BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TOMAS M. SALAZAR, Claimant, vs. KINDER MORGAN, INC., Employer, and ACE AMERICAN INSURANCE COMPANY, Insurance Carriers, Defendants.	FILED MAR 28 2016 WORKERS COMPENSATION	File No. 5049390 ARBITRATION DECISION Head Note Nos.: 1804; 2907; 4100

STATEMENT OF THE CASE

Tomas Salazar, claimant, filed a petition in arbitration seeking workers' compensation benefits from Kinder Morgan, Inc., and their workers' compensation carrier, Ace American Insurance Co. Hearing was held on December 4, 2015. Presiding at the hearing was Deputy Workers' Compensation Commissioner Erin Q. Pals.

Claimant, Tomas Salazar, was the only witness who testified live at trial. The evidentiary record also includes claimant's exhibits 1-19 and defendants' exhibits A-H. 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 requested the opportunity for post-hearing briefs, which were submitted on January 18, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. The extent of permanent disability claimant sustained to his body as a whole as a result of the February 28, 2011 work injury. Claimant contends he is

permanently and totally disabled under both the odd-lot doctrine and traditional analysis.

2. Whether claimant is entitled to reimbursement under Iowa Code section 85.39 for an independent medical evaluation.

3. The extent of defendants' credit.

4. Assessment of costs.

FINDINGS OF FACT

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

At the time of hearing Mr. Salazar was 66 years of age, married and lived in Columbus City, Iowa. He graduated from high school in 1970. After high school he attended a trade school for auto mechanics in 1971 or 1972. Although Mr. Salazar began working at a young age his employment history is somewhat limited. Mr. Salazar began working at his father's restaurant when he was 12 years old. He also worked on a ranch where he fed horses and cleaned out stalls. Mr. Salazar has only used his auto mechanic training to work on small jobs of his own; he had never been employed as an auto mechanic.

Mr. Salazar began working at Kinder Morgan in 1972, at the age of 23. Kinder Morgan is a gas company that operates underground wells that store and distribute natural gas. Mr. Salazar worked at Kinder Morgan for 40 years. During his time at Kinder Morgan he held different positions. His first job was as a general laborer painting in the engine room. He then moved in to the field where he sandblasted, primed, and painted the wells. For the last 12 to 14 years with Kinder Morgan he worked as an "operator" and he drove a semi called a vacuum truck. The truck pumped water out of the wells. This water was known as "drip gas," which had evaporated off of the gas. The truck would then haul away the drip gas to a station where it was pumped back out of the vacuum truck. Mr. Salazar testified that the truck had a manual transmission. When he stood next to his truck, his seat was at the level of his head. (Testimony)

According to the claimant, each of Kinder Morgan's wells had a tank. When Mr. Salazar first began working as an operator some of the tanks were vertical. In order to pump the drip gas out of the tank he was required him to climb 15 feet to connect the hose to the tank. During Mr. Salazar's time with Kinder Morgan the tanks have changed to approximately four feet tall horizontal tanks. Claimant testified that in order for him to pump the drip gas from the horizontal tanks he had to climb up four feet to access the valve. Over time, modifications have been made so that there is a valve on the side of some of the tanks. When the valve was on the side of the tank it was not necessary to

climb up the tank to attach the hose to the valve. Towards the end of Mr. Salazar's time with Kinder Morgan there were some vertical tanks, some horizontal tanks with valves on top, and some horizontal with valves on the sides. Kinder Morgan's tanks were located in fields which were usually accessed by gravel roads. Mr. Salazar serviced the tanks located in southeast Iowa. He would haul drip gas during the wintertime, which was the busy time. During the busy winter season he would work as many as 97 hours per week. The busy season was generally from December to the middle of April. (Testimony)

Mr. Salazar's duties also included "pigging." This was a method used to clean out the pipelines. He would run a squeegee-type tool known as a "pig" through the pipes in order to clean them and remove any excess water from the pipes. The moisture from the pipelines would shoot out into a vertical tank that Mr. Salazar brought with him when "pigging." According to Mr. Salazar once the moisture was in the vertical tank, he was required to climb 15 feet to the top of the tank so he could connect a hose to the valve and pump off the water into his truck. Mr. Salazar estimated that the "pigs" weighed around 150 pounds; they were loaded into the pipe by 2 men. The pigging was performed from around May to July. He would usually work 12 to 14 hours at the beginning of the pigging season, but his hours would decrease towards the end of the season.

On February 28, 2011, Mr. Salazar was walking at work when he slipped on ice. His left leg folded under him and his tailbone landed on the heel of his boot. He felt pain right away but tried to walk it off. However, as the day went on it became difficult for him to get in and out of his truck. Mr. Salazar reported the event to his supervisor, Chris Fennell. Mr. Fennel could tell that Mr. Salazar was limping and in a lot of pain. Mr. Fennel took him to the emergency room at the University of Iowa Hospitals and Clinics (UIHC). According to the records from UIHC, Mr. Salazar reported left knee and left low back pain. He was taken off of work until he could be seen by his primary care physician. (Exhibit 8b, pages 36-43)

Mr. Salazar saw his primary care physician, Curtis Frier, D.O. on March 1, 2011. (Ex. 8a, p. 29) He was still experiencing pain down both legs, behind both knees and pain in his lower back. The doctor ordered physical therapy. An MRI was eventually ordered. The MRI revealed spinal stenosis as L3-4 and L4-5. (Ex. 8a, pp. 32-34) Mr. Salazar was eventually referred to an orthopedic specialist. In the meantime, Dr. Frier kept Mr. Salazar off work from March 10 through March 27 due to his back injury. (Ex. 8a, p. 32)

On March 28, 2011, Mr. Salazar saw Benjamin MacLennan, M.D. at Steindler Orthopedic Clinic. He reported low back and bilateral leg pain. Dr. MacLennan noted that the spine CT showed a lot of degenerative changes and a lot of bone formation in the soft tissues and in the disk spaces and most importantly at the L4-L5 level centrally. Dr. MacLennan noted that this had resulted in severe central stenosis. He stated, "I explained to him this looks like an obvious chronic condition. I believe his fall at work

exacerbated this. He does have severe central stenosis at L4-5. Certainly this could have aggravated the symptoms." (Ex. 8d, p. 87) Dr. MacLennan recommended a conservative treatment approach. Mr. Salazar indicated he did not think there was any light duty work available, thus the doctor kept him off of work. (Ex. 8d, pp. 87-88)

Claimant received conservative treatment, including injections from Fred J. Dery, M.D.. However, when he was evaluated by Dr. MacLennan on June 1, 2011, the doctor recommended surgery. (Ex. 8d, pp. 88-93) During this time claimant was kept off of work.

On June 8, 2011, Dr. MacLennan authored a missive to the workers' compensation carrier. Dr. MacLennan noted that Mr. Salazar did have a lot of chronic degenerative changes of the lumbar spine. Specifically, he noted severe central stenosis at L4-5. Dr. MacLennan opined that the degenerative changes were a chronic condition. However, it seemed that the fall at work exacerbated the condition. (Ex. B, p. 1)

Dr. MacLennan performed an L4-L5 laminectomy on June 23, 2011. Mr. Salazar returned to Dr. MacLennan's office on July 6, 2011, two weeks after the operation. The doctor noted he was moving slowly and continued to use a walker. The doctor felt this was abnormal given his young age. Mr. Salazar reported that his legs felt better; he was not having any hurt or pain down his legs. (Ex. 8d, p. 95) He returned to Dr. MacLennan's office for follow-up again on August 5, 2011. Mr. Salazar reported that the pain in the posterior thigh and posterior leg was gone. He did still have some aching in the front of his thighs and his knees. He experienced off and on low back pain. Mr. Salazar was concerned about going back to full duty work for ten hours per day. He was also concerned that if he could not perform full duty work for ten hours per day he would be terminated. The doctor noted that Mr. Salazar was getting tired of being at home and he thought he could get back to work full duty. The doctor agreed he could return to work. Dr. MacLennan gave Mr. Salazar a soft lumbar corset to wear for back pain. Dr. MacLennan said it sounded like his job did not have a lot of heavy lifting. The doctor released him to work full duty with no restrictions. Mr. Salazar was to follow-up as needed. (Ex. 8d, p. 96)

Claimant did return to work in August of 2011. He was put back in his regular job which included driving the semi; however, this job was too painful for Mr. Salazar. Getting in and out of the truck was difficult for him. Because of this, Kinder Morgan tried having him work in a job that where he drove a pickup and checked the pressure in the wells. However, that job also involved getting in and out of a truck all day and caused him pain. Claimant testified that even his supervisor, Chris, could see that he was still struggling to perform his job. (Testimony)

On August 15, 2011, Dr. MacLennan sent another letter to the workers' compensation carrier regarding whether he believed Mr. Salazar was able to perform the job tasks outlined in the job description. The doctor noted the last time he saw

Mr. Salazar was on August 5, 2011. At that point Mr. Salazar had returned to work full duties, no restrictions. Dr. MacLennan felt that Mr. Salazar should be able to perform all the tasks as outlined in the job description. (Ex. B, p. 3)

On December 9, 2011, Mr. Salazar saw Petar Lenert, M.D., Ph.D., a rheumatologist at the UIHC. The note indicates that he was referred to Dr. Lenert by Dr. Frier. A workup was performed which included lab results, x-ray imaging of hands, feet, C-spine, left shoulder, and pelvis. (Ex. C, pp. 1-6)

Mr. Salazar returned to Dr. MacLennan's office on December 23, 2011. He reported a flare-up of his low back pain. He reported his pain at work with activity, bending and twisting. He was also having symptoms in his legs. The notes reveal that Dr. MacLennan was aware that Mr. Salazar had recently been to see a rheumatologist at the UIHC regarding a possible diagnosis of pseudogout. Dr. MacLennan recommended a refresher course of physical therapy. He opined that claimant had reached maximum medical improvement (MMI) and assigned ten percent impairment of the whole person. (Ex. 8d, pp. 98-99)

On February 24, 2012, claimant saw Dr. Dery at the Steindler Orthopedic Clinic. The note contains the history of the fall at work and indicates Mr. Salazar stated he had absolutely no back pain prior to the fall at work. Mr. Salazar reported that the back surgery did not provide any significant benefit. He reported he still had back pain and pain going down both legs which he described as numbness and tingling. Dr. Dery felt it was obvious that Mr. Salazar's symptoms were related to the work injury. Dr. Dery prescribed conservative treatment. (Ex. 8d, pp. 100-101) Mr. Salazar returned to Dr. Dery in April; the doctor referred him to Chad D. Abernathey, M.D.

Dr. Abernathey saw Mr. Salazar on May 2, 2012. The doctor recommended an MRI. (Ex. 8f, p. 112) Mr. Salazar returned to Dr. Abernathey to go over the MRI on May 16, 2012. The doctor noted that the previous lumbar decompression appeared to have been successful. He did not recommend an aggressive neurosurgical stance. Rather, he stated that a possible fusion procedure might be considered in the future if his symptoms persist or worsen. (Ex. 8f, p. 113)

Mr. Salazar was seen at the UIHC by Joseph J. Chen, M.D. on June 27, 2012. The note indicates he was referred by a medical case manager for evaluation of chronic low back pain following a work injury. He had returned to working full duties "until a few weeks ago when he had experienced increased back pain." Mr. Salazar acknowledged that he had short and long term disability policies but he was too proud to use those. Rather, he hoped to work until he was 66 years of age for health care benefit reasons. According to the notes, after Mr. Salazar worked 4 to 6 hours his back pain became less tolerable. Also, standing, sitting, and walking increased his pain. The diagnosis was chronic low back pain, work-related condition, lumbar post-laminectomy syndrome. Dr. Chen recommended a spine rehab evaluation. Dr. Chen restricted claimant to

4 hour days with no lifting over 40 pounds. (Ex. 8b, pp. 44-50) Kinder Morgan was not able to accommodate these restrictions. (Testimony)

Mr. Salazar underwent a spine rehabilitation program evaluation on July 24, 2012. He reported that his pain disturbed his sleep; he averaged only one hour of uninterrupted seep per night. According to the notes, he appeared motivated to learn new ways to manage his pain. He hoped to strengthen his back and ultimately return to work and to work for several more years. The UI Spine Center team made several recommendations including the two-week Spine Rehabilitation Program at the UIHC. (Ex. 8b, pp. 51-58)

Mr. Salazar began the UIHC spine program. He testified that he was in severe pain after a day in the program. On his way home he had to stop in Riverside because his back and legs were causing him so much pain. (Testimony) The September 11, 2012, note from UIHC indicates that on day 2 of the spine program Mr. Salazar reported that he continued to hurt. When he pulled into his driveway yesterday afternoon his 87-year-old neighbor came over to see why it was taking so much time for Mr. Salazar to get out of his car. The notes from the spine program indicate that Mr. Salazar put forth good effort and had a remarkable attitude. (Ex. 8b, pp. 59-64)

Following the spine program Mr. Salazar met with Dr. Chen. The doctor noted that Mr. Salazar was "quite tearful." Mr. Salazar did not think he could continue lifting up to 40 pounds as he had been; he thought he could only lift about 30 pounds. Mr. Salazar reported worsening back pain and now also hand and knee pain. Dr. Chen noted x-rays indicated a new diagnosis of pseudogout. Dr. Chen felt this was likely the reason he cannot return to lifting 40 pounds despite trying his best. Dr. Chen recommended a temporary restriction of lifting up to 30 pounds. He also encouraged Mr. Salazar to apply for Social Security Disability. (Ex. 8b, pp. 65-67)

On September 21, 2012, Dr. Chen sent a missive to the nurse case manager. He advised that Mr. Salazar had completed the two-week spine program. He noted that Mr. Salazar had worked hard to increase his strength, flexibility, and endurance. Dr. Chen noted that during the spine program Mr. Salazar had ongoing hand and knee pain. X-rays were obtained and reveal a form of crystalline arthropathy. Dr. Chen arranged a rheumatology consult that he felt should be covered under Mr. Salazar's personal health insurance. Dr. Chen opined that in light of the new findings he was revising his restrictions to avoid rigorous or repetitive joint maneuvers. He assigned additional temporary restrictions. (Ex. 8b, p. 70)

On October 3, 2012, Dr. Chen and Mr. Salazar discussed whether Mr. Salazar could continue to work full restricted duty or if he would be better off not working. (Ex. 8b, pp. 71-72) Mr. Salazar returned on October 31, 2012. He reported that he had been having a lot of difficulty performing all of his work duties. Kinder Morgan was having him check on 44 different wells daily which requires him to get in and out of his truck numerous times. Mr. Salazar reported that at the end of the work day he is

exhausted and "done" for the day. He goes home, soaks in a warm tub and tries to prepare himself for the next work day. (Ex. 8b, p. 72) Dr. Chen had a long discussion with Mr. Salazar about how much activity and pain he was willing to tolerate. Dr. Chen released him to resume regular, restricted duty. Mr. Salazar was to return to see Dr. Chen as needed. (Ex. 8b, pp. 72-75) On October 31, 2012, Mr. Salazar also met with a psychologist at the UIHC. Mr. Salazar expressed concern about his ability to perform his job. He was encouraged to strongly consider retirement. (Ex. 8b, p. 76)

Mr. Salazar returned to Dr. Lenert at the UIHC on November 8, 2012. Mr. Salazar was noted to have severe limitations of his hands, shoulders, back, and knees, and was unable to perform a full grip secondary to his calcium pyrophosphate deposition disease (CPPD) diagnosis. The doctor noted that this would lead to a significant decrease in Mr. Salazar's functional ability and would limit him from performing necessary activities of his current job. (Ex. C, p. 9)

Mr. Salazar retired from Kinder Morgan on January 3, 2013. Towards the end of his employment with Kinder Morgan he was paid $28.75 per hour. His hourly rate of pay was the same in summer and winter. (Testimony)

In April of 2015, Robin L. Sassman, M.D. conducted an IME at the request of Mr. Salazar's attorney. She opined that the February 28, 2011 work injury was directly and casually related to the low back symptoms, the need for surgery, and his ongoing symptoms. However, her opinion was based, at least in part, on Mr. Salazar denying any low back symptoms prior to the work injury. She noted that there was no evidence of prior problems in the records she had reviewed. Dr. Sassman indicated that if he did not seek any additional treatment then she considered him to be at MMI as of June 23, 2012. She assigned 13 percent impairment of the whole person. She recommended Mr. Salazar limit lifting, pushing, pulling, and carrying to 10 pounds rarely from floor to waist, 20 pounds rarely from waist to shoulder and 10 pounds rarely above shoulder height. She felt he should occasionally sit, stand and walk and would need to change positions frequently due to his symptoms. Also, he should not bend, crawl, or stop nor use ladders and rarely use stairs. (Ex. 1, p. 6) Dr. Sassman addressed the issue of pseudogout in her IME report. She opined that the pseudogout did not have any effect on Mr. Salazar's back and leg work injury. (Ex. 1, p. 5) Unfortunately, Dr. Sassman did not have a complete history at the time of her evaluation and report.

On October 3, 2015, Dr. Sassman sent a missive to claimant's counsel and indicated that she had reviewed the additional records dating back to 1995. She noted that Mr. Salazar did have back pain dating back to 1996 and sought osteopathic manipulative treatments. She stated that these additional records did not change her opinions as set forth in the IME report. (Ex. 1, p. 9)

At hearing, Mr. Salazar testified that he continues to experience back pain as well as a burning, numbing feeling in his low back and right leg; sometimes the pain travels to both legs. He also experiences tightness in his right thigh and back muscles.

He is never pain-free and his symptoms increase with activity. His pain interferes with his activities of daily living. He is still able to mow his yard with a riding mower and remove snow with a tractor, but he must take breaks during these types of activities. He continues to ice his back and wear a back brace or belt. (Testimony) It is noted that claimant submitted written statements from three individuals regarding claimant's condition. These statements are consistent with the claimant's testimony. (Ex. 15-18)

Defendants point out that Mr. Salazar had back and leg pain prior to the February 28, 2011 work injury. While the treatment notes do show that he had pain there is no evidence that the pain interfered with his ability to return to work and perform his job. Likewise, there are clinical notes that pre-date the February 28, 2011, work injury which indicate he had possible pseudogout. (Ex. 8z, p. 27) Mr. Salazar's 2003 MRI of his lumbar spine demonstrated degenerative disk disease and also indicated radicular pain in his right lower extremity. Nonetheless, Mr. Salazar was able to perform his regular duties without restrictions up until the time of his work injury. (Ex. A)

In 2012, Dr. Chen sent a letter to the insurance company and stated that claimant had reached MMI for the work injury and provided work restrictions which included the 30 pound lifting restriction. (Ex. 6, p. 19) In July of 2015, Dr. Chen noted that Mr. Salazar's hand and knee pain was caused by the pseudogout (CPPD). He also stated that the low back condition and his surgery were not caused by his pre-existing condition. Dr. Chen specifically stated, "Mr. Salazar's work incident aggravated his pre-existing crystalline arthropathy." (Ex. 6, p. 20) On August 6, 2015, Dr. Chen assigned 13 percent impairment to the body as a whole. Dr. Chen explained that an additional 3 percent was for "his pre-existing non-work-related pseudogout and 10% to his work injury of February 2011." (Ex. 6, p. 23) He also explained that he had previously assigned permanent work restrictions of no lifting more than 30 pounds due to his crystalline arthropathy which caused diffuse arm and joint pains. However, if he did not have crystalline arthropathy, Dr. Chen would have assigned a 40 pound weight lifting restriction due to his back. (Ex. 6, p. 23)

Claimant's personal physician, Dr. Frier was his family doctor for over ten years. He treated claimant both before and after this work injury and is familiar with Mr. Salazar's health history. In October of 2015, Dr. Frier stated that prior to the work injury he did treat Mr. Salazar for occasional low back pain; however, his symptoms would always resolve. Dr. Frier opined that after the work injury Mr. Salazar's physical condition changed for the worse dramatically. Dr. Frier believes that his current low back and leg symptoms were caused by the work injury and he felt the injury was permanent. Dr. Frier had "absolutely no concern" that Mr. Salazar was malingering. The doctor stated that Mr. Salazar was one of the hardest working patients he had ever treated. He also noted that fact that Mr. Salazar has not been able to return to work has been very frustrating to Mr. Salazar. The doctor stated "I do not believe Mr. Salazar can return to any type of truck driving, nor do I think he is capable of any full time, regular employment." (Ex. 3, p. 14) I give great weight to Dr. Frier's opinions in this case. Dr. Frier has been claimant's physician for approximately ten years. Thus, he knew

claimant both before and after the injury. Dr. Frier's statements describing claimant as a hard worker and an individual who is frustrated at not being able to return to work are consistent with the credible testimony given by Mr. Salazar. Based on Dr. Frier's opinions, I find that Mr. Salazar is not capable of any full time, regular employment.

The first issue that must be addressed is the extent of permanent disability Mr. Salazar sustained as a result of the February 28, 2011, work injury. In the present case, I find the preponderance of the evidence demonstrates that Mr. Salazar sustained 13 percent functional impairment to his body as a whole due to the work injury. This finding is based primarily on the opinions of Dr. Chen. Dr. Chen stated that although the work injury did not cause the pseudogout, the work injury did aggravate his pre-existing condition. Although the pseudogout is a non-work related condition, the record shows that Mr. Salazar's pseudogout was lit up by the work injury. Therefore, his pseudogout is compensable as part of the work injury. Furthermore, I find that as a result of the work injury Mr. Salazar is limited to lifting 30 pounds on an occasional basis and 15 pounds on a repetitive basis. (Ex. 6, p. 19) This finding is based on the opinion of Dr. Chen. Dr. Chen is a well-respected physician with the Department of Orthopaedics and Rehabilitation Center at the UIHC. He is also the physician who oversaw claimant's intensive spine rehabilitation treatment. As noted above, based on Dr. Frier's opinion I further find that Mr. Salazar is not capable of any full, regular employment.

The "operator" job description from Kinder Morgan stated that claimant's job hauling drip gas and "operator" require occasionally lifting from 26 to 50 pounds. This is also true of the accommodated job, "operations specialist." (Ex. 12 & 11) According to claimant's testimony the hoses and generators he needed to take out of the fields for power weighed that much. Also, the pigs weighed 150 pounds.

Mr. Salazar's actions demonstrate that he wanted to remain working. After he was unable to perform his regular job he attempted to work in the less strenuous job of checking wells. However, at the end of the work day he was still physically wiped out. Mr. Salazar has worked for the vast majority of his life. While working for the defendant employer he worked long hours in a physically demanding job. Claimant credibly testified that it was the pain that forced him to retire. His testimony is supported by Dr. Frier and the statements of his wife, co-worker, and neighbor.

Claimant testified that exposure to extreme cold increases his pain. Mr. Salazar also testified that he is not capable of performing either position at Kinder Morgan on a full time basis due to his injury. I find that although Mr. Salazar retired on a voluntary basis, he did so due to the pain he was in from the work injury. Mr. Salazar testified that the individuals he worked with could see he was in pain and encouraged him to consider retiring and/or applying for FMLA. Additionally, Mr. Salazar testified that Dr. Chen said he would not restrict him out of his job; however, he advised Mr. Salazar he might want to consider applying for disability and/or meeting with a financial planner. Likewise, claimant's family doctor advised him to consider applying for FMLA.

(Testimony) Defendants offered no testimony to refute claimant's contentions regarding the pain he was in while working after the injury or to refute claimant's testimony that he retired due to the pain from his work injury.

Since leaving Kinder Morgan, Mr. Salazar has looked for other work. He personally inquired about employment at several places including gas stations and a wrecker company. At the time of his inquiries the potential employer would ask him why he quit the gas company because that was a good job. He felt he could not lie to them so he told them about his back surgery. The perspective employers would simply state they would get back to him about a position but they never did. (Testimony)

Mr. Salazar did obtain part-time, seasonal employment at a county park where he and his wife camp. He worked at the campground for the 2014 and 2015 camping seasons. Mr. Salazar testified that he worked for two or three months in 2014. In 2015 he worked from late May to September or October. The job paid $12.00 per hour. He estimates he worked 32 hours per week. His duties include cleaning bathrooms, sweeping, mopping shops, cleaning tools, some mowing, and helping set up targets for the shooting range. He testified that he did get help hanging the targets and took breaks while mowing. Mr. Salazar admitted that his back is sore by the end of the day and he does not think he could perform this job year round. He testified that at the park he is permitted to work at his own pace. He may sit and take breaks or ask for help as needed. (Testimony)

Fritz Engel is claimant's supervisor at the park. He wrote a letter on Mr. Salazar's behalf. Mr. Engel stated that he has seen Mr. Salazar experience pain in his back and legs. He also knows that claimant always wears a back brace and appears to be in a lot of pain. Mr. Engel feels that unless something is done for Mr. Salazar's condition he will not be able to continue working at the park. (Ex. 16)

I find that Mr. Salazar has made a reasonable, but unsuccessful effort to find steady employment. I further find that because of the February 28, 2011 work injury the only services that Mr. Salazar could reasonably perform are so limited in quality, dependability, or quantity that a reasonable stable market for his services does not exist. Considering Mr. Salazar's age, educational background, employment history, ability to retrain, motivation to return to the workforce, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he is wholly disabled from performing work that he would otherwise be qualified and capable of performing. I find that Mr. Salazar has proven he is permanently and totally disabled as a result of the February 28, 2011 work injury at Kinder Morgan.

This finding is based on Mr. Salazar's inability to obtain regular employment. To his credit, he was able to obtain employment at a county park. However, this employment is seasonal and not full-time hours. Mr. Salazar has been a hard worker for the vast majority of his life. He obtained his first job at the age of 12, working in his

father's restaurant. He also worked cleaning barns and feeding horses. He was hired by Kinder Morgan in 1972. During his 40 years at Kinder Morgan claimant worked long hours performing a physically demanding job. To his credit he returned to work at Kinder Morgan following his injury and surgery. However, due to pain he was not able to perform his prior job on a full-time basis. After approximately 1 month back at his pre-injury job he switched to a different position. He attempted to work for Kinder in a position that allowed him to work out of a pick-up truck rather than a semi. But again, he was unable to continue to perform this job due to his pain. I find that as a result of the February 28, 2011 work injury Mr. Salazar is not physically capable of performing any of his prior jobs at Kinder. Thus, as a result of the work injury he can no longer perform the jobs he performed for 40 years of his adult working life.

Claimant is seeking reimbursement pursuant to Iowa Code section 85.39 for the IME of Dr. Sassman. Specifically, claimant is seeking reimbursement for his IME with Dr. Sassman. It appears that the requirements for Iowa Code section 85.39 were met. Defendants provide no basis for disputing the IME reimbursement. Thus, I find defendants shall reimburse claimant in the amount of $2,252.50 for the IME pursuant to Iowa Code section 85.39.

Claimant is seeking as assessment of costs as set forth in Exhibit 19. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was successful in his claim, I find it is appropriate to assess costs against the defendants.

Specifically, claimant is seeking the IME as a cost. Because this was awarded under Iowa Code section 85.39 that issue is now moot.

Claimant is seeking expert witness fees for Dr. Sassman in the amount of $590.00. This appears to be for the abstraction of the additional medical records ($400.00) provided to Dr. Sassman and her October 2, 2015 report ($190.00). I find that this is an appropriate cost under rule 876 IAC 4.33(6).

Claimant is also seeking an assessment of costs in the amount of $623.03 for the costs of obtaining medical records from medical providers. This is not a recovery allowed under rule 4.33, and therefore, I find it is not appropriate to assess this as a cost.

Claimant is also seeking the filing fee in the amount of $100.00 for the cost of filing his petition with the workers' compensation agency. I find that this is an appropriate cost under rule 876 IAC 4.33(7). Therefore, defendants shall be assessed the cost of the $100.00 filing fee.

Thus, defendants shall pay a total of $690.00 in costs.

CONCLUSIONS OF LAW

Mr. Salazar asserts that he is permanently and totally disabled as a result of the February 28, 2011, work injury. Mr. Salazar asserts his claim under both the traditional industrial disability analysis and claims that he is an odd-lot employee. The odd-lot claim will be evaluated first.

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.

In this case, I found Mr. Salazar produced prima facie evidence to establish a claim for permanent total disability. Therefore, the burden of production shifted to the defendants to produce evidence demonstrating the availability of suitable employment. I conclude that the employer did not produce any such evidence. Having found that Mr. Salazar proved that the only services he could presently offer in the labor market are so limited in quality, dependability, or quantity that there does not exist a reasonably stable labor market for those services, I conclude that Mr. Salazar has proven he is an odd-lot employee and that he is entitled to permanent total disability benefits.

However, even if I did not rely upon the odd-lot doctrine, I would still conclude that Mr. Salazar is entitled to permanent total disability benefits. Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured

workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

In the present case, I considered all of the relevant industrial disability factors and found that Mr. Salazar is wholly disabled. He is physically unable to perform work that his experience, training, education, and intelligence would otherwise have allowed him to perform. The only work that Mr. Salazar has been able to obtain since leaving Kinder Morgan is seasonal and part-time. Mr. Salazar's injury has rendered him unable to compete in the competitive labor market. Having found that Dr. Frier's opinion that Mr. Salazar is not capable of any full time, regular employment is credible I further find there are no realistic jobs available to Mr. Salazar. I conclude that claimant has proven he is permanently and totally disabled even if the odd-lot doctrine is not considered.

The parties have stipulated that the commencement date for permanent disability benefits is October 31, 2012. Thus, Mr. Salazar is entitled to permanent total disability benefits commencing on October 31, 2012, and continuing through the date of the arbitration hearing and into the future for so long as claimant's period of disability continues. Iowa Code section 85.34(3).

The parties have stipulated that prior to hearing claimant was paid 50 weeks of compensation at the rate of $768.99. The claimant disputes the extent of defendants' credit; however, claimant's brief fails to address this issue. I conclude defendants are entitled to credit for all weekly benefits paid to date. All benefits paid by defendants to date shall be credited toward their obligation to pay permanent total disability benefits, including overpayment of weekly benefits previously assumed to be healing period benefits. Iowa Code section 85.34(3)(b).

Claimant is seeking reimbursement for an IME pursuant to Iowa Code section 85.39. Specifically, claimant is seeking reimbursement for his IME with Dr. Sassman. Defendants provide no basis for disputing the IME reimbursement. Thus, I find defendants shall reimburse claimant in the amount of $2,252.50 for the IME pursuant to Iowa Code section 85.39.

Finally, claimant is seeking an assessment of costs. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was successful in his claim, I find it is appropriate to assess costs against the defendants as set forth above. Thus, defendants shall reimburse claimant costs in the amount of six hundred ninety and no/100 dollars ($690.00).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent total disability benefits from October 31, 2012, through the date of the arbitration hearing and into the future during the period of claimant's continued disability.

All weekly benefits shall be paid at the stipulated rate of seven hundred forty-eight and no/100 dollars ($748.00).

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 for Dr. Sassman's IME fee as set forth above.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall reimburse claimant's costs as set forth above.

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 March, 2016.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.