BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANTONIO ROBLES, Claimant, vs. JBS SWIFT & COMPANY, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED MAR 27 2015 WORKERS COMPENSATION	File No. 5046482 ARBITRATION DECISION Head Note Nos.: 1803; 1804; 2600

STATEMENT OF THE CASE

Antonio Robles, claimant, filed a petition in arbitration seeking workers' compensation benefits from JBS Swift & Company, employer and Zurich American Insurance Company, insurance carrier. Hearing was held on February 12, 2014.

Claimant was the only witness testifying live at trial. The evidentiary record also includes claimant's exhibits 1-16 and defendants' exhibits A-G. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

Ernest Nino-Murcia was the interpreter for the arbitration hearing.

The parties request the opportunity for post-hearing briefs, which were submitted on March 9, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. The nature and extent of permanent disability sustained by Mr. Robles as a result of the October 10, 2012 injury.

2. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing Mr. Antonio Robles was 61 years of age and lived in Marshalltown, Iowa. There is no dispute that Mr. Robles sustained a compensable injury to his left shoulder on October 10, 2012. The central disputes in this matter are whether Mr. Robles' hypertension is the result of his workers' compensation injury and the extent of permanency sustained by Mr. Robles as a result of the work injury. I find that Mr. Robles' ongoing/chronic pain resulting from his October 10, 2012 injury to his left shoulder, neck, and left arm substantially aggravated his underlying hypertension (high blood pressure). I further find that as a result of the October 10, 2012 work injury, Mr. Robles has sustained a 65 percent loss of earning capacity.

Mr. Robles began working for JBS Swift & Company ("Swift") in February of 1993. He testified that prior to his employment with Swift he did not have any problems with his left arm or shoulder. He had not received any treatment for his left arm or shoulder nor did he require any physical restrictions due to his left arm or shoulder. Mr. Robles testified that his first job at Swift was a skinner. This position required using his left arm "a lot." He performed this job for approximately 7 years. He said it was very repetitive work. He would skin approximately 7,000 pieces of meat each day. In 2000 he left the skinner position due to problems with his right hand. He had a work injury to his right hand/fingers, which resulted in him having permanent restrictions of no use of a knife, no use of a hook, and no skinning. (Testimony)

After performing the skinner position he moved to the job of making boxes in the "glue boxes" position. This was the same job he was performing on October 10, 2012. This job required moving boxes full of meat from a line that was approximately waist high. Mr. Robles testified that the weight of the boxes varied anywhere from 40 to 100 pounds. On October 10, 2012, Mr. Robles was moving boxes from the line down onto pallets. He was moving a box that weighed approximately 100 pounds from the line and attempted to push the box onto another row of boxes. When he pushed the box it fell and pulled his left arm with it. He said it popped his arm and his tendons. Following the accident, Mr. Robles' employer took him to the Marshalltown Hospital. At the hospital they took x-rays, gave him an injection, and some pills. (Testimony) The impression at that time was a left biceps tendon injury. (Exhibit 1, pages 1-5) Mr. Robles returned to work for JBS Swift & Company at a restricted-duty job. In this position he took empty boxes to a line using only his right arm. (Testimony)

On October 12, 2012, Mr. Robles was seen at the request of the defendants by Timothy R. Vinyard, M.D., an orthopedic surgeon. Dr. Vinyard was concerned for proximal long head biceps tendon rupture. He ordered an MRI of the left shoulder.

Dr. Vinyard felt he should remain on light duty with no use of his left upper extremity. (Ex. 2, pp. 24-28) The MRI took place on October 22, 2012 and revealed moderate supraspinatus and infraspinatus tendinopathy, advanced tendinopathy involving the tendon for the long head of the biceps. (Ex. 2, pp.29-31) Dr. Vinyard recommended arthroscopic evaluation of the shoulder, open form biceps tendinopathy and he would also evaluate the patient's rotator cuff. (Ex. 2, pp. 29-32)

Mr. Robles continued to work in the restricted duty position for several months. He testified that prior to the October 10, 2012 injury, he experienced high blood pressure and had a prior heart condition. Although he experienced high blood pressure, it was under control prior to the October 10, 2012 injury. After the injury his blood pressure increased to a high level due to his injury and the resulting pain. His blood pressure had to be brought back under control before he could undergo the recommended surgery. Thus, there was an approximately three-month delay in obtaining the surgery. (Testimony)

Mr. Robles was seen for pre-operative clearance on January 4, 2014, by Teresa Sieck, P.A., at Iowa Heart Center. The notes indicate Mr. Robles had a history of hypertension and had been noncompliant in the past. It was also noted he has a history of coronary artery disease with prior interventions. Mr. Robles was cleared for surgery. (Ex. B, pp. 1-5)

Dr. Vinyard performed the recommended surgery on January 22, 2013. The post-operative diagnosis was left proximal long head biceps tendinopathy, shoulder impingement/bursitis, and symptomatic acromioclavicular osteoarthritis. Unfortunately, Dr. Vinyard was not able to surgically repair the biceps tendon. (Ex. 3, pp. 56-57)

Mr. Robles did well post-surgery. He participated in physical therapy and Dr. Vinyard restricted him to 5 pounds with no repetitive work with his left upper extremity. (Ex. 2, pp. 37-38) Mr. Robles continued to work the same restricted duty job with the use of his right arm only until April of 2013. On April 10, 2013, the HR Director for Swift sent Mr. Robles a letter to inform him that as of the end of the day he would be "placed on Medical Leave of Absence from your work assignment at JBS." (Ex. 16, p. 167) The letter explained that extended assignments to all restricted duty jobs had been eliminated. The letter further explained that if Mr. Robles was unable to return to work within the next 12 months, his employment with Swift would end.

When Mr. Robles saw Dr. Vinyard in May of 2013, he was restricted to no lifting over 15 pounds and no repetitive lift, pull, push, reach, or work above shoulder level. (Ex. 2, p. 46) In July, Dr. Vinyard increased the weight to 20 pounds, but the remaining restrictions remained the same. Both Mr. Robles and Dr. Vinyard were frustrated that his symptoms had not improved more since surgery. The doctor prescribed additional physical therapy. (Ex. 2, pp. 49-52)

On August 6, 2013, Dr. Vinyard saw Mr. Robles and noted that the patient had continued to work with physical therapy, but still had pain over the anterior aspect of this shoulder. He also noted that on occasion Mr. Robles had numbness and tingling in a nondermatomal distribution throughout his left upper extremity. The note indicates that both the patient and doctor were frustrated with the lack of symptomatic relief. The doctor ordered another MRI to see if there was something else they were missing. (Ex. C, p. 1) The MRI was carried out on August 15 and showed a partial-thickness undersurface tear of the posterior fibers of the supraspinatus tendon with delamination-type proximally extension, tendinopathy of the infraspinatus tendon and the proximal long head of the biceps tendon, and degenerative changes of the acromioclavicular joint and bilateral humeral head at the site of the rotator cuff tendon insertion. (Ex. 1, p. 23) Mr. Robles returned to see Dr. Vinyard again on August 20, 2013, with continued pain. The doctor noted he seemed to have plateaued in terms of his improvement and the therapist did not feel any more therapy would be beneficial. Dr. Vinyard and Mr. Robles discussed possibly trying to go off restrictions and return to work but the patient did not feel like he would be able to do that. Dr. Vinyard recommended a functional capacity evaluation (FCE). (Ex. 4, pp. 59-60) The FCE was carried out on September 6, 2013 and Mr. Robles was considered to have given maximum effort. The FCE placed Mr. Robles in the medium physical demand level. (Ex. 5, pp. 68-77)

On October 15, 2013, Dr. Vinyard authored a letter to the insurance carrier in this matter. Dr. Vinyard opined that Mr. Robles had sustained 1 percent permanent impairment to his left upper extremity. Based on the FCE, Dr. Vinyard recommended a 30-pound lifting restriction. (Ex. 4, pp. 66-67)

On November 13, 2013, at the request of his attorney, Mr. Robles underwent an independent medical evaluation (IME) with Mark C. Taylor, M.D. Dr. Taylor's diagnosis was 1) acute left shoulder injury with rupture of the long head of the biceps tendon, 2) possible partial left rotator cuff tear, 3) status post left shoulder distal clavicle excision, subacromial decompression/acromioplasty, and extensive glenohumeral debridement; and 4) left upper extremity paresthesias of undetermined etiology. Based on the history provided to him by Mr. Robles and the medical records he reviewed, he opined that the left shoulder injury was directly and causally related to the October 10, 2012, work injury. He also felt all treatment and residual symptoms were related to the work injury. (Ex. 6, p. 85) Dr. Taylor recommended a second opinion for his left shoulder. He felt that neurodiagnostic studies of the left upper extremity would be beneficial to rule out a cervical radiculopathy versus a plexopathy or another type of nerve impingement. He also recommended smoking cessation. Dr. Taylor assigned 9 percent permanent impairment to Mr. Robles' left upper extremity, which equates to 5 percent whole person impairment. He recommended a maximum lifting limit of 30 pounds between knee and waist level on an occasional basis. He felt Mr. Robles could likely carry up to 30 pounds on an occasional basis and15 pounds or less above shoulder level on an occasional basis. Dr. Taylor also felt Mr. Robles should avoid ladders. (Ex. 6, pp. 86-87)

In May of 2014, Thomas S. Gorsche, M.D., performed an IME at the request of the defendants. Dr. Gorsche diagnosed: 1) rupture long head biceps tendon, left shoulder, status post arthroscopic surgery with subacromial decompression and excision of the distal end of the clavicle, left shoulder. 2) paresthesias, left upper extremity, unknown etiology. (Ex. 7, pp. 102-103) Dr. Gorsche opined that Mr. Robles' current symptoms were related to his work injury of October 10, 2012. Dr. Gorsche felt that the claimant had not reached MMI if he elected to proceed with the recommended diagnostic/therapeutic injection of cortisone into the acromioclavicular (AC) joint of the shoulder and nerve conduction studies. If he elected not to proceed with these then he reached MMI as of October 1, 2013, the date of his last appointment with Dr. Vinyard. Dr. Gorsche assigned 8 percent permanent impairment to the left upper extremity, which is the equivalent of 5 percent impairment to the whole person. He restricted Mr. Robles to no lifting more than 30 pounds. (Ex. 7)

Mr. Robles returned to work at Swift in April of 2014. He was placed in a job removing fat from skins. According to the claimant, he was told by the Swift safety person that they did not want to see him at the nurse's station. Mr. Robles testified that comment from the safety person is why he did not complain despite the fact that he had increased left shoulder and upper arm pain which radiated toward his neck. Mr. Robles believes that the increased pain also aggravated his underlying hypertension/blood pressure. Mr. Robles admitted that his job no longer required heavy lifting; however, it was still a very fast-paced, repetitive job. The job primarily required the use of his right upper extremity. but he testified that he still had to use his left arm too, in order to maintain the required rapid pace. Mr. Robles testified that his increased left shoulder and arm pain resulted in an increase in his blood pressure levels and eventually led to his removal from the plant long term and prompted his treatment with Timothy Swinton, M.D. (Testimony)

In June of 2014, Mr. Robles saw his primary care physician, Dr. Swinton, for left arm and neck. He also complained of having a headache. He reported he took his own blood pressure earlier in the day and it was 178/88. Mr. Robles indicated he did not go to work that day due to his arm and neck pain. The notes indicate he was smoking 6 cigarettes daily. The doctor noted the patient had returned to work on April 4, 2014 with a 30 pound lifting restriction. He performed repetitive left hand work, which the patient reported caused him to hurt at night and wake him from his sleep. Dr. Swinton gave Mr. Robles an injection into his left shoulder. He also refilled Mr. Robles' medications and gave him a note to be off work for several days. (Ex. 8, pp. 108-113)

Mr. Robles returned to his primary care clinic on July 10, 2014. He reported he went to the emergency room for shoulder pain and he was given medication for his high blood pressure. He was there to request completion of Family and Medical Leave Act (FMLA) paperwork because he missed work several days in June due to hypertension. He had a blood pressure machine at home and had been testing his blood pressure at all hours of the day and night. The assessment at the time of the July appointment was hypertension. It was recommended that Mr. Robles stop caffeine use and only check

his blood pressure twice per day. The FMLA papers were competed and a note was given to be off work all week due to blood pressure issues. (Ex. 8, pp. 114-18) He returned again on July 18, 2014. He requested and was given a note that he could return to work. However, he returned to the doctor's office on July 22 and reported that his blood pressure had been elevated and it made him dizzy and gave him headaches. Mr. Robles denied that he had any pain that affected his activity level. He also denied any muscle impairment, weakness, numbness/tingling. (Ex. G, pp. 14-18)

Mr. Robles was seen again on August 1, 2014. Short-term disability paperwork for Mr. Robles to remain off of work for 2 more weeks was completed. It was recommended that he undergo a brain MRI for his symptoms. (Ex. G, pp. 19-22) He returned to the office on August 18, 2014 for the results of the brain MRI. He reported headache, blurry vision, and weakness. His pain was a 6/10. It was explained to Mr. Robles that his MRI showed a small vessel ischemia, but no other major problems. The note indicates the patient's symptoms were "part of end organ disease due to long hx of HTN." (Ex. G, p. 25) He was given a note to remain off of work for two more weeks. Mr. Robles was seen again on September 2, 2014 at his primary care clinic. He was seen for high blood pressure and occasional headaches; he denied any other complaints. (Ex. G, p. 29)

On September 10, 2014, Mr. Robles saw Kyle Galles, M.D., for a second opinion regarding persistent left shoulder pain and dysfunction. At that time, the patient's pain was noted to be a 7 or 8. Dr. Galles' assessment was persistent left shoulder pain after previous surgical intervention. He attributed his residual pain to some arthritis of the glenohumeral joint. He did not feel the arthritis was severe enough to warrant shoulder arthroplasty. Dr. Galles recommended stretching exercises. The only work restriction he recommended was to try to minimize repetitive work over shoulder height with his left upper extremity. (Ex. 2, pp. 54-55)

The first issue that needs to be addressed is Mr. Robles' contention that his hypertension was aggravated by his work injury. Defendants contend that Mr. Robles' hypertension was preexisting and that the medical evidence does not support a relationship between the injury and his hypertension.

The medical evidence demonstrates that on November 24, 2014, claimant's counsel wrote a six-page letter to Dr. Swinton asking him numerous questions. On December 21, 2014, Dr. Swinton responded to those questions by indicating that he agreed with all six statements. Dr. Swinton indicated that he had been Mr. Robles' primary care doctor for approximately ten years. Dr. Swinton agreed that several diagnoses set forth by claimant's counsel were related to the October 10, 2012, work injury. Dr. Swinton also indicated that although he does not perform permanent impairment ratings, he did believe it was likely that Mr. Robles had "some level of permanent impairment" as a result of the work injury to his left shoulder and his resultant neck and left arm symptoms. (Ex. 8, p. 122) He also felt that Mr. Robles required permanent restrictions as a result of the work injury. He agreed with the

restrictions set forth in the FCE with the addition that he should avoid repetitive work with his left upper extremity. He further opined that the ongoing/chronic pain from the October 10, 2012, work injury to his left shoulder, neck, and left arm substantially aggravated and/or worsened his underlying hypertension (high blood pressure) to such an extent that he has been out of work since at least July of 2014. Dr. Swinton also indicated that as long as Mr. Robles continued to perform the repetitive work he would likely have increased pain and as a result, elevated hypertension to such an extent that it would be unlikely that Mr. Robles would be able to sustain employment in unskilled labor. Finally, Dr. Swinton opined that Mr. Robles would require pain management and ongoing care for his unstable hypertension indefinitely as a result of the work injury. (Ex. 8, p. 123)

Although Dr. Swinton does not provide his rationale for the statements he agreed with in December of 2014, he is the only expert who rendered an opinion regarding Mr. Robles' contention that his hypertension was substantially aggravated by his left shoulder, neck, and arm pain. Additionally, Dr. Swinton is Mr. Robles' primary care physician and has treated him both before and after this work injury. This treatment has included treatment for episodes of hypertension. Thus, Dr. Swinton is aware of the extent his hypertension has affected Mr. Robles in the past. Therefore, based on Dr. Swinton's unrebutted expert opinion, I find that the October 10, 2012 work injury to his left shoulder, neck, and left arm substantially aggravated his underlying hypertension (high blood pressure) to such an extent that Mr. Robles has been out of work since at least July of 2014. I further find that the repetitive work caused increased pain and as a result elevated his hypertension. I find that Mr. Robles' ongoing pain, which is the result of the October 10, 2012 injury, has substantially aggravated his underlying hypertension and therefore his current hypertension is related to the work injury. I also find that Mr. Robles requires pain management and ongoing care for his unstable hypertension as a result of the work injury.

The next issue is the extent of industrial disability Mr. Robles has sustained as a result of the work injury. Claimant contends that he is permanently and totally disabled.

There are several different expert opinions regarding the impairment and restrictions Mr. Robles has as a result of the October 10, 2012 work injury. Dr. Vinyard opined that claimant only sustained 1 percent impairment to his upper extremity. Dr. Gorsche and Dr. Taylor both believe 5 percent body as a whole impairment is appropriate. I find the opinions of Dr. Gorsche and Dr. Taylor to be more persuasive on the issue of impairment. The opinions of Dr. Gorsche and Dr. Taylor are consistent with one another and the medical picture as a whole. I specifically find that Mr. Robles sustained 5 percent impairment to his whole person as a result of the October 10, 2012 work injury. We next turn to the matter of restrictions. Mr. Robles underwent an FCE, which placed him in the medium work category. Dr. Vinyard, Dr. Gorsche, Dr. Swinton, and Dr. Taylor have all opined Mr. Robles could work with the restriction of lifting up to 30 pounds. Dr. Galles stated that the "only work restriction I would recommend, is to try to minimize repetitive work over shoulder height with his LEFT upper extremity." (Ex. 2,

p. 55) Dr. Swinton agreed with the lifting restrictions, but also felt it was necessary to restrict him to avoiding repetitive motions with his left upper extremity. Although Dr. Swinton is the only expert who has restricted claimant's ability to perform repetitive work with his left upper extremity at any level, he is also the only physician to address Mr. Swinton's hypertension issues. Dr. Swinton has opined that the pain Mr. Robles experiences from his October 10, 2012 work injury has substantially aggravated his underlying hypertension. He also indicated that Mr. Robles is no longer suited for repetitive upper extremity work. Dr. Swinton further opined that as long as claimant continues to perform the repetitive upper extremity work, he would likely have increased pain. With regard to Mr. Robles' hypertension issues there is no expert opinion that rebuts Dr. Swinton's opinions. Therefore, based on a preponderance of the evidence, I find that as a result of the October 10, 2012, work injury Mr. Robles has been restricted to a 30-pound lifting restriction and is also to avoid repetitive motions with his left upper extremity.

Mr. Robles testified that he continues to have stabbing pain in his left arm and shoulder. He also has weakness in this left shoulder and biceps area and up into his neck. He takes ibuprofen every 6 hours for pain and this seems to help a little. Mr. Robles is 61 years of age. He was born in Mexico. He has a very limited education; he only attended school until the 6th grade in Mexico. He has worked at Swift for over 20 years and has demonstrated that he can understand very basic instructions in a redundant work setting in English. However, he does not speak functional or conversational English. He does not know how to type or use a computer. (Testimony)

Prior to working for Swift, Mr. Robles held several jobs. His prior employment included working at a cigarette plant, a plastics production job, yard work, picking oranges and melons, meat processing plant, and construction work. Mr. Robles testified that he cannot return to any of his former work because he can no longer physically perform that type of work due to his left shoulder and arm. He could not perform the repetitive work or lift the required amounts of weight due to his restrictions. (Testimony)

At the time of the arbitration hearing, Mr. Robles was still considered an employee of Swift but was out on a medical leave due to his blood pressure condition. Mr. Robles admitted that no doctor has said the he cannot work because of his left upper extremity. Mr. Robles has not bid on any jobs at Swift since he has been out on medical leave because he believes the majority of jobs are heavy jobs and he believes he cannot bump the people that are already in the light duty jobs. However, he admitted that he does not have any personal knowledge if there are any jobs available for him to perform within his restrictions at Swift. (Testimony)

Throughout Mr. Robles' life his employment has required physical and repetitive work. He is no longer capable of performing work that requires lifting over 30 pounds or repetitive use of his left upper extremity. He lives in Marshalltown, Iowa and speaks

very little English. I note that in August of 2013, Dr. Vinyard suggested possibly having Mr. Robles "go off restrictions and return to work" however, Mr. Robles did not feel he would be able to perform the work. It is troubling that Mr. Robles was not at least willing to try to perform the work. (Ex. 4, pp. 59-60) I find that Mr. Robles has not proven he is permanently and totally disabled. I find he has demonstrated no motivation to return to his position at Swift, find another position at Swift, or look for employment elsewhere. Although he has not shown he is permanently and totally disabled, he has shown that he has lost access to a significant number of jobs. Considering Mr. Robles' age, educational background, employment history, lack of motivation, the length of his healing period, his permanent impairment, and permanent restrictions, as well as the other industrial disability factors identified by the Iowa Supreme Court, I find that Mr. Robles has proven that he sustained a 65 percent loss of future earning capacity as a result of this work injury at Swift.

CONCLUSIONS OF LAW

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

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" referred 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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

In considering all the evidence in the record, I found claimant did not prove by a preponderance of the evidence that he is permanently and totally disabled at the present time. Nonetheless, I did find that Mr. Robles has proven a significant loss of

future earning capacity. Specifically, I found that claimant proved that he sustained a 65 percent loss of future earning capacity.

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 hole. Iowa Code section 85.34. Having found claimant sustained a 65 percent loss of earning capacity, claimant is entitled to 325 weeks of industrial disability, or permanent partial disability benefits. Iowa Code section 85.34(2)(u). Pursuant to the parties' stipulations, all weekly benefits shall be paid at the rate of $396.31, and the permanent partial disability benefits shall commence on October 2, 2013.

Claimant is also seeking reimbursement in the amount of $2,120.00 for the IME of Dr. Taylor. (Ex. 6, p. 90) Dr. Taylor's IME was performed on November 13, 2013. This was after Dr. Vinyard, a doctor selected by the defendants rendered his opinion regarding impairment. The requirements of Iowa Code section 85.39 were met and therefore, claimant is entitled to reimbursement of the full amount for the IME.

Finally, claimant is seeking reimbursement for costs in the amount of $2,231.52. (Ex. 15, pp. 161-169) Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40. I conclude claimant was generally successful in his claims and that it is appropriate to assess costs.

Claimant's request for his filing fee is assessed pursuant to rule 876 IAC 4.33(7). His request for the service fees are assessed pursuant to rule 876 IAC 4.33(3). His request for reimbursement of Dr. Taylor's IME report was granted pursuant to Iowa Code section 85.39. Therefore, claimant shall be reimbursed costs pursuant to rule 876 IAC 4.33 in the amount of $111.52.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the weekly rate of three hundred ninety-six and 31/100 dollars ($396.31), commencing on October 2, 2013.

Defendants shall be entitled to a credit against the above award for any permanent partial disability benefits paid to date.

Defendants shall reimburse claimant's cost for the IME in the amount of two thousand one hundred twenty and 00/100 dollars ($2,120.00).

Defendants shall reimburse claimant's costs totaling one hundred eleven and 52/100 dollars ($111.52).

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 27th day of March, 2015.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EQP/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.