BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EDWARD BUNCH, Claimant, vs. EFCO CORP – WILIAN HOLDING COMPANY, Employer, and SENTRY INSURANCE COMPANY Insurance Carrier, Defendants.	FILED FEB 08 2019 WORKERS COMPENSATION	File No. 5055768 ARBITRATION DECISION Head Note Nos.: 1803, 2502

STATEMENT OF THE CASE

Claimant, Edward Bunch, filed a petition in arbitration seeking workers' compensation benefits against EFCO Corp., Wilian Holding Company, employer, and Sentry Insurance Company, insurer, both as defendants, for an accepted work injury dated May 7, 2015. This case was heard on November 20, 2018, and considered fully submitted on December 11, 2018, upon the simultaneous filing of briefs.

The record consists of joint exhibits 1-9, claimant's exhibits 1-5, and defendants exhibits A-F along with the testimony of claimant, Yvonne Bunch, and Tucker Wharton.

ISSUES

1. The extent of claimant's permanent disability;
2. Whether claimant is entitled to reimbursement of two independent medical examinations; and,
3. 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 agree the claimant sustained an injury on May 7, 2015, which arose out of in the course of his employment. They further agree that the injury was the cause of some permanent disability and that the disability is industrial in nature. The commencement date for permanent partial disability benefits, if any are awarded, would be April 11, 2016 for the right shoulder, and February 8, 2018, for the left shoulder.

At the time of the injury, the claimant's gross earnings were $896.30 per week. He was entitled to two exemptions. Based on those foregoing figures, the weekly benefit rate is $574.42.

Prior to the hearing the claimant was paid approximately 52 weeks of permanent partial disability benefits at the rate of $532.60. Defendants seek a credit for that amount.

FINDINGS OF FACT

Claimant, Edward Bunch, was a 65 year-old person at the time of hearing. His past education includes high school up to the tenth grade and a subsequent GED obtained through Kirkwood Community College. He joined the Marine Corps and was discharged in 1971.

His past work experience includes work in the family sodding business, maintenance of machinery, heavy manual labor, and ownership of a gas station. He also ran a toy store between 1983 and 1990. For approximately eighteen years, he worked for a single employer doing construction work.

He began at EFCO on June 14, 2010. His initial job classification was production welder where he read blueprints, assembled heavy metal parts, welded parts, and sent finished work to the paint line. It was heavy duty work. Tucker Wharton testified on behalf of the defendants. He indicated that there were machines available to help hoist and lift including a jib hoist, two forklifts and three cranes.

At the beginning of claimant's tenure at EFCO, he was in good physical shape. He could lift nearly anything, ran several miles a day, and worked out regularly.

When he was not working at EFCO, he built racing engines, racing cars, and performed other auto body work. He has a large auto body shop at his home.

On May 7, 2015, at the end of his shift, claimant fell backwards onto a metal beam of a sawhorse. He lost his breath for some time but was able to go home. While at home, he felt significant pain. He reported his injury to his employer. He then commenced a course of treatment which led to the discovery that he suffered a SLAP tear in his right shoulder which needed surgical intervention. (JE 7:36; 5:29) Right shoulder arthroscopy with debridement of the labrum, biceps tenotomy, subacromial bursectomy, subacromial decompression, and distal claviculectomy took place on December 4, 2015, by Mark Fish, D.O. (JE 6:30)

In his initial reports of injury, he complained of lower right back pain and right rib pain. X-rays of both the lumbar spine and the ribs were normal. (JE 1:1) These issues went on to heal without lingering issues.

After surgical repair of his right shoulder, claimant began physical therapy. On April 11, 2016, Dr. Fish found claimant to be at maximum medical improvement (MMI). (JE 7:41) During that April visit, claimant exhibited reduced passive range of motion on exertions and abduction strength. (JE 7:42) He had minimal discomfort and was improving with each physical therapy session. (JE 7:42) On April 21, 2016, Dr. Fish assessed a 4 percent whole person impairment for the reduced range of motion and reduced strength. (JE 7:43) No work restrictions were imposed.

Upon his return to work, he was assigned to the assembly line, and subsequently complained of left shoulder pain. According to Mr. Wharton, claimant was assigned to the plate clamp machine operator which is a normal job at the plant. This is claimant's current position. When claimant is not working on the plate clamp machine, he is responsible for assembling nuts and bolts that are sent out to different job sites. The nuts and bolts are put together and then placed inside of a machine which then welds those products. Once the pieces are welded, the finished pieces are tossed into a bucket. The assembly position is a rated job, meaning that if you produce more, you can make more than your hourly rate. There are other additional earnings such as incentive pay and attendance bonuses. From mid-2016 to the end of 2018, claimant received incentive pay approximately three times, but he has received his attendance bonus regularly. (Ex. E)

On August 25, 2016, claimant underwent an FCE with Charles E Goodhue, MS, MPT. (JE 8:82) The FCE was deemed valid and claimant was placed in the upper end of the light work category to the lower end of the medium work category due to his pain, discomfort, and limited range of motion in the right shoulder. (JE 8:82)

RECOMMENDATIONS:

1. Based on the results of today's FCE, Mr. Bunch demonstrated that his functional ability places him within the U.S. Department of Labor's upper end of the light work category to the lower end of the medium work category.

2. Mr. Bunch should perform all lifting, carrying, and pushing/pulling work activities within recommended restrictions as I have outlined on the FCE Recommended Abilities/Restrictions form. I recommend that Mr. Bunch avoid lifting waist to overhead on a constant basis and right single upper extremity on a constant basis (67% to 100% of an 8-hour workday).

3. Mr. Bunch should limit performing elevated work activities which require right upper extremity prolonged use and repetitive reaching at shoulder heights and above to no more than a rare basis (1% to 5% of an 8-hour workday).

4. Mr. Bunch should limit performing work activities which require crawling and step ladder climbing to no more than an occasional basis (6% to 33% of an 8-hour workday).

5. Mr. Bunch should continue to perform his home exercise program daily as instructed from his previous physical therapy interventions.

(JE 8:82)

Claimant also underwent an IME with Sunil Bansal, M.D. On September 2, 2016, Dr. Bansal found claimant to have reduced range of motion in the right shoulder, negative impingement tests, tenderness to palpation on the right. (Ex 3:20) The left shoulder exhibited full range of motion and no tenderness to palpation. Dr. Bansal opined claimant needed additional treatment for the right shoulder but assessed an 8 percent impairment rating for the right shoulder.

On or about May 1, 2017, claimant was seen by Richard S. McCaughey, D.O., for the left shoulder issue. (JE 1:7) Claimant could not identify any specific traumatic injury, only that the pain began to develop with use. (Id). Dr. McCaughey was not of the opinion that there was anything abnormal with the claimant's left shoulder and referred him to an orthopedic surgeon. (Id). Claimant returned to Dr. Fish's office. (JE 7:45) During the physical examination, claimant exhibited reduced range of motion in both shoulders, positive empty can tests, positive Neer's test, and positive crossover test, among others. (Id).

Right shoulder:

Strength: 4+/5 with resisted external rotation. 4+-/5 with resisted internal rotation. 4+/5 with resisted abduction.

Passive range of motion: 175° of flexion. 170° of abduction. Internal rotation to L3.

Positive empty can test. Positive Neer's test. Positive crossover arm test.

Left shoulder:

Strength: 4+/5 with resisted external rotation. 4+/5 with resisted internal rotation. 4+/5 with resisted abduction.

Passive range of motion: 165° of flexion. 140° of abduction. Internal rotation to L3.

Positive empty can test. Positive Hawkin's test. Positive Neer's test. Positive crossover arm test.

(JE 7:45) Dr. Fish injected both shoulders. (JE 7:46)

When questioned by the defendants regarding causation, Dr. Fish opined that the left shoulder condition was exacerbated through overuse. (JE 7:49)

Claimant continued to have pain and impingement of both shoulders. MRI of the left shoulder revealed a small SLAP Type II tear and mild AC joint osteoarthritis. (JE 7:54) The right shoulder had a SLAP Type II tear with mild supraspinatus tendinosis. (JE 7:55) Dr. Fish determined that despite the numbness and tingling in the right shoulder that radiated down the arm there was no surgical treatment appropriate for claimant's condition. On the left, however, surgery was offered. (JE 7:59)

Claimant underwent left shoulder arthroscopy with biceps tenotomy, debridement of labrum, subacromial bursectomy, subacromial decompression, distal claviculectomy, debridement of rotator cuff on November 3, 2017, to the left shoulder. (JE 6:32) The surgery was again performed by Dr. Fish.

Claimant was sent for an FCE of the right shoulder which was deemed invalid. (JE 9:91) Daniel Ihrke, PTA, determined that claimant failed to give maximum effort and performed inconsistently. (JE 9:91) It was noted that claimant was working light duty at the time of the FCE. (JE 9:94)

Dr. Fish placed claimant at medium work capacity and imposed restrictions of no lifting above 30 pounds floor to waist, no lifting above 10 pounds to the shoulder, and no over the shoulder activities. (JE 7:67) Claimant was released with restrictions of no restrictions for the left shoulder as Dr. Fish understood claimant to be doing the normal job duties at work. (JE 7:75) Claimant was working assembly at this point and not welding. It is not clear from the records that Dr. Fish understood that claimant had transitioned from his pre-injury work to a lower impact, less physically intensive position. In a later letter, Dr. Fish clarified that he was sent back to work without restrictions on the left "due to some previous restrictions for his right upper extremity." (JE 7:78)

Dr. Fish went on to assess a 6 percent rating whole person impairment for the left shoulder. (JE 7:78)

Claimant underwent a third FCE on August 6, 2018, with Charles E. Goodhue, M.S., who had conducted a previous 2016 FCE. Mr. Goodhue found claimant to have exerted maximal effort with some observable pain behaviors. (Ex. 2:7) Mr. Goodhue deemed the results to be valid and recommended claimant be placed in the light duty category. (Ex. 2:8)

RECOMMENDATIONS:

1. Based on the results of today's FCE, Mr. Bunch demonstrated that his functional ability places him within the U.S. Department of Labor's light work category.

2. Mr. Bunch should perform all lifting, carrying, and pushing/pulling work activities within the recommended restrictions as I have outlined on the FCE Recommended Abilities/Restrictions form. I recommend that Mr. Bunch avoid lifting above shoulder height and left single upper extremity carry on a constant basis (67% to 100% of an 8-hour workday).

3. Mr. Bunch should limit performing elevated work activities requiring bilateral upper extremity prolonged use and repetitive reaching at should heights to no more than a rare basis (1% to 5% of an 8-hour workday) and avoid overhead.

4. Mr. Bunch should limit performing work activities which require crawling and step ladder climbing to no more than an occasional basis (6% to 33% of an 8-hour workday).

5. Mr. Bunch should perform all other work activities within the work restriction category as I have identified on the FCE Recommended Abilities/Restrictions form.

6. Mr. Bunch should continue to perform his home exercise program daily as instructed from his previous physical therapy interventions.

7. In addition to the above recommendations and those outlined in this FCE, Mr. Bunch should continue to follow the permanent restrictions assigned by Dr. Fish for his right shoulder: 30# maximum lifting restriction floor to waist, 10# to shoulder height and no over the shoulder activities.

Id.

Claimant returned to Dr. Bansal for a second examination. (Ex. 3:35) Dr. Bansal assessed a 9 percent whole person impairment for the left shoulder injury due to reduced range of motion and a new impairment rating of 11 percent of the whole person for the right shoulder due to the new SLAP tear. (Ex. 3:36)

Claimant submitted an industrial assessment performed by Karen Stricklett, MS. (Ex. 4) Ms. Stricklett underestimated claimant's past work experience by listing claimant as a gas station cashier and not an owner of the gas station. However, the ownership was in the remote past. Ms. Stricklett opined that based on the lack of transferable skills, the light duty physical work category, and the restrictions set forth by Dr. Bansal, claimant would be considered an "odd-lot"[1] employee. (Ex. 4:48) She also determined that the loss of access to the job market would be approximately 95 percent. (Ex. 3:47)

Currently, claimant works in the assembly, beginning his shift at 7:30 a.m., and finishing around 4:00 p.m. Claimant is earning more today than he did at the time of his injury. (Ex. E) His current pay is at the top of the pay scale for welders. Defendant employer has done an admirable job of providing care for the claimant, as well as finding appropriate work within his restrictions.

Claimant is ambidextrous and can weld with either the right or left hand. He has applied for supervisory positions prior to his injury but did not receive an offer for any of those positions. Due to the pain in both his shoulders, worse on the right than the left, claimant feels that his production is 20 to 40 percent below what it was prior to the injury. Further, he has lost attendance bonuses for taking time off to see his lawyer, sick days, and doctor's visits.

Claimant presented Exhibit 5 which indicates the claimant had lost income of $3,805.19 due to absences. (Ex. 5:51) It is unknown whether claimant lost income due to absences was a result of his injury or as a result of his mother's death. Therefore Exhibit 5 is given little weight.

He does have experience in owning businesses, although that was in the remote past. He has limited experience with computers. He has a very remote conviction of a felony for which he was incarcerated for two years beginning in 1979.

His right shoulder is worse off than his left shoulder. He struggles doing any significant tasks including his hobbies such as golfing, bowling, building an engine, painting a car or doing bodywork.

Upon cross-examination, it was clarified that he had not built any engine since 2014, prior to the date of injury, and that he had quit league bowling in 2000.

He cannot shovel snow or participate in any activities that would require extended use of his shoulders. It has affected him emotionally and mentally. Claimant testified to feeling helpless and wondered if he should even be working. There are other complicating issues affecting claimant's mental state including previous heart attacks since his work injury and the loss of his mother. Further, there is no claim for any mental or psychological injury.

---

[1] Odd-lot doctrine was not pled and not considered in this decision.

He does not take any pain medication as he feels that he has a bad physical reaction to it. He would rather deal with the pain.

Claimant's wife testified that prior to the injury claimant was very active with an easy disposition. Reluctantly, she admitted that since the injury, claimant's personality has changed. She can see that he is in pain by the grimacing on his face, the times that he sleeps in his recliner, or the expressions of pain he utters in his sleep. She believes that he should no longer be working.

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. 6.14(6).

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).

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation,

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

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

The main dispute in this case is the nature and extent of claimant's disability. Claimant argues in his brief that he is totally and permanently disabled. In support of this argument, the claimant relies heavily on the vocational report of Karen Stricklett. Ms. Stricklett's vocational report inaccurately summarized the claimant's past work history and did so in a way that diminished claimant's transferable skills. While it was several years ago, claimant was a small business owner. He bought and ran a gas station and a toy store. Ms. Stricklett did not consider this past experience when arriving at her conclusion the claimant had sustained a 95 percent loss of access to jobs.

Ms. Stricklett also considered only the expert opinion of Dr. Bansal and not that of claimant's surgeon, Dr. Fish, who had cared for claimant for over two years and performed both left and right shoulder surgeries. Ms. Stricklett's opinions are given low weight for the foregoing reasons.

Claimant is a 65-year-old individual who has extensive and varied employment history. For nearly a decade, claimant has worked for the defendant employer as a welder. After his shoulder injuries, claimant moved to the assembly line where he is currently working in a light-duty capacity. The position the claimant works is not a position constructed solely for his benefit. It is a factory position that would have to be filled by another employee if the claimant was not injured.

However, claimant is being paid his welder wage and he is given increases on an annual basis based on that welder wage. Claimant is currently working but it is difficult for him according to both himself and his wife. Neither believes that he should continue working the position he is currently performing. Claimant's position is a repetitive one, requiring speed in order to achieve incentive pay. Claimant has only been able to achieve incentive pay three times.

Some of the things that claimant maintained that he could no longer do as a result of his injury such as bowling or running his auto body shop were tasks that he had stopped prior to his injury.

In weighing the expert opinions, the impairment ratings of the two experts are not substantially different. Dr. Fish found claimant to have sustained a 4 percent impairment on the right and a 6 percent impairment on the left. Dr. Bansal assessed 9 percent impairment on the left and 11 percent on the right.

Mr. Goodhue also provided restrictions first in 2016 and then again in 2018. He found claimant's results to be valid both times whereas Daniel Ihrke found evidence of cog wheeling and lack of maximal effort.

Dr. Fish placed claimant at medium work capacity whereas Mr. Goodhue's functional capacity exam placed claimant in light duty capacity. Mr. Goodhue's restrictions in 2016 were more severe than those adopted by Dr. Fish in 2016.

Claimant worked his assembly position without accommodations but the work appeared to have aggravated both his left and right shoulders. After surgery, claimant's left shoulder has improved. Claimant testified that the pain is worse in his right shoulder than his left shoulder which is consistent with the test results of Dr. Bansal. Claimant is more likely suited for light-duty work and therefore the restrictions recommended by Mr. Goodhue are adopted herein.

While claimant's current position may be one which he cannot sustain in the long term, claimant does have other transferable skills including the ability to own and operate his own business. Further, some of the hobbies he enjoyed prior to his injury were not curtailed by the injury but by claimant's own choice—whether it be from his age or lack of interest.

Based on the foregoing and taking into account claimant's lack of educational background, his bilateral shoulder injuries and restrictions, his past work experience, it is determined claimant has sustained a 75 percent industrial loss.

Iowa Code section 85.39 allows a claimant to obtain a medical evaluation by a doctor of his or her own choosing if a physician retained by the defendants issues a rating that is considered to be "too low." Iowa Code section 85.39. Application of this statute is guided by the decisions of the Iowa Supreme Court in Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter known as DART), as well as the subsequent agency decision in Reh v. Tyson Foods, Inc., File No. 5053428 (App. March 26, 2018).

Claimant was encouraged to provide case law to support his entitlement to two examinations, but no case law directly on point was provided.

The claimant argues that both examinations and reports of Dr. Bansal are appropriate because there are two injuries and two expert opinions. There is only one injury date and one file. Thus, this is a single injury with a sequelae. There is no holding in DART that would allow for the assessment of two examinations. The code specifically allows for a single examination. In Sheriff v. Intercity Express, 34 Iowa Indus. Comm'r Repts. 302, 303 (Oct.1978), the commissioner disallowed a second medical evaluation during a review-reopening procedure. In Kohlhaas v. Hog Slat, Inc., 777 N.W. 2d 387, 393-395 (Iowa 2009), the Iowa Supreme Court disallowed reimbursement of a second IME after claimant had settled a claim and then subsequently sought a review-reopening. While neither case addresses the exact matter at hand, all three cases show

a reluctance to deviate from the strict reading of the statute permitting only one examination. Thus, until such time as the Supreme Court directs otherwise, the undersigned will hew to the strict language of the code. Only one IME is permitted per injury and therefore, in this case, only one of Dr. Bansal's examinations qualifies for reimbursement under 85.39.

The claimant is entitled to reimbursement for one IME. DART, 876 N.W.2d at 847. While the fee presented is in summary fashion and does not divide out the examination charges as opposed to the report charges, the agency has determined both the fee and report should be reimbursed under Iowa Code section 85.39, so long as the elements of 85.39 are triggered. In this case, Dr. Fish assessed a 4 percent whole person impairment on April 21, 2016. Dr. Bansal's initial report and assessment was on September 2, 2016.

Claimant has requested reimbursement of a number of costs including two filing fees, two functional capacity examinations, a doctor's letter, two medical examinations, the vocational rehabilitation report, and deposition costs. Defendants take issue with the deposition charge, the doctor's letter, the examination portion of the FCEs, and the vocational rehabilitation report.

876 IAC 4.33 Sets forth guidelines under which the agency may assess costs:

> 876—4.33(86) Costs. 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, (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 it is 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 rules of civil procedure governing discovery.

In DART, the Iowa Supreme Court noted that taxable costs are those "incurred in the hearing." DART, 876 N.W.2d at 844; see also Iowa Code section 86.40 (granting the agency the authority to tax costs incurred in the hearing).

1) Deposition cost. There is no deposition that was proffered by claimant either in the individual claimant exhibits or the joint exhibits. No deposition was used by claimant in the examination or cross-examination of the witnesses. There was no indication who the person was that was deposed nor was there any evidence that the fee was for the attendance of a certified shorthand reporter. Thus, there is not sufficient evidence to assess this as a taxable cost pursuant to the IAC 4.33

2) Doctor's letters. The costs of procuring doctors' reports is permitted but the purpose of taxable costs is to reimburse a prevailing party for costs incurred in the hearing. As with the deposition cost, there is no evidence as to who the doctor was and whether his report was in evidence or used during the hearing. There is not sufficient evidence to assess the doctor's report as a cost.

3) Report of the first IME of Dr. Bansal. The entirety of his IME shall be reimbursed.

4) Second IME of Dr. Bansal. Reports can be assessed as a cost; however, the report is not separated from the examination and therefore, there is not sufficient evidence to assess the report of Dr. Bansal as a cost.

5) Vocational Rehabilitation Report. There was no examination although there was a telephone conversation between the claimant and Ms. Stricklett. Based upon the guidance of the Iowa Supreme Court in DART, as well as past interpretations of the law, a vocational report is deemed an appropriate cost. Searle Petroleum, Inc. v. Mlady, No. 3-480/12-2008 (Iowa Ct. App., Filed December 5, 2013) (holding that the assessment of a vocational rehabilitation report is within the agency's discretion). Ms. Stricklett's report is assessed as the second of the two practitioner reports allowed under 4.33.

6) Functional capacity examinations.

Functional capacity evaluation is considered a practitioner's report under Rule 876 IAC 4.33. Peters v. Bridgestone Firestone, File Nos. 5021402, 5021403 (November 20, 2008). The term "practitioner" is not preceded by the qualifier "medical" and thus the agency's position has been that the reasonable costs of a functional capacity evaluation falls under 4.33 and can be assessed as a practitioner report cost.

Because claimant is limited to only two doctors' or practitioners' reports, the report of Ms. Stricklett and that of the first IME is awarded.

The remainder of the costs are not in dispute and are assessed against the defendants including the entirety of the transcript of this hearing.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the rate of five hundred seventy-four and 42/100 dollars ($574.42) per week from April 11, 2016.

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.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten 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 percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

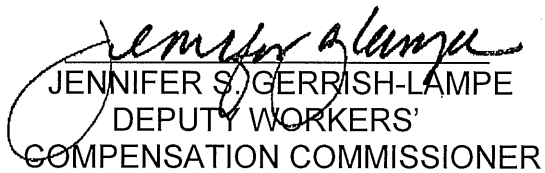
That defendants are to be given credit for benefits previously paid.

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

That the request for reimbursement of the September 2, 2016 IME of Dr. Bansal is granted.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 as directed above.

Signed and filed this 8th day of February, 2019.



JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Christopher Coppola
Attorney at Law
2100 Westown Pkwy, Ste. 210
West Des Moines, IA 50265
chris@wdmlawyers.com

John E. Swanson
Attorney at Law
5th Floor, US Bank Bldg.
520 Walnut St.
Des Moines, IA 50309-4119
jswanson@hmrlawfirm.com

JGL/kjw

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.