BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BILL J. GROUETTE SR.,

Claimant,

vs.

GILBANE BUILDING COMPANY
OCIP/MIDWEST STEEL, INC.,

Employer,

and

ZURICH NA INSURANCE,

Insurance Carrier,
Defendants.

File No. 5044473

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Bill Grouette Sr., claimant, has filed a petition in arbitration and seeks workers' compensation from Gilbane Building Company/Midwest Steel, Inc., employer and Zurich American Insurance, insurance carrier, defendants.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on September 23, 2015 in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 16; defense exhibits A through O; as well as the testimony of the claimant.

ISSUES

The parties presented the following issues for determination:

Whether the alleged injury is a cause of temporary disability.

Whether the alleged injury is a cause of permanent disability.

The extent of the claimant's entitlement to permanent partial disability benefits, including whether claimant is an odd-lot employee.

Whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

Whether the claimant is entitled to the expenses of an examination under Iowa Code section 85.39.

FINDINGS OF FACT

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

Bill Grouette testified he is 58 years old. He lives in Mason City, Iowa. He has been married for 15 years. His education consists of completing the eighth grade and some attendance in ninth grade. He has no GED. It was hard for him to learn, especially reading comprehension. He does not know the multiplication tables or how to divide, he only knows simple addition and subtraction.

Claimant went to work after leaving school. He worked for Anderson Construction in Clear Lake, at age 16, doing construction and concrete work. He then worked for Allied Construction, where he lied about his age and did road paving work. The work at both jobs was heavy work, using a shovel.

He served in the U.S. Marine Corps at age 17, but his reading deficiencies were detected during testing and he was discharged as a result. He returned to Mason City, where his father hired him to do sheet metal work. He did duct work, cutting metal with snips, and eventually he became a sheet metal mechanic. This was heavy work that involved twisting and getting into awkward positions. He did this work for his father four or five years.

Claimant then went to work for a railroad, on an extra gang, doing maintenance, changing rails, putting new ties in, running a shovel, driving spikes, etc. This was also heavy work.

He then returned to work for his father doing sheet metal work, and eventually for a sheet metal workers' union. He would report to a union hall and be sent on jobs that might last from a week to two years. He was sent to work at a power plant, which was heavier work than he did for his father. Exhibit 2 shows claimant's work history.

Claimant then went to Texas, and did duct work at a sports stadium, working 100 feet in the air on a scaffold. He worked there close to a year. He worked with heating, air conditioning, and ventilation. He then worked in Rochester, Minnesota, doing duct work at the Mayo Clinic, and at an apartment building there.

For a time he drove a flatbed truck over the road for Arrow Trucking, driving across the 48 contiguous states. This involved heavy work with tarping and tying down the loads onto the truck. He worked as a truck driver seven or eight years. He then

worked in Iowa Falls, where he worked on a pipeline. He was an oiler, and worked with a shovel. He also checked the oil levels on a machine that dug the trench for the pipeline, as well as cleaning rocks out of the rollers of the machine as it moved along. He worked there about a year. It was heavy work, involving throwing rocks, clay and mud around.

He then worked on a power plant at Mason City for a time, again doing heavy work. This was followed by working on a job where he learned to operate a "tele-handler," which is like a boom going as high as five or six stories. He became a fork operator because of the skills he developed.

Claimant then went to work for Midwest Steel, a subcontractor of Gilbane Buildings, defendant employer. He did not have any work restrictions before that. He began working there in June 2012. He hired on as a fork operator/oiler. Exhibit 3 describes that job. He would have to climb onto a crane and check the grease Zerks He would watch the machine for the operator to make sure it was operating correctly, and to make sure the crane did not hit anything when it was swung. He would move heavy kegs of bolts to the job site by hand, as well as spread dunnage, or wood, onto the ground to protect the iron from mud. His job description required him to be able to lift 175 pounds, which he was able to do.

On the date of injury, claimant was 55 years old, but he was able to do his job without any difficulty. He weighed around 270 pounds at that time, and he is nearly 6 feet tall. He enjoyed his job and the employer treated him well. The ironworkers were like a family to him.

On August 31, 2012, the date of injury, claimant got off his forklift to sign out for the day. It was the beginning of Labor Day weekend, so work was ending at noon. He started putting his tools away, and parked his machine in a safe place. Claimant went to sign the clipboard on the first floor of a building. He was required to step up onto a concrete ledge, and then another step. Claimant did so and was walking to the foreman when his left foot stopped as if it hit something in mid-stride. He tried to catch himself, but there was nothing to step on and he stumbled, trying to catch his balance. His momentum caused him to go down hard. He is sure he had his hands out to catch himself, but he dove into the concrete, doing a flip and tumbling over into a roll on his side. He rolled about ten feet and came to a stop on the floor.

The foreman, who saw this, asked if he was okay. He went home, and hoped to recover. After the holiday weekend, he was still sore but he hoped he would work his way out of the pain, but this did not happen. His shoulders were burning, his neck was stiff, and as the days went on, it became worse. He went to the safety person for Midwest Steel and asked him to document the injury. However, he declined, because claimant did not report it when it happened, so as far as he was concerned, if it was not reported, it simply did not happen on the job. Claimant told him the foreman saw the injury, but he told claimant to go home and go to his own doctor and claim it on his

health insurance, and tell them it happened at home. Claimant went to the Gilbane safety person, and he did fill out an injury report.

Claimant began to receive medical treatment, first at Osage, Iowa, at the Mitchell County Medical Center. His first treatment was October 8, 2012. The Gilbane safety person, Jim Free, insisted on going to the doctor's appointment with him, saying they had an arrangement with the doctors there as to what their company would want. When the doctor started to talk about restrictions, Jim Free said "no restrictions," and the doctor acquiesced.

When he returned to work, he had to have a co-worker do the climbing onto the cranes and working in the tight spaces. They told him not to carry heavy things. He performed his normal duties.

On November 7, 2012, claimant saw Mark Haganman, D.O., who found bilateral shoulder pain and neck pain. At this visit an MRI was ordered. It was conducted on November 8, 2012, and showed a bulging disc at C6-7. A bond scan by Jeffrey Nasstrom, D.O., confirmed increased edema at C6-7, possibly due to trauma. (Ex. 6, p. 3)

On December 3, 2012, he was placed on layoff. His last day of work was December 6, 2012. He does not know if anyone else was laid off as well. In the past he had worked through the winter months.

Claimant was referred to David Beck, M.D., a neurosurgeon in Mason City. Claimant saw him one time. He did not recommend surgery, but did recommend physical therapy. The insurance company in this case set up therapy at a nursing home in Lake Mills, Iowa.

He was also seen by Arnold Parenteau, M.D., a pain doctor in Ames, Iowa, on March 8, 2013. (Ex. 8) He gave claimant hydrocodone and trigger point injections. Claimant was also sent to a doctor who diagnosed carpal tunnel syndrome. Claimant testified his hands just went numb one day.

On April 13, 2015, claimant was seen by David Sneller, M.D. Claimant was given an injection to his right shoulder, but it did not do any good. Claimant had shoulder pain since the injury. The doctor wanted to see if an injection would help his right shoulder before attempting it on the left shoulder. Claimant was found to have neck pain, bilateral scapulae pain, and shoulder pain with evidence of carpal tunnel syndrome. (Ex. 9, p. 1) The cervical injury was the primary concern. Dr. Sneller felt the neck, bilateral shoulder and carpal tunnel syndrome were all work related. (Ex. 9, p. 3)

Claimant underwent a nerve block. However, he did not receive any benefit. Claimant's personal physician, Lynne Senty, D.O., saw claimant on June 3, 2013. On

some paperwork, she indicated claimant could never return to work. She attributed this to neck and shoulder pain. Because of this, claimant's unemployment benefits stopped, and he was asked to reimburse some past benefits. Claimant is still paying those back.

Claimant applied for Social Security Disability benefits, and was awarded benefits the first time he applied. He currently gets $1,942.00 per month.

On August 6, 2013, he saw Dr. Parenteau for the last time. He told claimant there was nothing more he could do for him, and he thought claimant was ready for an evaluation of his disability. At that point, claimant's pain was getting worse. Dr. Parenteau's treatment provided no pain relief. He found claimant to be at maximum medical improvement (MMI) on June 28, 2013. (Ex. 8, p. 5)

Claimant underwent a Functional Capacity Evaluation (FCE) with John Kruzich of E3 Work Therapy. (Ex. C) He was given tests involving picking up boxes and moving them, lifting a sled with weights, etc. He gave his best efforts. The FCE concluded claimant was limited to the medium demand category, with waist to floor lifting limited to 50 pounds occasionally, waist to crown lifting 30 pounds occasional only, bilateral carrying 40 pounds occasionally, and elevated work occasionally. There were no allowances for frequent lifting.

Claimant was having pain in his shoulders which went straight up to the back of his skull. The pain was so bad he did not care if he lived or died. He went to his family doctor, Dr. Senty, in severe, excruciating pain. She gave him a Medrol dose pack prescription.

Claimant stated if he was asked to return to a job that involved the activities he did before, he would not be able to do so. Even the simple things in life are painful.

Claimant was referred to Charles Mooney, M.D. The appointment on February 18, 2014, was short, as Dr. Mooney received a cell phone call and left the room. When he returned, he noted he and claimant were about the same age, he did a few short tests, and he told claimant he should just go back to work. He found claimant to still have pain symptoms, but nevertheless found him to be at MMI and assigned a rating of permanent partial impairment of zero percent. (Ex. 8)

On June 13, 2014, claimant was examined by Marc Hines, M.D. He found claimant's fall at work to have exacerbated claimant's pre-existing cervical spinal stenosis and cervical radiculopathy. He also found claimant's carpal tunnel syndrome to have aggravated to the point of biceps tendonitis. He rated claimant's permanent partial impairment as 21 percent of the body as a whole. He imposed restrictions of no standing longer than 30 minutes, need to change positions frequently, no lifting over 10 pounds above shoulder height, no repetitive lifting, no lifting more than 15 to 20 pounds from the floor, no repetitive side bending, twisting, or flexing the neck, no

extremes of vibration or temperature, no operation of heavy equipment or clutched vehicles, no climbing ladders, and no repetitive climbing. (Ex. 12, p. 7)

Claimant also underwent an IME with Douglas Martin, M.D., an occupational medicine doctor on June 2, 2015. He found claimant to have no impairment as a result of his fall because he felt claimant would not have been injured unless he had been running when he fell. He also ignored the findings of the bone scan that showed edema in the cervical spine. He found no evidence of muscle spasm, yet Dr. Senty clearly found muscle spasm after claimant's FCE.

Claimant met with Tom Karrow, a vocational specialist. He sent claimant websites where he could apply for sedentary jobs that fit claimant's educational background and his restrictions. Claimant did not finish the ninth grade. In his jobs, he did not work with computers. He did not have a computer at home at the time, but a friend gave him an old computer to help him apply for jobs. Claimant had hardly used a computer before that. When he tried to use the job websites, he struggled with knowing how to operate the computer. Eventually he asked his son's fiancée to help him.

Claimant had trouble filling out the job applications recommended by Mr. Karrow. For some, claimant would fill out the form and it would ask for his educational background, and when he indicated he lacked a high school diploma, it would not let him complete the application. When he went in person to some employers, he was told he had to apply on the internet. He asked for a manager at Verizon, and was told he had to fill it out on their website. They did not take written applications. He was told with his lack of education, his chances of being hired were similar to being struck by lightning six times and being in two earthquakes.

He applied at Starbucks to be a barista. He has no experience making coffees, and if he worked there at a busy time, he would not be able to keep up. He has trouble with his hands, and drops things. He does not feel he could work as a greeter at Wal-Mart, as he cannot stand or sit long, and he is not a people person. He estimates he has applied at 70 or 80 employers. No one has offered him a job. He has only been contacted by one employer, the Hy-Vee store in Albert Lea, Minnesota. They asked why he was applying for a job 40 miles from his home in Iowa, when there were two Hy-Vee stores in Mason City. Claimant told him he had applied to them. He was told by the Albert Lea store manager he would have to be able to lift 50 pounds to work in their liquor department.

The jobs he applied for paid as low as $7.00 per hour to $10.00 per hour. Most were $8.50 to $9.00 per hour. At the time of his injury, he was earning more than $34.00 per hour, as well as benefits such as health insurance, pension, etc.

Claimant is still looking for a job, and did so the day before the hearing. He applied for a truck stop job in Albert Lea, Minnesota, for $8.00 or $9.00 per hour. He was willing to travel 80 miles round trip per day if necessary.

Claimant stated after sitting in the hearing for over an hour, his neck, shoulders, and shoulder blades were sore, with a burning sensation in his shoulders and his low back was sore. At home, his sleep is disrupted many nights. He gets up in the morning, and checks the news. He walks around his yard because he does not want to sit all the time. He can load the dishwasher, but it is painful. For anything with heavy lifting he relies on his two sons to help. His sons do his mowing and snow removal. Even simple things like hanging a picture on the wall for his wife now has to be done by a son.

Even though claimant is 57 years old, he is not ready to be retired. He wanted to work until age 70 and build up his retirement. Working is something for him to do, and he enjoyed it. Claimant grew emotional when speaking of not working anymore.

On cross-examination, he agreed he had obtained a CDL for his trucking jobs. He studied a month and a half to pass the test. He still has a CDL license. He has restrictions on his license, such as not being able to drive out of state due to not having taken a physical. He worked on the railroad in his 20s and 30s, and he had pain after working at that job on occasion. He suffered a pulled muscle at that job.

Most of his career has been as a tele-handler and oiler, the job he did for defendant employer. He agreed it was a heavy job, and he did a lot of physical lifting at the Osage site, such as hauling bolts to the ironworkers. At his deposition, on pages 15 and 16, however, he stated he did not do heavy lifting on that job. He did a lot of the lifting with the tele-handler. To move a keg of bolts, he could not lift them, but he would drag them.

Prior to the injury, he was easily able to do his job. In 2003, he saw a doctor at Lake Mills for low back pain. He was 46 at the time. He attributed it at the time to work or an inner tubing incident. He missed no work for the inner tubing incident. He had seen a neurosurgeon prior to that, and had an MRI. He had been diagnosed with degenerative disc disease. He had seen a chiropractor.

Many of his doctors have told him to stop smoking. He smokes about a pack per day. He wears a patch to help him quit. He has also had anxiety issues in the past.

Exhibit H, page 14, shows claimant sought medical treatment for low back pain issues, and the inner tubing incident was mentioned again. He had been to a chiropractor then as well. He reported chronic low back pain.

In May 2006, claimant sought treatment for a neck injury sustained at work. He received some pain meds. Exhibit H, page 17, shows he had slipped at work, and snapped his neck. He reported cracking and grinding when he turned his head. He also twisted his back climbing down from a ladder during his past employment. He has had MRIs in the past for these incidents.

Exhibit H, page 20, shows on May 3, 2006, he was carrying buckets of mortar when he tripped and fell and hurt his neck. He had a clicking and popping noise in his neck. Claimant could not recall ever carrying mortar for an employer. Degenerative changes were again noted in his back.

Exhibit H, page 25, indicates in November 2011, claimant saw Stephen Holmes, M.D., for chest pain. He was found to have a neck strain and shoulder inflammation.

Claimant stated he saw a chiropractor for pain along his belt line in his right low back. An x-ray was taken, and claimant was recommended to undergo maintenance adjustments. Exhibit H, page 27, shows claimant was seen with complaints of back pain. There was not a new incident, but claimant felt like he had been kicked under the ribs.

For this work injury, claimant agreed he had done full duty without restrictions prior to this event. It may have been a week to ten days before he reported the fall. Exhibit M, page 1, is claimant's description of his work injury. He was in immediate pain, but he tried to shake it off. He hoped it would go away, but it never did. When it did not, he decided to document it by seeing Mr. Free. He feels if he had not been injured, he would not have been laid off, but would have been offered indoor work for the winter.

Exhibit H, page 29 documents that? claimant underwent a stress test in September 2012. It was noted he had shortness of breath. Claimant had pain in his left shoulder blade and was concerned he was having a heart attack, and that is why the stress test was conducted. Claimant has had hypertension for years and is on medication for it. This is an additional reason he thought he might be having a heart attack. He agreed the insurer has paid for all medical care to which they referred him.

His Social Security Disability application was based on shortness of breath as well as pain. He feels the shortness of breath was probably due to smoking. He also had anxiety issues, and he may have had a diagnosis of arthritis. He also receives retirement benefits of around $1,000.00. He gets about $2,900.00 per month from disability and pension.

He agreed he has not looked for jobs much after being found disabled, except the jobs recommended by Mr. Karrow. Exhibit I, page 3, is Mr. Karrow's initial assessment. Exhibit I contains the job search leads Mr. Karrow gave to claimant. Each contains an address, a phone number, and an internet address. But claimant stated nearly all required an online application. When an application was completed and submitted, the rejection response was communicated to Mr. Karrow.

Claimant has not attended any class work for computers or typing. He did try a GED course in Texas but found he could not do it. He has trouble reading a

newspaper. He has never been diagnosed with a learning disability, although when he was a child that was not a term that was used. He is able to drive a car, and drove from Mason City to Des Moines, about 100 miles, for the hearing.

He does not dispute the medical records may say his carpal tunnel syndrome is not related to his work injury.

On re-direct examination, he stated he does not think he could go back to truck driving, due to the loading, unloading, bouncing, etc. He never saw any doctor more than two or three times for this injury.

Prior to the work injury, he had been able to work with the shortness of breath and anxiety. When he applied for his pension at the age he did, he paid a penalty in his benefit amount for applying early. The carpal tunnel syndrome does affect his ability to learn to use a keyboard. He is only able to hunt and peck.

When he took Iowa Basic Skills tests as a child, he could not read the questions, so he simply guessed at the answers. Since the injury, his temper is short, and he takes Erazaban to help control it.

Prior to his injury, he never missed a day of work other than one day for the flu. He was able to do his job even with just an eighth grade education. His father taught him sheet metal work, his brother taught him to drive a truck. He learns by hands on activity. He taught himself how to use the tele-handler.

CONCLUSIONS OF LAW

The first issue is whether the alleged injury is a cause of temporary or permanent disability.

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).

Claimant had pre-existing symptoms for neck and shoulder pain, as well as some prior off and on treatment for occasional pain. However, the record shows these conditions were not symptomatic prior to this work injury. Claimant was able to do his job, which was very strenuous.

Dr. Nasstrom, the treating physician, concluded claimant's neck, bilateral shoulder and carpal tunnel syndrome (CTS) conditions were caused by claimant's work injury. (Ex. 6, p. 14)

Dr. Sneller conducted an IME of claimant at the request of defendants, and he also concluded claimant's conditions were caused by his work injury. (Ex. 9, p. 3)

Dr. Hines concluded there was a causal connection between the work injury and the conditions as well. (Ex. 12, p. 6)

Dr. Mooney and Dr. Martin did not feel there was a causal connection. Dr. Martin had several erroneous assumptions in his report. Dr. Mooney agreed claimant had ongoing pain and needed pain management.

Greater weight will be given to the causal connection opinions of the treating physician and Dr. Sneller and Dr. Hines. It is concluded claimant's current neck, bilateral shoulder and CTS conditions were either caused or aggravated by his work injury on August 31, 2012.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits, including whether claimant is an odd-lot employee.

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 R. 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 the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, 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.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Claimant is 58 years old. This puts claimant at an age where he will have trouble competing with younger workers for job opportunities in the future.

He has only an eighth grade education. He has very limited math skills, and does not know multiplication or division, skills taught in the early grades. His reading skills are also severely limited, which has caused him difficulty all of his life. This limitation represents a severe disability, in that claimant will be at an extreme disadvantage in competing with more educated applicants to jobs. Indeed, he has already seen many employers will not consider hiring anyone without at least a high school diploma.

Claimant's work history has always involved heavy labor, not surprising in light of his limited intellectual abilities. Before the injury, he was able to do all of the requirements of his job. He had no work restrictions.

Now, after his work injury, he has constant pain. He has severe work restrictions that make it impossible for him to return to his old job or to work at any similar positions. After his FCE, he experienced severe muscle spasms, an indication of what would happen if he attempted to return to physical work. The FCE found him only capable of medium work, but all of his lifting abilities, which were limited, were for only occasional lifting.

Claimant was laid off and has not been able to find substitute work, in spite of showing good motivation to find a job. He still has ongoing pain, which he treats with pain medication and injections. He cannot stand or sit for extended periods of time. He has to change positions frequently. He was found to be disabled by the Social Security Administration under their guidelines.

The vocational assistance of Mr. Karrow did not produce any viable job leads for claimant. Claimant has such limited computer skills he is unable to complete the online applications many employers require. Claimant applied for between 70 to 80 jobs, with only 1 positive response. That job was outside claimant's lifting restrictions. He has had no job offers. This is highly indicative of extreme disability.

When he was injured, claimant was earning $34.55 per hour, a high wage. Now he has no job and has therefore suffered a severe loss of earnings as a result of his work injury.

Phil Davis, M.S., also conducted a vocational evaluation. Mr. Davis' vocational evaluation found claimant limited to a sedentary position, and that he is no longer able to perform any of his past jobs. Based on claimant's age, limited intellectual abilities, past work history, and current work restrictions, Mr. Davis concluded claimant is totally disabled. (Ex. 14)

Based on these and all other appropriate factors of industrial disability, it is concluded claimant is, as a result of his work injury on August 31, 2012, permanently and totally disabled. This conclusion is based on normal principles of disability and not on the odd-lot doctrine.

The next issue is whether the claimant is entitled to payment of medical expenses pursuant to Iowa Code section 85.27.

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 16, 1975).

Claimant has submitted a list of unpaid medical expenses for which he seeks reimbursement under Iowa Code section 85.27. Defendants abandoned claimant's medical treatment after he was found to be at MMI, and claimant had to seek treatment from his personal physician.

That treatment and all requested medical expenses are found to be causally related to the work injury, and also found to be medically necessary and appropriate for treatment of claimant's injury. The treatment is found to have benefitted claimant. Defendants will be ordered to pay for claimant's submitted medical expenses.

The next issue is whether the claimant is entitled to the expenses of an examination under Iowa Code section 85.39.

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).

Although marked as a disputed issue on the hearing report, neither party addressed it in their post-hearing brief. It is an ongoing mystery to the undersigned why parties indicate an issue is disputed and needs to be addressed by the deputy, then fail to offer any argument or authority or indication of the party's position on the issue in the post-hearing briefs.

Under Iowa Code section 85.39, claimant is entitled to be reimbursed the costs of an independent medical examination if defendants have obtained a report indicating a degree of disability with which claimant disagrees. The record shows that occurred in this case. Defendants will reimburse claimant for the costs of the independent medical examination he obtained.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant permanent total disability benefits at the rate of eight hundred fifty and 49/100 dollars ($850.49) per week commencing August 31, 2012 and during the time claimant remains permanently and totally disabled.

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 benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing, including the costs of an examination under Iowa Code section 85.39.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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.

Signed and filed this 16th day of December, 2015.

Jon E. Heitland

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Harry W. Dahl
Attorney at Law
974 – 73rd St., Ste. 16
Des Moines, IA 50324-1090
harrywdahl@msn.com

Jason P. Wiltfang
Attorney at Law
PO Box 36
Cedar Rapids, IA 52406-0036
jwiltfang@scheldruplaw.com

JEH/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.