BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PATRICK FOLEY, Claimant, vs. JOHN DEERE DUBUQUE WORKS, Self-Insured, Employer, and SECOND INJURY FUND OF IOWA, Defendant.	File No. 19006793.01 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.40; 1803; 1808; 3203

STATEMENT OF THE CASE

Claimant, Patrick Foley, filed a petition in arbitration seeking worker's compensation benefits against John Deere Dubuque Works, self-insured employer, for an accepted work injury date of September 17, 2019. Claimant also filed a claim against the Second Injury Fund of Iowa, claiming a prior qualifying loss to the right arm in 2018. The case came before the undersigned for an arbitration hearing on September 15, 2022. Pursuant to an order of the Iowa Workers' Compensation Commissioner, this case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

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

The evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 5, Defendants' Exhibits A through C, and Second Injury Fund's Exhibit AA.

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on September 15, 2022. The parties submitted post-hearing briefs on November 18, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant sustained permanent disability as a result of his stipulated work injury;
2. If so, the extent of permanent disability;
3. Whether claimant is entitled to benefits from the Second Injury Fund of Iowa;
4. Payment of claimant's independent medical examination under Iowa Code section 85.39; and
5. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

At the time of hearing, claimant was a 65-year-old person. (Hearing Transcript, page 13) He is a high school graduate, and he attended one year of art school following graduation. He also attended one year of information technology courses at North Iowa Area Community College (NIACC) in approximately 2009 to 2010. (Tr., pp. 13-14)

During high school and for about one year after graduation, claimant worked as a delivery driver for a pharmacy and a bakery. (Tr., pp. 14-16) He then attended a program through the carpenters' union and worked through the union building residential and commercial buildings for about four years. (Tr., p. 16) He was laid off around 1980, and went to work for Operation Weatherization, which is an organization that helps elderly and low-income families insulate their homes. (Tr., p. 17) Claimant worked there until about 1986.

In 1986, claimant went to work at Holy Ghost Schools and Church. (Tr., p. 18) Claimant initially started as a volunteer, helping to insulate and remodel the school, and was eventually hired full time as the head of maintenance, buildings, and grounds. (Tr., pp. 18-19) In that position, claimant took care of the boilers; the grounds, including landscaping and baseball and football fields; cement work; plumbing; heating; air conditioning; roofing; and electrical. (Tr., pp. 19-20) Claimant worked for Holy Ghost until 2005. (Tr., p. 20) He then worked for himself for about a year, obtaining his contractor's license and working in small construction doing remodeling and rebuilding projects. (Tr., pp. 20-21)

In 2006, claimant started working at John Deere Dubuque. (Tr., p. 21) He started as an assembler in the backhoe line, and said he was "in the pool," meaning he did not get a permanent job at first, so he had to know all the jobs on the line in order to fill in for people. He worked that line for about two and a half years, and then was laid off.

(Tr., p. 22) He was offered a position at the Davenport location, which he accepted, and he worked in Davenport for about one year. He was then rehired in Dubuque and went back in a skid steer position. (Tr., p. 23) This was another "pool" job where he learned several positions, until he eventually got a permanent position as a forklift driver.

About six months later, claimant moved to the crawler line, also known as line 143. (Tr., p. 24) He worked as a "trucker," and described the job as involving manual labor, as he had to transport many different parts and fill the lines with whatever was needed. (Tr., pp. 24-25) He then moved to the line, and worked on aftertreatment devices, which were devices to control emissions. (Tr., pp. 25-26) After that, he moved up the line to a position installing cabs on top of frames. (Tr., p. 26)

In late 2017, claimant tore his right biceps tendon. (Tr., p. 30) He saw Stephen Pierotti, M.D., on June 27, 2018, and reported an injury to his right biceps that occurred eight months prior while bowling. (Claimant's Exhibit 3, p. 19) He said that he rolled the bowling ball, felt a pop in his shoulder and had pain. Since then, he noticed a deformity in his biceps. He continued to have occasional popping in the shoulder, but denied pain, numbness, or tingling. The record states he remained active in everything else, and the injury did not limit him at that time.

Dr. Pierotti diagnosed a proximal right biceps tendon rupture. On physical exam, he noted full active range of motion of the shoulder, and normal strength in the biceps and triceps. He did not have any operative treatment to recommend and told claimant he would always have the deformity. He told claimant to follow up with him as needed.

Claimant returned to Dr. Pierotti on October 30, 2018, with persistent right shoulder pain. On exam, claimant again had full range of motion, but was markedly weak with external rotation strength. (Cl. Ex. 3, p. 20) Dr. Pierotti suspected a rotator cuff tear and ordered an MRI. Records indicate the MRI showed a significant partial-thickness tear of the supraspinatus tendon insertion and was also suggestive of significant biceps tendon tearing. The record indicates claimant was a surgical candidate and wished to proceed with surgery. However, when claimant returned for follow-up on November 21, 2018, his pain had gotten better, and he requested a shoulder injection, which was provided. He did not return until April 16, 2019, at which time he asked for another injection, and stated he did not want surgery. (Cl. Ex. 3, p. 21) There are no additional records from Dr. Pierotti in evidence.

In the spring of 2019, a new line was introduced at John Deere, line 146. (Tr., pp. 27-28) Claimant testified that the new line started with only 16 people, while the old line had 42 people. (Tr., p. 28) He said the new line was slower, and they used heavier and newer torque wrenches that were computerized. He said each person on the new line had to perform two to four jobs in the same amount of time as they did one job on the old line. Claimant testified that the new line began to cause him some difficulties. (Tr., p. 32) Specifically, he testified that the computerized torque wrenches they used put more stress on his hands and wrists than the old impact wrenches or impact drills they used previously. (Tr., pp. 32-33)

After working line 146 for a few months, claimant started to develop symptoms in his bilateral hands and wrists. (Tr., p. 33) The symptoms included a burning sensation, "dead feeling," numbness, and waking up in the middle of the night. (Tr., pp. 33-34) By September 17, 2019, his symptoms progressed to the point he went to see the on-site nurse. (Tr., p. 34) He testified that his hands had gotten so bad he could not pick up a wrench. He saw Amanda Addison, NP, at the John Deere Occupational Health clinic, and was referred for active release technique (ART) therapy. (Joint Exhibit 1, pp. 17-18; Jt. Ex. 2, p. 22) He was also assigned work restrictions of no lifting more than five pounds, no twisting or bending the bilateral wrists, and avoiding vibratory tools. (Jt. Ex. 1, p. 15)

Claimant had several ART appointments and returned to NP Addison on September 26, 2019. (Jt. Ex. 1, pp. 14, 16; Jt. Ex. 2, pp. 21-27) He did not report any improvement and she had him continue with ART. The notes from ART continued to note no improvement, so claimant was referred for occupational therapy (OT) with his first appointment on October 4, 2019. (Jt. Ex. 1, p. 14; Jt. Ex. 2, pp. 28-30; Jt. Ex. 3, p. 31) At his next appointment with NP Addison on October 7, 2019, he reported some relief after his first OT session, but the pain returned. (Jt. Ex. 1, p. 13) He was to continue with his restrictions and OT.

At his next follow up with NP Addison on October 14, 2019, he reported worsening pain in his bilateral hands and wrists, and noted the relief from OT was minimal. (Jt. Ex. 1, p. 12) He was again told to continue OT, but also referred to orthopedics.

Claimant saw Lindsay Caldwell, M.D., on October 28, 2019. (Jt. Ex. 4, p. 67) He described a four-month history of bilateral hand pain after starting a new process at work. He complained of constant aching, burning, and dull, radiating pain with numbness and pins-and-needles in the bilateral wrists and hands. After physical examination, Dr. Caldwell recommended EMG/NCV testing to confirm carpal tunnel syndrome. (Jt. Ex. 4, pp. 68-69) She kept him on the same restrictions and directed him to follow up after the testing. (Jt. Ex. 4, p. 73)

Claimant followed up with Dr. Caldwell on November 25, 2019. (Jt. Ex. 4, p. 74) The EMG showed mild bilateral carpal tunnel with slowing of nerve conduction in the median nerve distribution. Claimant complained of frequent nighttime symptoms causing him to awaken several times each night. He also reported being unable to work at full capacity due to weakness in his grip and numbness. Dr. Caldwell recommended surgical release of both the right and left carpal tunnel. (Jt. Ex. 4, p. 76) Claimant agreed, and wanted to pursue the right side first as his right-sided symptoms were slightly worse.

Claimant had a right carpal tunnel release on December 17, 2019. (Jt. Ex. 4, p. 82) He was seen for follow up on December 30, 2019, and reported significant improvement in his right-hand symptoms. (Jt. Ex. 4, p. 84) He stated he was very happy

with the surgery and wished to proceed with surgery for the left side. He had a left carpal tunnel release on January 7, 2020. (Jt. Ex. 4, p. 89) He was seen for follow up on January 21, 2020, and again reported doing well, with "near full resolution of numbness and tingling in the left hand." (Jt. Ex. 4, p. 90) He was pleased with his improvement and had no complaints of pain.

Claimant's next follow up with Dr. Caldwell was February 3, 2020. (Jt. Ex. 4, p. 93) He was doing great at that time and was very happy with the results of his surgeries. Dr. Caldwell determined that claimant could return to work on February 11, 2020, with no restrictions, and stated he would be at maximum medical improvement (MMI) at that time. (Jt. Ex. 4, p. 97) Dr. Caldwell also provided an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 4, pp. 95-96) She noted full and normal range of motion of the fingers, normal sensation and no other neurologic disfunction or instability. As such, she provided a zero percent impairment rating, and stated that future treatment was not anticipated. She later clarified that the zero percent rating applied to both the right and left carpal tunnel. (Jt. Ex. 4, p. 100)

Claimant testified that when he saw Dr. Caldwell on February 3, 2020, he had not returned to work. (Tr., p. 37) He said the appointment lasted five to ten minutes, and Dr. Caldwell did not use any instruments to test or measure his grip strength or range of motion. (Tr., pp. 37-38) At that point, his strength had not fully returned, but the pain was gone, and he was happy with the surgeries. (Tr., p. 37) However, once he returned to work at John Deere, performing his regular duties, his symptoms returned.

With respect to his right hand, claimant testified that he has constant pain in his right wrist and hand. (Tr., pp. 39-40) He described constant achiness, and said he takes anywhere from 12 to 16 ibuprofen a day when working. (Tr., p. 40) He rated his right hand and wrist pain at a level four or five out of ten on average. He also reported dropping tools and parts "all day long," due to a lack of grip strength and numbness. With respect to his left hand, he testified it is much worse than his right. (Tr., p. 41) He stated that he has a lot of pain around the base of his left thumb, and the thumb locks up three to four times a day. (Tr., pp. 41-42) He described it as feeling like lightning striking it when it happens. (Tr., p. 42) He rated his left hand and wrist pain anywhere from a level seven to nine out of ten if he does not take ibuprofen, especially when pinching or pulling or tuning bolts. If he is taking ibuprofen, his pain will go down to a three or four.

With respect to his right biceps area, claimant testified that he continues to have symptoms and difficulties, especially if he has to flex while lifting between 40 and 60 pounds. (Tr., p. 43) He again described a lightning feeling, and said it causes him to drop things a lot. He said when the pain happens, it is about a level eight out of ten, and described it as a "screaming cramp right thought the arm." (Tr., pp. 43-44)

When claimant returned to work following his surgeries, he changed jobs and went to the engine line. (Tr., p. 29) The job entailed a lot of pulling, and he had to install

32 zip ties for a wire harness that wrapped around the engine. He also had to place a pump on one side of the engine, two pumps on the back, and some hoses. Claimant chose this position because he thought it would be better for his hands, as he did not have to use the large torque wrenches any longer. (Tr., p. 45) He said it was better for his hands, but he continued to have difficulties due to all the pulling involved with the zip ties. (Tr., pp. 45-46)

Shortly after claimant returned to work, the COVID-19 pandemic hit Iowa, and claimant was taken off work by his asthma doctor due to his personal health and age. (Tr., p. 46) He was initially taken off for a couple of weeks, which was extended, and he ultimately ended up being off work for 11 months. Claimant testified that his hand "felt great" while he was off work. When he returned in the Spring of 2021, he began to have difficulties with his hands again. (Tr., p. 47) About three months after his return he was off work again due to an unrelated personal injury and returned in March of 2022. (Cl. Ex. 2, p. 7) He again had difficulties with his hands but was eventually able to bid into another job at the beginning of the engine line, which is the job he was in at the time of hearing. (Tr., p. 48)

Claimant's current job at the beginning of the engine line involves installing the tandem pumps to the engine. (Tr., p. 48) Claimant testified that he builds the pumps and puts them on the engine and does the air conditioning. It involves placing clips and wires around the engine to set it up for others down the line, and he only has to deal with two zip ties, which he does not have to pull. (Tr., pp. 48-49) He said it is much easier than his prior position, but he still has some difficulty when turning bolts. (Tr., p. 49) To compensate, he changes hands until he the bolt is all the way in, and then uses a torque wrench to tighten them down. He testified that the current job still puts some stress on his wrists and hands. (Tr., pp. 49-50)

At the time of hearing, claimant was hoping to transfer to a parts-counting position at John Deere. (Tr., pp. 50-51) He said the parts-counting position involves riding a bicycle around the departments to make sure all the parts are in the proper place and taking inventory. (Tr., p. 51) Physically, he described it as the easiest job in the company, and he testified that usually people who have been hurt and can no longer do their regular jobs are in this position. It pays about $2.00 less per hour than his current position, however claimant does not wish to retire for another four years. (Tr., pp. 51-52) He is concerned about his ability to make it that long unless he is able to get into the parts-counting position. (Tr., p. 52) He testified that he has put in an official bid for the parts-counting position three separate times, but at the time of hearing he had not been offered the position. (Tr., p. 67)

Claimant attended an independent medical evaluation (IME) with Robin Sassman, M.D., on April 12, 2022. (Cl. Ex. 2, p. 3) Dr. Sussman's report is dated August 15, 2022. Dr. Sassman reviewed the relevant medical records and took a detailed history from claimant. (Cl. Ex. 2, pp. 3-7) The symptoms he reported to Dr. Sassman are consistent with his testimony at hearing. (Cl. Ex. 2, p. 8) On physical examination, Dr. Sassman found some limited range of motion in the right elbow. (Cl.

Ex. 2, p. 9) She also noted he was tender to palpation of the cubital tunnel bilaterally. With respect to his hands and wrists, he was tender to palpation over his scars. Dr. Sassman took measurement of claimant's range of motion in his wrists and performed neurological testing and grip strength measurements. (Cl. Ex. 2, pp. 9-10) Claimant testified that his appointment with Dr. Sassman lasted about an hour and a half, and she used instruments to test his grip strength and range of motion. (Tr., p. 38)

Dr. Sassman's diagnoses included bilateral carpal tunnel syndrome, status post release of each side; and symptoms of left ulnar tunnel syndrome and DeQuervain's tenosynovitis. (Cl. Ex. 2, p. 10) With respect to the second injury fund claim, she diagnosed right biceps tendon rupture in 2018, with residual range of motion deficit of the right elbow. She opined that the bilateral carpal tunnel syndrome was a direct result of claimant's work at John Deere. (Cl. Ex. 2, pp. 10-11) She opined that claimant may benefit from a repeat EMG due to his ongoing symptoms and the fact that he was also having cubital tunnel syndrome symptoms. (Cl. Ex. 2, p. 11) However, barring that testing, she would place him at MMI for each hand one year after the date of surgery, which would be December 19, 2020 for the right, and January 7, 2021 for the left.

Using the AMA Guides, fifth edition, Dr. Sassman provided an 11 percent upper extremity rating for the right upper extremity, based on sensory deficit of the median nerve, combined with strength deficit. (Cl. Ex. 2, pp. 11-12) This converts to 7 percent of the whole person. For the left upper extremity, she provided a 21 percent upper extremity rating, based on sensory and strength deficits, combined with the decreased range of motion in his wrist. (Cl. Ex. 2, p. 12) This converts to 13 percent of the whole person. Combining the 13 percent whole person impairment for the left upper extremity with the 7 percent whole person impairment for the right upper extremity, Dr. Sassman provided a total rating of 19 percent of the whole person related to the work injury. (Cl. Ex. 2, p. 13)

With respect to the second injury fund claim, Dr. Sassman provided a 1 percent upper extremity rating for loss of flexion at the elbow joint. This converts to 1 percent of the body as a whole.

For the bilateral carpal tunnel, Dr. Sassman recommended restrictions of lifting, pushing, pulling, and carrying up to 30 pounds occasionally. She also recommended limiting forceful and repetitive gripping and grasping to an occasional basis and limiting the use of vibratory or power tools to a rare basis. For the right elbow, she recommended similar restrictions. (Cl. Ex. 2, p. 13)

I find Dr. Sassman's IME report and ratings to be a more reliable and historically accurate picture of claimant's current condition than the prior rating offered by Dr. Caldwell. While Dr. Caldwell was the treating surgeon, she provided her impairment rating prior to claimant's return to work, when he was without pain and having little other difficulty. It was not until claimant returned to work that his symptoms returned. By the time claimant saw Dr. Sassman, he had been back working for over two years, and he was able to provide a more accurate picture of his condition. Additionally, Dr. Sassman

took measurements of his range of motion and grip strength, and made note of his sensory deficits, which is required by the Guides. As such, I find her ratings to be more reliable.

CONCLUSIONS OF LAW

The first issue to determine is the extent of permanent disability to claimant's bilateral upper extremities as a result of the stipulated September 17, 2019 injury. Defendant employer argues that claimant has no permanent disability, given his return to work and Dr. Caldwell's zero percent rating. Claimant disagrees, and argues he is entitled to permanent partial disability (PPD) benefits based on Dr. Sassman's impairment rating.

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).

I found that claimant sustained permanent impairment to his bilateral upper extremities. He is not seeking permanent total disability. Therefore, his permanent disability is compensated based on Iowa Code section 85.34(2)(t). That section states:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks, and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

Iowa Code section 85.34(2)(t)(2017).

In other words, the degree of claimant's disability is computed on a functional basis with a maximum benefit entitlement of 500 weeks. Simbro v. Delong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

In this case, I found Dr. Sassman's impairment rating to be more accurate. Therefore, claimant is entitled to 19 percent of the body as a whole, which is 95 weeks of benefits.

Claimant also seeks payment of the remainder of his IME fee from the employer. Defendant employer paid for 75 percent of the total IME bill, and argues it is not liable for the remainder because Dr. Sassman also included a rating for the injury related to the second injury fund claim. Claimant argues that because he filed a petition for an IME that was not contested and was ultimately granted, defendants have waived any argument in this regard. (See Cl. Ex. 5) Defendant responds that the petition for IME only refers to the bilateral arms and wrists, and the dates of injury listed involve the claims against the employer, not the Fund.[1] Defendant employer also argues that is never got an impairment rating for the right biceps injury, so Iowa Code section 85.39 does not apply.

I agree with defendant that the petition for IME and order granting same only applied to the portion of the IME related to the bilateral upper extremity injuries sustained while working on September 17, 2019. Claimant argues in the alternative that because such a small portion of Dr. Sassman's IME involved the right biceps injury, defendant's offset should be 15 percent, which is roughly the amount of the report related to the second injury fund claim.

I find claimant's alternative argument persuasive. Dr. Sassman's invoice is not itemized by injury, but her report indicates that she spent 1.25 hours evaluating claimant, and a total of 4 hours reviewing records and preparing the report. (Cl. Ex. 2, p. 4) Only 3 pages of medical records involve the biceps injury. (Cl. Ex. 2, p. 4; Cl. Ex. 3, pp. 19-21) The majority of the examination and report focused on the bilateral carpal tunnel, and only a small percentage discussed the biceps injury. Therefore, I find that defendant is entitled to offset 15 percent of the total IME fee, in the amount of $519.75. Dr. Sassman's total bill was $3,465.00. (Cl. Ex. 5, p. 35) I find defendant is responsible for $2,945.25. Defendant previously paid $2,598.75 toward the IME bill. (Cl. Ex. 5, p. 36) Therefore defendant shall pay an additional $346.50 for Dr. Sassman's IME.

The next issue to consider is whether claimant is entitled to benefits from the Second Injury Fund of Iowa (the Fund). The Fund contends it has no liability in this case. The Fund argues that claimant failed to prove a qualifying first injury and failed to prove a qualifying second injury. In the alternative, the Fund claims that even if claimant establishes two qualifying injuries, he has not shown industrial disability in excess of the Fund's credits.

[1] The petition for IME lists August 5, 2019 and September 17, 2019 as the dates of injury. At hearing, the petition related to the August 5, 2019 injury was dismissed.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost, or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss of or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury. Iowa Code section 85.64.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, section 17:1, p. 211 (2014-2015). The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

The Fund disputes whether claimant has proven a first qualifying injury to his right arm. The Fund argues that Dr. Pierotti's treatment records indicate that after his initial visit, claimant did not have any pain in his arm, he remained active, and the injury was not limiting him. (Cl. Ex. 3, p. 19) On examination, claimant had normal strength in his biceps and triceps, normal external and internal rotation, was neurovascularly intact, and had full function of his right arm. While he returned to Dr. Pierotti for shoulder injections, he did not have any additional treatment specific to his biceps. Finally, the Fund argues that while Dr. Sassman's rating is based on diminished range of motion in the right elbow compared to the left, there is nothing to indicate the deficit is causally connected to the biceps tear, or that is existed prior to the second date of injury to claimant's bilateral upper extremities.

It is the claimant's burden to prove entitlement to the benefits sought by a preponderance of the evidence. Claimant testified that he has a permanent deformity to his right arm, causing it to look like a "Popeye arm," as well as an indentation where the tendon tore. (Tr., p. 32) He testified that he still gets an electric shock sensation through his upper arm where the biceps tear was, into his elbow and shoulder. (Tr., pp. 63-64) He testified that happens about four times per month, depending on what he is doing and how he is doing it. (Tr., p. 65) There is nothing in the record to indicate claimant's problems, including the diminished range of motion, were the result of something other than the biceps tear. As such, I find that claimant has met his burden to prove a first qualifying injury in the form of a one percent permanent impairment to his right upper extremity.

It has already been established that claimant sustained a second qualifying injury, as I found him entitled to benefits for his bilateral carpal tunnel injuries. The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Therefore, the

question is whether the cumulative effect of the two scheduled member injuries resulted in industrial disability in excess of the Fund's credits. Neelans, 436 N.W.2d at 357-358.

The disability caused by the bilateral upper extremity injuries is compensated functionally under Iowa Code section 85.34(2)(t) and caused permanent functional impairment of 19 percent of the whole body, which entitles the Fund to 95 weeks of credit. Dr. Sassman's one percent right upper extremity rating entitles the fund to 2.5 additional weeks of credit, for a total of 97.5 weeks of credit.

The Iowa Supreme Court has held:

> [W]here both injuries are scheduled, that is, neither is itself an injury to the body as a whole, the Fund is liable for the entire amount of the industrial disability minus the two scheduled amounts. Only where one of the injuries is to the body as a whole must there be an apportionment. No basis for reversing the district court appears.

Braden, 459 N.W.2d at 471.

Here, claimant's first injury is confined to a scheduled member. His second injury is not to the body as a whole because it is a bilateral injury within the purview of section 85.34(2)(t), which is part of the schedule under which permanent disability is compensated functionally. See Simbro, 332 N.W.2d at 889. "It is the *cumulative* effect of the scheduled injuries resulting in industrial disability to the body as a whole—rather than the injuries considered in isolation—that triggers the Fund's proportional liability." Braden, 459 N.W.2d at 470. "[T]he Fund is responsible for the difference between the disability caused by the current employer and the total amount of the disability." Second Injury Fund v. Shank, 516 N.W.2d 808, 812 (Iowa 1994).

Industrial disability measures how the injuries have impacted claimant's earning capacity. See Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012) (citing Broadlawns Med. Ctr. v. Sanders, 792 N.W.2d 302, 306 (Iowa 2010)). The assessment of a claimant's earning capacity is based on multiple factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics of the claimant, the claimant's inability, because of the injury, to engage in employment for which the claimant is fitted, and the employer's inability to accommodate the claimant's functional limitations. Id.; IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

In this case, claimant has continued working for John Deere in several different positions since the bilateral carpal tunnel surgeries. While he has some lingering pain and minor difficulties, the injuries have not impacted his ability to engage in employment for which he is fitted. He currently earns more per hour than he made at the time of

injury. He plans to continue working for John Deere and has not applied for work anywhere else. (Tr, pp. 66-67) While claimant testified that he has made attempts to get into the lighter parts-counting position, there is nothing to suggest he cannot continue performing his current job. Any potential impact on claimant's future employability is minimal, at best, and certainly does not exceed the Fund's credits.

The Fund is responsible only for the amount of the industrial disability from which the employee suffers, reduced by the compensable value of the first and second injuries. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995). In the event the credits due to the Fund exceed the industrial disability resulting from the qualifying injuries, the fund has no liability. Crudo v. Second Injury Fund of Iowa, Case No. 98-828 (Iowa App. July 23, 1999). In this case, I do not find industrial disability in excess of the Fund's credits. Therefore, the claimant is not entitled to second injury fund benefits.

Finally, claimant seeks a taxation of costs against the employer in the total amount of $200.00, which represents the $100.00 filing fee for each of his two petitions. (Cl. Ex. 4, p. 23) Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. As claimant was generally successful in his claim against defendant employer, I use my discretion and award him costs in the amount of $100.00 for the filing fee related to File number 19006793.01. The other file for which he seeks costs, number 21700545.01, was dismissed. As such, I decline to award costs for that filing fee.

ORDER

THEREFORE, IT IS ORDERED:

Defendant employer shall pay claimant ninety-five (95) weeks of permanent partial disability benefits, commencing on February 10, 2020, at the stipulated rate of six hundred eighty and 53/100 dollars ($680.53).

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

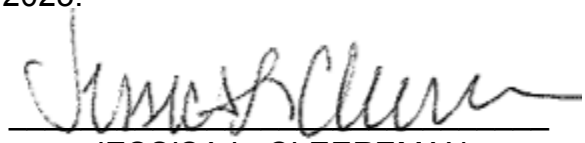
Defendant employer shall reimburse claimant in the amount of three hundred forty-six and 50/100 dollars ($346.50) for Dr. Sassman's IME.

Defendant employer shall reimburse claimant in the amount of one hundred and 00/100 dollars ($100.00) for costs.

Defendant 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.

Claimant shall take nothing from the Second Injury Fund of Iowa.

Signed and filed this 21st day of March, 2023.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark J. Sullivan (via WCES)

Zeke McCartney (via WCES)

Dirk Hamel (via WCES)

Meredith C. Cooney (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 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.