BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN KELLY, Claimant, vs. EAST SIDE JERSEY DAIRY, INC., d/b/a PRAIRIE FARMS DAIRY, Employer, and INDEMNITY INS. CO. OF NORTH AMERICA, Insurance Carrier, SECOND INJURY FUND OF IOWA, Defendants.	File No. 1621904.01 ARBITRATION DECISION Head Note No.: 1108

STATEMENT OF THE CASE

The claimant, Brian Kelly, filed a petition for arbitration and seeks workers' compensation benefits from East Side Jersey Dairy, employer, and Indemnity Insurance Company of North America, insurance carrier. In addition, claimant filed against the Second Injury Fund of Iowa. The claimant was represented by Mark Sullivan. The defendants were represented by Thomas Wolle. The Fund was represented by Jonathan Bergman.

The matter came on for hearing on April 11, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 11; Claimant's Exhibits 1 through 6; and Defense Exhibit A and Fund Exhibits AA through BB. The claimant testified at hearing. Amy Pederson served as court reporter. The matter was fully submitted on May 23, 2022, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The primary issue in this case is the nature and extent of claimant's disability. The nature of the disability, of course, affects the determination regarding the applicability of the Second Injury Fund Act.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship.

2. Claimant sustained an injury which arose out of and in the course of employment on August 30, 2016.

3. Temporary disability/healing period and medical benefits are no longer in dispute.

4. The commencement date for any permanent disability benefits is September 19, 2016.

5. The weekly rate of compensation is $646.81.

6. Defendants have paid and are entitled to a credit of 2.5 weeks of compensation (permanent partial disability).

FINDINGS OF FACT

Claimant, Brian Kelly, was 45 years old as of the date of hearing. He is right handed. Mr. Kelly testified live and under oath at hearing. I find him to be a highly credible witness. His testimony was straightforward, simple and easy to follow. It was consistent with other portions of the record. There was nothing about his demeanor which caused me any concern regarding his truthfulness. In fact, the opposite is true.

Mr. Kelly is married and he graduated from high school in 1994. He has performed mechanical work from a very young age, beginning with his work at a family business. After he graduated high school, he continued performing various types of mechanical work on cars, trucks and heavy equipment. (Transcript, pages 14 to 20) The record reflects he is a highly-skilled and experienced mechanic. The record further reflects that Mr. Kelly is highly-motivated and industrious. He is not a complainer.

In 2016, Mr. Kelly worked for Prairie Farms as a mechanic. He worked on tractors, trucks and trailers. He worked the third shift from 9:00 p.m. to 7:00 a.m. On August 30, 2016, Mr. Kelly sustained a life-changing work injury. He was removing a transmission from a semi to replace the clutch. A strap broke and the transmission fell on him. He managed to move out of the way so it did not crush his chest, however, in the process the transmission landed on his right forearm and elbow, trapping him there. (Tr., p. 25) He estimated the transmission weighed between 1200 and 1500 pounds. Mr. Kelly was trapped for approximately an hour before a co-worker appeared for work at about 2:00 a.m. He went to the Mercy Hospital emergency room that morning. There were no fractures. He was placed in a half cast and his right arm was immobilized.

Thereafter, Mr. Kelly began a lengthy and frustrating course of treatment with multiple physicians. Most of the treatment is not particularly probative of any disputed issues in the case. He essentially finished his treatment in August 2018, nearly two years after his accident. His treatment included three arm surgeries and a significant amount of physical therapy. The first surgery was in February 2017, described as decompression of the radial nerve in his right elbow. (Jt. Ex. 7, p. 104) It resulted in a 12 inch zig zag scar down his arm. The second surgery also focused on his right arm/elbow in October 2017. (Jt. Ex. 8, p. 119) Following this surgery, Mr. Kelly developed triggering in his fingers. His final surgery focused on his right hand to correct the triggering and other symptoms. (Jt. Ex. 10, p. 161) Each time, he had surgery, he was taken off work and then returned on light-duty, often with his entire right upper extremity immobilized to some degree.

Mr. Kelly testified that approximately one month after he returned to full-duty work, he began to notice symptoms in his right shoulder. (Tr., pp. 84-85) As I stated above, I believe him. He is, as a witness, entirely credible. His wife, Jennifer Kelly, also testified live and under oath at hearing. She is also highly credible. Her testimony confirmed that Mr. Kelly has significant, disabling symptoms in his right shoulder which began after the work injury. (Tr., p. 98) She further testified that her husband is not "a complainer." (Tr., p. 96) I understood her testimony to mean that Mr. Kelly does not usually or often complain about his physical symptoms, even sometimes when he should complain.

One of Mr. Kelly's treating surgeons, Tobias Mann, M.D., followed up with him after his third surgery in August 2018. Mr. Kelly had a substantial and documented loss of grip strength at this time, although he was undoubtedly doing fairly well.

> At this point, he can continue with all his regular activities as tolerated. He can continue working without restrictions. I do not feel that he has to come back and see me at this point anymore. We discussed going to therapy to work on strengthening, but he feels doing his regular job will help him increase his strength. I have explained that it can take up to a full year before he regains all of his strength. At this point he does not have to continue to come back and see me for this. We wish him well. He was given a note today stating he can continue working without restrictions.

(Jt. Ex. 8, p. 144) I find it likely that Mr. Kelly did not complain about his ongoing symptoms to Dr. Mann at this visit. Dr. Mann only saw Mr. Kelly on one occasion after this, for a short visit in April 2019, to perform an impairment rating.

Mr. Kelly quit employment with East Side Jersey Dairy in approximately October or November 2018. He testified that the heavy mechanical work was just too difficult on his arm and hands. (Tr., p. 81) He quickly obtained employment with MH Equipment working on forklifts. He testified this was medium work with smaller parts. His pay at MH Equipment started at $2.00 per hour less than the work at East Side Jersey Dairy,

but he has quickly received pay increases where he is now earning $29.00 per hour. (Tr., p. 82) He has switched positions at MH Equipment to even lighter work refurbishing and painting.

Several medical experts have provided opinions regarding the nature and extent of Mr. Kelly's disability which has resulted from his work injury.

In May 2019, Dr. Mann provided a minimal 0.5 percent impairment rating (rounding this up to 1 percent) for all of Mr. Mann's conditions. (Jt. Ex. 8, p. 150) The rating was apparently based upon the examination he performed in April 2019. At that evaluation, it is documented that the triggering in his fingers had reoccurred occasionally, but was not causing pain per se. He stated that Mr. Kelly had near full range of motion and no strength loss, although Mr. Kelly testified that he only saw him less than five minutes at the last visit and there was no formal strength testing. Dr. Mann essentially declared Mr. Kelly to be fully healed. I do not find Dr. Mann's opinions convincing. It does not appear that Dr. Mann was fully aware of all of Mr. Kelly's symptoms. For example, Dr. Mann did not even mention that Mr. Kelly had changed jobs due to his ongoing symptoms.

Mr. Kelly did not agree with this assessment and asked his nurse case manager for a second opinion. He testified that when he called the adjustor she instructed him to go ahead and get a second opinion "around Dubuque" for the evaluation. (Tr., p. 51) He testified that his own research only revealed two physicians in the Dubuque area who perform such ratings. The first, he could not get an appointment with. The second was Erin Kennedy, M.D., an occupational medicine physician at Tri-State Occupational Health. Dr. Kennedy was an employer-retained physician who actually treated Mr. Kelly for his work injury shortly after the accident. (Jt. Ex. 2) Mr. Kelly mistakenly believed that he was only allowed to choose between the two physicians in the Dubuque area for his evaluation. (Tr., p. 54)

On August 8, 2019, the adjustor sent a memo to Dr. Kennedy.

> Please be advised this appointment has not been requested through our office. Mr. Kelly requested a second opinion for an impairment rating with your office as he did not agree with the rating provided by the treating physician.
>
> Under Iowa Workers' Compensation Law, he is entitled to an 85.39 examination for an impairment rating only at our expense if he does not agree with the rating provided by the treating physician.
>
> Therefore, we will agree to pay for the charges related to the impairment rating.

(Jt. Ex. 2, p. 11)

Dr. Kennedy received and reviewed a number of records in advance from the insurance carrier. In fact, she performed a full and thorough record review at their request. (Jt. Ex. 2, pp. 12-20) She also reviewed a questionnaire her office had sent to Mr. Kelly. She examined him thoroughly on September 13, 2019, documenting the following:

> A current symptom drawing reveals that he continues to experience a great deal of symptoms from the level of the elbow to the digits in the right upper extremity. He reports pain that affects this entire distribution fairly globally at all surfaces of the arm. He describes this as aching. Pain is between 2 and 5 out of 10 in the elbow area, 4 and 6 out of 10 in the forearm, and is about 3 out of 10 in the hand. He reports not being able to localize the pain well in the elbow or forearm, but that in the hand it primarily affects the radial aspect in the first 3 digits. Most of the time this is a dull ache though use of the arm can cause pain to sharpen or feel like a stinging sensation. This is particularly true with rotational movements of the forearm. He also reports weakness affecting the forearm and hand. He notices that the right hand does not appear equal to the left and appears smaller in muscle bulk and slightly clawed. He describes being unable to open the fingers of the hand fully. He can accomplish this if he uses the opposite hand to open the fingers of the right hand, but he cannot do it actively. He reports working diligently with his home exercise program to try to strengthen the hand and forearm, but is not sure this is helping. In general he develops worsened pain with a great deal of use of the arm and hand though it does not limit his activities and he does work through it. He is generally most comfortable if the hand is rested in a neutral posture without engagement of the hand or arm.
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> Activity tolerance is discussed at length. He describes that he previously worked as a heavy machinery mechanic. Because of reduced strength of his dominant right arm and hand, he has changed occupation to a lighter equipment mechanic. He describes limitation of strength with lifting, carrying, and reaching with the right upper extremity. He describes that he can hold weight for a short period, but the hand and arm fatigue quickly. He also reports limitation of reaching due to the elbow not extending fully. He reports difficulty with his right hand for pinch and grip activities due to strength, but also notes that he is unable to extend the hand and specifically the digits fully such that it is sometimes difficult to maneuver his hand into small spaces because of the limited motion. This affects his occupation as a mechanic. In his personal activities, he is no longer able to golf or bowl successfully. This is disappointing to him. . . . He does report that he is functioning fully without restrictions in his current occupation which is not as heavy of labor as the work at Prairie Farms.

(Jt. Ex. 2, p. 24) I find this is a highly persuasive statement of Mr. Kelly's functional abilities at that time.

Dr. Kennedy then performed an independent medical evaluation, utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, ultimately assigning a 43 percent impairment of the right upper extremity. (Jt. Ex. 2, pp. 26-27) This appears to be an accurate use of the AMA Guides, Fifth Edition, which correctly assessed his actual functional impairment. There is no mention in this evaluation of shoulder symptoms in this report.

In March 2020, Dr. Mann prepared a report responding to Dr. Kennedy's rating. Dr. Mann opined that Dr. Kennedy "paints a picture that is vastly different than how he was doing when he saw me and also how he was doing when he last saw the physical therapist back in 2018." (Jt. Ex. 8, p. 152) He opined Dr. Kennedy's rating was not appropriate. (Jt. Ex. 8, p. 156)

Defendants then had Mr. Kelly examined by James Milani, D.O., in June 2020. Dr. Milani conducted a physical examination of the right arm. He assigned a 13 percent rating of the right upper extremity, which focused on the functional loss in his right elbow. Dr. Milani opined that the range of motion measurements for the wrist, hand and fingers should not be included with the radial nerve functional loss because this would amount to "double dipping". (Def. Ex. A, pp. 6-7) Specifically, he opined that all of Mr. Kelly's functional losses in his wrist, hand and fingers were encompassed within his 13 percent rating. He went on to suggest that "Mr. Kelly is functioning very well with activities of daily living, therefore a large impairment rating is not expected." (Def. Ex. A, p. 7)

In September 2021, claimant underwent a functional capacity evaluation with Short Physical Therapy, Daryl Short, P.T. The results were valid and included a detailed assessment of current symptoms in his right upper extremity at that time (including his right shoulder). (Cl. Ex. 2, pp. 17-21) Mr. Short documented significant functional limitations with Mr. Kelly's right upper extremity. He recommended permanent restrictions which placed Mr. Kelly in the light to lower medium work category. (Cl. Ex. 2, p. 7) This valid report strongly rebuts Dr. Milani's assessment that Mr. Kelly was functioning very well with his activities of daily living.

Through counsel, claimant argued at hearing that Dr. Kennedy's evaluation was not a true IME since she had already been retained by defendants on this case. In October 2021, claimant's counsel referred Mr. Kelly to a second IME with Robin Sassman, M.D. On that date, Dr. Sassman performed a thorough medical examination, including formal range of motion and strength testing and reviewed the relevant medical file. (Cl. Ex. 3, pp. 28-39) She prepared a report dated March 9, 2022, offering a number of expert medical opinions regarding his condition. (Cl. Ex. 4) Dr. Sassman diagnosed right forearm crush injury with radial nerve damage and lateral epicondylitis, triggering of the right index, middle and ring fingers and right shoulder range of motion deficits "likely adhesive capsulitis from immobilization after multiple right upper extremity surgeries …" (Cl. Ex. 3, p. 40) This is the first time any physician had documented or diagnosed a right shoulder condition. She assigned a 43 percent right upper extremity rating pursuant to the AMA Guides, Fifth Edition, based upon the foregoing diagnoses.

(Cl. Ex. 3, p. 43) Dr. Sassman also evaluated two other conditions for Second Injury Fund purposes: his left wrist carpal tunnel and his right knee (previous arthroscopic surgery). She assigned ratings for both these conditions. (Cl. Ex. 3, p. 44) She recommended permanent restrictions in line with the FCE recommendations. (Cl. Ex. 3, p. 44)

CONCLUSIONS OF LAW

The first question submitted is the nature of Mr. Kelly's permanent disability. It is noted that the date of injury is prior to the 2017 Legislative changes. Claimant contends his disability extends into his shoulder and, is therefore, industrial. The employer and insurance carrier contend that claimant's disability is limited to his right arm and should be evaluated under Iowa Code section 85.34(2)(m) (2015). The Second Injury Fund agrees with the claimant.

This is primarily an issue of medical causation. That is, whether the stipulated work injury is a substantial cause of the development of Mr. Kelly's shoulder condition.

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).

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764,

767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

The question in this case is whether the claimant developed a sequela injury disability in his right shoulder. Mr. Kelly estimated that he began to develop shoulder symptoms about a month after he returned to work full-duty. (Tr., pp. 84-85) It is unclear in this record exactly when this was. Mr. Kelly also did not testify in great detail about what specific shoulder symptoms he was having exactly or when they started. It is clear from this record that his shoulder symptoms were not the worst of his symptoms, which primarily concentrate in his right elbow, wrist, hand and fingers. He did not complain of his shoulder symptoms to any medical provider until he saw Dr. Sassman.

Dr. Sassman diagnosed adhesive capsulitis in his right shoulder. (Cl. Ex. 3, p. 40) Regarding medical causation she opined the following:

> Regarding the right shoulder, Mr. Kelly denies having any right shoulder range of motion deficits prior to the injury and subsequently surgeries to the right upper extremity. Based on the information I have at this time, it is likely that the range of motion deficit of the right shoulder is due to the prolonged and frequent immobilization of the right upper extremity due to the prolonged and frequent immobilization of the right upper extremity due to the injury of 8/30/16 and the multiple surgeries thereafter.

(Cl. Ex. 3, p. 41) She went on to assign a functional disability rating for this condition only of 14 percent of the right upper extremity. (Cl. Ex. 3, pp. 41-42)

Having reviewed the entire file, I find that a greater weight of evidence supports a finding that Mr. Kelly did sustain a functional impairment to his right shoulder which resulted from his original work injury. This is based upon Dr. Sassman's expert opinion, combined with Mr. Kelly's highly credible testimony, Mrs. Kelly's testimony, as well as treatment records which confirm that Mr. Kelly's arm was, in fact, repeatedly immobilized on multiple occasions for significant periods of time.

The primary fact in evidence which would weigh against this argument is that Mr. Kelly did not complain specifically about right shoulder symptoms to any of his medical providers until he saw Dr. Sassman in 2021. Because of this, the employer-retained physicians had no opportunity to perform any work up on this condition or even properly diagnose it. Based upon this record, I suspect some of this occurred because Mr. Kelly was not a very good communicator with his physicians. As his wife described at hearing, he is not a "complainer." Nevertheless, I simply have no reason to disbelieve Mr. Kelly. The defendants contend that Mr. Kelly is not credible, pointing to the fact that he is now claiming he had symptoms which he did not report at the time. (Def. Brief, p. 8) The reality is, however, that his shoulder symptoms were not his most significant

problem. Moreover, Mr. Kelly would still be entitled to industrial disability benefits whether his condition extended into his shoulder or not. In other words, even if it were determined that his condition was only in his arm, he still has a solid Second Injury Fund claim and would be entitled to industrial disability benefits. The fact is, he is a highly credible witness. His wife, also a highly credible witness, verified his symptoms. He has contemporaneous records proving his arm was immobilized. And he has a highly credible medical expert who supports this position. For these reasons, I find that his disability extends into his body as a whole. As such, I conclude he is entitled to benefits under Iowa Code section 85.34(2)(u) (2015). Since his disability is industrial, I conclude that there is no Fund liability. Second Injury Fund v. Braden, 459 N.W.2d 459 N.W.2d 467, 471 (Iowa 1990). All remaining issues involving the Second Injury Fund are moot.

The next issue is the extent of industrial disability.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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, 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.

Mr. Kelly was 45 years old as of the date of hearing. He is a highly-skilled mechanic in his prime earning years. He is highly motivated and industrious. He suffered a significant, traumatic crush injury on August 30, 2016, wherein a transmission fell on his forearm, pinning him to the ground for an hour or more. The accident could have killed him. He underwent a lengthy healing period with three surgeries, significant physical therapy and periods of right arm immobilization. The injury ultimately resulted in significant radial nerve damage and lateral epicondylitis which resulted in a very high

impairment rating of 43 percent of the right upper extremity. He has intermittent locking and clawing of his middle three fingers, which is found to be especially troublesome for a mechanic. Since he was released from care, he has switched jobs twice, initially taking a pay cut to obtain lighter work. He does have objective restriction recommendations from Short Physical Therapy based upon a valid FCE. The FCE documented significant functional limitations in grip strength, endurance, range of motion and lifting, particularly away from his body. The FCE placed him in the light to lower work category. Dr. Sassman recommended he should not forcefully grip or pinch, which is a primary activity for a mechanic. The evidence is, he is not well-suited for a long career in heavy mechanical work.

Mr. Kelly has continued to work. His best opportunity moving forward is to find lighter mechanical work. Although he has switched positions twice, he is likely still working beyond his recommended work restrictions from the FCE and Dr. Sassman. I find he is highly motivated. I decline to penalize him for his strong work ethic. The reality is he is not well-suited to work a long career in heavy mechanical work where he would have the greatest economic opportunity.

Considering all of the appropriate factors of industrial disability, I find that Mr. Kelly has sustained a 50 percent loss of earning capacity in the competitive job market. I conclude this entitles him to 250 weeks of compensation commencing September 19, 2016, as stipulated by the parties.

The next issue is whether Mr. Kelly is entitled to IME expenses of Dr. Sassman.

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). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I find that claimant has failed to meet his burden of proof. Claimant’s counsel contends that the medical evaluation with Dr. Kennedy should not count as an IME because Dr. Kennedy had previously been retained by the employer in this case as an authorized treating physician. Moreover, claimant argues, the insurance carrier suggested to the claimant that he had to select a physician from the Dubuque area.

I do not completely disregard the claimant's arguments here. It is somewhat unusual at least that the defendants directed certain aspects of this examination. Because claimant was unrepresented at the time, it had the appearance that the defendants were overly involved in controlling the exam. Viewing the entire file as a whole, the facts strongly suggest that Dr. Kennedy actually performed a thorough, fully independent examination of the claimant's conditions. In fact, she ultimately assigned the highest rating of any physician in this record for his elbow, wrist and hand conditions. While there could be some circumstance where claimant's argument would prevail, this is not the case.

The final issue is costs.

Iowa Code section 86.40 states:

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

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

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

I find the employer is responsible for the following costs:

Filing fee:	$103.00
Short FCE Report:	$350.00
Sassman Report:	$4,785.00
Total Costs:	$5,238.00

ORDER

THEREFORE IT IS ORDERED:

All benefits shall be paid at the stipulated weekly rate of six hundred forty-six and 81/100 ($646.81) per week.

Defendants shall pay the claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of commencing September 19, 2016.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for the nineteen point one four three (19.143) weeks previously paid as stipulated.

There is no Second Injury Fund liability.

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

Costs are taxed to defendants in the amount of five thousand two hundred thirty-eight and 00/100 dollars ($5,238.00).

Signed and filed this _8th_ day of November, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Sullivan (via WCES)

Thomas Wolle (via WCES)

Jonathan Bergman (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.