr. Latic also obtained an independent medical evaluation performed by Mark Taylor, M.D. on February 27, 2020. Dr. Taylor diagnosed claimant with lumbago and right posterior hip/pelvis/SI pain. However, Dr. Taylor declined to offer an opinion about whether claimant's low back, hip, or pelvis symptoms are causally related to the work injury in July 2017. (Claimant's Ex. 1, p. 11)

Defendants investigated the claim of a low back injury by asking claimant's treating orthopaedic surgeon, Dr. Karam, whether claimant sustained a permanent injury to his low back or hip. Dr. Karam opined that, at most, any hip or back symptoms or injury would be temporary in nature. (Defendants' Ex. B, p. 16)

Defendants also had Robert L. Broghammer, M.D. perform an evaluation on claimant. Dr. Broghammer opined, "I do not find any particular diagnosis of Mr. Latic's low back, right hip, or pelvis related to the injury of July 2017. Dr. Broghammer further opined, "Mr. Latic's examination today is benign and reassuringly normal." (Defendants' Ex. N, p. 67)

Defendants also sought an evaluation with a board certified orthopaedic surgeon, Gary Knudson, M.D., specific to claimant's low back condition. Dr. Knudson noted that he evaluated claimant in May 2019 and that his examination did not demonstrate any permanent impairment or need for permanent restrictions in the hip or low back. Dr. Knudson also noted that claimant's hip and low back symptoms arose nearly two years after his fall and that any hip or low back symptoms in 2019 would be "temporary in nature." (Defendants' Ex. C, p. 18) Dr. Knudson also reviewed other medical records, noting that there was no mention of low back or hip symptoms until at least five months after claimant's fall. Dr. Knudson opined that claimant does not need permanent restrictions relative to his hip or low back and that he "cannot causally relate his back and hip issues to the fall at work on July 17, 2017." (Defendants' Ex. C, p. 19)

Considering the opinions in this record pertaining to Mr. Latic's low back and/or hip symptoms, I find the opinions of Dr. Knudson to be the most convincing. Claimant's independent medical evaluator declined to offer an opinion on causal connection of the low back and/or hip conditions. Claimant's treating chiropractor recommended an orthopaedic evaluation. Dr. Knudson is a board certified orthopaedic surgeon. He specifically opines that he cannot causally connect the low back and/or hip conditions to the July 2017 fall at work. To the extent that Dr. Karam's opinions are similar and support Dr. Knudson's opinions, I also find those to be convincing and credible. Again, Dr. Karam is an orthopaedic surgeon. Both Dr. Knudson and Dr. Karam have superior credentials to those offered by claimant's treating chiropractor. Indeed, the chiropractor recommended orthopaedic evaluation and opinion.

Dr. Broghammer's opinions also support those of Dr. Knudson and Dr. Karam on the low back and hip causation issue. To the extent that Dr. Broghammer's opinions support the ultimate finding, they are also accepted. However, Dr. Broghammer is not an orthopaedic surgeon (Defendants' Ex. N, p. 69) and I specifically find the opinions of Dr. Knudson to be the most convincing and credible on the low back and hip issues. Therefore, I find that claimant failed to prove a causal connection between his low back and/or hip symptoms and the fall at work on July 17, 2017.

With respect to his left arm fracture, Mr. Latic produced the opinions of Dr. Taylor via an independent medical evaluation performed on February 27, 2020. Dr. Taylor opined that claimant had reduced ranges of motion in his wrists and sustained a seven percent permanent functional impairment rating of the right upper extremity and a five percent permanent impairment rating of the left upper extremity as a result of his reduced ranges of motion after the July 17, 2017 work injury. (Claimant's Ex. 1, p. 5) In a subsequent report dated April 16, 2020, Dr. Taylor deferred to the impairment ratings offered by Dr. Lawler, specifically 27 percent of the right upper extremity and 24 percent of the left upper extremity. (Claimant's Ex. 1, p. 9)

Defendants disputed the impairment ratings offered by Dr. Lawler and Dr. Taylor. They sought an independent medical evaluation performed by Robert L. Broghammer, M.D. on July 29, 2019. Dr. Broghammer found four percent permanent impairment of the right upper extremity as a result of decreased range of motion in the right wrist. He

found a one percent permanent functional impairment of the left upper extremity, again as a result of decreased range of motion in the left wrist. (Defendants' Ex. A, p. 13)

Defendants also submitted a supplemental report from Dr. Broghammer dated October 27, 2020. In his supplemental report, Dr. Broghammer reiterates his impairment ratings. However, he noted that his range of motion measurements at his second evaluation varied only slightly from his prior evaluation and would not change the impairment ratings. (Defendants' Ex. N, pp. 65-66)

Considering all of the impairment ratings and medical opinions in this record, I find the opinions of Dr. Lawler to be most convincing. I accept her opinion that the ulnar transpositions were related and necessitated by the work injury. I accept Dr. Lawler's opinion that Mr. Latic achieved MMI for his arm injuries on February 27, 2020. I note that Dr. Lawler treated claimant over an extended period of time and evaluated his wrists and elbows surgically more than once. I find that Dr. Lawler was in a unique and advantageous position to offer causation opinions as well as to provide accurate and credible permanent impairment ratings following her treatment. For these reasons, I find Dr. Lawler's opinions and impairment ratings to be most convincing and credible in this evidentiary record.

To the extent that Dr. Taylor ultimately deferred and adopted Dr. Lawler's impairment ratings, I also accept his opinion. Therefore, I find claimant proved he sustained 27 percent permanent functional impairment of the right arm and 24 percent permanent functional impairment of the left arm as a result of his work injury and fall on July 17, 2017. Pursuant to Table 16-3 of the AMA Guides, a 27 percent functional impairment of the upper extremity converts to 16 percent of the whole person. A 24 percent impairment of the upper extremity converts to a 14 percent impairment of the whole person using the same table. Combining the 16 percent whole person rating for the right arm with the 14 percent whole person rating for the left arm results in 28 percent permanent functional impairment of the whole person for the combined effects of the right and left arms. See AMA Guides, Fifth Edition, pp. 604 (Combined Values Chart).

With respect to claimant's right knee, Dr. Karam assigned a 29 percent permanent impairment rating of the right lower extremity, which converts to a 17 percent impairment of the whole person as a result of the injuries to claimant's right knee and leg after his fall at work on July 17, 2017. (Joint Ex. 3, p. 51) Dr. Taylor reviewed Dr. Karam's impairment rating and concurred with the approach utilized by Dr. Karam. However, Dr. Taylor ultimately explained an error in Dr. Karam's rating and opined that claimant sustained a 21 percent functional impairment rating of the right lower extremity, which converts to 8 percent of the whole person. (Claimant's Ex. 1, p. 5) Upon review of Dr. Taylor's impairment rating, Dr. Karam concurred that he had erred and he adopted the impairment rating offered by Dr. Taylor. (Defendants' Ex. B, p. 16)

Dr. Broghammer also evaluated claimant's right leg at the request of defendants. Dr. Broghammer identified 10 percent permanent functional impairment of the right lower extremity. Ultimately, both Dr. Broghammer and Dr. Taylor explain their rationale

and use of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to arrive at their impairment ratings. I find the impairment rating offered by Dr. Taylor and supported by and adopted by Dr. Karam to be the most reasonable and convincing. Therefore, I find claimant has proven a 21 percent permanent functional impairment of the right leg, or the equivalent of 8 percent of the whole person.

Again, combining the impairment ratings for the arms (28 percent whole person) with the 8 percent whole person for the right knee, results in a total permanent functional impairment rating of 34 percent functional impairment of the whole person. See AMA Guides, Fifth Edition, p. 604 (Combined Values Chart). I find claimant has proven by a preponderance of the evidence that he sustained 34 percent functional impairment of the whole person as a result of his fall at work on July 17, 2017.

Mr. Latic has a work history that includes some office type positions. His earnings prior to Seamless Exterior included earnings from $8.00 to $12.51. Accordingly, he was at the lower end of the earnings scale in the local economy. Surveillance demonstrated Mr. Latic being fairly active without significant obviously outward signs of symptoms or limitations. He realistically should be able to find alternate employment within his current restrictions and is young enough that he should be able to pursue retraining and education, if necessary, to improve his ability to be employed and earn at higher levels.

Since the injury, Mr. Latic has demonstrated he is capable of working as a truck dispatcher. The injuries were significant and severe. Claimant required several surgeries and has significant permanent functional impairment. However, I find that he remains capable of performing work within the competitive labor market and earning at or near the wage levels he earned prior to the date of injury. Considering Mr. Latic's educational background, his employment background, his age, his level of motivation, his permanent functional impairment, his permanent restrictions from the injuries, the reasonable length of time remaining for him to work before retirement, the situs and severity of his injuries, including the need for multiple surgeries, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Latic sustained a 40 percent loss of future earning capacity as a result of the fall and injuries on July 17, 2017.

Mr. Latic also asserts a claim for temporary disability, or healing period, benefits from July 17, 2017 through the date of hearing. Defendants introduced surveillance videos of claimant from November 2019. Although claimant was active in the surveillance videos introduced, nothing in those videos suggests that claimant was capable of substantially similar employment activities prior to February 27, 2020. Having found that Mr. Latic was not capable of performing substantially similar work and was not at MMI for the wrist injuries until February 27, 2020, I must determine whether he worked during this period of time and whether he experienced loss of earnings during this period of time.

During hearing, Mr. Latic conceded that he worked as a dispatcher at a trucking company from January 2018 through March 2019. No wage records were introduced

from the trucking company for earnings during this period. Based on this evidentiary record, it is impossible to determine whether claimant earned the same, less, or more working as a dispatcher than he earned on the date of injury. I find that claimant returned to work from January 2018 through March 2019. I further find that claimant failed to prove a loss or reduction of his earnings from January 2018 through March 2019. I find that claimant had no earnings from February 17, 2017 through December 31, 2017 or from April 1, 2019 through February 27, 2020. (Claimant's testimony)

The parties also dispute claimant's average gross weekly earnings prior to the injury date.

At Claimant's Exhibit 8, page 38, Mr. Latic introduced an hourly statement of hours worked by him, his father and Scott Stevens. Defendants introduced the same wage information for consideration at Defendants' Exhibit G, page 29. Claimant also introduced Claimant's Exhibit 8, page 39, reflecting the actual payment of earnings from the employer to Mr. Latic. The parties do not appear to dispute the amounts paid to claimant for his hours worked at Seamless.

The dispute between the parties appears to be how the gross average weekly wages should be calculated. Defendants urge use of 52 weeks of earnings to be divided by 50 to calculate the gross average weekly wage. Claimant urges use of the actual earnings at Seamless divided by the four weeks claimant worked before the date of injury. In reality, there are not 52 weeks of wages included within the evidentiary record.

While defendants likely can argue it is claimant's burden of proof, use of claimant's four weeks of earnings at Seamless divided by 50 would not provide a fair representation of claimant's actual earnings or a reasonable estimate of his average gross weekly wages prior to the injury date. I find that it is reasonable and most likely representative of claimant's wages at the time of the injury to use the four weeks of wages actually earned by claimant at Seamless and divide those wages by four.

Claimant's Exhibit 8, page 39 demonstrates that claimant earned $2,262.40 during the four weeks preceding his injury. Dividing this amount by four weeks, I find that Mr. Latic's average gross weekly wages at the time of his injury were $565.60. The parties stipulate that Mr. Latic was single. (Hearing Report) He testified that he has two children that he supports through child support. I find that Mr. Latic is entitled to three exemptions.

Finally, Mr. Latic seeks award of his past medical expenses. Claimant introduced the medical expenses he seeks at Claimant's Exhibit 9.

CONCLUSIONS OF LAW

The first disputed issue is whether Mr. Latic was an employee of Seamless Exterior on July 17, 2017, when he was injured. Claimant contends that he was an

employee while Seamless Exterior contends that claimant was an independent contractor.

Section 85.61(11) provides in relevant part:

"Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . .

It is claimant's duty to prove, by a preponderance of the evidence, that he was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence, which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed.

The overriding issue is the intention of the parties. However, even if both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the agreement exists to avoid the workers' compensation laws. Likewise, the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261: Lembke v. Fritz, 223 Iowa 261,272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

The primary purpose of Iowa's workers' compensation statute is to benefit the worker. The statute is intended to be interpreted liberally to achieve the goal of the statute. Shook, 313 N.W.2d 503, 506 (Iowa 1981). The intent of Iowa's workers' compensation statue is "to cast upon the industry in which the worker is employed a share of the burden resulting from industrial accidents." Id.

Any worker whose services form a regular and continuing part of the cost of the product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the presumptive area of intended protection. Shook, 313 N.W.2d at 506 (quoting 1C A. Larson, The Law of Workmen's Compensation § 43.51 at 8-18 (1980)).

The statute is interpreted liberally in favor of the employee so that "the ultimate cost is borne 'by the consumer as part of the cost of the product" Shook, 313 N.W.2d at 506 (quoting 1C A. Larson, The Law of Workmen's Compensation § 43.51 at 8-17 and 18 (1980)).

In this case, I conclude that Mr. Latic presented a prima facie case to establish that he was an employee of Seamless Exterior on July 17, 2017. He was paid by Seamless Exterior on an hourly basis. He worked where Seamless Exterior's appointed supervisor told him to work and performed the work assigned by the supervisor. Mr. Latic provided no tools for his work with Seamless Exterior. I conclude that claimant established a prima facie case that he was an employee on the date of injury.

Therefore, it was incumbent upon Seamless Exterior to prove its affirmative defense that claimant was an independent contractor on the date of injury. An independent contractor is generally considered someone who carries on an independent business, contracts to do a specific piece of work according to the independent contractor's own methods, and that is subject to the control of the employer only as to determination of the final results to be obtained. Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254, 257 (1931). Generally, if an employer provides the necessary tools and equipment to perform the job, the worker is understood to be an employee. Id.

There are eight factors to be considered in determining whether a worker is an independent contractor:

(1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;

(2) Whether the worker is engaged in an independent business or a distinct calling;

(3) The worker's employment of assistants, with a right to supervise their activities;

(4) The worker's obligation to provide necessary tools, supplies, and materials;

(5) The worker's right to control the progress of the work, except as to final results;

(6) Whether there is a definitive time or the length of time for which the worker is employed;

(7) The method of payment, whether by time or by the job; and

(8) Whether the work is part of the regular business of the employer. Id.

The initial factor outlined in Mallinger is whether there is a contract in place for performance and completion of a specific piece of work at a fixed price. No such

contract existed in this instance. Instead, claimant was paid by the hour for his work. The initial factor favors a conclusion that Mr. Latic was an employee on the date of injury.

The second Mallinger factor requires analysis of whether the worker engages in an independent business or a distinct calling. In this case, Mr. Latic was involved in construction work, but he and his father typically performed siding work. Although they knew how to hang fabricated gutters, they did not know how to fabricate seamless gutters required to be used by Seamless Exterior. Therefore, although claimant and his father operated an independent construction business, this factor reveals mixed results in determining whether claimant was an employee or independent contractor on the date of injury.

The third factor in the Mallinger test requires analysis of whether the employee has the right to employ and supervise assistants. In this situation, Mr. Latic was not likely able to hire assistants. In fact, he was not even supervising his own work on the date of injury but answering to Seamless Exterior's supervisor on the date of injury. This factor leans toward a conclusion that claimant was an employee on the date of injury.

Factor number four of the legal test inquires about whether the worker provided his or her own tools. In this case, claimant was using tools provided by the purported employer, including a seamless gutter machine that claimant did not otherwise own or know how to use. Factor number four pushes me toward a conclusion that claimant was an employee on the date of injury.

Factor five in Mallinger focuses upon the worker's ability to control the progress and means of performing the work. In this instance, Seamless Exterior determined which jobs were to be performed and in what order. However, claimant specifically desired to be an independent contractor because he wanted to be his own boss and control his own hours of work. I conclude that the fifth factor weighs in favor of a finding that Mr. Latic was an independent contractor.

Factor six of the Mallinger test requires a determination of whether the worker was hired for a definitive time or definitive project. Claimant's father demonstrated prior to claimant's injury that the worker was not hired for a definitive time but was hired by the project. Claimant's father worked with claimant on the same crew and quit the Friday before claimant's injury occurred. Apparently, claimant's father felt no compulsion to give a two-week notice and quit working for Seamless Exterior because it would not provide him the kind of work he desired.

Seamless Exterior produced testimony that it did not believe it had the right to fire a worker in claimant's position. Instead, if Seamless Exterior did not like the work produced by the worker, it would simply not offer future projects for the purported contractor. Factor six provides mixed results but tends to lead me toward a conclusion that Mr. Latic was an independent contractor on the date of injury.

With respect to factor seven outlined in Mallinger, claimant was clearly paid by the hour and not by the job. Factor number eight involves a determination of whether the work being performed by the worker was part of the regular business of the purported employer. In this instance, claimant was actually learning how to hang seamless gutters, the specific business conducted by Seamless Exterior. In fact, claimant did not possess the skill to fabricate and hang seamless gutters prior to commencing work for Seamless Exterior. Both factor seven and factor eight strongly favor a conclusion that Mr. Latic was an employee on the date of injury.

Overall, the majority of the legal factors to determine employment status as an employee or an independent contractor weigh in favor of Mr. Latic being an employee. On the other hand, claimant specifically testified that he wanted to be an independent contractor at the time of the injury. He had a specific reason for his desire to be an independent contractor and freely admitted at trial that he desired to be an independent contractor on the date of injury.

Obviously, the intention of the parties is an overriding factor. Yet, in this instance, the parties followed very few of the indicia of an independent contractor in their employment relationship. Ultimately, I conclude that the majority of the legal factors suggest that Mr. Latic established he was an employee of Seamless Exterior on July 17, 2017.

I further conclude that Seamless Exterior has not established its affirmative defense or assertion that claimant was an independent contractor. Therefore, I conclude that an employer-employee relationship existed between Mr. Latic and Seamless Exterior on July 17, 2017.

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa

1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Defendants denied and challenged whether claimant's injuries arose out of and in the course of his employment. Realistically, however, claimant's injuries are apparent and clearly the result of his fall off a roof on July 17, 2017. Mr. Latic was clearly performing services for Seamless Exterior on July 17, 2017. He fell off a roof while attempting to perform those duties and sustained significant and obvious injuries to both arms and a knee as a result of the fall. While there may have been reasonable doubt about claimant's employment status on the date of injury, it is clear that Mr. Latic sustained significant injuries as a result of his fall on that date. I conclude that claimant overwhelmingly established that he sustained his injuries on July 17, 2017 and that those arose out of and in the course of his employment.

However, defendants also challenge causal connection of claimant's bilateral cubital tunnel syndrome to the July 17, 2017 fall. Having weighed the respective medical opinions, I ultimately accepted the opinion of Dr. Lawler as the most credible and convincing. Dr. Lawler opined that claimant's cubital tunnel syndrome is causally related to the July 17, 2017 fall. Therefore, I also found that the bilateral cubital tunnel syndrome and related surgeries are causally related.

Mr. Latic also asserts that he sustained injury to his low back as a result of the July 17, 2017 fall. With respect to the low back claim, I accepted the opinions of Dr. Knudson as the most credible and convincing. Accordingly, I found that claimant failed to prove he sustained or materially aggravated his low back or hip conditions as a result of the fall on July 17, 2017.

I conclude claimant proved by a preponderance of the evidence that he sustained fractures to the bilateral wrist and right knee, as well as bilateral ulnar tunnel syndrome as a result of the July 17, 2017 fall at work. However, I conclude that claimant failed to prove by a preponderance of the evidence that his low back condition and/or hip condition is causally related to the July 17, 2017 fall.

Having concluded that Mr. Latic proved a compensable work injury, I must address defendants' notice defense.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

In this situation, the employer urges a notice defense under the theory that the claimant did not notify the employer he felt this was a compensable claim within 90 days. However, Iowa Code section 85.23 requires the employee to report the work injury, "[u]nless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury." In this instance, Seamless Exterior was clearly aware of Mr. Latic's fall from a roof on the date of injury.

Seamless Exterior had a supervisor on site, who was directing claimant's work activities. Seamless Exterior's supervisor observed claimant's fall off a roof and clearly had to observe claimant's fractured and misaligned limbs after the fall. Seamless Exterior's supervisor called the ambulance after claimant's fall on July 17, 2017. Seamless Exterior clearly had actual knowledge of this work injury. It may have believed that claimant was an independent contractor, but it clearly had timely and full knowledge of the injury. The employer was clearly on notice of the injury and had the information necessary to perform any investigation it may have desired into whether claimant was an independent contractor or sustained a compensable injury as an employee of the company. Therefore, I conclude that the employer failed to carry its burden to establish a notice defense pursuant to Iowa Code section 85.23.

Having determined that Mr. Latic proved a compensable work injury, I must consider what types of benefits he may qualify to receive. Claimant asserts a claim for temporary total disability, or healing period, benefits. Mr. Latic asserts a claim for a running healing period, claiming that his back injury has not yet achieved maximum medical improvement, that he requires additional care for his low back, and that such additional care is causally related to the July 17, 2017 fall.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Mr. Latic asserts a claim for a running healing period, asserting that his low back and/or hip injury requires additional treatment and is not yet at MMI. Having found that claimant failed to prove a causal connection between his low back and/or hip condition and the July 17, 2017 work injury, I conclude that claimant failed to prove entitlement to a running healing period for the low back. Nevertheless, it is apparent that claimant was off work and entitled to healing period benefits for his bilateral wrists and right knee injuries.

Having found that Mr. Latic was not at maximum medical improvement, did not return to work, and was not capable of performing substantially similar employment between July 17, 2017 and December 31, 2017, I conclude he proved by a preponderance of the evidence entitlement to healing period benefits from July 17, 2017 through December 31, 2017. Iowa Code section 85.34(1).

However, Mr. Latic returned to work for a friend as a trucking dispatcher from January 2018 through March 2019. No time records or wage records were introduced for claimant's work as a truck dispatcher. Claimant bore the burden of proof on this issue. Therefore, I found claimant failed to prove that he was off work and experienced a loss of earnings from January 1, 2018 through March 31, 2019. I conclude claimant failed to prove entitlement to healing period benefits during this period of time.

Mr. Latic was laid off from his dispatcher job in March 2019 and did not work again before he achieved MMI. He was not yet capable of performing substantially similar work and did not achieve maximum medical improvement until February 27, 2020. I conclude Mr. Latic proved entitlement to healing period benefits from April 1, 2019 through February 27, 2020. However, claimant achieved MMI on February 27, 2017. This terminates his entitlement to healing period benefits. Iowa Code section 85.34(1).

Mr. Latic also asserts a claim for permanent disability resulting from his injuries on July 17, 2017. The parties submitted three disputed issues pertaining to permanent disability. First, the parties dispute whether the injuries should be compensated as scheduled member injuries or with industrial disability benefits as unscheduled injuries. Second, the parties dispute the extent of permanent disability to which claimant is entitled. Finally, the parties dispute the proper commencement date for permanent disability benefits. Each disputed issue will be considered and resolved in order.

The initial dispute related to permanent disability is whether the injury should be compensated as scheduled member disabilities or with industrial disability. The right of an employee to receive compensation for injuries sustained is statutory. The statute conferring this right can also fix the amount of compensation payable for different specific injuries. The employee is not entitled to compensation except as the statute provides. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Claimant proved three separate scheduled member injuries in this case. Iowa law provides that scheduled member injuries be compensated using a functional method. However, Iowa Code section 85.34(2) contemplates an injured worker sustaining either a single scheduled member injury or a simultaneous injury to two scheduled members. The statute does not specifically contemplate the scenario in which three scheduled member injuries are sustained in the same accident.

Claimant contends that three scheduled member injuries should be compensated on an industrial disability basis. Defendants contend that the scheduled member injuries should remain scheduled and be compensated functionally. Neither party cites prior agency case law or appellate case law on the subject. The undersigned was not able to find authority from appellate courts in Iowa or an agency-level appeal decision on topic.

However, several deputy commissioners have addressed this issue. The first decision identified was a Review-Reopening decision filed in January 1980. In that decision, Deputy Moranville concluded that three scheduled member injuries were not specifically contemplated in the delineated scheduled member injuries and held that three scheduled member injuries should be compensated with industrial disability pursuant to what is now Iowa Code section 85.34(2)(v). Schlottman v. Sharp Bros Contracting Co., File No. 477094 (Review-Reopening January 1980).

Since the issuance of Schlottman in 1980, four former deputy commissioners have considered the issue. Each held that three scheduled member injuries should be compensated with industrial disability pursuant to what is now Iowa Code section 85.34(2)(v). See Bruce v. Hydecker Wheatlake Co., File No. 5036473 (Arbitration January 2013); Wallingford v. Atlantic Carriers, File No. 5008405 (Arbitration July 2004); Martinek v. Grube, Inc., File No. 5000177 (Arbitration July 2002); Kirschbaum v. J.L. Miller Constr., File No. 1199477 (Arbitration Oct. 1999). Quite obviously, the Commissioner or appellate courts may not agree with the rationale and conclusions made by prior deputy commissioners. Yet, the agency precedent was established by no less than five former deputy commissioners. I conclude it is appropriate to rely upon and apply this prior legal precedent unless and until appellate level precedent overrules or distinguishes these cases.

Moreover, Iowa Code section 85.34(2)(a)-(s) contemplate injuries to a single scheduled member and delineate the specific maximum number of weekly benefits permitted for each scheduled member injury. Iowa Code section 85.34(2)(u) provides for compensation for permanent disfigurement of the face or head. Iowa Code section 85.34(2)(t) provides the method for compensating "[t]he loss of both arms, or both

hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident." However, none of the subsections providing for compensation of scheduled members in Iowa Code section 85.34(2) considers or provides a mechanism for compensating three scheduled member injuries arising out of the same incident or injury.

Iowa Code section 85.34(2)(v) provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "u" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.

This "catch-all" provision in Iowa Code section 85.34(2)(v) appears to be relevant and appropriate in this situation because no other subsection of Iowa Code section 85.34(2) specifically applies. Accordingly, I conclude that these injuries should be compensated with industrial disability pursuant to Iowa Code section 85.34(2)(v).

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. of Iowa, 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 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.

Pursuant to statutory revisions made in 2017, an injured worker is only awarded functional disability and the worker's industrial disability is not determined or awarded if the employee "returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury." In this situation, however, Mr. Latic has not returned to work for Seamless Exterior and was not offered a position with the company.

Therefore, I conclude claimant's industrial disability is ripe for determination. Iowa Code section 85.34(2)(v).

Pursuant to statutory revision again made in 2017, the reduction in claimant's earning capacity should "take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code section 85.34(2)(v) (2017). Having considered all of the statutory factors, including years claimant was reasonably anticipated to continue to work, along with claimant's age, education, employment background, the situs and severity of the injuries, the length of healing period, the residual permanent functional impairment, permanent restrictions, claimant's level of motivation, ability to retrain, and all other factors of industrial disability, I found Mr. Latic proved he sustained a 40 percent loss of future earning capacity. This is equivalent to a 40 percent industrial disability and entitles claimant to an award of 200 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The parties also dispute the proper commencement date for permanent disability benefits. Permanent partial disability benefits commence "when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by the use of the guides to the evaluation of permanent impairment." Iowa Code section 85.34(2). In this instance, claimant achieved MMI on February 27, 2020. At that time, the knee impairment had already been assessed by Dr. Karam and on that date Dr. Lawler offered permanent impairment for claimant's bilateral arm injuries. I conclude permanent partial disability benefits should commence February 28, 2020. Iowa Code section 85.34(2).

I must also determine the rate at which weekly benefits should be paid. Iowa Code section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Mr. Latic testified that he was paid hourly in his position with the employer. If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Defendants urge the use of Iowa Code section 85.36(9) because claimant worked less than full-time hours and less than full-time earnings prior to the date of injury. However, wages were not introduced for the full 12 months prior to the injury date. Dividing claimant's actual earned wages in four weeks of work by 50 would not provide a reasonable or fair estimate of his actual earnings at the time of the injury.

Therefore, I conclude the proper method of calculating claimant's gross weekly earnings in this situation is to use the wages he earned prior to his date of injury and divide those by the four weeks he worked. Having done this, I found that Mr. Latic's average gross weekly earnings at the time of his injury were $565.60.The parties stipulated that Mr. Latic was single on the date of injury and I found that he was entitled to three exemptions.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $565.60, and using the Iowa Workers' Compensation Manual (p. 99) with effective dates of July 1, 2017 through June 30, 2018, I determine that the applicable weekly rate is $375.50. Iowa Code section 85.36.

Claimant seeks award of past medical expenses related to his work injury.

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

Claimant sustained significant and serious injuries. The treatment documented and the charges incurred in Claimant's Exhibit 9 appear to be reasonable and necessary for treatment of claimant's condition. However, claimant did not prove that his low back condition was causally related to or materially aggravated by the work injury. Therefore, I find the medical charges documented in Claimant's Exhibit 9 to be related to the alleged injuries with the exception of the charges incurred for treatment at Ebert Chiropractic.

Mr. Latic also asserts a claim for reimbursement of his independent medical evaluation (IME) fees pursuant to Iowa Code section 85.39. Iowa Code section 85.39 requires the claimant to demonstrate a few pre-requisites to qualify for reimbursement of the IME fees. First, pursuant to a statutory amendment in 2017, an injured worker can only qualify for reimbursement of an independent medical evaluation fee "if the injury for which the employee is being examined is determined to be compensable." Iowa Code section 85.39(2). In this instance, Dr. Taylor evaluated claimant's arms and

right knee. All three conditions and injuries have been determined to be compensable. Accordingly, claimant has met this pre-requisite.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

In this instance, Dr. Karam was an authorized physician. He provided an impairment rating for claimant's knee on May 21, 2019. Defendants also obtained an IME with Dr. Broghammer, which occurred on August 14, 2019. Dr. Broghammer rated claimant's arms and right leg injuries. Dr. Lawler also provided an impairment rating on February 27, 2020 for claimant's arm injuries. Claimant did not secure an IME with Dr. Taylor until February 27, 2020. Defendants clearly selected and obtained impairment ratings from physicians of their choosing prior to claimant's IME with Dr. Taylor. Therefore, I conclude claimant has established entitlement to reimbursement for Dr. Taylor's IME. Iowa Code section 85.39(2).

Finally, claimant requests that his costs be taxed against defendants. Costs are taxed at the discretion of the agency. Iowa Code section 86.40. However, costs statutes are construed strictly. Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992). Claimant has prevailed on the majority of the disputed issue. It is reasonable to assess his costs in some amount.

Claimant seeks his filing fee ($100.00) as a cost. This is reasonable and appropriate. 876 IAC 4.33(7). Claimant seeks assessment of his IME charges. Those charges were already found owed pursuant to Iowa Code section 85.39. I decline to assess any additional charges as costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from July 17, 2017 through December 31, 2017 and again from April 1, 2019 through February 27, 2020.

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on February 28, 2020.

All weekly benefits shall be payable at the weekly rate of three hundred seventy-five and 50/100 dollars ($375.50) per week.

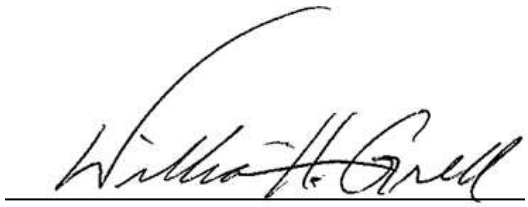
Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

Defendants shall satisfy, pay, or reimburse all medical expenses incurred for treatment, as reflected in Claimant's Exhibit 9 except those incurred for treatment at Ebert Chiropractic for claimant's low back and/or hip condition.

Defendants shall reimburse claimant's costs in the amount of one hundred and 00/100 dollars ($100.00).

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 15th day of June, 2021.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Robin Maxon (via WCES)

Chandler Surrency (via WCES)

Stephen Spencer (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.