BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSHUA RICHARDSON, Claimant, vs. VERMEER MANUFACTURING, Employer, and EMC RISK SERVICES, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 5057918, 5057919 ARBITRATION DECISION Head Note Nos.: 1108; 1402.30; 1402.40; 1402.50; 1600; 1701; 1802; 1803; 1808; 2209; 2401; 2501; 2801; 3202

FILED
FEB 22 2018
WORKERS' COMPENSATION

Claimant Joshua Richardson filed two petitions in arbitration on November 28, 2016, File Numbers 5057918 and 5057919. In File Number 5057918, Richardson alleges he sustained an injury to his right upper extremity while working for the defendant, Vermeer Manufacturing ("Vermeer"), on July 24, 2015. In File Number 5057919, Richardson alleges he sustained an injury to his left upper extremity while working for Vermeer on November 16, 2016, and he contends he is entitled to benefits from the Second Injury Fund ("the Fund"). Vermeer and its insurer, the defendant, EMC Risk Services ("EMC"), filed answers to the petitions on November 30, 2016. The Fund filed an answer in File Number 5057919 on December 12, 2016.

An arbitration hearing was held on November 7, 2017, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Robert Tucker represented Richardson. Richardson appeared and testified. Candy Richardson appeared and testified on Richardson's behalf. Attorney William Scherle represented Vermeer and EMC. Ronald Stanhope appeared on behalf of Vermeer and EMC, but did not testify. Assistant Attorney General Jonathan Bergman represented the Fund. Joint Exhibits ("JE") 1 through 7, Exhibits A through D, 2 through 18, and AA and BB were admitted into the record. The hearing could not be completed on November 7, 2017. The parties agreed to continue the hearing to December 8, 2017. Richardson supplemented Exhibit 18, which was admitted into the record, following review by the defendants. Prior to the December 8, 2017 hearing, the parties agreed to submit the case on the existing record.

The parties requested the record be held open through January 16, 2018, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared hearing reports for each file, listing stipulations and issues to be decided. Vermeer and EMC raised the affirmative defense of lack of timely notice under Iowa Code section 85.23 for both files, and waived all other affirmative defenses.

FILE NUMBER 5057918

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. Temporary benefits are no longer in dispute.

3. If the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to the right arm.

4. If the injury is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is September 3, 2015.

5. At the time of the alleged injury Richardson's gross earnings were $1,021.00 per week, he was married and entitled to six exemptions, and the parties believe the weekly rate is $682.14.

6. Prior to the hearing Richardson was paid no weeks of compensation.

7. Vermeer and EMC are entitled to a credit under Iowa Code section 85.38 for payment of sick pay/disability income.

8. Costs have been paid.

ISSUES

1. Did Richardson sustain an injury on July 24, 2015, which arose out of and in the course of his employment with Vermeer?

2. Is the alleged injury a cause of permanent disability?

3. Has Richardson sustained an industrial disability?

4. Is Richardson entitled to payment of medical expenses?

5. Is Richardson entitled to payment of an independent medical examination?

6. Should Richardson be awarded penalty benefits for nonpayment of permanent partial disability benefits?

7. Should costs be assessed against either party?

FILE NUMBER 5057919

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. If the injury is found to be the cause of permanent disability, the disability is a scheduled member disability to the left arm.

3. If the injury is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is June 7, 2017.

4. At the time of the alleged injury Richardson's gross earnings were $762.00 per week, he was married and entitled to six exemptions, and the parties believe the weekly rate is $527.41.

5. Prior to the hearing Richardson was paid no weeks of compensation.

6. Costs have been paid.

ISSUES

1. Did Richardson sustain an injury on November 16, 2016, which arose out of and in the course of his employment with Vermeer?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is Richardson entitled to temporary disability benefits from November 16, 2016 through January 9, 2017?

4. Is the alleged injury a cause of permanent disability?

5. Has Richardson sustained an industrial disability?

6. Has Richardson established he is entitled to benefits from the Fund?

7. Is Richardson entitled to payment of medical expenses?

8. Is Richardson entitled to payment of an independent medical examination?

9. Should Richardson be awarded penalty benefits for nonpayment of temporary total disability and permanent partial disability benefits?

10. Are Vermeer and EMC entitled to a credit under Iowa Code section 85.38 for payment of sick pay/disability income in the amount of $3,427.92?

11. Should costs be assessed against either party?

FINDINGS OF FACT

Richardson lives in Oskaloosa with his wife, two children, and four stepchildren. (Transcript, page 22) Richardson graduated from high school in Topeka, Kansas in 2009. (Tr., p. 23) Richardson attended Washburn College, but he dropped out during the first semester. (Tr., p. 23) While living in Topeka, Richardson worked as a courtesy clerk, cart pusher, machine operator, stocker, and pizza maker, earning between $5.15 and $9.00 per hour. (Exs. 2, p. 18; 3, p. 21; Tr., pp. 24-28) At the time of the hearing he was twenty-six. (Tr., p. 22)

In 2012, Richardson moved to Iowa. (Tr., p. 28) On February 27, 2012, Vermeer hired Richardson as a janitor, and paid him $13.50 per hour. (Exs. 2, p. 18; 3, p. 21; Tr., pp. 29, 31) Richardson passed a physical examination performed by a nurse at the time of his hiring. (Ex. 5, p. 27; Tr., pp. 29, 63) Richardson reported he had diabetes and hernia surgery as a baby on the medical history questionnaire. (Ex. 5, pp. 28-29; Tr., p. 30) During his employment with Vermeer Richardson has worked as a janitor, material handler, and assembly technician. (Exs. 2, p. 18; 3, p. 21)

As a janitor Richardson was responsible for cleaning, vacuuming, removing trash, mopping, floors, and scrubbing toilets. (Tr., p. 31) After approximately eight months he moved to a material handling position. (Tr., p. 34) Richardson reported he moved carts with items from welding to painting, and from painting to the assemblers, he loaded carts with non-welded parts, and he placed parts on hooks. (Tr., pp. 34, 36)

Richardson worked in material handling for approximately one year, until he moved to an assembly technician position. (Tr., pp. 34, 36) Vermeer receives partially disassembled machines manufactured outside the United States. (Tr., p. 35) As an assembly technician, Richardson tears open containers the machines arrive in, and reassembles the machines. (Tr., p. 35) If a machine develops a problem down the line at the plant, he looks at the machine, diagnoses the problem, and fixes it. (Tr., p. 35) When employees working on the assembly line are absent, Richardson also fills in on the assembly line. (Tr., p. 39) Richardson testified as an assembly technician he uses hammers, crowbars, power tools, power drills, impact wrenches, power ratchets, and air ratchets. (Tr., pp. 36-37) Richardson estimated he works with impact wrenches and assembly tools fifty percent of each day. (Tr., p. 38)

On June 23, 2015, Richardson attended an appointment with ZeHui Han, M.D., an orthopedic surgeon with Iowa Ortho, complaining of bilateral wrist pain worse on the

right, radiating to the right arm, and aggravated by lifting, pushing, and gripping, with associated nocturnal pain, and numbness and tingling in both arms for one month. (JE 1, pp. 1-2) Dr. Han noted Richardson had a right wrist dorsum cyst. (JE 1, p. 1) Dr. Han ordered electrodiagnostic testing, and elected to observe the ganglion cyst. (JE 1, pp. 6, 9)

Anthony Stark, D.O., a physiatrist, performed electrodiagnostic testing for Richardson on July 15, 2015. (JE 1, p. 13) Dr. Stark listed an impression of right and left median neuropathy at the wrist consistent with carpal tunnel syndrome. (JE 1, p. 14) Richardson attended an appointment with Dr. Han the same day to discuss the testing results. (JE 1, p. 17) Dr. Han noted Richardson had positive Tinel signs in his bilateral wrists, and assessed Richardson with severe right hand and moderate left hand carpal tunnel syndrome. (JE 1, p. 17) Dr. Han recommended Richardson undergo a right carpal tunnel release first. (JE 1, p. 17)

Richardson testified at hearing and during his October 2016 deposition that before his appointment with Dr. Han he approached his manager, Jim Flescher, and told him he was having difficulties with his hands, but his right hand mainly, and he told Flescher he needed to schedule an appointment with a physician because he was having bad pain in his right arm. (Tr., p. 39; Ex. AA, p. 5) Richardson testified Flescher did not offer to send him for medical treatment or fill out an incident report. (Tr., p. 40)

Richardson testified he reported he was having "pain in my right arm. The left hand was just tingling, going to sleep, kind of numb, not pain like my right." (Ex. AA, p. 5) Richardson testified he first noticed his hand was falling asleep a few weeks before he brought it up to Flescher. (Ex. AA, p. 4) Richardson relayed that during this time he would "constantly" have to switch his arms while driving because of tingling in his hand. (Ex. AA, p. 6)

Richardson testified after Dr. Han diagnosed him with bilateral carpal tunnel syndrome he told Flescher Dr. Han was going to schedule surgery. (Tr., p. 44) Richardson reported Flescher told him he should fill out Family Medical Leave Act paperwork to protect his position with Vermeer. (Tr., p. 44)

On July 24, 2015, Dr. Han performed a right carpal tunnel release, and a right fourth dorsal compartment release. (JE 1, pp. 19, 21-23; JE 3, p. 69) Dr. Han prescribed a volar splint, and imposed restrictions of no use of the right upper extremity at work, and to work in a clean and dry environment. (JE 1, pp. 19, 21-23; JE 3, p. 69)

Dr. Han documented Richardson had full range of motion and he was doing well following surgery. (JE 1, pp. 26, 29-30) Richardson continued to have symptoms in his left upper extremity daily. (JE 1, p. 29) Richardson testified he told Dr. Han he could not bend his wrists and Dr. Han was "very short" with him and he would not listen to him. (Tr., pp. 45-46) Richardson relayed Dr. Han told him he did not need to see him again and walked away. (Tr., p. 46)

Richardson's wife called Dr. Han's office and he was referred to Scott Shumway, M.D., an orthopedic surgeon also with Iowa Ortho, for a second opinion. (JE 1, p. 38; Tr., p. 47) During Richardson's appointment on October 2, 2015, Dr. Shumway documented Richardson had limited flexion of the right wrist due to pain and swelling around the surgical site. (JE 1, p. 39) Dr. Shumway performed an injection into the right wrist, prescribed a volar wrist splint and occupational therapy, and imposed restrictions of avoiding grasping, lifting, pulling, and pushing with the right upper extremity, and imposed a two to five pound lifting restrictions. (JE 1, pp. 39, 41) Dr. Shumway documented the injury was not related to work. (JE 1, p. 41)

Richardson completed a first report of injury form at Vermeer on October 13, 2015, reporting his work "could have contributed to carpal tunnel syndrome in both" of his hands, caused by "[t]he constant use of power tools and hammering." (Ex. 17, p. 72) Richardson listed an injury date of June 10, 2015. (Ex. 17, p. 72; Tr., p. 50) Richardson testified June 10, 2015, was "[t]he date that I reported to [Flescher] that I was going to have to make an appointment, or problems I was having with my hand." (Tr., p. 50)

Richardson continued to complain of symptoms in his right wrist. (JE 1, pp. 45-46) During an appointment on October 23, 2015, Dr. Shumway noted Richardson "works for Vermeer and uses an impact drill/wrench mostly throughout the day. I do believe that his repetitive and somewhat forceful activities are a significant exacerbating factor for his right carpal tunnel symptoms." (JE 1, p. 46) On October 23, 2015, Dr. Shumway also completed a patient status report, which provided the injury was "non-work comp." (JE 1, p. 47) Dr. Shumway imposed a five pound lifting restriction with the right upper extremity, and lifted Richardson's other restrictions. (JE 1, pp. 42, 46-47)

On November 13, 2015, Richardson attended an appointment with Timothy Schurman, M.D., a hand surgeon, with the Iowa Clinic. (JE 6, pp. 167-68) Dr. Schurman examined Richardson, and noted he had some difficulty with extension and flexion of the wrist on the left, and some fullness on the left side. (JE 6, pp. 167-168) Dr. Schurman assessed Richardson with bilateral carpal tunnel syndrome, and requested Richardson's medical records. (JE 6, pp. 167-68)

Richardson filed a petition in arbitration on December 8, 2015, alleging he sustained an injury to his right and left upper extremities while working for Vermeer on June 10, 2015. (Ex. A, p. 1) On March 8, 2016, counsel for Vermeer and EMC sent an e-mail to Richardson's counsel, notifying him Vermeer and EMC were denying Richardson's claims. (Ex. 16, p. 71)

Richardson returned to Dr. Schurman on November 3, 2016, reporting his left carpal tunnel syndrome symptoms were getting worse. (JE 6, p. 178) Dr. Schurman recommended surgery.

Vermeer and EMC requested an impairment rating from Dr. Han. (JE 1, p. 50A) Dr. Han responded by letter on November 4, 2016, opining "because the patient had no

residual numbness and tingling with full range of motion of the wrist, this patient suffered a 0% impairment rating." (JE 1, p. 50B) Dr. Han did not provide a causation opinion. (JE, 1, pp. 50A-50B)

Dr. Schurman performed a left carpal tunnel release on Richardson on November 16, 2016. (JE 6, p. 183; JE 7, p. 188)

Richardson dismissed his original petition on November 21, 2016. (Claimant's Brief, pp. 1-2) On November 26, 2016, Richardson filed two petitions in arbitration, File Numbers 5057918 and 5057919. In File Number 5057918, Richardson alleges he sustained an injury to his right upper extremity while working for Vermeer on July 24, 2015. (Ex. A, p. 2) In File Number 5057919, Richardson alleges he sustained an injury to his left upper extremity while working for Vermeer on November 16, 2016, and he seeks benefits from the Fund. (Ex. A, p. 3) Richardson testified he picked these injury dates because he underwent surgery on both dates. (Tr., pp. 57, 126)

On January 3, 2017, six weeks following surgery, Dr. Schurman noted Richardson had "nearly full" range of motion, and he would be allowed to return to work the following week. (JE 6, p. 184) Dr. Schurman released Richardson to return to work on January 6, 2017, noting he could use a glove for three months at work, if it was helpful. (JE 6, pp. 186, 187A-187B) Dr. Schurman did not impose any additional restrictions and noted Richardson could return on an as-needed basis. (JE 6, p. 186) Richardson testified he returned to work on January 9, 2017. (Tr., p. 58)

Richardson returned to Dr. Schurman on June 6, 2017. (JE 6, p. 187B) Dr. Schurman noted, "[o]n examination his hand looks good. He still has a little redness to the scar which is only slightly tender. He has full range of motion and good strength." (JE 6, p. 187B) Schurman noted Richardson could return to full activity at work, with the option of wearing a glove if it is helpful, and noted he could return "on an as-needed basis." (JE 6, p. 187B)

Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Richardson on September 2, 2016. (Ex. 1) Dr. Bansal did not issue his report until October 2017. (Ex. 1) Richardson testified he attended appointments with Dr. Bansal before and after the surgery performed by Dr. Schurman. (Tr., pp. 85-86)

Dr. Bansal noted he examined Richardson and reviewed his medical records. (Ex. 1) Dr. Bansal opined Richardson sustained cumulative injuries to his bilateral wrists on June 10, 2015, caused by heavy lifting of buckets, material handling, janitorial tasks, and working with a pressure hose, which placed significant pressure on the wrists based on repetition, force, and vibration. (Ex. 1, pp. 10-11)

Dr. Bansal agreed with Dr. Han that Richardson reached maximum medical improvement on September 2, 2015, with respect to his right wrist. (Ex. 1, p. 9) With respect to his left wrist, Dr. Bansal agreed with Dr. Schurman's recommendation of a

left carpal tunnel release, and opined he would place him at maximum medical improvement three months after surgery. (Ex. 1, p. 8) Dr. Bansal found permanent restrictions were not necessary. (Ex. 1, p. 11) Dr. Bansal's report does not mention the surgery performed by Dr. Schurman. (Ex. 1)

Using Tables 16-10, 16-11, and 16-15 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), with respect to the right upper extremity, Dr. Bansal found:

> Severity of sensory deficit is 0%
>
> Severity of motor deficit is 30%.
>
> Upper extremity impairment due to sensory deficit of the median nerve below the mid forearm, involving the radial and ulnar palmar digit nerves of the index finger is 9%, and radial and ulnar digital nerves of the thumb is 18%. Maximum sensory deficit is 10%.
>
> **Multiplied together: (30% x 10%) = 3% upper extremity impairment.**

(Ex. 1, p. 10) Using the same tables from the AMA Guides with respect to the left upper extremity, Dr. Bansal opined:

> Severity of sensory deficit is 10% for the first and second digits, and 20% for the third digit.
>
> Severity of motor deficit is 0%.
>
> Upper extremity impairment due to sensory deficit of the median nerve below the mid forearm, involving the radial and ulnar palmar digit nerves of the index and long fingers is 9%, and thumb is 18%.
>
> **Multiplied together: (10% x 18%) + (10% x 9%) + (20% + 9%) = 5% upper extremity impairment.**

(Ex. 1, p. 10)

Richardson testified after Dr. Schurman released him from care he continued to have symptoms with his right upper extremity up until a new work injury in October 2017.[1] (Tr., p. 64) Richardson testified he had trouble gripping things, his hands would fatigue easily, he would randomly drop things, he had pain, and the base of his hand was sore at the end of every day of work. (Tr., pp. 64-65) Richardson reported his left hand symptoms were "[p]retty much the same," but he is right hand dominant, so he does not use his left hand as much as his right. (Tr., p. 65)

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[1] The October 2017 work injury is not the subject of this proceeding.

Richardson reported that since his work injury he cannot mow his lawn or shovel snow because his hands "get so tired and so worn out" from the activity. (Tr., pp. 66-67)

Richardson enjoys exercising with a video program called "Insanity." (Tr., p. 67; Ex. C) Richardson relayed that before his work injuries he was able to do "[p]retty much all of [the exercises]." (Tr., p. 67) Richardson testified since his work injuries:

> I do quite a bit of it differently. I mean, anything you have to get down on the floor, pushups, tricep dips. My hand doesn't – like I said, the range of motion in my right hand especially, I can't get alignment on there, so I mean, I have to do them on my, like, fist or something, which even then I can't do as many as I used to be able to because just my hands won't allow it.

(Tr., pp. 67-68) Richardson reported he does tricep dips and pushups on his fists, but performs fewer of them because he is using his fists with his knuckles on the ground. (Tr., pp. 68-70)

CONCLUSIONS OF LAW

I. Nature of the Injury

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (quoting Bushing v. Iowa Ry. & Light Co., 208 Iowa 1010, 1018, 226 N.W.719, 723 (1929)).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

Richardson contends he sustained cumulative injuries to his right and left upper extremities while working for Vermeer. Cumulative injuries are occupational diseases that develop over time. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015). A cumulative injury results from repetitive trauma in the workplace. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. 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, experience, 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).

Dr. Shumway, a treating orthopedic surgeon, and Dr. Bansal, an occupational medicine physician retained by Richardson to conduct an independent medical examination of Richardson, provided causation opinions. While Dr. Han, Richardson's treating physician, provided an impairment rating at the request for EMC, his opinion does not address causation. (JE 1, pp. 50A-50B) Dr. Schurman, a treating physician, did not provide an opinion as to causation or impairment. Vermeer and EMC contend Dr. Bansal's opinion should be given no weight.

During an appointment on October 23, 2015, Dr. Shumway documented Richardson "works for Vermeer and uses an impact drill/wrench mostly throughout the day. I do believe that his repetitive and somewhat forceful activities are a significant

exacerbating factor for his right carpal tunnel symptoms." (JE 1, p. 46) The same date Dr. Shumway also completed a patient status report, which provided the injury was "non-work comp." (JE 1, p. 47) Dr. Shumway also documented the injury was a "non-work comp" on October 2, 2015. (JE 1, p. 41) Dr. Shumway's causation opinion concerning the right upper extremity is equivocal. I do not find it persuasive.

Dr. Bansal examined Richardson and reviewed his medical records. (Ex. 1) Dr. Bansal opined Richardson sustained cumulative injuries to his bilateral wrists on June 10, 2015, caused by heavy lifting of buckets, material handling, janitorial tasks, and working with a pressure hose, which placed significant pressure on the wrists based on repetition, force, and vibration. (Ex. 1, pp. 10-11) Vermeer and EMC contend Dr. Bansal's report as a whole is flawed, as set forth in their brief at pages seven through nine, however, Vermeer and EMC elected not to retain a physician to conduct an independent medical examination of Richardson, after receiving Dr. Bansal's opinion, which addresses causation. Dr. Bansal's opinion is unrebutted. There is no evidence in the record of preexisting carpal tunnel syndrome, or a physician opinion supporting an alternate, superseding cause. Richardson has established he sustained injuries to his right and left upper extremities arising out of and in the course of his employment with Vermeer.

II. Bilateral Cumulative Injuries and the Fund

Richardson alleges he sustained a cumulative injury to his right upper extremity on July 24, 2015, and a second cumulative injury to his left upper extremity on November 16, 2016, entitling him to an award of industrial disability benefits from the Fund. The Fund rejects his assertion, and contends Richardson sustained contemporaneous bilateral cumulative injuries to his right and left upper extremities in July 2015.

Under Iowa Code section 85.64,

> [i]f an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this subchapter and the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Thus, an employee is entitled to Fund benefits if the employee establishes: (1) the employee sustained a permanent disability to a hand, arm, foot, leg, or eye, a first

qualifying injury; (2) the employee subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying injury; and (3) the employee has sustained a permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the "previously lost member." Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

The injuries at issue in this case concern two scheduled members, Richardson's right and left upper extremities. The parties dispute whether Richardson sustained a second qualifying injury. The dispute raises an issue of credibility as to when the injuries manifested. When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

Richardson testified he sustained a cumulative right upper extremity injury on July 24, 2015, and a second cumulative injury to his left upper extremity on November 16, 2016. Richardson reported he picked these injury dates because he underwent surgery on both dates. (Tr., pp. 57, 126) Richardson has an interest in recovering benefits from the Fund in this case. Considering the factors for assessing witness credibility, I do not find Richardson's testimony regarding the injury dates reasonable and consistent with the other evidence I believe.

Richardson attended an appointment with Dr. Han on June 23, 2015, complaining of bilateral wrist pain that was worse on the right, aggravated by lifting, pushing, and gripping, with associated nocturnal pain, and numbness and tingling in both arms for one month. (JE 1, pp. 1-2) Dr. Han ordered electrodiagnostic testing. (JE 1, pp. 6, 9) Dr. Stark performed the electrodiagnostic testing on July 15, 2015, and listed an impression of right and left median neuropathy at the wrist consistent with carpal tunnel syndrome. (JE 1, pp. 13-14) Richardson attended an appointment with Dr. Han the same day to discuss the testing results. (JE 1, p. 17) Dr. Han assessed Richardson with severe right hand and moderate left hand carpal tunnel syndrome, and recommended Richardson undergo a right carpal tunnel release first. (JE 1, p. 17)

Richardson testified before he attended his appointment with Dr. Han in June 2015, he told Flescher he was going to have to schedule an appointment with a physician because he was experiencing bad pain and difficulty holding onto things. (Tr., p. 39) During his deposition in October 2016, Richardson testified he first noticed his hand starting to fall asleep more often than normal, "maybe a couple of weeks prior to bringing it up" to Flescher, "[a] few weeks before June 10[, 2015]." (Ex. AA, p. 4) Richardson reported he has having "pain in my right arm. The left hand was just tingling, going to sleep, kind of numb, not pain like my right." (Ex. AA, p. 5) Richardson relayed that during this time he would "constantly" have to switch his arms while driving because of tingling in his hand. (Ex. AA, p. 6)

Richardson reported after Dr. Han diagnosed him with bilateral carpal tunnel syndrome he told Flescher Dr. Han was going to schedule surgery. (Tr., p. 44) Richardson testified Flescher told him he should fill out Family Medical Leave Act paperwork to protect his position with Vermeer. (Tr., p. 44)

On July 24, 2015, Dr. Han performed a right carpal tunnel release, and a right fourth dorsal compartment release. (JE 1, pp. 19, 21-23; JE 3, p. 69) Following surgery Dr. Han documented Richardson had full range of motion in his right wrist and he was doing well, but he continued to have symptoms in his left upper extremity daily. (JE 1, pp. 26, 29-30)

Richardson was experiencing symptoms in his bilateral arms at least one month prior to his June 23, 2015 appointment with Dr. Han. (JE 1, pp. 1-2) He was diagnosed with bilateral carpal tunnel syndrome following electrodiagnostic testing on July 15, 2015, and elected to proceed with surgery on his right arm first in July 2015. (JE 1, pp. 13-14, 17)

On October 13, 2015, Richardson completed a first report of injury form at Vermeer, alleging his work "could have contributed to carpal tunnel syndrome in both" of his hands, caused by "[t]he constant use of power tools and hammering," with an injury date of June 10, 2015. (Ex. 17, p. 72; Tr., p. 50) Richardson testified June 10, 2015, was the date he first reported he "was going to have to make an appointment, or problems [he] was having with [his] hand" to Flescher. (Tr., p. 50) Moreover, Richardson initially filed a petition in arbitration on December 8, 2015, File Number 5055370, alleging he sustained injuries to his right and left upper extremities while working for Vermeer on June 10, 2015. (Ex. A, p. 1) He dismissed the petition on November 21, 2016, and on November 28, 2016, filed new petitions, asserting the alternate injury dates, File Numbers 5057918 and 5057919. (Ex. A, p. 1; Claimant's Brief pp. 1-2)

Richardson retained Dr. Bansal to conduct an independent medical examination. (Ex. 1) Dr. Bansal also opined Richardson sustained cumulative injuries to his bilateral wrists on June 10, 2015. (Ex. 1, p. 10)

The evidence supports Richardson sustained bilateral cumulative injuries to his right and left upper extremities on June 10, 2015. Richardson has not established he sustained a qualifying second injury because he has not sustained a previous disability to an enumerated member. Second Injury Fund of Iowa v. Kratzer, 778 N.W.2d 42, 45 (Iowa 2010) (noting "it is beyond dispute that an injury qualifies as a second injury for Fund purposes if it (1) follows a previous disability to an enumerated member and (2) results in "the loss of or use of another such member"). He is not entitled to benefits from the Fund.

III. Notice

Vermeer and EMC aver Richardson failed to provide timely notice of his work injury under Iowa Code section 85.23. Richardson asserts he provided timely notice to his supervisor, Flescher.

Iowa Code section 85.23 requires an employee to provide notice to his or her employer within ninety days of the occurrence of an injury, unless the employer or the employer's representative has actual knowledge of the occurrence of the injury. The purpose of the notice provision is to afford the employer the opportunity to investigate the circumstances of the injury when the information is fresh. Johnson v. Int'l Paper Co., 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). "Actual knowledge must include information that the injury might be work-connected." Id. The employer bears the burden of proving the affirmative defense. DeLong v. Iowa State Highway Comm'n, 299 Iowa 700, 703, 295 N.W. 91, 92 (1940).

The Iowa Supreme Court has held the discovery rule is applicable to the notice and limitation provisions contained in Iowa Code sections 85.23 and 86.26. IBP, Inc. v. Burress, 779 N.W.2d 210, 218-19 (Iowa 2010). Richardson bears the burden of establishing the discovery rule is applicable to this proceeding. Id. at 219.

Under the discovery rule, the period "does not begin to run until the claimant knows or in the exercise of reasonable diligence should know 'the nature, seriousness[,] and probable compensable character' of his or her injury." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 685 (Iowa 2015). Thus, the claimant must have actual or imputed knowledge of all three elements before the statute begins to run. Swartzendruber v. Schimmel, 613 N.W.2d 646, 650-51 (Iowa 2000).

The Iowa Supreme Court has held:

> [u]nder the imputed knowledge prong of the discovery rule, the statute of limitations begins when a claimant gains information sufficient to alert a reasonable person of the need to investigate. Thus, a claimant's knowledge is judged under the test of reasonableness. The need to investigate arises when a reasonable person has knowledge of the *possible* compensability of the condition. This knowledge must include all three characteristics of the condition. As of that date, the duty to investigate begins and the claimant has imputed knowledge of all the facts that would have been disclosed by a reasonable diligent investigation. Thus, a claimant has two years from that time to gather the facts and file a petition.

Id. (internal citations omitted). The discovery rule does not require "exact knowledge of the seriousness of an injury," nor does it require an expert opinion "to establish knowledge of the characteristics of the injury," rather, the claimant has a duty to

investigate when the claimant is aware of the problem. Id. at 650-51. "[I]f it is reasonably possible an injury is seriousness enough to be compensable as a disability, the seriousness component of the test is satisfied." Id. at 651.

Richardson signed an abbreviated history form for Dr. Han dated June 24, 2015, reporting he began experiencing pain in his "palms, wrist, and forearm" in March 2015. (JE 1, p. 7) Richardson underwent electrodiagnostic testing on July 15, 2015. (JE 1, pp. 13-14) Dr. Stark listed an impression of right and left median neuropathy at the wrist consistent with carpal tunnel syndrome. (JE 1, pp. 13-14) Richardson attended an appointment with Dr. Han the same day to discuss the testing results. (JE 1, p. 17) Dr. Han assessed Richardson with severe right hand and moderate left hand carpal tunnel syndrome, and he recommended Richardson undergo a right carpal tunnel release first. (JE 1, p. 17) Richardson agreed at hearing he knew of the seriousness of his condition and impact it was having on his work at that time. (Tr., p. 101) Richardson scheduled right carpal tunnel release surgery on July 24, 2015. There is no evidence in the record Richardson connected his symptoms to his work activities before June 2015.

Richardson testified before he attended his appointment with Dr. Han in June 2015, he told Flescher he was going to have to make an appointment with a physician because "I'm having real bad pain. I'm not able to hold onto things." (Tr., p. 39)

Richardson relayed after Dr. Han diagnosed him with bilateral carpal tunnel syndrome he told Flescher Dr. Han was going to schedule surgery. (Tr., p. 44) Richardson testified Flescher told him he should fill out Family Medical Leave Act paperwork to protect his position with Vermeer. (Tr., p. 44) Vermeer and EMC did not present testimony from Flescher, or other evidence concerning Richardson's statements, or Flescher's understanding of the nature of Richardson's condition. Vermeer and EMC have not established Richardson failed to provide timely notice.

IV. Extent of Disability

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

Dr. Bansal assigned five percent impairment rating to Richardson's left upper extremity. Dr. Bansal's opinion does not discuss the surgery performed by Dr. Schurman. Richardson testified at hearing Dr. Bansal examined him following the surgery performed by Dr. Schurman in November 2016. (Tr., pp. 85-86) Dr. Bansal's report is dated October 2, 2017. (Ex. 1) Dr. Bansal is the only physician to provide an impairment rating concerning Richardson's left upper extremity. Dr. Bansal's impairment rating concerning the left upper extremity is unrebutted.

Dr. Han assigned a zero percent impairment rating to Richardson's right upper extremity. (JE 1, pp. 50A-50B) Dr. Bansal assigned a three percent impairment rating to Richardson's right upper extremity. (Ex. 1) I find Dr. Bansal's opinion most persuasive. Dr. Han has not examined Richardson since September 2015. Richardson received additional treatment for his right upper extremity from Dr. Han's practice partner, Dr. Shumway. Dr. Bansal most recently examined Richardson.

As discussed above, Richardson sustained a cumulative injury to his right and left upper extremities on June 10, 2015. The schedule provides a maximum award of 500 weeks for an injury to both arms, both hands, both feet, both legs, or both eyes as the result of a single accident. Iowa Code § 85.34(2)(t).

Table 16-3, at page 439 of the AMA Guides addresses conversion of upper extremity impairments to the whole person. Under Table 16-3, Richardson's left upper extremity impairment of five percent is converted to a three percent whole person impairment, and Richardson's right upper extremity impairment of three percent is converted to a two percent whole person impairment. Using the Combined Values Chart on page 604 of the AMA Guides, Richardson has sustained a five percent whole person impairment. Under the schedule, Richardson is entitled to twenty-five weeks of permanent partial disability benefits at the rate of $682.14.

Richardson contends he is entitled to an award greater than that provided by the schedule. The record does not support a deviation from the schedule. Considering all of the evidence, lay and medical, the record establishes Richardson has sustained a five percent impairment of the whole person.

V. Temporary Benefits

The parties stipulated temporary benefits are no longer in dispute concerning Richardson's right upper extremity. Richardson seeks temporary total disability benefits from November 16, 2016 through January 9, 2017.

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period

benefits is to "partially reimburse the employee for loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id.

"[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). "Stabilization of the employee's condition 'is the event that allows a physician to make the determination that a particular medical condition is permanent.'" Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57. Richardson has sustained a permanent impairment to his left upper extremity. Therefore, if he is entitled to temporary benefits, the benefits would be healing period benefits.

Iowa Code section 85.34(1) governs healing period benefits, as follows:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

As analyzed above, Richardson has met his burden of proof that he sustained an injury to his right and left upper extremities while working for Vermeer. Richardson was off work from November 16, 2016, when he underwent surgery until Dr. Schurman released him to return to work on Friday, January 6, 2017. (JE 6, pp. 186, 187A-187B) Richardson returned to work on Monday, January 9, 2017. Richardson is entitled to healing period benefits from November 16, 2016, through January 8, 2017, at the rate of $682.14 per week.

VI. Credit for Short Term Disability Benefits

Vermeer and EMC seek a credit under Iowa Code section 85.38 for payment of short-term disability income in the amount of $3,427.92, set forth in Exhibit B, the defendants' answer to interrogatory number 25. Richardson disputed Vermeer and EMC are entitled to a credit on the hearing report.

Iowa Code section 85.38(2)(*a*) provides:

> [i]n the event the employee with a disability shall receive any benefits, . . . under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chapter, . . . then the amounts so paid to the employee from the group plan shall be credited to or against any compensation payments . . . made or to be made under this chapter. . . . The amounts so credited shall be deducted from the payments made under [this chapter]. Any nonoccupational plan shall be reimbursed in the amount deducted. This section shall not apply to payments made under any group plan which would have been payable even though there was an injury under this chapter. . . . Any employer receiving such credit shall keep the employee safe and harmless from any and all claims or liabilities that may be made against them by reason of having received the payments only to the extent of the credit.

The Iowa Supreme Court has held that the purpose of Iowa Code section 85.38(2) is to avoid duplication of payments made by an employer to an employee. Midwest Ambulance Serv. v. Ruud, 754 N.W.2d 860, 867 (Iowa 2008); State v. Erbe, 519 N.W.2d 812, 815 (Iowa 1994)

An employer seeking the credit bears the burden of proving entitlement to the credit. Miller v. Maintainer Corp. of Iowa, Inc., File No. 5020192 (App. Dec. 2, 2009). To meet this burden, Vermeer and EMC must prove: (1) the benefits were received under a group plan; (2) contribution to the plan was made by the employer; (3) the benefits should not have been paid if workers' compensation benefits were received; and (4) the amount to be credited or deducted from payments made or owed under Iowa Code chapter 85. Id.

It is necessary to examine the language of the short-term disability policy to determine whether short-term disability benefits should not have been paid to Richardson if he received workers' compensation benefits. Vermeer and EMC did not present a copy of the policy or any testimony or other written evidence concerning the policy at hearing, beyond the summary of the payments made to Richardson. Vermeer and EMC have not established they are entitled to a credit for any short-term disability benefits received by Richardson. SKW Biosystems/Degussa Health & Nutrition v. Wolf, No. 05-1214, 2006 2006 WL 1750272, at *4 (Iowa Ct. App. June 28, 2006) (concluding the employer failed to present sufficient evidence showing it was entitled to a credit when it failed to present the short-term and long-term disability policies at hearing).

VII. Medical Expenses and Medical Mileage

Richardson seeks to recover out-of-pocket medical expenses set forth in Exhibit 18, totaling $2,438.97, and medical mileage totaling $1,190.45, set forth in Exhibit 12.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). Rule 876 Iowa Administrative Code 8.1(2) also provides for recovery of medical mileage.

As analyzed above, Richardson has established he sustained a cumulative injury to his right and left upper extremities on June 10, 2015. Vermeer and EMC are responsible for all causally connected medical bills set forth in Exhibit 18, totaling $2,438.97, and medical mileage totaling $1,190.45.

VIII. Penalty

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of

the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Richardson seeks an award of penalty benefits for nonpayment of permanent partial disability benefits with respect to his right upper extremity, and for nonpayment of temporary total and permanent partial disability benefits with respect to his left upper extremity. Richardson did not provide any documentation of Vermeer's penalty history.

Richardson initially filed a petition in arbitration on December 8, 2015, alleging he sustained an injury to his right and left upper extremities while working for Vermeer on June 10, 2015. (Ex. A, p. 1) Richardson did not receive a denial letter or other communication from Vermeer or EMC until March 8, 2016, when counsel for Vermeer and EMC sent an e-mail to counsel for Richardson, notifying him Vermeer and EMC were denying his claims, including medical care. (Ex. 16, p. 71) The e-mail does not provide the basis for the denial. Vermeer and EMC did not seek an independent medical examination of Richardson, or obtain a causation opinion from any of Richardson's treating providers. Vermeer and EMC did not provide any information at hearing concerning the investigation and evaluation they conducted into whether benefits were owed to Richardson relied upon in denying benefits, even after the defendants received Dr. Bansal's opinion in October 2017, before hearing. An award of penalty benefits is appropriate for the nonpayment of temporary and permanent benefits. Richardson is awarded $2,000.00 in penalty benefits.

IX. Costs

Richardson seeks to recover the $522.00 cost of Dr. Bansal's independent medical examination, the $2,020.00 cost of Dr. Bansal's report, the $100.00 cost of the filing fee, the $6.74 cost of service, the $141.25 cost of Richardson's October 2016 deposition transcript, and the $81.75 cost of Richardson's May 2017 deposition transcript. Vermeer and EMC aver Richardson is not entitled to recover the cost of the independent medical examination.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 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, (8) costs of persons reviewing health service disputes.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice." Id.

Vermeer and EMC denied Richardson's claims. Richardson selected Drs. Han and Schurman, both treating physicians, and he was referred by Dr. Han's office to Dr. Shumway, also a treating physician. (Tr., pp. 78-80) Dr. Han is the only treating physician who provided an impairment rating. (JE 1, pp. 50A-50B) Richardson selected Dr. Han, Vermeer and EMC did not. (Tr., p. 79) Richardson is not entitled to recover the cost of Dr. Bansal's independent medical examination under Iowa Code section 85.39. See also IBP, Inc. v. Harker, 633 N.W.2d 322, 326 (Iowa 2001) (holding although the employer acquiesced to the claimant's physician choice, the claimant was not entitled to recover the cost of an independent medical examination because she chose the physicians who provided the unfavorable impairment ratings, and they were not "retained by the employer").

The administrative rule expressly allows for the recovery of the filing fee, service fee, Dr. Bansal's report, and for the depositions. 876 IAC 4.33(6). Using my discretion, I find Vermeer and EMC should be assessed $2,349.74 in costs.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant twenty-five weeks of permanent partial disability benefits, at the rate of six hundred eighty-two and 14/100 dollars ($682.14) per week, commencing on January 9, 2017.

Defendants shall pay the claimant healing period benefits, from November 16, 2016 through January 8, 2017, at the rate of six hundred eighty-two and 14/100 dollars ($682.14) per week.

Defendants shall pay accrued benefits in a lump sum with interest on all weekly benefits provided by law.

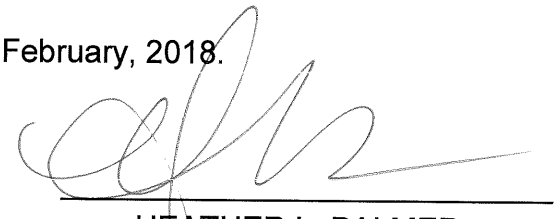
Defendants shall pay the claimant two thousand four hundred thirty-eight and 97/100 dollars ($2,438.97) for out-of-pocket medical costs and one thousand one hundred ninety and 45/100 dollars ($1,190.45) for medical mileage.

Defendants shall pay the claimant two thousand and 00/100 ($2,000.00) in penalty benefits.

Defendants are assessed one hundred and 00/100 dollars ($100.00) for the filing fee, six and 74/100 dollars ($6.74) for service costs, one hundred forty-one and 25/100 dollars ($141.25) for the October 2016 deposition transcript, eighty-one and 75/100 dollars ($81.75) for May 2017 deposition transcript, and two thousand twenty and 00/100 dollars ($2,020.00) for the cost of Dr. Bansal's report.

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

Signed and filed this 22nd day of February, 2018.



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HLP/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.