

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KIM ZESCH,,

Claimant,

vs.

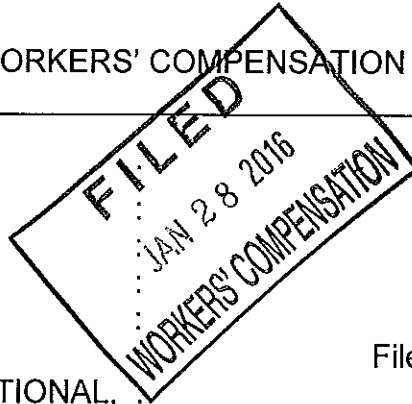
FISHER CONTROLS INTERNATIONAL,
INC./EMERSON ELECTRIC COMPANY,

Employer,

and

OLD REPUBLIC INSURANCE
COMPANY,

Insurance Carrier,
Defendants.



File No. 5047984

ARBITRATION
DECISION

: Head Note Nos.: 1402.40, 1702, 1803, 4100

STATEMENT OF THE CASE

Kim Zesch, claimant, filed a petition in arbitration seeking workers' compensation benefits from Fisher Controls International, Inc./Emerson Electric Company, employer and Old Republic Insurance Company, insurance carrier, both as defendants. Hearing was held on November 6, 2015.

Claimant, Kim Zesch, testified live at trial. The evidentiary record also includes claimant's exhibits 1-8 and defendants' exhibits A-G. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties request the opportunity for post-hearing briefs which were submitted on November 30, 2015.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant is entitled to additional permanent partial disability benefits and if so, the extent of industrial disability.
2. Whether claimant is an odd-lot employee.
3. Whether defendants are entitled to a credit under Iowa Code section 85.34 for 30 percent industrial disability that was paid related to the September 1, 2010 right shoulder injury.

FINDINGS OF FACT

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

At time of hearing claimant, Kim Zesch (hereinafter "Zesch") was 63 years of age. He graduated from high school in 1970. Following high school he attended one year of college. From approximately 1971 to 1973, Zesch worked for Montgomery Ward as an auto mechanic. Zesch was hired by Fisher Controls International, Inc./Emerson Electric Company (hereinafter "Fisher") in 1973. Zesch worked as an electrician for the majority of his time at Fisher. He took classes annually in order to maintain his city electrical license. In 2010, he also began receiving training through the State of Iowa and took 18 hours of continuing education courses every three years to comply with the National Electric Code. At the time of the July 2013 injury, Zesch was one of five electricians employed at Fisher. Following the injury Zesch continued to work as an electrician at Fisher until he retired on August 31, 2015. (Testimony)

Zesch sustained a prior injury to his body as a whole while employed at Fisher. He sustained a compensable right shoulder injury on September 1, 2010. (Testimony) For that previous injury he underwent a right shoulder arthroscopic acromioplasty, loose body removal, and massive rotator cuff repair on November 23, 2010. (Testimony) He was placed at maximum medical improvement (MMI) by Kyle Galles, M.D. on June 28, 2011. Id. Dr. Galles assigned permanent work restrictions as set forth in the functional capacity evaluation (FCE). Id. According to the FCE results, Zesch demonstrated the ability to work in the heavy work category for all activities, with the exception of overhead or single right arm tasks which limited him to the medium work category. (Exhibit 3, page 44) Dr. Galles noted that Zesch had done exceptionally well following the shoulder surgery, "probably better than 95% of the patients that we would see with such a massive cuff defect." (Ex. 1, p. 1) Zesch reported to his physical therapist that his shoulder was feeling stronger than it had any time in the past. (Ex. 8, p. 88) Dr. Galles opined claimant sustained 9 percent upper extremity impairment. (Ex. 1, p. 2)

With regard to the prior 2010 right shoulder injury, another deputy workers' compensation commissioner awarded Zesch 30 percent industrial disability. (Ex. 8, p. 93) At the time of the arbitration hearing for his right shoulder Zesch remained employed at Fisher Controls as an electrician, and was earning approximately \$20.50

per hour. (Ex. 8, p. 90) Although the FCE results gave claimant's foreman at Fisher concerns about whether claimant could perform the functions of the electrician position, claimant believed he was physically capable of performing the position and continued to do so. (Ex. 8, p. 90; Hr. Tr. p. 30) The deputy workers' compensation commissioner disagreed with vocational expert, Ms. McLaughlin, who felt claimant could only work in the light category because Zesch was performing his work duties as an electrician and therefore the deputy gave more weight to the FCE findings. (Ex. 8, pp. 91-92)

After being released by his physician for the right shoulder injury, claimant returned to work and performed the same job functions for nearly two years prior to sustaining his left shoulder injury on July 16, 2013. The evidence does not demonstrate that his earnings were less at the time of the July 16, 2013, injury due to the 2010 work injury. (Testimony)

On July 16, 2013, Zesch was working at Fisher tearing down heavy conduit when he injured his left shoulder. At the time he was standing on a motorized lift using a wrench and channel locks to disassemble conduit. After the conduit was disassembled it was necessary to pull the electrical wire from the conduit. This required him to use both arms overhead and out in front of him. Normally, this is a two-person job but he was working alone at the time. As he was doing this, he felt a sharp pain in his left shoulder and then noticed a bulge in his left biceps area. (Testimony)

On July 16, 2013, claimant saw Darrell Jebesen, M.D. at McFarland Marshalltown Clinic. Zesch reported that he injured his left upper arm while simply performing some overhead type activity at work that day. The notes reflect there was a lump over the lower biceps region but that most of Zesch's pain was toward the anterior aspect of his shoulder. Dr. Jebesen's assessment was a rupture of the longhead left biceps tendon related to the work incident. Dr. Jebesen did not recommend surgery but Zesch requested a second opinion with an orthopedist. (Ex. 2, p. 40)

Zesch was seen by Scott A. Meyer, M.D. at Iowa Ortho on August 16, 2013. Zesch rated his left shoulder pain as 8 out of 10. He noted the pain was constant and stable. He described the pain as aching and sharp. His pain was aggravated by sleep, work, and lifting the arm. Dr. Meyer recommended an MRI and noted that he had a biceps tear but might also have a rotator cuff tear. He recommended operative treatment of the cuff tears but not of the biceps tendon tear. (Ex. 1, pp. 3-7) Zesch had the MRI on August 27, 2013. (Ex. B, p. 2)

Zesch returned to Iowa Ortho on August 30, 2013, and was seen by Michael Clark, PA-C who reviewed the MRI. A tear of the rotator cuff involving the supraspinatus, rupture of the long head of the bicep tendon, and moderate AC joint degenerative changes were noted. (Ex. 1, pp. 9-11) Dr. Meyer performed left shoulder arthroscopic rotator cuff repair and arthroscopic acromioplasty on October 31, 2013. (Ex. 1, pp. 12-14)

Following surgery Zesch followed up with Iowa Ortho. By December 6, 2013, he

reported he was improving. He was referred to physical therapy and given a prescription for hydrocodone. He was restricted to lifting 5 pounds. (Ex. 1, pp. 15-20) Zesch continued to treat with Iowa Ortho. On March 3, 2014, he reported making steady gains in strength and had essentially normal motion. He felt his current physical therapist was getting him through this therapy quite well. His restrictions were decreased. (Ex. F1, pp. 28-30)

Dr. Meyer saw Zesch again on April 14, 2014. At this point he was nearly six months post-operation. He was still experiencing pain when he was working and he had some pain at night. He described his symptoms as moderate and occurring randomly. He did note that the symptoms had improved. Zesch testified at hearing that his strength improved with physical therapy except for his overhead strength which did not return. At the April visit, Dr. Meyer advised Zesch that he was actually doing quite well given the massive rotator cuff tear that he had. Dr. Meyer felt that Zesch would likely require long-term work restrictions. Dr. Meyer recommended a month of work hardening and then an FCE. (Ex. 1, pp. 31-34)

Claimant underwent an FCE on May 7, 2014 with Scott Carnahan, MS, MPT, at Sports Plus. (Ex. 3, p. 49) Mr. Carnahan stated claimant gave maximum consistent effort throughout the two-day testing and that claimant demonstrated the ability to work in the heavy work category. (Ex. 3, p. 50) Mr. Carnahan stated claimant did extremely well throughout his course of physical therapy, and he appeared to be doing excellent in regards to his left shoulder. (Ex. 3, p. 49) Mr. Carnahan noted claimant demonstrated the ability to lift and carry heavy loads and did not have any pain in his left upper extremity that limited his functional abilities. (Ex. 3, p. 50) Further, Mr. Carnahan observed that claimant's left shoulder was not a limiting factor with any of the testing that was performed. Id.

Claimant returned to Mr. Clark on May 12, 2014 and reported that he was working his regular position at work without restrictions, other than self-limitations and the modification that lifting heavy loads was done by co-workers. (Ex. 1, p. 35) Claimant stated he took a tramadol in the morning and he had some pain when lying on his left side, reaching overhead, or with loads on the side. Id. Mr. Clark recommended ongoing strengthening exercises because claimant had some persistent weakness but had good motion. (Ex. 1, p. 36) Claimant stated the pain was not too disabling. Id. Mr. Clark recommended restrictions in accordance with the FCE results and released claimant to return on an as-needed basis. Id.

In a letter dated May 22, 2014, Dr. Meyer stated claimant reached maximum medical improvement on May 12, 2014. Dr. Meyer opined claimant sustained 1 percent whole body impairment and noted claimant may require ongoing tramadol once a day. He recommended restrictions in accordance with the FCE results.

According to the FCE, he could frequently lift throughout the day 20 pounds. For 2/3 of the day, he could lift 35 pounds, for 1/3 of the day 55 pounds, and infrequently 75 pounds. Likewise, for waist to overhead,

he could frequently lift 10 pounds and 2/3 of the day 20 pounds, and for 1/3 of the day 30 pounds, and infrequently 40 pounds. He could front carry frequently throughout the day 15 pounds, for 2/3 of the day 30 pounds, and for 1/3 of the day 45 pounds, and infrequently 60 pounds. There are no pushing or pulling restrictions. Because he does have a history of bilateral shoulder rotator cuff repairs, we would recommend avoidance of repetitive overhead lifting.

(Ex. 1, p. 38)

Claimant underwent an independent medical examination with Robert Jones, M.D. on August 7, 2015. Dr. Jones opined claimant sustained 8 percent whole body impairment. He recommended permanent work restrictions lifting and carrying up to 50 pounds occasionally or 25 pounds frequently below shoulder level; limited use of the arm above shoulder level; avoid activities placing a twisting, forceful load on the shoulder; and lifting performed in close proximity to the trunk of the body. (Ex. 4)

On October 27, 2015, claimant's counsel sent a letter to Dr. Jones asking for his rationale on the permanent restrictions he assigned to Zesch. On November 3, 2015, Dr. Jones sent a responsive missive. Dr. Jones explained the reason he felt the restrictions were appropriate was because the biceps stabilize the shoulder, and in Zesch's case the long head of the biceps was torn away from its bony attachment. Because of this Zesch's biceps was not providing any mechanical assistance with movement of his shoulder. Thus, further stress was being placed on the rotator cuff which then creates the potential for re-rupture of the cuff. Additionally, Dr. Jones explained that anytime the extremity is used above shoulder level further loading occurs. This "stress has the potential to aggravate the shoulder causing pain and dysfunction." (Ex. 4, p. 60b)

Following the May 2014 FCE, Zesch returned to his job as an electrician at Fisher. He still worked the third shift and primarily worked alone. He testified that if he needed to lift an object under 40 pounds he could lift with both hands from the ground to his waist, and onto a three-wheeled cart that he then used to take objects to his workstation. Zesch testified that at Fisher they have a plant-wide safety restriction for all of their employees. Regardless of an employee's physical condition, they are only to lift up to 40 pounds. Zesch also explained that prior to his July 2013 injury there were numerous fluorescent lights that needed to be replaced and this required significant overhead work. Zesch testified that when he returned to work after his injury the fluorescent light work above shoulder level was very sparse, so he was not required to perform nearly as much overhead work. However, there was still some over shoulder-level work to be performed on occasion.

When he returned to work he was taking tramadol and Celebrex. Over the next year and a half he performed his work duties with what he described as a moderate amount of pain. Although he still primarily worked alone he had a new foreman, Cody Summers, who was very compassionate about his shoulder problems. Fisher also had

an electrician that regularly came in at 6:00 a.m. Thus, if claimant had a two-person job he would wait until 6:00 and then perform that job from 6:00 to 8:00 when they were both there. Zesch also testified that due to his injury Fisher determined it would be much safer to utilize wire conduit holders rather than have workers pull the wires because this eliminated a lot of strain on the workers' shoulders. (Testimony)

Zesch testified that if he had not sustained this second injury he would have liked to retire at "... whatever the retirement age was. I think at my age it's 66 or 66 and a half. I really haven't checked into it that well. But I would have liked to work until then." (Tr. pp. 47-48) However, he did sustain this second injury, and in March of 2015 Zesch began to feel as though he was being forced into retirement by Fisher. Part of the reason he felt this was because he was not sent by Fisher to the National Electric Code training that he typically was sent to. Zesch filed a grievance and was informed that he was retiring. He told Fisher he was not retiring but again he was not sent to the training the next time it was offered. According to Zesch, in order to keep his State of Iowa electrical license he had to have this training. (Testimony and Ex. 7, pp. 81-86) Additional testimony revealed that this technically would not have precluded Zesch from working at Fisher because he had the required amount of credits he needed through the end of 2016. Zesch said that due to the limited number of classes available he would not have had enough credits for 2017. By August of 2015 Zesch continued to feel as though he was being pushed into retirement. He felt the "harassment" had become stressful to the point where it was affecting his physical health. He testified that between his shoulder pain and the stress, it was hard for him to sleep. Zesch's last day of work was August 31, 2015; he retired on September 1, 2015.

Zesch attributes his "early" retirement date to his work injury. However, Fisher points out that Zesch was the most senior electrician at Fisher. So, if there were to be a reduction in force he would be the last one standing. Also, his seniority would also have allowed him to bid out of his shifts. Thus, when Zesch became concerned about his lack of sleep he could have attempted to bid into another shift so he could work during the daytime. However, Zesch made no such attempts. On the other hand, Fisher offered no testimony at hearing as to why Zesch was not sent to the NEC training that he was typically sent to before he sustained the second injury. (Testimony)

The first issue to be addressed is industrial disability. In the present case, I find the opinions of Dr. Meyer to be more persuasive than those of Dr. Jones. Dr. Meyer is a respected orthopedic surgeon whose practice includes treatment of shoulder injuries. Dr. Jones' Curriculum Vitae states that since 1963 his practice was "exclusively limited to Neurosurgery" and that he has been "carrying out independent medical evaluations since retirement." (Ex. 4, p. 62) In the present case, claimant has sustained injury to his left shoulder; I find that Dr. Meyer's specialty makes him better qualified to render opinions regarding Zesch's injury and post-injury abilities. Furthermore, Dr. Meyer's opinion is more consistent with the medical evidence in this case. The treatment records reflect an excellent recovery by Zesch. (Ex. 1) Zesch was able to return to work in his regular job and perform that job for 1 ½ years before he retired. Additionally, the permanent restrictions assigned by Dr. Meyer are based on the valid and objective

findings of the FCE. Therefore, I find that as a result of the July 16, 2013, work injury Zesch has permanent restrictions as set forth in Dr. Meyer's May 22, 2014 letter. (Ex. 1, p. 38) Additionally, I find that as a result of that injury Zesch sustained 1 percent body as a whole functional impairment. (Ex. 1, p. 38)

Since Zesch retired from Fisher he has looked for other work. He looked into working at Alliant Energy, but he felt the jobs there did not fit his skill set. For example, although Zesch used computers at Fisher his computer use was limited mostly to CribMaster which is a specific system used at Fisher. Zesch has not encountered CribMaster anywhere outside of Fisher. Zesch testified that he can function on a computer but not very well. (Testimony) Although Zesch testified that he has looked for work since the time he retired from Fisher, Zesch has not demonstrated that he has made a diligent or extensive search for employment. I find Zesch has not demonstrated that he is very motivated to perform any work in addition to the farm work he is currently performing with his father.

At hearing Zesch testified that he continues to have problems with his left shoulder. When he raises his arm out to the front or side of his body it is painful and he lacks strength. His shoulder is also painful when he raises his arm above shoulder level. Prior to this left shoulder injury his left arm was much stronger than his right. However, now, his right arm is stronger than his left. He also still has similar issues with the right shoulder as he does on the left shoulder. Thus, at the time of hearing, claimant was 63 years of age and experiencing symptoms and functional problems with both of his shoulders.

Zesch admitted that he does still try to remain active. He has golfed since the injury, but the flexibility in his left shoulder is not as good as it was before the injury. He has also participated in the Iowa Games in activities such as pickle ball, badminton, and other "rinky-dink" games. Zesch explained that pickle ball is mostly below the waist arm movement. (Testimony; Ex. F)

Zesch does still help with his father's farm. Zesch testified that he controls 233 tillable acres of land; there is a total of 239 acres. His father is 87 year of age. Zesch helps his father get in and out of the combine. He also helps load and/or drive the semi; he does have his CDL. The loading is done hydraulically. Zesch testified that harvest takes a little less than three weeks and planting takes about the same amount of time. There is also a stock calf/cow operation. They raise the animals from 7 to 900 pounds and then sell them. They use a vet for vaccinations and any births with complications. His farming duties include operating a loader tractor with a fork. He also checks to make sure the electrical fences are not knocked down. Zesch is able to operate a tractor without difficulty. He does have some problems getting in and out of the tractor because his shoulders get pretty sore after climbing in and out all day. Zesch also does some mechanical work on the farm. The only money he receives for his farm work is cash-rent from his father.

Zesch asserts that he is entitled to permanent total disability benefits under the

"odd-lot" doctrine. In support of his assertion he relies on the December 13, 2012 report of vocational counselor, Barbara Laughlin, M.A. This report was generated at the request of claimant's counsel following his first injury. In the arbitration decision for the September 2010 right shoulder injury the deputy commissioner did not find the opinions of Ms. Laughlin to be persuasive. For the same reasons set forth in the arbitration decision and because the Laughlin report does not contain a complete history for the pending injury the undersigned gives no weight to Ms. Laughlin's opinions.

The preponderance of the evidence does not demonstrate that the injuries prevent Zesch from obtaining employment in any well-known branch of the labor market. Both FCEs demonstrated that he could perform work in the heavy work category. Additionally, following both injuries Zesch was able to return to work at Fisher in the same position he had previously held. He performed that same job for nearly one and a half years after the second injury before he retired. Since retiring from Fisher Controls he has actively worked on his father's farm operation. He has not applied for any other jobs. Nor has he demonstrated that he is highly motivated to find any other employment. I find Zesch has not made a prima facie showing for the application of the odd-lot doctrine.

Although Zesch has failed to show that he is an odd-lot employee, I find that the preponderance of the evidence demonstrates that Zesch is entitled to an award of industrial disability. I find Zesch's restrictions preclude him from a significant number of jobs. However, I find that the preponderance of the evidence does not show that he is permanently and totally disabled. Zesch has demonstrated that he has a work history with transferable skills that would enable him to pursue alternate employment if he were so motivated. Zesch has also demonstrated very little motivation to find alternate work or retraining. Furthermore, through his work at his father's farm Zesch has demonstrated that he is capable of employment.

I also find that Zesch has sustained a significant loss of future earning capacity as a result of the work injuries. Unfortunately, he has permanent restrictions. He has lost access to a significant portion of his pre-injury employment opportunities. However, he should be able to expand his employment opportunities with a willingness to work, other than on his father's farm, and retraining. Considering Zesch's age, educational background, employment history, ability to retrain, lack of motivation, permanent impairment ratings and permanent restrictions and the other industrial disability factors identified by the Iowa Supreme Court, I find that Zesch has proven that he sustained a 40 percent loss of future earning capacity as a result of his work injuries with Fisher.

Defendants assert they are entitled to a credit under the successive disabilities statutes. Claimant correctly points out that this "is a combined disability case as contemplated by Iowa code section 85.34(7)(b)(1) and so the industrial disability determination must take into account a prior permanent injury sustained September 1, 2010." (Claimant's post-hearing brief, p. 1) Iowa Code section 85.34(7) states:

7. Successive disabilities.

a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.

Iowa Code section 85.34(7) (2015).

In the present case, Fisher is liable for the combined disability, under paragraph u of section 85.34, for the prior September 1, 2010 right shoulder injury and this July 16, 2013 left shoulder injury. Pursuant to this agency's prior decision Fisher paid Zesch 30 percent industrial disability for his September 2, 2010 right shoulder injury. Thus, I find the award of 40 percent industrial disability shall be considered to be already partially satisfied to the extent of the 30 percent disability for which Zesch was previously compensated by Fisher.

Claimant is also seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. First, claimant is seeking reimbursement for the filing fee in the amount of \$100.00. I find that this is an appropriate cost pursuant to 876 IAC 4.33(7). Defendants shall reimburse claimant costs in the amount of \$100.00.

It should be noted that prior to the start of the hearing defendants agreed to reimburse claimant in the amount of \$1,000.00 for the costs of Dr. Jones' report and examination. Therefore, this issue is moot and need not be addressed by the undersigned.

CONCLUSIONS OF LAW

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).

A treating physician's opinions are not to be given more weight than a physician who examines the claimant in anticipation of litigation as a matter of law. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 408 (Iowa 1994); Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192.

The extent of claimant's entitlement to permanent disability benefits is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

The parties agreed in the hearing report submitted at hearing that the shoulder is the cause of some degree of permanent industrial disability to the body as a whole. Consequently, this agency must measure claimant's loss of earning capacity as a result of this impairment. Claimant has alleged that he is an odd-lot employee; defendants dispute this.

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.

For the reasons set forth above I conclude claimant has failed to carry his burden of proof to show a prima facie case of total disability by showing that he is not employable in the competitive labor market. Therefore, claimant has failed to show he is an odd-lot employee.

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured workers' medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. However, advanced age's adverse impact on employability is a proper factor in determining industrial loss. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995).

This case involves successive injuries with the same employer. This invokes the provisions of Iowa Code section 85.34(7)(b) which govern how successive injuries are to be assessed and what credits should be given to the employer for past payments of weekly benefits. As previously stated, subsection 85.34(7)(b)(1) is applicable to the facts of the present case because Zesch's income did not decrease after the September 2010 shoulder injury.

For the reasons set forth above I concluded claimant sustained 40 percent loss of future earning capacity.

Under 85.34(7)(b)(1), when a subsequent work injury occurs while working for the same employer and the subsequent injury is compensated under the same subsection of Iowa Code section 85.34(2), then this agency is to determine the combined disability that is caused by both injuries and then the employer's liability for the combined disability shall be considered satisfied to the extent of the percentage of disability for which the employee was previously compensated. For the reasons set forth in the Findings of Fact, I found that claimant suffered a 40 percent loss of his earning capacity as a result of both the injury on September 1, 2010 and the injury on July 16, 2013. Such a finding entitles claimant to 200 weeks of permanent partial disability benefits as a matter of law, which is 40 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in Iowa Code section 85.34(2)(u). Defendants shall also receive a full credit against the award for the combined disability for weekly benefits paid to claimant after the second injury and prior to hearing.

Finally, defendants shall reimburse claimant's costs as set forth above.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of five hundred sixty-nine and 36/100 dollars (\$569.36).

Defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits.


Defendants shall be entitled to credit for all weekly benefits paid to date, including those benefits stipulated to have been paid on the hearing report as well as a credit for the thirty (30) percent to the body as a whole industrial disability award as a result of the September 2010 work injury.

All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant's costs in the amount of one hundred and 00/100 dollars (\$100.00).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this 28th day of January, 2016.


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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.