BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELVA MARQUEZ,	:	
	:	File No. 5032658.01
Claimant,	:	
	:	BIFURCATED ARBITRATION
vs.	:	
	:	DECISION
JOHN MORRELL & CO.,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	Head Note No. 1803

STATEMENT OF THE CASE

The claimant, Elva Marquez, filed a petition for review-reopening and seeks workers' compensation benefits from John Morrell & Co., a self-insured employer. The claimant was represented by Dennis McElwain. The defendant was represented by Tim Clausen. Both parties were well-represented.

The matter came on for hearing on October 9, 2020, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa, via Court Call. The record in the case consists of joint exhibits 1 through 2; claimant's exhibits 1 through 21; and defense exhibits A through D. The claimant testified under oath at hearing. Jami Johnson was appointed and served as the court reporter. Frank Gonzalez was the interpreter. The matter was fully submitted on November 30, 2020, after helpful briefing by the parties.

ISSUES

The parties submitted the following issues for determination:

1. The primary issue in this case is the nature and extent of claimant's permanent disability. She alleges permanent and total disability and she pled "odd-lot." Defendant disputes this. There are other ancillary issues including temporary disability or healing period, commencement date and credit.

2. Whether the claimant is entitled to penalty benefits.

3. Whether the claimant is entitled to IME expenses.

4. Costs.

STIPULATIONS

Through the hearing report, the parties stipulated and/or established in the prior hearing:

1. The parties had an employer-employee relationship at the time of the injury.

2. Claimant sustained an injury which arose out of and in the course of employment on February 4, 2009.

3. This work injury is a cause of both temporary and permanent disability.

4. Temporary disability/healing period and medical benefits are not in dispute.

5. The weekly rate of compensation is $639.54.

6. Affirmative defenses have been waived.

7. Defendant has paid weekly indemnity benefits from July 23, 2012, through April 20, 2020. (The nature of these payments is disputed as set forth above.)

PROCEDURAL HISTORY AND FINDINGS OF FACT

This claim was filed technically as a review-reopening case on September 27, 2019. In fact, these were bifurcated arbitration proceedings. The first hearing occurred on January 11, 2012. An arbitration decision was filed on March 22, 2012, which awarded the claimant the treatment she was seeking both past and future, as well as costs. The order specifically stated that the "issue of the extent of claimant's entitlement to permanent disability benefits or other lingering issues shall be set back into assignment for pre-hearing and hearing on the extent …" (Joint Exhibit 1, page 10) The factual findings in that decision are preclusive.

Certain findings in that decision are relevant to the case at hand.

> Elva was born in Mexico on October 20, 1966. She is now 45 years of age. She attended school for nine years as a child in Mexico. She came with her husband to this country in 1988 and located in Scottsbluff, Nebraska. Elva's four children were born in 1990, 1994, 1997, and 2002. Elva and her husband lived in Scottsbluff, Nebraska, for four years, where Elva was employed as a field worker and meatpacker. The family moved to Sioux City, Iowa, in January 1992, at which time Elva began working for Morrell as a production worker at its pork slaughter and processing facility in Sioux City.
>
> Elva, who is right hand dominate [*sic*], testified that she had no problems with her right shoulder, or her right scapular [*sic*] and no physical limitations prior to her employment at Morrell. There are no medical

> records in evidence to suggest otherwise. She passed Morrell's pre-employment physical. (Ex. 1-5)
>
> Elva was employed at the Morrell plant from January 1992 until the plant closed on April 9, 2010. She has not been employed in any capacity since. While at Morrell, she performed three main jobs and described these jobs at hearing and in her deposition (Ex. D-9:13) as follows:

(Jt. Ex. 1, p. 2) The three jobs were using a Whizard knife, 1992-2000; packing hams, 2000-2002; and bagging tenders, 2002-2010.

Ms. Marquez began reporting right shoulder discomfort in late fall 2006. (Jt. Ex. 1, p. 3) She was treated by the plant nurses with over-the-counter meds and splints in 2006 and 2007.

> Elva testified that in late February 2007, due to temporary layoffs, she was assigned to [*sic*] back to removing fat from hams with a whizzard [*sic*] knife to avoid being laid off. This work increased her arm pain and the pain radiated up under her arm to her shoulder. Beginning March 19, 2007, Elva was placed on light duty. (Ex. 5-4) Eventually, an Accident Investigation Form was completed (Ex. 3) and Elva was referred by Morrell to Douglas Martin, M.D., an occupational medicine physician, to address her complaints. (Ex. D-14:17, Ex. 5-3:4)

(Jt. Ex. 1, p. 3) She underwent a course of treatment between 2007 and 2009 which focused on her right shoulder and right arm into her hand and fingers. The deputy detailed this treatment thoroughly in his findings of fact and they are relevant to the case at hand.

> On June 6, 2007, Elva was seen by Thomas Chopp, M.D., an orthopedic surgeon. He reports a history of off and on right shoulder pain for the last several months which became worse in February along with right long finger triggering. His assessment was right shoulder impingement and right long finger trigger digit. He injected the shoulder and referred her for EMG testing and referred her to another physician for the trigger finger. The injection only resulted in minimal improvement and the EMG was normal. He restricted Elva from repetitive and overhead activates. [*sic*] (Ex. 7)
>
> Elva was seen by Nichole Friessen, PA-C, an assistant to orthopedist, Ryan Meis, M.D., on August 24, 2007. An injection into the trigger finger was performed and conservative modalities were continued for the right shoulder impingement including medications, restricted duty, and physical therapy. Surgery was not recommended at that time. (Ex. 8-1:3) Elva was seen by Dr. Meis on September 28, 2007 who reported improvement in the right shoulder, but not in the finger. An A-1 pulley release surgery was recommended. (Ex. 8-5:6) This surgery was done

on October 11, 2007. (Ex. 8-7) Elva was returned to work with no use of the right hand. (Ex. 8-8)

On November 27, 2007, Dr. Meis stated that her right hand problem had improved and she could now use it at work, but that her right shoulder problems still required restricted duty and possibly another injection. However, he cautioned at that time that Elva's shoulder condition may require permanent restrictions or a change in jobs due to her continued right shoulder complaints. (Ex. 8-11)

Elva returned to Dr. Meis on January 11, 2009 stating that her worst problem is now her right shoulder. The doctor recommended another injection and Elva agreed. (Ex. 8-13) Finally, on February 29, 2009, when Elva reported no improvement in her shoulder complaints, the doctor recommended shoulder surgery and this was done on April 21, 2009. The surgery was a right shoulder arthroscopy with subacromial decompression. A degenerative tear of the anterior labrum was found during this procedure, but the doctor felt this was not the cause of a majority of her symptoms. The doctor did find a slight laxity in her shoulder and stated as follows with reference this [*sic*] laxity:

> . . . . I think, if it were mild multi-directional instability alone: 1) it would be rare in her age category and 2) it should resolve with the rest she has been having.

(Ex. 8-19)

Elva was provided physical therapy and home exercises after the surgery and reported some improvement in her pain in May 2008, but in June, she started complaining of more severe pain in the axilla (arm pit) and Dr. Meis' assistant had no explanation for the arm pit pain. (Ex. 8-23) In August, Dr. Meis and his assistant ordered another EMG to rule out an axillary nerve lesion that may be causing the arm pit pain. These tests were normal. (Ex. 8-27) On September 9, 2009, Dr. Meis and the assistant declared Elva at MMI and returned her to work without restrictions despite the ongoing arm pit pain for which they had no explanation. They felt it was a separate issue from her shoulder condition. They suggested referral for an FCE or to a Dr. Luther. (Ex. 8-29)

On October 1, 2008, Elva was seen by Jeff Luther, M.D., for an impairment evaluation. He is a director of an occupational health services clinic and is board certified in emergency medicine and internal medicine. He also states in his report that he is a certified disability evaluator. He provided an impairment rating to the upper extremity based on lost range of motion and loss of strength. He stated that he would not recommend work activity restrictions because Elva was currently working in packing and this job would be a low risk environment for repetitious shoulder

activities. Dr. Luther noted Elva's severe ongoing pain in the arm pit, but this pain was not discussed in arriving at his conclusions as to impairment and restrictions. (Ex. 9)

Elva returned to full duty in her regular job of bagging tenders in October 2008 and continued his [*sic*] job activity until she suffered another injury at Morrell on May 13, 2009, when she slipped and fell onto her outstretched right hand. (Cl. Ex. 10) She was referred by Morrell to Rodney Cassens, M.D., who followed her for this right hand injury until June 24, 2009, at which time she was sent to an orthopedist, Michael Genoff, who injected her wrist and released her. Dr. Cassens reported on October 15, 2009, that Elva is currently working at her regular duty, but continues to have right wrist pain of uncertain etiology. (Ex. l0-5) Dr. Cassens reported that the wrist sprain was resolved on October 29, 2009, but also stated that she continued to have persistent right upper extremity pain likely due to prior shoulder injury. (Ex. 10-6)

In December, 2009, Elva on her own, sought an evaluation of her right shoulder by another orthopedist, Jack McCarthy, M.D., who practices in the Omaha, Nebraska, area. She reported pain over her shoulder, deep in nature, that radiates down her right axillary (arm pit) area. He reviewed prior medical records, noting Elva's scapula problem had been documented going back to June 2007. At his deposition Dr. McCarthy explained that Elva's right axillary or arm pit pain was consistent with a condition called scapular winging. (Ex. 19-12:13) Dr. McCarthy states that he performed several tests specific for diagnosing scapula pathology. (Ex. 19-10:11) He states that Elva's history indicates reports of pain in the shoulder blade, not just shoulder pain and that the most pronounced thing on her exam was what we call winging of the scapula or the shoulder blade would raise up off the chest wall. He added that it was possible to miss this aspect of her condition, but for him it was obvious after performing the various shoulder maneuvers. (Ex. 19-8:9) His assessment was as follows:

> Persistent right shoulder pain status post arthroscopy.
> Scapular winging. Probable scapulothoracic instability with secondary pain.

(Ex. 12-3)

Dr. McCarty recommended further conservative care at that time, and relayed his report to Elva's prior surgeons. Elva was still employed at Morrell at this time and Dr. McCarthy did not restrict her work activities.

Elva returned to Dr. McCarthy September 8, 2010. Her most significant symptom was the winging of the right scapula. He admitted no easy answers at that point, and suggested if there was no improvement,

> Elva may need FCE to outline her permanent restrictions. (Ex. 12-5)
>
> Morrell referred Elva back to Dr. Martin for examination on October 12, 2010. Dr. Martin agreed that Elva now has scapular winging, but denied that this condition existed while he was treating her. He admitted that in May 2007, Elva exhibited a scpulothoracic [*sic*] rhythm problem, but not winging. He stated that because he and Dr. Chopp, Dr. Meis, and Dr. Luther had not noted any type of scapular winging problem, Elva's winging must have occurred after she saw Dr. Luther in October 2009. Thus, he reasoned, it was "less likely an issue of work'-related [*sic*] as opposed to personal issues." (Ex. 6-15)
>
> In follow-up examination on December 15, 2010, Dr. McCarthy reported Elva "continues to have substantial winging and pain." He reviewed Dr. Martin's recent report, and took issue with both Dr. Martin's history and causation opinion. Dr. McCarthy expressed his opinion that this is a tough problem that I feel should be treated as a work related condition. I think this is really a significant persistent shoulder problem that dates back with mild scapulothoracic dysfunction noted by Dr. Martin to the dramatic changes we see today," Dr. McCarthy recommended further diagnostic studies, and that "we need to continue to be aggressive. (Ex. 6-6:7)
>
> In response, Morrell did authorize further EMG testing, performed by Dr. Michael McHenry, a physiatrist. As Dr. McCarthy later testified, this did not confirm a thoracic nerve source, but that Elva clearly had significant winging. (Ex. 12-8; Ex. 19- 22) In a follow-up examination on March 17, 2011, Dr. McCarthy reported Elva as having "significant functional restrictions" due to this problem. He reiterated his opinions on causation, although the precise nerve had not been identified. He suggested surgery as an option if further injection did not help. (Ex. 12-9)

(Jt. Ex. 1, pp. 3-6)

Defendant denied liability for the shoulder winging condition based upon the expert opinion of Dr. Martin. Dr. Martin testified via deposition and the causation opinions of Dr. Martin and Dr. McCarthy were the primary dispute in the case. The deputy rendered specific findings of fact regarding medical causation.

> I find the views of Dr. McCarthy convincing more so that [*sic*] the views of Dr. Martin. While Dr. Martin, as an occupational physician, is certainly well qualified to render medical opinions regarding work injuries, Dr. McCarthy is a board certified specialist in orthopedics and such knowledge and experience better qualifies him to render opinions on the cause of an orthopedic problem. This is why Dr. Martin referred Elva to an orthopedic specialist for her shoulder problems in May 2007. Also, the explanations of Dr. McCarthy as how this winging problem arose and not

> previously diagnosed is a reasonable explanation, especially when even Dr. Martin noticed early shoulder blade movement issues, which Dr. McCarthy felt was consistent with an early winging problem. It is also noted that Dr. Meis later on also noted shoulder laxity, but felt it would subside in time.
>
> Therefore, I find that the stipulated work injury of April 24, 2007 is a cause of Elva's current scapular winging condition found by both Dr. McCarthy and Dr. Martin. I find that the medical expenses requested in this proceeding, Exhibit 17 and 18, constituted reasonable and necessary treatment of the work injury of April 24, 2007. I further find that the work injury of April 24, 2007 is a cause of the need for further treatment of that condition as recommended by Dr. McCarthy. I find Dr. McCarthy to be the best physician to address the winging condition, given his greater and more recent familiarity with Elva's right shoulder condition.

(Jt. Ex. 1, p. 7)

The deputy made the following concluding findings of fact:

> Dr. McCarthy did not impose work restrictions on Elva while she was working at Morrell and Elva kept working at Morrell until the plant closed. Claimant seeks temporary total disability from the time Elva left Morrell's employment, April 10, 2010. She was under no restrictions when she was laid off. When Dr. McCarthy saw Elva in September 2010, he acknowledged some functional limitations due to the winging, but was not specific other than to state that she may need to accept the condition and obtain an FCE to outline her permanent restrictions. When Dr. Martin saw Elva on October 12, 2010, although he felt that the winging problem was not work related; he stated that it would be difficult for Elva to return to overhead or over shoulder work. (Ex. 6-17) Elva's job at the time she left did not require overhead or over shoulder activity. When Dr. McCarthy saw Elva on March 17, 2011 he specifically added a restriction of no lifting over 5-10 pounds. (Ex. 12-9) However, Elva's bagging job at Morrell did not require lifting more than 3 pounds, albeit quite repetitively. Dr. McCarthy did not restrict repetitive activity. Consequently, there has been no showing that Elva is prohibited by a physician from returning to the type of work she was doing when she left Morrell. At hearing, claimant admitted that but for the plant closure, she would still be working at Morrell.

(Jt. Ex. 1, pp. 7-8)

As a consequence of these findings, the deputy denied claimant's claim for temporary disability benefits, concluding that she "failed to show that she is medically incapable of performing the type of work she held when she was permanently laid off on April 10, 2010 due to plant closure." (Jt. Ex. 1, p. 9) He did award her past and future

medical expenses for the scapular winging. (Jt. Ex. 1, p. 9)

The October 9, 2020 hearing focused on the facts which have occurred since the January 2012 arbitration hearing.

Ms. Marquez has not worked in any gainful employment since the plant closed in April 2010.

Dr. McCarthy referred claimant to the Mayo Clinic in Rochester, Minnesota. Her treatment began there in July 2012 with Bassem Elhassan, M.D. (Jt. Ex. 2, p. 11) Dr. Elhassan diagnosed right shoulder pain mostly secondary to scapula winging and secondary impingement. (Jt. Ex. 2, p. 12) On exam, he found that she had "gross dyskinesis and winging of the scapula. With resisted protraction the patient has major winging of the scapula indicating weakness of the serratus anterior." (Jt. Ex. 2, p. 12) He ordered an EMG and a repeat MRI. He recommended surgery to "stabilize the scapula." (Jt. Ex. 2, p. 12) Ms. Marquez was placed on significant work restrictions at this time. (Jt. Ex. 2, p. 14) Surgery was performed on August 3, 2012. This surgery involved detachment of the pectoralis major muscle and a segment of its bony insertion from the humerus. The muscle was threaded through a tunnel to be attached to the distal tip of the scapula. (Jt. Ex. 2, p. 16) Ms. Marquez testified that she continued to experience the winging, along with a sensation that the muscles were jumping around. (Transcript, pp. 26-28) This was also documented in her physical therapy sessions. (Jt. Ex. 2, p. 22)

Dr. Elhassan reexamined Ms. Marquez on March 14, 2013, and opined she still showed evidence of winging. (Jt. Ex. 2, p. 25) He kept her on medical restrictions. (Jt. Ex. 2, p. 24) Dr. Elhassan saw her again in June 2013, noting that he expected her recovery to be slow. (Jt. Ex. 2, p. 27) He recommended aqua therapy and swimming. She underwent physical therapy throughout all of 2013. She also attempted to take GED classes through the local community college. (Tr., p. 30) In September 2013, she was provided restrictions of working for an hour at a time with her right arm with breaks. She was allowed to increase to 4 hours per day. She had to lift less than 5 pounds with her right hand for lift, carry, push, pull, grip, pinch and fine manipulation. (Jt. Ex. 2, p. 28)

On November 4, 2013, after hearing, Ms. Marquez was approved for Social Security Disability. (Cl. Ex. 7)

In April 2014, Dr. Elhassan noted she continued to have the scapular winging. Because of radiating neck pain, a cervical MRI was ordered and she was referred to pain management, K.A. Bengtson, M.D. (Jt. Ex. 2, p. 30) In December 2014, Dr. Bengtson documented that Ms. Marquez's active range of motion was "quite limited." (Jt. Ex. 2, p. 35) He ordered more physical therapy and changed her medications some. She continued physical therapy at Sioux City Physical Therapy. (Jt. Ex. 2, p. 36)

In January 2015, Dr. Bengtson documented the following diagnoses: (1) Ongoing right scapular dysfunction following pectoralis transfer and (2) Right upper

extremity neuropathic pain, most consistent with sympathetically maintained pain. (Jt. Ex. 2, p. 37) On February 6, 2015, Ms. Marquez was provided with restrictions to return to work with no use of her right arm. (Jt. Ex. 2, p. 40) At that time, Dr. Bengtson noted that Ms. Marquez seemed to have a "block" in her range of motion. He indicated that he would discuss the "mechanics of her shoulder with Dr. Elhassan and develop a plan to address the issues. (Jt. Ex. 2, p. 39) Ms. Marquez then told her physical therapist that she "needed to hold off on therapy until further notice." (Jt. Ex. 2, p. 41)

The following is documented by Dr. Bengtson dated April 23, 2015.

> We received a telephone call on April 17, 2015, from Renee from Ms. Marquez's work comp carrier who wanted to know about her maximal medical improvement. Renee informed us that they have had a difficult time contacting the patient as well as having the patient consistently be noncompliant with treatment. Renee is asking for our opinion on MMI and a date.

(Jt. Ex. 2, p. 41) There is no evidence in the record that any of this is true. Ms. Marquez testified it was not true. (Tr., p. 34) She testified that Mayo Clinic had only called her regarding unpaid medical bills.

Ms. Marquez had, in fact, filed an alternate medical care petition in February 2015, seeking the authorization of treatment at the Mayo Clinic. A Deputy Commissioner ordered the treatment be authorized and paid on February 17, 2015. The defendant actually did not resist the alternate care order, other than as to costs. (Cl. Ex. 20, p. 93) The defendant certainly did not raise any issue related to claimant's alleged noncompliance with treatment. In any event, the defendant converted Ms. Marquez's weekly payments at this time to permanent partial disability. (Def. Ex. D, p. 23) Ms. Marquez continued to treat thereafter. The defendant, however, did not immediately pay the past due Mayo Clinic bill. This remained unpaid until at least the fall of 2015, apparently further delaying her treatment. (Cl. Ex. 20, pp. 99-100)

Ms. Marquez returned to Dr. Elhassan in December 2015, reporting little improvement. Dr. Elhassan ordered a new MRI for her neck and shoulder, which occurred in February 2016. He diagnosed (1) recurrent scapula winging after prior pec transfer mostly secondary to stretch injury at the site of the repair, and (2) anterior shoulder pain mostly secondary to biceps tendinitis and partial rotator cuff tear. (Jt. Ex. 2, p. 45) He recommended revision surgery, which was performed on April 22, 2016. This surgery was described as a mini open subpectoral right shoulder tendon transfer reconstruction. (Jt. Ex. 2, pp. 46-51) She was taken off work at this time. During her recovery, she ended up visiting the emergency room due to pain before returning to Dr. Elhassan on June 7, 2016. Dr. Elhassan documented the following. "I am really concerned about her progress in the setting of a conversion reaction and very abnormal scapula motion. She will require very dedicated therapy for this problem . . ." (Jt. Ex. 2, p. 59) He provided a request for physical therapy and a psychotherapy consult.

On August 19, 2016, Dr. Elhassan documented that the therapy request "did not

go through." (Jt. Ex. 2, p. 62) He further described her problem with the scapula, indicating she had a very "abnormal rotatory motion." (Jt. Ex. 2, p. 62) He opined that without successful therapy her "transfer is going to stretch again" and her only option would be scapulothoracic fusion. (Jt. Ex. 2, p. 63)

In November 2016, Dr. Elhassan recommended the fusion surgery to "stabilize the scapula on the chest wall." (Jt. Ex. 2, p. 66) This was delayed pending the attempted use of a shoulder brace. (Jt. Ex. 2, p. 67) She proceeded with the fusion surgery on April 26, 2017. (Jt. Ex. 2, pp. 70-71) She underwent a course of recovery which included follow-up visits and additional physical therapy. Dr. Elhassan wrote an opinion letter in March 2018, providing expert medical opinions. He opined she had not reached maximum medical improvement throughout her treatment with him and that only at her last visit had she begun to stabilize. He connected her "conversionary reaction" to the work injury. (Jt. Ex. 2, pp. 81-82)

By June 25, 2018, follow-up radiograph films showed an excellent fusion. Her symptoms, however, had not completely resolved. Dr. Elhassan documented her symptoms of twitching muscles and her limited range of motion particularly on abduction. (Jt. Ex. 2, pp. 83-87) He referred her for a functional capacity evaluation (FCE) to determine permanent restrictions and additional physical therapy. She started on Tramadol at this time.

On July 31, 2018, Ms. Marquez was examined by Russell Gelfman, M.D., to determine "return to work recommendations." (Jt. Ex. 2, p. 88) Dr. Gelfman documented the muscle twitching and limited motion in her shoulder "finding it difficult to reach above shoulder level, away from her body . . ." (Jt. Ex. 2, p. 88) He recommended she continue with physical therapy through August 2018 and that she would not reach maximum medical improvement until after her physical therapy.

An FCE was performed at Mayo Clinic on October 1-2, 2018. It was determined she gave maximum effort. The testing placed her in the sedentary work classification. (Jt. Ex. 2, p. 95) It provided severe work limitations limiting her ability to lift at all from certain positions, such as waist to crown. The full report directs detailed significant limitations on her abilities to use her arms for any type of forceful or repetitive activities. (Jt. Ex. 2, pp. 94-108) She then returned to Dr. Gelfman on October 3, 2018, who documented he would consult with Dr. Elhassan to determine maximum medical improvement and impairment. (Jt. Ex. 2, pp. 109-110) Ms. Marquez then returned to Dr. Elhassan on October 9, 2018. While he found her fusion to be stable, he noted she continued to have spontaneous abnormal muscle contractions surrounding her scapula. He ordered additional tests including a new MRI and pulmonary testing. He also ordered a Botox injection. (Jt. Ex. 2, p. 111)

At his final exam on February 1, 2019, Dr. Elhassan documented that the Botox injection did not help much. He placed her at maximum medical improvement. "I recommend for her just to continue using her hand in front of her body but without much elevation so as not to cause this abnormal motion in the shoulder." (Jt. Ex. 2, p. 114) He stated he would "keep her off work as before." (Jt. Ex. 2, p. 114) He signed an

Activity/Work Status Report stating "Patient is unable to work at all from February 1, 2019, through permanent." (Jt. Ex. 2, p. 115)

The defendant sent Ms. Marquez to Dr. Martin for finalization and impairment rating evaluation. (Def. Ex. A, p. 4) He provided opinions on restrictions and impairment. He assigned an 8 percent whole body rating. (Def. Ex. A, p. 11) His restrictions were contrary to the FCE, opining that she was deconditioned and had other health conditions.

> … I frequently speak about not needing a Functional Capacity Examination in dealing with singular upper extremity complaints or diagnoses because it is my feeling that an Occupational Medicine physician should have enough knowledge to be able to identify work capacities and work activities if there is a residual issue without having to get a Functional Capacity Examination involved.

(Def. Ex. A, p. 11) He opined she "will do very well if she keeps activities with her right upper extremity between her beltline and mid torso line, and closer to her body." (Def. Ex. A, p. 12) He advised against above shoulder height work and "extended-type of work with the right arm at a plane that would be greater than 50 to 60 degrees of either flexion or abduction from the body." (Def. Ex. A, p. 12)

Sunil Bansal, M.D., performed an IME on July 7, 2020. He assigned a 9 percent whole body impairment rating and recommended using the restrictions set forth in the valid Mayo Clinic FCE. (Cl. Ex. 14, p. 74) He added the following restriction: "The right arm is restricted to a guide hand only, and to a level below the chest." (Cl. Ex. 14, p. 74)

Tom Audet provided an expert vocational report finding that there is no gainful employment in the competitive job market Ms. Marquez could perform. (Cl. Ex. 17, p. 85) Defendant did not submit expert vocational evidence.

CONCLUSIONS OF LAW

The first and primary question is whether the claimant is permanently and totally disabled as a result of her stipulated work injury. The claimant has sustained an injury to her body as a whole and disability is calculated industrially.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be

given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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.

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 Ry. Co. of Iowa, 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 1987);

Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, Appeal Decision (November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

The overwhelming evidence in this case is that Ms. Marquez is permanently and totally disabled. It is unnecessary to apply odd-lot procedures. Ms. Marquez is 53 years old at the time of hearing. She has limited educational background and does not speak, read or write English, despite her efforts to learn the language. She has an unusual and catastrophic injury to her shoulder and scapula which places her in the sedentary work classification. She can no longer use her right arm at all other than as a "guide" to perform work. Her treating surgeon has advised no work at all. Even if I utilized Dr. Martin's restrictions, which entirely discounted a valid FCE from the Mayo Clinic, I find there would be no work for her. She had a healing period which included multiple complex surgeries and extensive physical therapy which spanned over ten years. The plant which provided manual labor opportunities to non-English speakers has closed. She has been deemed totally disabled by the Social Security Administration since 2013. Prior to her work injury, Ms. Marquez was able to perform hard work in meat processing. She can no longer do this. I find that claimant is permanently and totally disabled commencing July 23, 2012. Defendant is entitled to a credit for all weekly payments made since this date. This also obviates the need to address temporary disability benefits.

The next issue is whether Ms. Marquez is entitled to an IME.

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

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

I find claimant is entitled to Dr. Bansal's IME costs set forth in claimant's exhibit 15.

The next issue is penalty.

Iowa Code section 86.13(4) provides:

a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits

> to the employee at the time of the denial, delay, or termination of benefits.

Claimant argues that defendant should have reassessed the decision to pay a 30 percent industrial disability after receiving reports from Dr. Bansal and Tom Audet. I find that the assessment of a 30 percent industrial loss, was, in fact, a low assessment. I do not find it was per se unreasonable. The claimant has failed to prove entitlement to penalty.

ORDER

THEREFORE IT IS ORDERED

Defendant shall pay permanent total disability benefits at the rate of three hundred sixty-three and 82/100 ($363.82) per week commencing July 23, 2012.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten (10) percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the Federal Reserve in the most recent H15 report settled as of the date of injury, plus two (2) percent. See. Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall be given credit for the weeks previously paid since July 23, 2012.

Defendant shall pay the IME expense of Dr. Bansal set forth in claimant's exhibit 15.

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

Costs are taxed to defendant.

Signed and filed this ___9th___ day of June, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dennis McElwain (via WCES)

Timothy Clausen (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.