BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES McCARTHY	:	
Claimant,	:	File No. 5029888.01
vs.	:	
	:	REVIEW-REOPENING
JELD-WEN HOLDING, INC.,	:	
	:	DECISION
Employer,	:	
Self-Insured,	:	Head Note Nos.: 1800; 1803; 1804;
Defendant.	:	2905; 4100

STATEMENT OF THE CASE

The claimant, James McCarthy, filed a petition for review-reopening seeking workers' compensation benefits from self-insured employer Jeld-Wen Holding, Inc. Gary Nelson appeared on behalf of the claimant. Stephanie Techau appeared on behalf of the defendant.

The matter came on for hearing on July 25, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred electronically. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-3, Claimant's Exhibit 1-4, and Defendant's Exhibits A-F. The exhibits were received into the record without objection.

The claimant testified on his own behalf. Carin Eckhoff was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on August 29, 2022, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. That the claimant sustained an injury which arose out of, and in the course of employment on July 30, 2009.

3. That the alleged injury is a cause of temporary disability during a period of recovery.

4. That the alleged injury is a cause of permanent disability.

5. That the claimant was married, and entitled to two exemptions at the time of the alleged injury, and that the corresponding rate of compensation is three hundred seventy-five and 78/100 dollars ($375.78).

6. That prior to the hearing, the claimant was paid 400 weeks of compensation at the agreed upon weekly rate.

Entitlement to temporary disability and/or healing period benefits is no longer in dispute. Medical benefits are no longer in dispute. The defendant waived its affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant is entitled to review-reopening benefits.

2. The extent of permanent disability, if any is awarded.

3. Whether the permanent disability should be evaluated as an industrial disability.

4. Whether the commencement date for permanent partial disability benefits, if any are awarded is June 1, 2018, which is the last permanent partial disability payment made by the defendant, or June 15, 2020, the date of filing of the petition for review-reopening.

5. Whether the claimant is permanently and totally disabled under the odd-lot doctrine.

6. Whether an assessment of costs is appropriate.

FINDINGS OF FACT

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

Procedural History

The claimant was injured on July 30, 2009. He subsequently filed a petition for arbitration. That matter came for hearing on June 17, 2011. (Defendant's Exhibit A:1-10). Another deputy commissioner issued an arbitration decision on September 1, 2011. (DE A:1-10). The parties stipulated that the claimant sustained an injury to his respiratory system on July 30, 2009, and that the injury was a cause of permanent disability. (DE A:2). At the time of his 2011 hearing, the claimant was 56 years old. (DE A:2). He worked for the defendant since 1978. (DE A:2). In July of 2009, he was laid off. (DE A:2). At the time he was ranked one of the lowest production workers. (DE A:4).

While at Jeld-Wen, the claimant assembled garage doors, loaded a production line, and cut pieces for special orders. (DE A:2). Mr. McCarthy developed a sensitivity to a chemical known as diphenylmethane diisocyanide. (DE A:2). Mr. McCarthy became sensitized to the chemical during an exposure in the early 2000's. (DE A:2). At that time, the Jeld-Wen plant used a spray insulation that contained the chemical. (DE A:2). Jeld-Wen brought the chemical back into use in September of 2008. (DE A:2). Around this time, the claimant began to experience "more serious respiratory response to the exposure." (DE A:2). Between April and June of 2009, the claimant was off work for a hernia surgery. (DE A:2). During that time, his respiratory issues receded. (DE A:2). Upon returning to work, his respiratory distress and issues worsened. (DE A:2). On July 30, 2009, the claimant worked in close proximity to a glue processing area, where he experienced a direct exposure to diphenylmethane diisocyanide, contained in the glue. (DE A:2).

Several medical providers agreed that Mr. McCarthy suffered an exposure to diphenylmethane diisocyanide, which caused a sensitivity to isocyanates. (DE A:2). The parties in the underlying arbitration proceeding stipulated that the claimant sustained a permanent disability as a result of his exposure. (DE A:2). The parties disputed the extent of the claimant's disability. (DE A:2). Ronald Schope, M.D., opined on February 18, 2010, that Mr. McCarthy had "irreversible reactive airway disease," and that his pulmonary function testing showed FEV1 to vital capacity at around 80 to 85 percent. (DE A:2).

As a result, Patrick Hartley, M.D., recommended that the claimant avoid exposure to isocyanates, dusty work environments, or extremes of heat, cold or humidity. (DE A:3). Dr. Hartley also recommended that the claimant avoid exposures to irritating chemicals. (DE A:3). He also concluded that the claimant could only lift up to 40 pounds on an occasional basis and 20 pounds on a frequent basis. (DE A:3). Dr. Hartley assigned the claimant an 18 percent permanent impairment rating. (DE A:3). Dr. Hartley concluded, "[i]n general most of the improvement occurs early on, but there can continue to be improvement up to about two years. Thereafter, it's unlikely that there will be further improvement." (DE A:5).

The arbitration decision noted that Mr. McCarthy's lungs were fragile, and that his condition worsened when he was exposed to cold and dampness. (DE A:5). At the

time of the underlying arbitration proceeding, Mr. McCarthy had attempted to obtain new employment through a Workforce Development Center. (DE A:5). He applied for jobs, but was not successful in obtaining employment until February of 2010 when he found part-time work as a shredding clerk. (DE A:5). He gathered up cardboard and scrap paper, which he fed into a machine for shredding. (DE A:5; Testimony). He worked there until January 16, 2011, when his position was eliminated. (DE A:5).

The claimant then worked with an individual to attempt to find employment. (DE A:5). His work with this person involved rebuilding a resume, reviewing a list of jobs on a monthly basis, and discussing hints and tips on interviewing. (DE A:5). Despite this work, he did not obtain any job offers after his part-time job was eliminated. (DE A:5). Barbara Laughlin, a vocational expert, opined that the claimant suffered a 90 percent to 100 percent loss of employability due to his age, education level, the existing labor market, and his restrictions. (DE A:5).

The arbitration decision also discussed the claimant's issues with tinnitus. (DE A:3-4). Based upon the evidence in the record, that does not appear to be an issue in the review-reopening proceedings. (DE A:3-4). Therefore, discussions of the alleged tinnitus issues are omitted. (DE A:3-4, 6-7).

The deputy commissioner who drafted the arbitration decision determined that the claimant achieved maximum medical improvement ("MMI"), and thus permanent disability benefits were to begin September 29, 2010. (DE A:8). The claimant was also awarded healing period benefits from July 31, 2009, to September 28, 2010. (DE A:9). Finally, the deputy commissioner determined that, based upon the claimant's pulmonary issues, Mr. McCarthy was entitled to an 80 percent industrial disability. (DE A:9). This is 400 weeks of benefits. (DE A:9).

On August 2, 2012, the Commissioner filed an appeal decision. (DE B:11-12). The claimant asserted that the deputy commissioner erred in not finding that he was permanently and totally disabled. (DE B:11). The defendant asserted on a cross-appeal that the deputy commissioner erred in finding that the claimant sustained an 80 percent industrial disability. (DE B:11). The Commissioner affirmed the entirety of the underlying arbitration decision. (DE B:11).

Mr. McCarthy appealed the arbitration decision to the district court. (DE C:13-23). Judge Robert Blink heard the appeal, and issued a ruling on April 11, 2013. (DE C:13-23). The claimant again asserted that he was permanently and totally disabled as a result of his respiratory injury. (DE C:13-14). The defendant filed a cross-petition asserting that the Deputy Commissioner and Commissioner erred in awarding the claimant healing period benefits. (DE C:14). Judge Blink reviewed the applicable evidence in the record. (DE C:13-18). Judge Blink noted that the defendant performed two pulmonary function tests on the claimant in 2009. (DE C:15). The first test, in February of 2009, was "relatively normal," while the second test in August of 2009, found significant deterioration. (DE C:15). Judge Blink determined that substantial evidence supported the Agency's findings of partial disability, rather than a permanent total disability. (DE C:20). Judge Blink also determined that substantial evidence

supported the Agency's award of healing period benefits. (DE C:21). Judge Blink affirmed the underlying decision, and appeal to the Commissioner in their entirety. (DE C:23).

The claimant then appealed to the Iowa Court of Appeals. (DE D:24-35). The Court of Appeals reviewed the procedural and factual background of the case. (DE D:24-26). The Court of Appeals affirmed the findings of the district court with regard to healing period benefits. (DE D:31). The Court of Appeals also affirmed the district court's ruling with regard to the award of 80 percent industrial disability. (DE D:32). A dissent was filed by Judge Vogel in which they opined that they did not find substantial evidence to support the award of healing period benefits. (DE D:34-35).

Medical Care

While his case proceeded through the appeals process, Mr. McCarthy continued to seek medical care for his pulmonary issues. On August 10, 2012, Mr. McCarthy presented to Grand River Medical Group, where Ronald W. Schope, M.D., examined him for an intractable cough and reactive airway disease related to a diisocyanate exposure. (Joint Exhibit 1:1-2). Mr. McCarthy told Dr. Schope that his cough was "really no better." (JE 1:1). He also reported significant shortness of breath with activity and recovery time after activity that equaled the amount of time he was active. (JE 1:1). Dr. Schope recommended that the claimant continue using Advair, Accolate, DuoNeb, Dalisrep, and Omeprazole. (JE 1:1).

Mr. McCarthy returned to Dr. Schope's office on February 15, 2013. (JE 1:3-4). He continued to complain of a cough and reactive airway issues due to his chemical exposure. (JE 1:3). He had no improvement in his cough, and saw no benefit from using Dalisrep. (JE 1:3). Cold weather significantly aggravated his cough. (JE 1:3). Dr. Schope recommended that the claimant continue using Advair and Omeprazole. (JE 1:3-4).

Jill Powers, D.O., examined the claimant on July 9, 2013. (JE 1:5-6). Mr. McCarthy wanted to establish a doctor-patient relationship with Dr. Powers so that he could have a physical examination. (JE 1:5). Mr. McCarthy recounted his reactive airway disease caused by a chemical exposure at work, and that he struggled with breathing. (JE 1:5). Mr. McCarthy also complained of right hip pain that worsened over time due to osteoarthritis. (JE 1:5). While examining Mr. McCarthy, Dr. Powers observed that he was fidgety and that he frequently sighed loudly. (JE 1:5). His lungs were clear for the most part, but Dr. Powers noted some occasional wheezing. (JE 1:5). Dr. Powers also observed that Mr. McCarthy had difficulty taking a deep breath and that coughing during his exam made it difficult to listen to his lungs. (JE 1:5). Given his lung disease, Dr. Powers provided Mr. McCarthy with the pneumonia vaccine. (JE 1:5-6). Dr. Powers requested that he return in one year. (JE 1:6).

On August 15, 2013, Mr. McCarthy returned to Dr. Schope's office for a six-month follow-up visit. (JE 1:7-9). Dr. Schope reviewed Mr. McCarthy's history, and noted that Mr. McCarthy continued to have shortness of breath going up an incline. (JE

1:7). However, he could walk on a flat surface with no problems if he took his time. (JE 1:7). He attempted various medications, some of which he indicated provided no help. (JE 1:7). Dr. Schope opined that it would "be good to relook at everything and see where he stands in terms of pulmonary function tests, chest x-ray, CBCs and IgE levels." (JE 1:7). Upon examination, Dr. Schope found Mr. McCarthy's lungs to sound "fairly clear." (JE 1:8). Dr. Schope also noted that Mr. McCarthy's oxygen saturation was 98 percent while at rest and 95 percent while walking. (JE 1:9).

Dr. Schope examined Mr. McCarthy again on December 18, 2013. (JE 1:10-11). He recently had his right hip replaced. (JE 1:10). Dr. Schope noted that Mr. McCarthy had no changes in his cough. (JE 1:10). A lung capacity test in 2009 showed a vital capacity of 2.8, and an FEV1 of 2.29. (JE 1:10). In August of 2013, this testing was repeated, and showed a vital capacity of 4.07 and an FEV1 of 3.2. (JE 1:10). The FEV1 to vital capacity was 79 percent. (JE 1:10). Dr. Schope continued by noting that Mr. McCarthy's "DLCO" was 27 or 36 or 76 percent and his residual volume was elevated at 4.7. (JE 1:10). Dr. Schope also observed that Mr. McCarthy's FEV 25-75 or "peak flow" was 80 percent, and that his oxygen saturation was 95 percent to 98 percent. (JE 1:10). Further, Dr. Schope noted that Mr. McCarthy had normal hemoglobin, hematocrit, white blood cell, and eosinophil counts. (JE 1:10). Dr. Schope opined that the claimant's cough was likely linked to diisocyanate and was "probably irreversible." (JE 1:10). Dr. Schope requested that the claimant return in six months. (JE 1:11).

On April 10, 2014, Mr. McCarthy returned to Dr. Schope's office for continued follow-up care. (JE 1:12-13). His lungs continued to sound "absolutely clear," but Dr. Schope observed that he had "some shortness of breath with activity." (JE 1:12). Dr. Schope opined that there was nothing more to be done for Mr. McCarthy's intractable cough. (JE 1:12). Dr. Schope recommended that Mr. McCarthy continue using Advair and Omeprazole. (JE 1:12).

Dr. Schope examined Mr. McCarthy again on August 12, 2014, for his continued pulmonary issues. (JE 1:14-15). Dr. Schope observed that Mr. McCarthy attempted a number of medications, with no improvement. (JE 1:14). Dr. Schope recommended that Mr. McCarthy continue to use Advair and Omeprazole, and have another IgE. (JE 1:14). He also requested that Mr. McCarthy return in six months. (JE 1:15).

Ammar Hatab, M.D., saw the claimant on August 19, 2014. (JE 1:16-18). Mr. McCarthy expressed a desire to explore Xolair injections to treat his issues following his diisocyonate exposure. (JE 1:16). Mr. McCarthy told Dr. Hatab that he could only perform four hours activity per day. (JE 1:16). Mr. McCarthy also reported a daily dry cough and "frequent chest tightness." (JE 1:16). Dr. Hatab treated the claimant with an injection of Xolair, and advised him to continue using his Advair. (JE 1:17). Dr. Hatab opined that Mr. McCarthy's airway inflammation was triggered by his exposure to isocyanates. (JE 1:17). He also opined that "[e]nvironmental allergens are likely playing a significant role in his symptoms at this time, especially that he is allergic to multiple perennial and seasonal allergens." (JE 1:17). Dr. Hatab recommended allergen avoidance and control measures. (JE 1:17).

Patrick Hartley, M.D., examined Mr. McCarthy again on November 5, 2014. (JE 3:77-83). Dr. Hartley reviewed Mr. McCarthy's history since his last visit in 2010. (JE 3:77). Mr. McCarthy indicated he was recently evaluated by an allergist, and was found via skin test to be allergic to "a number of trees, grasses, weeds, molds, and dust mite, dogs, cats, horses, cockroaches [*sic*]." (JE 3:77). Mr. McCarthy told Dr. Hartley that he felt "slightly better' in comparison to his last visit in 2010, and he was not coughing constantly anymore. (JE 3:77). He walked about one mile per day, maintained his outside activities as much as possible, and wore a mask outside during winter months due to the cold air. (JE 3:77). At the time of his examination, he was not working. (JE 3:77). Upon examination, Dr. Hartley observed no wheezes or crackles in the lungs. (JE 3:79). Dr. Hartley reviewed spirometry results, which showed a normal FEV1 of 3.39 (90 percent), an FVC of 4.44 (89 percent), which is an FEV1/FVC1 of 76 percent. (JE 3:79). Dr. Hartley saw no significant change to these numbers after use of an inhaled bronchodilator. (JE 3:79). In the past, Mr. McCarthy's IgE was 286 IU/mL, and 313 IU/mL. (JE 3:80). Dr. Hartley found no significant isocyanate IgE antibody levels during this visit, which "confirmed that he has no significant isocyanate antibodies detected." (JE 3:81). Dr. Hartley opined that the use of Xolair injections, as recommended by the allergist, was not supported by medical evidence. (JE 3:81). Dr. Hartley continued, "[i]t is more likely than not that Mr. McCarthy's elevated IgE levels are related to his atopy to environmental aeroallergens." (JE 3:81). He concluded that Mr. McCarthy's respiratory symptoms were disproportionate to the objective lung function measures. (JE 3:81).

On February 12, 2015, the claimant returned to Dr. Schope's office for his continued complaints. (JE 1:19-20). Dr. Schope mentioned that Xolair may provide Mr. McCarthy with relief. (JE 1:19). Mr. McCarthy recounts that he had wheezing and pressure in his chest, especially when he exerts himself. (JE 1:19). Dr. Schope noted, "I wonder whether he shouldn't have a chemical stress test more because I don't think he can walk." (JE 1:19). Dr. Schope indicated that he would discuss the chemical stress test with a cardiologist, and recommended that the claimant pursue the Xolair injection. (JE 1:20).

Dr. Powers examined Mr. McCarthy again on July 21, 2015, for a physical. (JE 1:21-23). Mr. McCarthy was dismayed by his lung function, but was "getting along okay." (JE 1:21). He remained active by gardening, and was trying to eat healthier. (JE 1:21). He planned on buying a treadmill so he could keep his weight down over the winter. (JE 1:21).

On August 25, 2015, Mr. McCarthy continued his care with Dr. Schope, for his reactive airway disease. (JE 1:24-25). Dr. Schope was still worried about the pressure in Mr. McCarthy's chest. (JE 1:24). Dr. Schope reviewed the results of a nuclear stress test that Mr. McCarthy had in February, which showed a "fixed inferior wall defect." (JE 1:24). This caused the cardiologist to recommend coronary angiography to further evaluate the claimant for coronary artery disease. (JE 1:24). Mr. McCarthy declined the procedure, and continued to have chest pains. (JE 1:24). Dr. Schope recommended that Mr. McCarthy return to the cardiologist, for a "cardiac cath to make sure he doesn't have coronary artery disease." (JE 1:24). Dr. Schope also prescribed

Spiriva in the morning, followed by albuterol, to see if it helps Mr. McCarthy's cough. (JE 1:25).

Dr. Schope saw Mr. McCarthy again on September 5, 2017. (JE 1:26-29). His cardiac cath results were normal despite his chest pain. (JE 1:26). He had no change in his cough, and found Xolair and albuterol to be ineffective. (JE 1:26). Mr. McCarthy could not take Spiriva, or other atropine type drugs, as he developed increased shortness of breath. (JE 1:26). Mr. McCarthy reported that his cough was "just as intense and as long lasting as it has always been." (JE 1:26). This has been intractable since 2009. (JE 1:26). Dr. Schope recommended that Mr. McCarthy have another chest x-ray, a repeat spirometry, and repeat oximetry. (JE 1:27). He prescribed hydrocodone-acetaminophen and Mucinex. (JE 1:27). Pulmonary function tests showed a vital capacity of 2.82 and a FEV1 of 2.34. (JE 1:28). The tests also showed restrictive lung disease with normal 5.02 on a vital capacity and FEV1 of 3.77. (JE 1:28). Dr. Schope opined, "this is restrictive lung disease related to his exposure to diisocyanate." (JE 1:28). The chest x-rays had no change. (JE 1:28).

On March 5, 2018, Mr. McCarthy followed-up with Dr. Schope for his continued intractable cough and reactive airway disease. (JE 1:30-31). Mr. McCarthy felt "spacy" after taking hydrocodone, and did not use it. (JE 1:30). Dr. Schope concluded that Mr. McCarthy had restrictive lung disease. (JE 1:30). He noted that Mr. McCarthy looked "really good" at that time, despite his chronic cough. (JE 1:31). Dr. Schope recommended that the claimant continue his albuterol, Advair, and Mucinex. (JE 1:31).

Mr. McCarthy returned to Dr. Schope's office on July 18, 2018, for continued care following his chemical exposure. (JE 1:32-33). Mr. McCarthy continued to have a chronic cough due to his reactive airway disease. (JE 1:32). Dr. Schope recommended that the claimant return in six months and continue taking his medications. (JE 1:32).

On August 20, 2019, Dr. Schope re-examined Mr. McCarthy. (JE 1:34-35). He recounted Mr. McCarthy's current medications, and noted that Mr. McCarthy was under strain as his adult daughter battled leukemia. (JE 1:34). Dr. Schope recommended that Mr. McCarthy continue taking Advair, albuterol, and ProAir HFA. (JE 1:35).

Braden Powers, M.D., saw Mr. McCarthy on January 8, 2020. (JE 1:36-38). Dr. Schope retired, so Mr. McCarthy transferred his care to Dr. Powers. (JE 1:39). Mr. McCarthy was not taking Advair at the time, and noted that winter caused his reactive airway disease to worsen. (JE 1:36). Mr. McCarthy continued to have a daily cough and wheezing. (JE 1:36). Dr. Powers recommended additional pulmonary function testing and a methacholine challenge test to confirm that the claimant still had reactive airway dysfunction syndrome. (JE 1:36). If the diagnosis continued, Dr. Powers recommended that the claimant begin Symbicort rather than Advair. (JE 1:36).

Mr. McCarthy had a pulmonary function test at the UnityPoint Pulmonary Function Lab on February 6, 2020. (JE 2:59-72). The examiner noted that the testing was very difficult to complete, as Mr. McCarthy complained of severe shortness of breath with each test. (JE 2:61). He complained of extreme lightheadedness and visual

difficulty. (JE 2:61). He also required "a lengthy recovery time" after each test. (JE 2:61). Despite this, the examiner opined that Mr. McCarthy gave his best effort. (JE 2:61). The pulmonary function test showed impingement of tidal breathing on the flow volume loop. (JE 2:62). His lung volumes also showed severe air trapping with mild hyperinflation. (JE 2:62). A methacholine challenge test showed that the claimant had severe airway hyperresponsiveness. (JE 2:65).

Dr. Powers called Mr. McCarthy on February 7, 2020, with the results of his airway testing. (JE 1:40). The testing showed that Mr. McCarthy had nonspecific ventilatory limitations, severe air trapping with mild hyperinflation, and severe airway hyperresponsiveness. (JE 1:40). Dr. Powers opined that "[t]hese findings are consistent with reactive airway dysfunction syndrome given his prior isocyanate exposure." (JE 1:41). Dr. Powers recommended that Mr. McCarthy begin Symbicort. (JE 1:40).

On June 9, 2020, Dr. Powers responded to a check-box-type letter from claimant's counsel. (JE 1:43-44). Dr. Powers agreed that Mr. McCarthy's pulmonary condition worsened since September of 2011. (JE 1:43). He also agreed that the claimant's pulmonary condition was the result of his exposure to isocyanates while employed with the defendant. (JE 1:43). For future medical treatment, Dr. Powers recommended, inhaled corticosteroids, long-acting beta agonists, long-acting muscarinic antagonist inhalers, and short-acting beta-agonists. (JE 1:44). Dr. Powers recommended that Mr. McCarthy avoid inhaled fumes, chemicals and allergens, which may exacerbate his reactive airway dysfunction syndrome. (JE 1:44).

Dr. Powers saw Mr. McCarthy again on November 16, 2020, for continued follow-up of his reactive airway dysfunction syndrome. (JE 1:45-48). He continued doing poorly due to the winter weather. (JE 1:45). He used inhalers with "some benefit." (JE 1:45). Mr. McCarthy could walk one flight of stairs and less than one mile on his treadmill. (JE 1:45). Dr. Powers recommended that Mr. McCarthy continue his use of Breo, Spiriva, and albuterol. (JE 1:47).

Claimant's counsel requested that Dr. Powers complete a whole person impairment rating in April of 2021. (JE 1:49-51). Dr. Powers could not complete a whole person impairment rating, as he noted, "that is not within my expertise." (JE 1:49).

Dr. Hartley examined Mr. McCarthy again on October 13, 2021, for his ongoing pulmonary issues. (JE 3:84-93). He was seen on the referral of the insurer and "defence [*sic*] attorney" for an opinion on whether the continuing symptoms were "attributable to his isocyanate-induced lung disease." (JE 3:84). Mr. McCarthy told Dr. Hartley that he had increased dyspnea with less exercise tolerance. (JE 3:84). Bending over in his garden causes his shortness of breath to increase. (JE 3:84). He experienced episodic wheezing, for which he used a rescue inhaler. (JE 3:84). Dr. Hartley did additional testing, and noted that Mr. McCarthy's pulmonary function testing worsened in comparison to his last "PFTs" in November of 2014, which suggested "a greater degree of respiratory impairment." (JE 3:93). Dr. Hartley could not opine

whether this was caused by the claimant's environmental allergies or his isocyanate-induced airway disease. (JE 3:93). Dr. Hartley noted that the claimant had findings suggestive of pulmonary hypertension and reduced left ventricular ejection fraction on a recent echocardiogram. (JE 3:93). Dr. Hartley also did not opine as to whether this was attributed to the isocyanate related airway disease or other factors. (JE 3:93). Dr. Hartley continued by noting that the medication which Mr. McCarthy took for atrial fibrillation may contribute to his reduced exercise tolerance. (JE 3:93). Dr. Hartley recommended that Mr. McCarthy have a CT scan to "assess for small airway disease with air trapping." (JE 3:93).

Mr. McCarthy had a CT scan of his check performed on October 27, 2021. (JE 1:52). The CT showed no acute abnormalities. (JE 1:52). The CT also showed no evidence of significant air trapping. (JE 1:52).

On November 2, 2021, Dr. Hartley reviewed the CT scan results and issued his final opinions. (JE 3:95-96). Dr. Hartley agreed with the interpreting radiologist that "the CT did not reveal any significant evidence of air-trapping or peribronchiolar changes to suggest small airway disease." (JE 3:95). Dr. Hartley hypothesized that Mr. McCarthy's decreased exercise tolerance, "may be multifactorial in etiology." (JE 3:95). Among these factors include Mr. McCarthy's occupational asthma, weight gain and deconditioning, cardiovascular disease, and any residual chest wall effects associated with his sternal fracture in 2019. (JE 3:95). Dr. Hartley then noted Mr. McCarthy's allergies, including to his two dogs, to which Dr. Hartley indicated, "it's hard to believe that his dog allergy, with continuing daily exposure, isn't a factor [in] his continued airway disease." (JE 3:95). Dr. Hartley recommended immunotherapy, anti-IgE therapy, or another biologic therapy for treatment. (JE 3:95). This therapy would be unrelated to his occupational-induced asthma according to Dr. Hartley. (JE 3:95).

Dr. Hartley then provided an updated permanent impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 3:95-96). This updated impairment, based upon his reduced pulmonary function seen in the 2021 testing, was 25 percent of the whole person. (JE 3:96). Dr. Hartley also opined that no changes were required to the December of 2010 work restrictions, which were,

> He should not be exposed to isocyanates. A dusty work environment or extremes of heat, cold or humidity should be avoided. In addition I would recommend that he limit or avoid exposure to irritant chemicals, which are likely to trigger cough. He could lift up to 40 lbs [*sic*] occasionally, 20 lbs [*sic*] frequently.

(JE 3:96).

Dr. Powers saw Mr. McCarthy again on November 17, 2021. (JE 1:53-55). Since his last visit, Mr. McCarthy had worsening dyspnea, which he attributed to "the change in the weather." (JE 1:53). Mr. McCarthy continued to use inhalers, as prescribed. (JE 1:53). Dr. Powers continued to note that Mr. McCarthy had severe, persistent, poorly controlled reactive airway dysfunction syndrome. (JE 1:53-54). Dr.

Powers recommended that the claimant continue using Breo, Spiriva, and albuterol. (JE 1:54). Dr. Powers also considered a referral to allergy specialists. (JE 1:54). Mr. McCarthy discussed the COVID-19 vaccine with Dr. Powers, and the record concluded with Mr. McCarthy refusing the COVID-19 vaccine. (JE 1:54).

Mr. McCarthy reported to Short Physical Therapy, PLLC, for a functional capacity evaluation, on May 5, 2022. (Claimant's Exhibit 1:5-17). The examiner determined that Mr. McCarthy gave a consistent effort with all of his test items, and that he was "very cooperative." (CE 1:5). At the beginning of the FCE, he rated his pain 0 out of 10. (CE 1:6). By the end of the FCE, his pain increased to 8 out of 10 along his chest wall. (CE 1:6). The examiner found that Mr. McCarthy had slight or no limitations with sitting. (CE 1:6). He showed some limitations with elevated work, forward bent standing, standing work, and walking. (CE 1:6). Mr. McCarthy displayed significant limitations with kneeling/half-kneeling, stairs, lifting 20 pounds from the floor to the waist, lifting 15 pounds from the floor to the waist, and front carrying up to 20 pounds up to 50 feet. (CE 1:6). Based upon the examination and due to his decreased strength and endurance, including deconditioning and breathing dysfunction, caused Mr. McCarthy to fail to meet the capabilities of the sedentary category of physical demand. (CE 1:6). Because of Mr. McCarthy's breathing issues, and decreased respiratory rate, he should limit his standing and walking combined to up to 30 percent of the day. (CE 1:6). Mr. McCarthy should also be allowed to change positions between sitting, standing, and walking as needed. (CE 1:6-7). The examiner continued by recommending that Mr. McCarthy limit elevated work and non-material handling activities to an occasional basis. (CE 1:7).

During his examination, Mr. McCarthy told the examiner that he had a foggy feeling, and/or difficulty focusing. (CE 1:7). At times, this caused him to be unsteady on his feet. (CE 1:7). The examiner opined that this was demonstrated consistently throughout the FCE. (CE 1:7). The examiner noted that Mr. McCarthy used his upper chest and neck muscles when breathing rather than his diaphragm. (CE 1:9).

Again on May 9, 2022, Dr. Powers agreed that Mr. McCarthy's worsening pulmonary condition since September 2011, was the result of an exposure to isocyanates at work. (JE 1:57). He also agreed that this was "a material contributing factor" in the results of the FCE. (JE 1:57). Dr. Powers also considered the recommended restrictions in the FCE to be permanent. (JE 1:57).

Claimant's Testimony

James McCarthy, the claimant was 68 years old at the time of the hearing. (Testimony). He resides on 12 acres in East Dubuque, Illinois. (Testimony). He does some gardening. (Testimony). He also tends to apple, pear, cherry, and peach trees. (Testimony). As a hobby, he makes wine from the fruit that he cannot use. (Testimony). He does not use pesticides or fertilizers on his fruit trees. (DE F:45). One of his other hobbies is target shooting. (Testimony; DE F:45). He used to hunt with a bow, but he could no longer do that after his work injury. (DE F:48). Mr. McCarthy also has dogs. (Testimony; DE F:47-48). He is allergic to dogs. (Testimony; DE F:47). Dr. Powers recommended at one time that he should get rid of his dogs. (DE F:47).

Five days per week, Mr. McCarthy spends the morning with his 86-year-old mother. (Testimony). He helps her with whatever she needs around her house, and keeps her company. (Testimony). He also takes her grocery shopping, to pick-up prescriptions, and picks her up from getting her hair done. (Testimony).

He mows two of his acres on a riding lawn tractor. (Testimony). When he mows, he can only mow for two hours before he becomes lightheaded and is unable to continue. (Testimony). He blames this on his lung condition. (Testimony).

On April 21, 2021, Mr. McCarthy had his deposition taken. (DE F:42-49). He felt that his asthma was getting worse gradually, and that it had "never stopped getting worse." (DE F:43). He testified that since the 2011 hearing, he has been "less able to function on almost anything." (DE F:43). He had shortness of breath, and a hard time focusing on what he does. (DE F:43).

Since his hearing in June of 2011, Mr. McCarthy testified that his stamina has decreased. (Testimony; DE F:46). He also testified that when his stamina wanes, he experiences difficulty focusing mentally. (Testimony; DE F:46). At the time of the hearing, Mr. McCarthy testified that he could walk a half mile to one mile on his home treadmill. (Testimony). At times, he walks outside, but when the heat and humidity are too much, he cannot do it. (Testimony). He also wears a face mask if the temperature drops below 40 degrees, or the weather was excessively windy or damp. (Testimony).

In 2011, Mr. McCarthy began installing solar panels on his property. (Testimony). He installed two additional sets, including the last in 2017. (Testimony). He testified that he worked for two hours at a time, as he would become fatigued, and "foggy." (Testimony). He indicated that he was afraid he would injure himself if he attempted to work through the fatigue. (Testimony).

In 2017 or 2018, Mr. McCarthy built a 12 foot by 14-foot sunroom onto his home. (Testimony). He testified that he worked for two hours and then take a break for two hours. (Testimony). Since he was working at his own home, he could work at his own pace. (Testimony). It took him an entire summer to finish the project. (Testimony).

In 2019, Mr. McCarthy had a car accident, wherein he lost control of his truck on black ice. (DE F:45). He broke three bones in his sternum as a result of the accident. (DE F:45).

Mr. McCarthy still used an inhaler, Albuterol, Spiriva, and Breo, to treat his asthma. (Testimony). These were prescribed by Dr. Powers. (Testimony). These are the same medications that he took at the time of the 2011 hearing, and they continued to help him. (Testimony).

Neither the claimant, nor his wife smoke. (Testimony). He used to smoke a pipe, but he stopped doing so in 2009. (Testimony). His son smokes, but not when he is around Mr. McCarthy. (Testimony).

Mr. McCarthy helps hang laundry on the line, and fold it. (Testimony). He also does most of the cooking and grocery shopping for his household. (Testimony).

During the hearing Mr. McCarthy audibly sighed on occasion. He testified that he does this because he has to catch his breath after he talks for a protracted period of time. (Testimony). He also testified that he needs to remain hydrated in order to speak. (Testimony). Specifically, Mr. McCarthy stated, "[i]f I'm not drinking, I'm not talking. It's as simple as that." (Testimony). He testified further that doing anything bothered him, even small tasks like cutting or cooking vegetables. (Testimony).

Mr. McCarthy receives social security retirement and social security disability. (Testimony). At the time of the hearing, he was not working. (Testimony). He also was not looking for work because he felt that he was not capable of working. (Testimony). He testified that he felt that he could not find a job wherein he could work for two hours and then "knock off" for two hours, and then finish his day. (Testimony). He also testified that he could not spend time with his mother if he found a job. (Testimony). Mr. McCarthy indicated that he wished to work until he was 66 and one-half years old, at which time he planned on retiring. (Testimony). He planned on working part-time after that until he decided to stop. (Testimony).

CONCLUSIONS OF LAW

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

Review-Reopening

Iowa Code section 86.14 governs review-reopening proceedings. When considering a review-reopening petition, the inquiry "shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded." Iowa Code section 86.14(2). The deputy workers' compensation commissioner does not re-determine the condition of the employee adjudicated by the former award. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391 (Iowa 2009). The deputy workers' compensation commissioner must determine "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." Id. (quoting Stice v. Consol. Ind. Coal. Co., 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). In a review-reopening proceeding, the deputy workers' compensation commissioner should not reevaluate the claimant's level of physical impairment or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action." Id. at 393.

The claimant bears the burden of proving, by a preponderance of the evidence that, "subsequent to the date of the award under review, he or she has suffered an *impairment or lessening of earning capacity proximately caused by the original injury*." Simonson v. Snap-On Tools Corp., 588 N.W.2d 430, 434 (Iowa 1999)(emphasis in original).

Before considering any other disputed issue in this case, I must first determine whether Mr. McCarthy has established a change in condition following the previous decisions. Mr. McCarthy presents his own testimony, medical evidence, and a valid FCE. The defendant presents medical evidence from Dr. Hartley and argue that the claimant's own testimony supports their contention that the claimant has not suffered a lessening of earning capacity proximately caused by the original injury. When considering expert testimony, the trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The defendant argues that this case is "practically identical" to another arbitration decision in Brownrigg v. GITS Manufacturing Co., File No. 5042388.01 (Review-Reopening, September 20, 2021). First, the undersigned would note that this decision is not binding on the undersigned, as it is a review-reopening decision, and not a decision of the Commissioner, a district court, the Court of Appeals, or the Supreme Court. Secondly, the decision by my colleague in Brownrigg appeared to be based on the fact that the claimant in that case voluntarily retired from employment, and had not sought additional employment. The quoted decision in the defendant's post-hearing brief notes on several occasions that the claimant voluntarily retired, and remained retired. The evidence in this matter does not reflect that the claimant voluntarily retired. Mr. McCarthy testified very credibly during the hearing. He testified that he planned on working until he was 66 and one-half years old, at which time, he planned on retiring. After that, he testified that he planned on working part-time until such time as he decided to stop. While a loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable, I do not find that this is the case in this matter. See e.g. Id. (citations omitted). Mr. McCarthy was terminated by the employer in 2009. He sought some part-time work after this, but was subsequently laid off from the part-time position. While Mr. McCarthy has not actively sought work since his 2011 hearing and decision, this is because of his lack of physical capability to do so. He has not voluntarily retired. Mr. McCarthy credibly noted that he could not identify jobs that would allow him to work for two hours and then take a two-hour break. While this two-hour restriction is self-imposed, it is well documented in the claimant's testimony and medical records that he experiences issues with feeling foggy or mentally slower after exerting himself for two hours.

Mr. McCarthy was re-evaluated by Dr. Hartley in November of 2021. At that time, Dr. Hartley opined that he would not change Mr. McCarthy's permanent restrictions. These restrictions were adopted by the deputy commissioner in the underlying arbitration decision. He did, however, increase the claimant's permanent disability from 18 percent of the whole person to 25 percent of the whole person. He also agreed that the claimant's pulmonary testing results worsened. While he could not definitively opine that Mr. McCarthy's worsening condition was the result of his chemical

exposure, he did not deny that this was the case. It is important to note that Dr. Hartley was asked by the insurer and defense counsel to provide opinions as to the claimant's continuing symptoms. While Dr. Hartley previously treated the claimant, I view his subsequent examination as akin to a defendant's arranged independent medical examination. This factors into my assessment of the credibility of his opinions.

Dr. Powers was Mr. McCarthy's treating pulmonologist. He opined on several occasions that Mr. McCarthy had a worsening pulmonary condition as the result of his exposure to isocyanates while working for the defendant. Pulmonary testing also showed worsening conditions for Mr. McCarthy. Mr. McCarthy also had a valid FCE, for which he provided consistent effort. The FCE revealed that Mr. McCarthy failed to meet the capabilities of even the sedentary category of physical demand. This is more restrictive than Mr. McCarthy's capabilities from the arbitration decision. In the arbitration decision, it was determined that the claimant was capable of working some amount of sedentary or light duty work. This is evidence of a worsening of the claimant's condition, and a lessening of the claimant's earning capacity.

Based upon the information in the record, the claimant has proven, by a preponderance of the evidence, that he suffered an impairment and/or lessening of earning capacity.

Permanent Disability Benefits

The claimant was previously awarded an 80 percent industrial disability. This was affirmed on several occasions in the appeal process. The various levels of appeal also declined to declare the claimant to be permanently and totally disabled. The claimant does not make an argument in their post-hearing briefing that the claimant is simply increased in his permanent disability and/or industrial disability. The claimant's argument is that the claimant is now permanently and totally disabled. The defendant disputes this, and argues that the claimant's potential ability to earn wages has increased since 2011.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber

Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004)(discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish that they are totally and permanently disabled if the claimant's medical impairment, taken together with nonmedical factors totals 100-percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100-percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003)(quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633. However, finding that the claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Guyton v. Irving Jensen, Co., the Iowa Supreme Court formally adopted the "odd-lot doctrine." 373 N.W.2d 101 (Iowa 1985). 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 provide evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, then 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.

The claimant has made a prima facie case that he is not employable in the competitive labor market. This is bolstered by the results of the FCE, the impairment rating of Dr. Hartley, and the opinions of Dr. Powers. The defendant points to the claimant's visits to his mother, including performing small tasks for her, as evidence that the claimant is capable of performing home companion work, which is "generally in demand." (Defendant's Post-Hearing Brief, page 4). However, this is simply an argument. The defendant produced no evidence to back up their assertion. They had no vocational expert report and no competing FCE that showed that the claimant was capable of working in this area.

I reject the notion that the claimant is voluntarily retired. He was fired from his employment with the defendant. He was subsequently laid off from his part-time employment. Since that time, his condition has deteriorated. He credibly testified that he can only perform certain tasks for two hours at a time before he requires a two-hour break to recover.

The claimant is now 68 years old. He is a high school graduate. He worked at Jeld-Wen from 1978 to 2009. During that time, Mr. McCarthy assembled garage doors, loaded production lines, and cut pieces for special orders. He had no other training in areas such as personal care. He also never worked a sedentary job, based upon the evidence in the record. While he has a potential for retraining, his employment history indicates that he has the requisite skills to be a home companion for anyone other than his mother. Additionally, the claimant is providing care to a family member. There is no evidence that he provided care for any other elderly individuals, nor is there evidence that he would be capable of doing so.

Dr. Hartley determined that the claimant experienced increased disability between 2011 and 2021. Pulmonary testing also showed that the claimant's condition worsened. Dr. Powers connected the worsening of the condition to Mr. McCarthy's work-related chemical exposure. Dr. Hartley tried to connect the worsening condition to Mr. McCarthy's allergies and environmental condition. However, Dr. Hartley's opinion was not conclusive as to this issue. I find Dr. Powers' opinions more credible.

Mr. McCarthy underwent an FCE. The FCE was deemed valid, and it was noted that Mr. McCarthy provided a good effort in the FCE. The results of the FCE provided Mr. McCarthy with significant limitations. The examiner concluded that Mr. McCarthy failed to even meet the capabilities of the sedentary category of physical demand for a job. This is a change from the previous arbitration decision, in which it was noted that Mr. McCarthy was capable of working light duty or sedentary work. The defendant presented no evidence to rebut this besides their simple arguments presented above.

I am concerned that Mr. McCarthy has sought no work since being laid off from his part-time position. A reasonable, but unsuccessful effort to find employment is a factor to consider in an odd-lot analysis. Mr. McCarthy has not made a reasonable effort to find employment. Claimant argues in their post-hearing brief that the defendant should provide the claimant with assistance in this regard. I do not find this persuasive. If Mr. McCarthy desired to work, he should have looked for a job within his restrictions. While I am concerned about this, there is no one factor that is dispositive in an odd-lot analysis. Mr. McCarthy testified credibly that he felt that he could not find a job that would allow him to work for two hours and rest for two hours. Certainly, based upon the results of the FCE and considering Mr. McCarthy's employment history, and age, it seems that he would have had difficulty finding subsequent employment. Also, the defendant did not provide any evidence that there were jobs available to Mr. McCarthy within even the restrictions provided by Dr. Hartley, let alone those provided in the valid FCE.

Based upon the evidence in the record, the claimant is permanently and totally disabled under the odd-lot doctrine.

Commencement Date of Benefits

The parties indicated in their hearing report that there was a dispute as to the commencement date of benefits. The claimant concedes in their post-hearing brief that the benefits should commence on the date of the filing of the review-reopening petition, which was June 15, 2020. Therefore, no further analysis is required as to this issue.

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 4. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(6) provides:

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

Pursuant to the holding in Des Moines Area Regional Transit v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (Noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857(App., September 27, 2019).

The claimant requests reimbursement of costs as follows:

Filing fee – one hundred and 00/100 dollars ($100.00)

Short Physical Therapy FCE – nine hundred fifty and 00/100 dollars ($950.00)

(CE 4:30-34). The claimant is entitled to recover the filing fee. The claimant is only entitled to recover the costs of the FCE report. According to the invoice, that is three hundred fifty and 00/100 dollars ($350.00).

Based upon my discretion, I award the claimant one hundred and 00/100 dollars ($100.00) for the filing fee. I also award the claimant the cost of the FCE report of three hundred fifty and 00/100 dollars ($350.00). The total costs awarded are four hundred fifty and 00/100 dollars ($450.00).

ORDER

THEREFORE, IT IS ORDERED:

Claimant has proven an entitlement to review-reopening benefits pursuant to Iowa Code section 86.14.

All weekly benefits shall be paid at the stipulated rate of three hundred seventy-five and 78/100 dollars ($375.78) per week.

Defendant shall pay claimant permanent total disability benefits on a weekly basis from June 15, 2020, through the date of the review-reopening hearing, and continuing into the future during the period of claimant's total disability.

Defendant shall be entitled to a credit for four hundred (400) weeks of compensation at the rate of three hundred seventy-five and 78/100 dollars ($375.78) paid to date.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall reimburse the claimant four hundred fifty and 00/100 dollars ($450.00) for costs.

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

Signed and filed this 18th day of October, 2022.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Joe Quinn (via WCES)

Stephanie Techau (via WCES)

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