BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHNNY ESKRIDGE, Claimant, vs. MICHELS CORPORATION, Employer, and ARCH INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 1622889.01 ARBITRATION DECISION Head Note Nos.: 1108, 1108.50, 1803, 3000, 3001, 3002, 2907

STATEMENT OF THE CASE

Claimant, Johnny Eskridge, has filed a petition for arbitration seeking workers' compensation benefits against Michels Corporation, employer, and Arch Insurance Company, insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of Coronavirus/COVID-19 Impact on Hearings, the hearing was held on February 1, 2022, and considered fully submitted upon the simultaneous filing of briefs on February 22, 2022.

The record consists of Joint Exhibits 1-5, Claimant's Exhibits 1-9 , Defendants' Exhibits A-F, and the testimony of the claimant.

ISSUES

1. The extent of claimant's disability;

2. The appropriate benefit rate;

3. Whether claimant is entitled to reimbursement of lodging expenses during the healing period;

4. Whether claimant is entitled to reimbursement of the 85.39 examination;

5. Whether defendants are entitled to a credit;

6. The assessment of costs.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate the claimant was an employee at the time of the injury on September 23, 2016. They further agree the injury was the cause of a permanent disability to the left hand and left upper extremity and that the commencement date for permanent partial disability benefits is September 27, 2017.

At the time of the accepted work injury, claimant was married and entitled to two exemptions.

Prior to the hearing, defendants paid claimant 17.5 weeks of compensation at the rate of $1,159.41 per week. They are entitled to a credit of that amount against any award.

All affirmative defenses are waived.

FINDINGS OF FACT

At the time of the hearing, claimant was a 58-year-old person. Claimant has been a heavy equipment mechanic for over three decades. He received his journeyman's card in 1987 from the International Union of Operating Engineers. Claimant would be assigned to different contractors through the union.

Claimant began working for defendant employer on September 6, 2016. He worked as a full-time heavy equipment mechanic until the injury of September 23, 2016.

The physical labor required of claimant for the defendant employer included lifting in the 50 to 120-pound range with 60 percent of the work between waist and shoulder height, 20 percent below waist and 20 percent above shoulder. He was frequently required to squat, bend, crawl, kneel, and use vibratory tools. He was constantly gripping and grasping. (Claimant's Exhibit 1, page 1) In March 2018, claimant began temporary work with Minnesota Limited as a heavy equipment mechanic. On April 22, 2021, claimant began work as a heavy equipment mechanic for Ryan Incorporated Central. (Defendants' Exhibit F) He works an average of 60 hours per week. This position requires him to use both hands. His goal is to retire at the age of 60.

On or about September 23, 2016, claimant was working on a pipe bending machine with another mechanic. The co-worker was using a pry bar on a shoe of the machine. It slipped away from him, and claimant's hand became caught between the shoe and frame of the machine, resulting in a crush injury. He was taken to the emergency room and diagnosed with a complex, comminuted crush fracture of the

distal shaft of the proximal phalanx of the left long finger. (Joint Exhibit 3, page 72) He was transferred from the local hospital in Clinton, Iowa, to the University of Iowa Hospitals and Clinics. (JE 3:75) There, claimant was seen by Dr. Benjamin Miller who undertook surgery to repair the laceration, perform closed reduction and pinning of the finger, and apply a splint. (JE 5:81-85)

A cast was applied on September 30, 2016, and claimant was released to return to work with restrictions of no use of the left upper extremity in a clean environment. (JE 5:89) However, because of the restrictions, claimant was not able to return to work. He continued to have significant pain.

On December 20, 2016, post-surgical x-rays showed swelling of the soft tissues in the third digit but stable degenerative changes at the base of the thumb. (JE 2:5) He was fitted with an orthotic on December 20, 2016, and released to light duty work with no repetitive pushing, pulling, gripping or grasping and no lifting more than 2 pounds on December 30, 2016. (JE 2:8, 5:95)

In mid-December 2016, claimant was offered either voluntary lay-off or light duty work in Wisconsin. He opted for the light duty work in order to keep his wages and treatment plans open. His care was then transferred to William W. Dzwierzynski, M.D. (JE 2:19) While he was working light duty, claimant stayed in a hotel. Claimant testified that it was his belief that the pre-job agreement would be honored, and claimant would be paid his hourly base, the $20.00 per diem and a $70.00 per day truck pay instead of the $17.00 per hour rig pay. Claimant agreed that there is no written agreement that he would be paid $70.00 per day. (See also Ex C:26) He further agreed that the defendants refused to pay the lodging.

On December 22, 2016, Dr. Dzwierzynski administered a steroid injection and referred claimant to occupational therapy. (JE 2:19) Dr. Dzwierzynski noted that x-rays revealed delayed healing and a possible fibrous union.

On December 30, 2016, he was seen by Dr. Lawler who noted that the proximal phalanx fracture was demonstrating nonunion and she recommended a revision of ORIF with distal radius bone grafting. (JE 5:92-93)

In a follow up with Dr. Dzwierzynski on January 19, 2017, claimant was noted to have been making excellent progress in therapy. (JE 2:27) A second MRI was ordered due to the pain in his wrist. (JE 2:29) He was returned to work with restrictions of "light assist of left up to 10 pounds." (JE 2:26) He was advised to continue using his cast/splint and avoid driving a commercial vehicle. Id. The MRI of February 8, 2017, showed:

1. Full thickness chondral disease present along the ulnar aspect of the lunate and proximal pole of the hamate. Subchondral edema is associated with these defects. Representative image includes series 5 image number 12.

2. Fraying of the radial attachment of the triangular fibrocartilage.

3. Complete tear of the lunotriquetral ligament of unknown chronicity.

4. Radiocarpal and mid carpal joint effusions present.

5. Fluid and a fragment are present within the pisotriquetral recess.

(JE 2:32)

Dr. Dzwierzynski recommended exploration with arthroscopy with possible debridement and pinning of the LT ligament. (JE 2: 33) Dr. Dzwierzynski advised against plating of the proximal phalanx fracture as it would cause more dysfunction at the time. (JE 2:33) On March 13, 2017, claimant underwent debridement and radiofrequency tightening in the left dorsal wrist as well as percutaneous pinning of the lunotriquetral interval. (JE 2:34) He was then splinted on the left arm. Id.

In a May 2, 2017, follow-up, claimant reported moderate tenderness over the pin site and the LT and SL ligament. (JE 2:38) He still had a flexion contracture, but the area of the previous bone spur was slightly less tender to palpation. Id. The three pins were removed on May 15, 2017. (JE 2:43)

On the June 13, 2017, follow-up, claimant continued to have tenderness over the proximal phalanx at the area of the small bone spur. (JE 2:45) Dr. Dzwierzynski was concerned about the increased pain and placed claimant on two weeks of rest. Id. On July 18, 2017, claimant presented to Dr. Dzwierzynski for follow-up with continued persistent point tenderness over the scapholunate ligament on the left. (JE 2:47) Dr. Dzwierzynski suggested an injection which was administered, along with physical therapy. (JE 2:47) On September 14, 2017, claimant presented to Dr. Dzwierzynski with continued diffuse pain throughout the entire wrist and middle finger. (JE 2:49) Dr. Dzwierzynski reviewed the therapy notes which showed limited participation and significant inconsistencies during the examination which resulted in claimant being discharged from the work reconditioning program. Id. New x-rays were taken which showed no bony or ligamental abnormalities in the wrist. Id. Dr. Dzwierzynski concluded there was nothing further he could provide to the claimant and referred him for an FCE. (JE 2:49)

The FCE was conducted on September 19, 2017. (JE 2:56) During the examination, he exhibited diminished light touch, diminished protective sensation and loss of protective sensation during the Semmes Weinstein evaluation. (JE 2:59) The FCE placed claimant in the modified light activity basis. (JE 2:61)

On September 26, 2017, Dr. Dzwierzynski returned claimant to work with the following restrictions adopted from the FCE.

General Restrictions:

		Restrictions
Hours/Day		**Strenuousness**
Full Time	2 Handed Allowed	Waist Level: Modified light (maximum lift 30 lbs., frequent lift/carry up to 15 lbs.) Hip Level: Heavy (maximum lift 100 lbs. frequent lift/carry up to 50 lbs.)

Physical Demands:

Unilateral Lift (Left)	Occasionally (1% - 33%) 12x/hour 25 lbs Frequently (34% - 67%) 12 - 60x/hour 12.5 lbs Continuous (68% - 100%) 60x/hour 6.0 lbs
Unilateral Carry (Left)	Occasionally (1% - 33%) 12x/hour 20 lbs Frequently (34% - 67%) 12 - 60x/hour 10 lbs Continuous (68% - 100%) 60x/hour 5.0 lbs
Unilateral Push (Left)	Occasionally (1% - 33%) 12x/hour 325 lbs
Unilateral Pull (Left)	Occasionally (1% - 33%) 12x/hour 475 lbs

Additional Restrictions: Limited use of Left Wrist for repetitive movement.
No Vertical ladder climbing.
Use of splint on injured hand if needed.

(JE 2:55)

On October 25, 2017, Dr. Dzwierzynski also assessed a 7 percent disability based on the AMA Guides, 6th edition, for the ligament tear, weakness in the hand, loss of grip, pinch, and pain as well as the range of motion loss. (DE A)

On January 24, 2018, claimant presented to Dr. Dzwierzynski for pain in the wrist and periods of his hand locking up, catching, and dropping objects. (JE 2:69) Dr. Dzwierzynski ordered an ultrasound. On February 7, 2018, claimant returned to Dr. Dzwierzynski following the ultrasound which showed no evidence of any flexor tenosynovitis, no evidence of any triggering, and no evidence of any dorsal ganglion cyst. (JE 2:65) Dr. Dzwierzynski informed claimant there was no further treatment to be offered. Id.

On March 16, 2018, Dr. Dzwierzynski filled out an opinion letter stating that the work injury of September 23, 2016, did not require the use of amitriptyline and that any prescription for that medication following March 1, 2018, was unrelated to the September 23, 2016, injury. (JE 2:70) Dr. Dzwierzynski stated that amitriptyline in this case was prescribed for short-term use. Id. At hearing, claimant disputed this and instead testified that he was told that when his prescription ran out, he would need to see his own doctor for a refill.

Claimant has not had treatment since 2018.

On January 8, 2019, claimant presented to Priyesh D. Patel, M.D., for a second opinion regarding his left hand injury. (JE 1:3) There was minimal swelling of the left hand and no bruising. Id. A deformity of the long finger was noted along with flexion contracture and failure to extend the long finger at the PIP and DIP joints. Id. He could not make a full fist or position the hand in a resting position. (JE 1:4) Further, he had diffuse tenderness to palpation and any attempts at range of motion caused discomfort. Id. Dr. Patel did not recommend any surgical solutions due to the lack of relief experienced from the corticosteroid injections. (JE 1:4)

On August 13, 2018, claimant underwent an IME with Mark Taylor, M.D. (CE 1) At the time of the examination, claimant expressed constant pain over the back of the left hand and wrist that he described much like bees stinging his hand. (CE 1:5) The pain averaged between three and five on a ten scale but could be higher depending on the day. Id. The skin on the back of the hand was very sensitive to light touch and his wrist locks at times. Id. There was a spur or palpable anomaly that was intensely painful if touched or bumped. His left hand strength has not returned to baseline and he noticed ongoing swelling, especially over the back of the hand. He wore a wrist brace to bed.

Inspection of the hands revealed a bit more discoloration associated with the back of the left hand compared to the right with minimal edema. (CE 1:7) He had increased sensitivity to light touch over the back of the left hand and tenderness over the dorsal aspect of the left wrist as well as over the left radial wrist just distal to the distal radius as well as over the ulnar side of the wrist just distal to the distal ulna. Id. There was also a palpable bone spur or defect over the ulnar aspect of the proximal middle finger that was exquisitely tender. (CE 1:8)

His sensory exam revealed increased sensitivity to light touch over the back of the left hand but decreased pinprick over the dorsal left hand and wrist. (CE 1:8) His reflexes were 1-2+/4 and symmetric. His strength testing revealed normal strength over the right elbow, wrist and hand. The left elbow revealed normal strength to flexion and extension and mild weakness of supination and pronation as well as decreased strength of the left wrist, but all these maneuvers were associated with pain. Id. He was unable to make a complete fist as well. Id.

Dr. Taylor concluded that claimant's current symptoms as of August 13, 2018, in the left hand and left upper extremity were causally related to his 9/23/2016 work injury. (CE 1:8) Given the guidelines of the 5th Edition of the AMA, Dr. Taylor assigned 16 percent impairment to the left hand or 14 percent of the left upper extremity for the hand symptoms and 14 percent impairment for the reduced range of motion in the left wrist. Id. Lastly, claimant would qualify for ratings specific to the scapholunate and lunotriquetral ligament injuries which Dr. Taylor placed at an 8 percent upper extremity impairment rating. Combined, it results in a 32 percent upper extremity rating. (CE 1:9)

For restrictions, Dr. Taylor recommended the following:

> Mr. Eskridge should continue with the lifting limitations outlined as part of the FCE, although I will note that it is probably more appropriate that he handle up to 50 pounds occasionally (hip level lifting), as opposed to 100 pounds, and more than 50 pounds on a rare basis as far as the two-

> handed hip-level lifting. To lift 100 pounds would require approximately 50 pounds of force with the left arm and they recommended only occasional lifting of 25 pounds with just the left arm alone (and only 20 pounds carrying with the left arm). As such, in my opinion, a 50-pound limit, hip level, with both arms together would make more sense. The other lifting limits appear reasonable and my change pertains only to the hip level limit of 100 pounds.

(CE 1:10)

Dr. Taylor charged $700.00 + $656.50 for the examination and $700.00 + $1,143.50 for the report. (CE 9:83)

Claimant also had additional costs of postage, photocopies, depo, records, etc., for a total of $4,948.21. (CE 9:85-87)

Because of the nature of his job, claimant would work for one contractor and then another on various jobs. These positions were obtained through his union. At the time of his injury, claimant had only worked two weeks and thus a thirteen week pay history is not available.

Claimant proposes that the average weekly wage at the time of the injury was $2446.12 using the pay rate of a similarly situated employee. (CE 4i:30) While claimant worked for defendant employer, he was in Group 1 and his hourly rate for base pay was $35.69 per hour. He worked six, 10-hour days a week. (CE 7) Additionally claimant would receive $20.00 for per diem, $70.00 per day for operator truck pay and $17.00 per hour for rig pay. (CE 7) Claimant testified that it was expected that he would bring his own equipment or he would not have been hired. The company or contractor provides only specialized equipment.

In the two weeks preceding his injury, claimant earned $1,807.33 for the first week and $2,991.18 for the second week. (CE 4iii-32)

Two other similarly situated workers' wages were presented at hearing. Mr. Samuel Grey was the steward and had the same pay rate as claimant. Claimant testified that as a mechanic, he would work more hours than Mr. Grey. Per the timesheets, Mr. Grey worked an average of 62 hours per week. (CE 4ii:31a) Mr. Grey also worked for a different employer in a few of the weeks included on the rate calculation and at a higher hourly wage than he had been paid by the defendant employer. For defendant employer, Mr. Grey earned $3,159.32 for the month of January, $11,826.67 for the month of February, $10,046.74 for the month of August, and $14,241.10 for the month of September.

The other employee was Cody Eskridge, claimant's son. Cody Eskridge began work in September 2016 at the same time as the claimant. In the weeks leading up to September, Mr. Eskridge worked for Minnesota Ltd. Claimant acknowledged that while the per diem and rig pay were the same, the wages varied from state to state and district to district. Thus, Cody Eskridge's pay rate in Minnesota was different than the wage rate in Iowa. For defendant employer, Cody Eskridge earned $5,657.64 for the

month of December, $15,614.39 for the month of November, $12,816.44 for the month of October, and $5,049.51 for the month of September.

Defendants propose an average weekly wage of $1,963.00 based on the two weeks of work paid for a benefit rate of $1,159.41. (DE C) Defendants' calculation is based on the two weeks claimant actually worked including the first week of work. (DE C)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Defendants request the disability finding be based on the opinions of Dr. Dzwierzynski, the treating physician, whereas claimant requests the disability finding be based on the opinions of Dr. Taylor.

Dr. Dzwierzynski performed claimant's surgery and provided all follow up care. He opined claimant sustained a 7 percent functional impairment following the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment. The 6th Edition has been discouraged by the agency. See Wiederin v. AG Processing, Inc., IWC File No. 5022228 (Arb Decision Sept 10, 2008). In 2017, the legislature adopted the 5th Edition AMA Guides as well over the 6th Edition. Given that the agency discourages the use of the 6th Edition and that subsequent revisions to the Iowa Workers' Compensation law adopted the 5th Edition, Dr. Dzwierzynski's opinions are given lower weight.

Dr. Dzwierzynski's impairment is low considering the functional changes of claimant's upper extremity. There were significant restrictions placed on claimant moving him into the light duty category. Further, claimant continued to have pain, locking up, and weakness that necessitates medication which Dr. Dzwierzynski discontinued.

It is found that the opinions of Dr. Taylor are more aligned with claimant's current condition and therefore, Dr. Taylor's opinions are adopted herein. While Dr. Taylor was a hired expert, he gave thoughtful and detailed explanation for his ratings. It is found claimant is entitled to a 32 percent upper extremity rating. While the agency is not bound by the exact impairment rating proffered by an expert for pre-2017 cases, in this case, Dr. Taylor's impairment ratings address each of claimant's functional deficiencies and it is appropriate to rely on those.

The parties dispute the appropriate average weekly wage.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot

be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

While a week that includes both a vacation day and a rain day can be considered a customary week, the problem is that in the manner in which defendants propose to calculate this. The vacation day and rain day are transformed into half of the claimant's earnings which would not be an accurate reflection of customary wages as claimant would not have a vacation and rain day for half of the thirteen weeks. (Ex C)

Section 85.61(3) also provides in part: "'*Gross Earnings'* means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive, pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Section 85.61(3) excludes reimbursement and expense allowances from the definition of gross earnings. Defendants appear to argue that rig pay and per diem are reimbursements and not part of the gross earnings calculations.

Per diem was paid every day regardless of the amount of work performed. Operators were paid an additional $70.00 per day and $17.00 per hour.

Simply labeling a part of a person's earnings as "per diem" or an "expense allowance" does not make that portion of the earnings an actual, bona fide per diem or expense allowance. (Berst v. T T C, Inc., File No. 1053524 (Arb. August 1, 1994))

In this case, as in Berst, the claimant is not being paid per day; rather these are additional earnings that are part of the overall compensation package bargained for by the union. It is appropriate to include these payments in the compensation calculation. Indeed, they are not broken out in the ledger form as an expense or reimbursement.

Further, it is the defendants' burden to prove what should not be included. McCarty v. Freymiller Trucking, Inc., File Nos. 729340 and 729341 (App. Feb. 25, 1986)

In the record, there is nothing that can be used to calculate hourly rig pay either for the claimant during the two weeks he worked or by the other employees' ledgers. It is not discernable whether claimant was entitled to five hours of rig pay on one day but seven on another. The undersigned is left only to speculate what hourly rig pay was earned on any given day.

Mr. Grey is a similarly situated employee. He was a steward and would work fewer hours than the claimant but was employed by the defendant employer at the same wage rate as the claimant. Mr. Grey earned $3,159.32 for the partial month of January, $11,826.27 for the month of February, $10,046.74 for the month of August, and $14,421.10 for the month of September. The months that he worked for Precision Pipeline are excluded as noncustomary work weeks as is the month of January as he worked for both Challenger Drilling and defendant employer. The gross weekly wage would thus be $3,024.51 ($11,826.27 + $10,046.74 + $14,421.10/12 = $3,024.51).

The weekly benefit rate would thus be the statutory maximum of $1,553.00.

Defendants argue that they are entitled to a credit for overpaying temporary benefits. The basis of this argument is that the appropriate rate is $1,159.41 and claimant was paid TPD and TTD benefits at the rate of $1,356.77 per week. As it is found that the claimant's appropriate rate is $1,553.00, the defendants are not entitled to a credit. Even if defendants had overpaid, a pre-2017 injury is controlled by the Supreme Court decision of Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) which holds that overpayment of any benefits are applied to future weekly benefits due for a subsequent injury to the same employee. Id. At 137.

Claimant requests reimbursement for lodging expenses that were incurred while he was staying in Wisconsin during a period of light duty work. Claimant's wage rate includes per diem, rig pay and operator truck use. Claimant's argument that he is entitled to these would characterize the aforementioned as expenses or reimbursement which was previously held to be an inaccurate characterization. Further, there is no statutory or case law cited in support of claimant's position and therefore the lodging expenses are denied.

Claimant seeks reimbursement of the IME costs of Dr. Taylor pursuant to Iowa Code section 85.39. Iowa Code section 85.39 requires the triggering event of a low rating issued by a physician retained by the defendants. On October 25, 2017, Dr. Dzwierzynski issued a 7 percent rating of claimant's left upper extremity. Claimant sought out an opinion of Dr. Taylor on August 13, 2018. Thus, the elements of Iowa Code Section 85.39 were met. Claimant is entitled to the reimbursement of the examination of Dr. Taylor. See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa June 5, 2015).

The report fee is assessed as a cost under administrative rule 876 IAC 4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39. Claimant also seeks reimbursement for medical records, postage, photocopies, and claimant's deposition under 876 IAC 4.33. Defendants argue that the statutory provisions do not allow for the recovery of these expenses.

> Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses

> or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before costs are taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the Iowa Rules of Civil Procedure governing discovery.

IAC 876-4.33(86) The recoverable costs are limited to the filing fee and claimant's deposition.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant 80 weeks of permanent partial disability benefits at the rate of one thousand five hundred fifty-three and 00/100 dollars ($1,553.00) per week from September 27, 2017.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid to the extent that there were permanent partial disability benefits paid.

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

That defendants shall pay the examination fees of Dr. Taylor pursuant to Iowa Code section 85.39.

That defendants shall pay the cost of the report fee of Dr. Taylor, filing fee and claimant's deposition pursuant to rule 876 IAC 4.33

Signed and filed this ___20th___ day of April, 2022.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Emily Anderson (via WCES)

Terri Davis (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.