BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERRY TUCKER, Claimant, vs. COLONY HEATING AND AIR CONDITIONING, Employer, and REGENT INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1648828.01 ARBITRATION DECISION Head Note Nos.: 1402.40, 1703, 1804, 2502, 2907, 3001

STATEMENT OF THE CASE

Jerry Tucker, claimant, filed a petition for arbitration against Colony Heating & Air Conditioning (hereinafter referred to as "Colony"). This case proceeded to an arbitration hearing before the undersigned on October 5, 2020. As a result of the ongoing pandemic and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried via videoconference using the CourtCall platform. Claimant appeared from his attorney's office. Defense counsel, defendants' representative and the court reporter all appeared from separate remote sites.

Prior to trial and again at the commencement of trial, defendants raised an objection to proceeding with the case via CourtCall. Although the written motion, request for rehearing, and rulings on those motions are more specific as to the contents of the objection, defendants essentially objected that their counsel could not be in the same room as claimant while he testified. Their objection essentially challenged the involuntary trial of the case via videoconferencing on due process grounds. In recognition of the unprecedented pandemic currently affecting Iowa, and in reliance upon the Commissioner's order and 876 IAC 4.49, the undersigned overruled the defendants' objection and the case proceeded as scheduled.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through C. All exhibits were received without objection.

Claimant testified on his own behalf. The employer and insurance carrier called their representative, Douglas Kohoutek, to testify. No other witnesses testified at hearing. The evidentiary record closed at the conclusion of the evidentiary hearing on October 5, 2020.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted, and both parties filed briefs simultaneously on November 13, 2020. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to permanent disability benefits, including a claim that he is permanently and totally disabled.

2. Whether claimant qualifies as an odd-lot employee if he is found not permanently and totally disabled under the traditional industrial disability analysis.

3. The proper commencement date for permanent disability benefits.

4. Claimant's gross average weekly earnings at the time of the injury and the corresponding weekly rate at which benefits should be awarded.

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

6. Defendants' entitlement to credit for benefits paid to date, including an alleged overpayment of weekly benefits prior to hearing.

7. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Jerry Tucker, claimant, is a 53-year-old gentleman. Mr. Tucker has a long work history that is mainly in manual labor. He has been employed relatively consistently, other than seasonal lay-offs or slow-downs, since high school.

Mr. Tucker served in the Navy for three years, working mainly in a sheet metal shop. He drove a semi over-the-road for less than a year. He worked as a welder, a mechanic for cars and trucks, a beverage body technician working on pop and beer trucks, performed heating and air conditioning-type jobs, performed plumbing-type jobs, installed counters and cabinetry, and owned a part-time lawn service and snow removal

service while his kids were young and needed jobs. He has never worked in a management position (other than in his own business supervising his own children). Mr. Tucker has never held a clerical position.

In 2011, claimant began working for Colony. In his position, Mr. Tucker performed heating and air conditioning work. He performed both installations as well as service calls and earned $33.00 per hour when he last worked for Colony. He also was offered and worked overtime for Colony to service their customers and keep up with the available work.

Mr. Tucker reviewed the company's job description and testified that it was generally accurate. However, he testified that he would have to lift more than the listed 50 pounds on the job description. He estimates he was lifting approximately 80 pounds on May 16, 2018, the alleged date of injury. He also estimated that he lifted approximately 75 pounds during a typical service call, carrying his tool bag, refrigerant, and other parts and items. He also testified that his job required frequent climbing onto roofs or the use of ladders to access service areas.

On May 16, 2018, Mr. Tucker was performing his typical job duties. He was at a service call where he had to climb into an attic and into a cupola to service an air conditioning unit. When he was descending from the cupola, he missed a step and fell. As a result of that fall, Mr. Tucker injured his right foot and ankle as well as his low back.

After his fall, Mr. Tucker gathered up his tools and items and returned to his service truck. He called his supervisor and was told to proceed to urgent care for evaluation. Mr. Tucker testified that he experienced the primary symptoms at that point in time in his right foot and ankle.

Urgent care placed him in a boot and referred him to Work Well for further follow-up. Claimant presented for care at Work Well and Ignatius Brady, M.D. served as the authorized treating physician. Dr. Brady made appropriate referrals and attempted reasonable non-surgical treatments.

Dr. Brady declared Mr. Tucker to have achieved maximum medical improvement (MMI) on January 10, 2019 for his low back injury. Dr. Brady opined that claimant sustained an eight percent permanent functional impairment of the whole person as a result of the low back injury and released claimant from further care. Dr. Brady also recommended that claimant lift less than 30 pounds as a result of the low back injury. He deferred to the treating orthopaedic surgeon, Scott Ekroth, M.D. for issues related to Mr. Tucker's right foot and ankle. (Joint Exhibit 1, pages 1-2) In a June 20, 2019 note, Dr. Brady opined that claimant should not lift or carry greater than 30 pounds, should not stoop or bend, should stand less than 2 hours per shift, and should be permitted to walk, stand, and/or sit as tolerated for comfort while working. (Joint Ex. 1, p. 5)

Defendants sought an independent medical evaluation, performed by Robert L. Broghammer, M.D., on May 6, 2019. Dr. Broghammer opined that both the right ankle and low back injuries were causally related to the May 16, 2018, work injury. (Defendants' Ex. A, p. 15)

Dr. Ekroth declared Mr. Tucker at MMI for his right foot and ankle injury on August 8, 2019. Dr. Ekroth opined that claimant sustained a 30 percent permanent functional impairment of the right lower extremity as a result of the May 16, 2018, work injury. Dr. Ekroth also recommended against a return to a "labor intensive job." Dr. Ekroth specifically imposed a 20 pound lifting restriction and allowed claimant to stand for less than 2 hours per shift. (Joint Ex. 2, p. 6)

Unfortunately, after the injury, Mr. Tucker also developed a deep vein thrombosis (blood clot). He required anti-coagulation therapy. On August 20, 2019, Dr. Brady addressed the issue, noting that the clotting disorder had continued for more than six months, that claimant had developed multiple blood clots in his right leg, and that claimant continued treatment with Coumadin. (Joint Ex. 1, p. 3)

Fortunately, Dr. Brady opined that claimant has not experienced any end-organ damage as a result of his clotting disorder. However, claimant still qualifies for a ten percent permanent functional impairment of the whole person as a result of the clotting disorder and need for ongoing anti-coagulation medication therapy. (Joint Ex. 1, p. 3) Dr. Brady confirmed that no lifting limits are required as a result of the blood clots. However, he recommended against claimant working at heights because of the risk of bleeding with trauma should claimant fall. (Joint Ex. 1, p. 3) Dr. Brady also opined that claimant will require ongoing use of anti-coagulant medications and opined that need is "directly related to his DVT which arose in the context of injury and decreased activity while being treated. It is therefore a secondary consequence of his work related trauma, so is a work related injury." (Joint Ex. 1, p. 4)

In a supplemental report, Dr. Broghammer opined that the blood clots could be related to inactivity after the date of injury. However, he opined that claimant sustained no permanent impairment as a result of the blood clots. Nonetheless, Dr. Broghammer conceded that if claimant required long-term usage of anti-coagulant medication, the applicable functional impairment rating would be ten percent of the whole person. (Defendants' Ex. A, p. 21)

Dr. Broghammer opined that claimant did not sustain permanent impairment as a result of the low back injury. (Defendants' Ex. A, p. 21) While he was at a loss to explain the ongoing symptoms, Dr. Broghammer opined that all of claimants' symptoms were subjective and that he perceived symptom magnification efforts by claimant during his evaluation. (Defendants' Ex. A, p. 21) Dr. Broghammer imposed no permanent work restrictions for the low back condition and opined that restrictions should not be imposed for the right ankle condition unless claimant submitted to and had a positive EMG test on the right leg. (Defendants' Ex. A, p. 22)

Dr. Broghammer opined that claimant reached MMI by January 3, 2020. He assigned zero percent impairment for claimant's low back condition and two percent permanent functional impairment for the right lower extremity. (Defendants' Ex. A, pp. 25-26)

Claimant also obtained an independent medical evaluation performed by Mark Taylor, M.D., on December 12, 2019. Dr. Taylor opined that claimant's low back and right ankle conditions were causally related to the alleged work injury. (Claimant's Ex. 1, p. 9) Dr. Taylor recommended a pain management referral. (Claimant's Ex. 1, p. 10) However, Dr. Taylor concurred that claimant achieved MMI on January 3, 2020. Dr. Taylor concurred with Dr. Brady that claimant qualifies for an 8 percent permanent functional impairment of the whole person as a result of his low back injury and an additional 10 percent permanent functional impairment of the whole person as a result of the blood clotting disorder. (Claimants' Ex. 1, p. 10) In addition, Dr. Taylor opined that claimant qualifies for a 26 percent permanent impairment of the right lower extremity as a result of the work injury. In total, combining the impairment ratings using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Taylor opined that claimant sustained a 21 percent impairment of the whole person as a result of the right ankle injury. (Claimant's Ex. 1, p. 10-11)

Dr. Taylor addressed permanent restrictions and concurred with Dr. Brady and Ekroth that claimant should not lift more than 20-25 pounds on an occasional basis. He also concurred that claimant should not stand for more than 1-2 hours per work shift and should be allowed to alternate walking, standing, or sitting as needed. Finally, Dr. Taylor concurred that claimant should be precluded from working at heights due to the clotting disorder. (Claimant's Ex. 1, p. 11)

Mr. Tucker's personal physician ultimately referred claimant for a pain consultation with Stanley J. Mathew, M.D. Dr. Mathew diagnosed claimant with complex regional pain syndrome (CRPS) in his right leg and lumbosacral radiculopathy. (Joint Ex. 4, p. 21) Dr. Mathew recommended trigger point injections and a spinal cord stimulator. (Joint Ex. 4, p. 23) Anesthesiologist, Kyle E. Morrissey, D.O., concurred that a spinal cord stimulator was an appropriate option and recommended a trial be completed. (Joint Ex. 4, p. 31) Claimant submitted to necessary psychological testing to confirm he was a reasonable candidate for a spinal cord stimulator. The evaluating psychologist recommended claimant proceed with the spinal cord stimulator trial. (Joint Ex. 4, p. 45)

In a report dated September 3, 2020, a nurse practitioner in Dr. Mathew's office issued a report opining that claimant should refrain from bending, stooping, squatting, overhead reaching activities, and not lift greater than 10 pounds. (Joint Ex. 4, 39) Dr. Mathew responded to inquiries from claimant's counsel on September 9, 2020, opining that claimant has reached maximum medical improvement and that all future treatment is for pain management resulting from his work injury. (Joint Ex. 4, p. 42)

Considering the various medical opinions in this record, I note that Dr. Brady and Dr. Ekroth had the advantage of being treating physicians and seeing claimant multiple times over a period of treatment. Dr. Ekroth also possesses expertise as an orthopaedic surgeon. I accept the opinions of Dr. Brady and Dr. Ekroth as convincing and credible in this record. Dr. Taylor appears to share many of those opinions and his opinions are accepted to the extent that they support or bolster those offered by Dr. Brady and Dr. Ekroth.

Dr. Broghammer, on the other hand, seems to hold somewhat of a divergent opinion to the other physicians. Although he casually connects the injuries, he perceives the ramifications of those injuries to be much less severe than Drs. Brady, Ekroth, and Taylor. I am not convinced by Dr. Broghammer's opinions that claimant has no permanent impairment related to his low back injury or only two percent related to the right ankle injury. Similarly, I find that claimant continues to treat for a clotting disorder and that the 10 percent permanent impairment rating offered by Dr. Brady and Dr. Taylor is more realistic and accurate. I similarly am skeptical of Dr. Broghammer's opinion that claimant requires no permanent restrictions in the face of three other physicians who all offer similar restrictions. Ultimately, I do not accept the opinions of Dr. Broghammer in this case and instead accept the opinions of Dr. Brady and Dr. Ekroth as supported by Dr. Taylor's opinions.

I acknowledge the medical restrictions offered by Dr. Mathew's nurse practitioner. However, I find the credentials of Dr. Brady, Dr. Ekroth, and Dr. Taylor to be superior and give greater weight to their restrictions. To the extent that Dr. Mathew opines claimant has achieved MMI and supports the opinions of Dr. Brady, Dr. Ekroth, and Dr. Taylor in this respect, I accept that opinion as well.

Specifically, I find that Mr. Tucker achieved MMI on January 3, 2020 and that ongoing treatment is for symptoms and not likely to significantly improve functional abilities. I find that Mr. Tucker requires ongoing treatment for his symptoms, including a potential spinal cord stimulator trial and potentially a permanently implanted stimulator.

Unfortunately, in spite of performing at least a reasonable job search since the injury date, Mr. Tucker has not returned to work for the employer or any other employer since the date of injury. (Claimant's Ex. 6) Claimant testified that the employer's representative, Douglas Kohoutek, told him that he could not return to work for the employer unless he had a full release without restrictions. (Tr., pp. 52-53, 68) Claimant further testified that he did not believe he is still employed with this employer. (Tr., p. 66)

Mr. Kohoutek testified and denied that he ever told claimant he could not return to work. Instead, Mr. Kohoutek testified that he made claimant a light duty work offer. Mr. Kohoutek testified that claimant declined the light duty work offer, indicating that claimant did not think he could physically perform the offered work. (Tr., p. 76)

The testimony of Mr. Tucker and Mr. Kohoutek is not reconcilable. One of these gentlemen is telling the truth and the other is not, yet I do not find that the discrepancy is relevant or determinative of any issues in this situation. Instead, I note that both claimant and Mr. Kohoutek testified that the employer did not provide claimant a written work offer after the date of injury. (Tr., pp. 70, 78) Accordingly, I find that a valid light duty work offer was never made to or refused by claimant.

Mr. Tucker also obtained and introduced a vocational report prepared by Barbara Laughlin on February 24, 2020. (Claimant's Ex. 2) Ms. Laughlin did not attempt to place Mr. Tucker in new employment. Instead, she performed a labor market survey

and provided opinions about claimant's loss of access to the labor market as a result of his work injury.

Ultimately, Ms. Laughlin opined that claimant sustained a significant loss of access to the labor market as a result of his injuries and resulting restrictions. Specifically, Ms. Laughlin opined that claimant lost 95 to 98 of his access to the labor market using the restrictions outlined by Drs. Brady, Ekroth, and Taylor. Having found those restrictions to be credible and accurate, Ms. Laughlin's opinions pertaining to loss of access to the labor market are significant. Of particular interest and importance, Ms. Laughlin opined that Mr. Tucker would require accommodations to secure any new job in the labor market as a result of his permanent work restrictions. (Claimant's Ex. 2, p. 24) Ms. Laughlin opined that any work claimant may find in the future would be of limited quality, dependability, and quantity such that a stable labor market for such services does not realistically exist.

I perceive no glaring errors in Ms. Laughlin's report. Ms. Laughlin appears to have gathered the applicable facts and her vocational analysis appears sound and reasonable. Defendants offered no competing vocational opinion and offered no specific bases of error in Ms. Laughlin's analysis. The employer has not returned claimant to work as claimant could not do his pre-injury job with the restrictions he now carries from Drs. Brady, Ekroth, and Taylor. I find the opinions of Ms. Laughlin to be credible and convincing in this record.

Considering claimants' age, educational background, employment background, permanent restrictions, permanent functional impairment, inability to return to work, his motivation, the severity of his injuries, length of healing period, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Tucker proved he is permanently and totally disabled as a result of the May 16, 2018, work injury. Although likely not necessary given the above findings, I also find that the only services claimant can perform in any well-known branch of the labor market are so limited in quality, dependability, or quantity that a reasonably stable market for claimant's skills and abilities likely does not exist.

The parties also dispute claimant's gross average weekly earnings at the time of the injury. Review of Claimants' Exhibit 5, page 35, Defendants' Exhibits B, and the parties' post-hearing briefs demonstrates that the parties do not have dispute about the claimant's actual earnings. Rather, each party asserts that certain weeks of earnings prior to the injury are not representative of claimant's customary earnings prior to the date of injury and should be excluded.

I do not agree with either party's assertions and calculations. I find that all weeks in which claimant worked less than 40 hours are unrepresentatively low and would skew claimants' average gross weekly earnings to be unrealistically low if included in the gross earnings. Similarly, I find that the weeks of December 20, 2017, and January 6, 2018, include an inordinately high number of hours worked and are not representative of claimants' typical pre-injury earnings.

Claimant earned $33.00 per hour on the date of injury and at all relevant times for purposes of calculating his weekly rate. Pursuant to the parties' stipulations, Mr. Tucker was single and entitled to only one exemption on the date of injury. (Hearing Report) Using the wage information from Defendants' Exhibit B, page 29, I calculate Mr. Tucker's gross average weekly earnings and find the following calculations to be representative of his typical earnings prior to the date of injury:

	Week Ending	Hours Worked	Gross Earning @ Straight Hourly Rate	Include/Exclude
1	5/12/18	42.25	$1,394.25	Include
2	5/5/18	40.13	$1,324.29	Include
	4/28/18	39.35	$1,298.55	Exclude
	4/21/18	37.33	$1,231.89	Exclude
	4/14/18	15.4	$508.20	Exclude
	3/3/18-4/7/18		N/A	Lay-off-Exclude
	2/24/18	24.47	$807.51	Exclude
	2/17/18	27.15	$895.95	Exclude
3	2/10/18	42.78	$1,411.74	Include
4	2/3/18	44.87	$1,480.71	Include
5	1/27/18	46.62	$1,538.46	Include
6	1/20/18	47.0	$1,551.00	Include
7	1/13/18	47.93	$1,581.69	Include
	1/6/18	70.15	$2,314.95	Exclude
	12/30/17	63.13	$2,083.29	Exclude
8	12/23/17	43.23	$1,426.59	Include
9	12/16/17	48.93	$1,614.69	Include
10	12/9/17	54.07	$1,784.31	Include

	Week Ending	Hours Worked	Gross Earning @ Straight Hourly Rate	Include/Exclude
11	12/2/17	50.08	$1,652.64	Include
	11/25/17	29.85	$985.05	Exclude
12	11/18/17	47.48	$1,566.84	Include
13	11/11/17	53.92	$1,779.36	Include

Claimant's total earnings for the 13 most recent and representative weeks of earnings immediately prior to the injury date are $20,106.57. Dividing these gross earnings by 13 weeks results in gross average weekly earnings of $1,546.66. Considering claimant's earnings over the above period of time, I find this to be realistic and typical of claimant's earnings. Therefore, I find that claimant's gross average weekly earnings at the time of the work injury were $1,546.66.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

The parties stipulate that claimant sustained permanent disability and that the disability should be compensated industrially pursuant to Iowa Code section 85.34(2)(v). The parties' stipulation is appropriate because claimant has not returned to work for the employer. (Tr., pp. 5, 52-55; Hearing Report)

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

I considered all of the relevant available factors outlined by the Iowa Supreme Court to assess industrial disability. I found that Mr. Tucker proved he is not capable of working in his prior employment or at any other employment for which he would otherwise be qualified and physically capable as a result of the May 16, 2018, work injury. Ultimately, I found that Mr. Tucker is permanently and totally disabled as a result of the May 16, 2018, work injury. Accordingly, I conclude that claimant is entitled to an award of permanent total disability benefits under the traditional industrial disability analysis. Iowa Code section 85.34(3).

Claimant also asserted a claim that he is an odd-lot employee. In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Having found that claimant proved he is permanently and totally disabled under the traditional industrial disability analysis, I conclude that claimant does not need to rely upon the odd-lot doctrine to prove a permanent total disability claim.

In this case, I found that the employer did not extend a written light duty work offer. As amended in 2017, Iowa Code section 85.33(3)(b) requires, "The employer shall communicate an offer of temporary work to the employee in writing." Having found that the employer did not extend a written offer of light duty or temporary work, claimant was not obligated to return to light duty work. Claimant never returned to work for this employer or another employer since the date of injury. Accordingly, I conclude that permanent total disability benefits commence on May 17, 2018, the day after the work injury. Iowa Code section 85.34(3). Permanent total disability benefits shall continue from May 17, 2018, through the present and continue into the future until claimant is no longer permanently and totally disabled. Iowa Code section 85.34(3)(1).

I must also determine the rate at which weekly benefits should be paid. Iowa Code section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

According to the claimant's testimony and the wage records, Mr. Tucker was paid on an hourly basis. If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

I made an analysis of claimant's weekly earnings prior to the date of injury. Ultimately, I did not agree with either party's assertion as to which weeks should be included or excluded. In the findings of fact, I set forth my findings as to claimant's typical weekly earnings and which weeks of earnings were representative of claimant's customary earnings prior to the injury date. Having made this analysis, I found that claimant's customary gross average weekly wage on the date of injury was $1,546.66.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $1,546.66, that claimant was single, and only entitled to one exemption on the May 16, 2018, injury

date, I used the Iowa Workers' Compensation Manual with effective dates of July 1, 2017 through June 30, 2018, to determine that the applicable rate for permanent total disability benefits is $858.90 per week.

The parties also noted a dispute about defendants' entitlement to credit for benefits paid. At trial, it was clarified that there is no dispute about the benefits actually paid to claimant. Rather, the dispute was when permanent disability benefits commenced and the applicable weekly rate at which benefits were to be paid. Defendants are clearly entitled to a credit for the benefits they have paid to claimant against this award of permanent total disability benefits. Iowa Code section 85.34(3)(b). Presumably, the parties can calculate the total credit, the total award to date, and determine the defendants' credit. If the parties cannot perform these mathematical calculations and arrive at agreement on their math, they should file a request for rehearing and the undersigned will perform the necessary mathematical calculations or order that an accountant or economist be hired at the shared expense of the parties to calculate the total credit.

Mr. Tucker also seeks reimbursement of his independent medical evaluation pursuant to Iowa Code section 85.39. Claimant has clearly presented a compensable claim for benefits. Accordingly, he is entitled to reimbursement for his independent medical evaluation fees if he establishes the other pre-requisites of Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991).

Dr. Broghammer performed an IME at defendants' request in May 2019. Dr. Taylor performed his IME in December 2019. Claimant has established that defendants obtained their impairment rating before he sought a competing impairment rating. Dr. Taylor opined that the cost of his IME was reasonable given the amount of time he spent on the case, as well as based upon his credentials and experience. I have no reason to disagree with Dr. Taylor on this and find that his fee of $3,640.50 is in line with other IME fees seen by this agency and is reasonable for the services provided in this case. (Claimants' Ex. 1, p. 12) Therefore, I conclude that claimant is entitled to reimbursement for Dr. Taylor's IME fees ($3,640.50). Iowa Code section 85.39.

Finally, Mr. Tucker seeks assessment of his costs associated with this contested case proceeding. Costs are assessed at the discretion of the agency. Iowa Code

section 86.40. Considering that claimant prevailed and established he is permanently and totally disabled, I exercise the agency's discretion and conclude that it is reasonable to assess claimants' costs in some amount.

Mr. Tucker seeks his filing fee ($100.00) and the fee for service of the petition ($12.92) on defendants. Both of these are reasonable costs and granted pursuant to 876 IAC 4.33(3) & (7).

Claimant also seeks assessment of the cost of his deposition ($161.00). Claimant's deposition was not introduced into evidence. I do not deem this to be a reasonable cost given that the deposition was not introduced into this evidentiary record.

Finally, Mr. Tucker seeks assessment of the cost of Barbara Laughlin's vocational report. Claimant's affidavit of costs states that Ms. Laughlin's charges total $1,128.00. However, Ms. Laughlin's billing statement indicates that she spent five hours drafting the vocational report. That billing statement also indicates that she charged $110.00 per hour for her services. Accordingly, I conclude that Ms. Laughlin charged a total of $550.00 for preparation of her written report.

Pursuant to Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839 (Iowa 2015), only the expense of drafting an expert's report can be taxed as a cost. The Supreme Court permitted only the cost of the report because the report was offered in lieu of the expert's live or deposition testimony. Accordingly, I conclude that only $550.00 of Ms. Laughlin's charges can be taxed as a cost. I conclude it is reasonable to assess $550.00 of Ms. Laughlin's charges against defendants pursuant to 876 IAC 4.33(6).

Mr. Tucker's affidavit of costs also lists a request to assess the IME fee from Dr. Taylor. Having already concluded that claimant is entitled to reimbursement of that IME fee pursuant to Iowa Code section 85.39, I decline to assess that fee as a cost. In total, I conclude a total of $662.92 of claimant's costs should be assessed against defendants for reimbursement.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant weekly permanent total disability benefits commencing on May 17, 2018, through the date of this decision and continuing into the future until claimant is no longer permanently and totally disabled.

All weekly benefits shall be payable at the weekly rate of eight hundred fifty-eight and 90/100 dollars ($858.90) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity

published by the Federal Reserve in the most recent H15 report settled as of the date of injury, plus two percent as required by Iowa Code section 85.30.

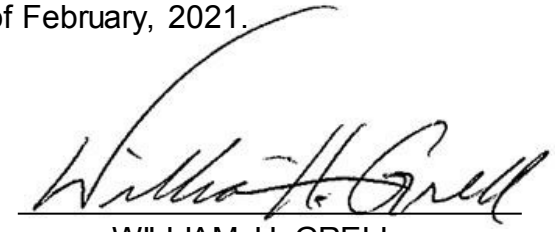
Defendants shall be entitled to a credit against this award for all weekly benefits paid to date.

Defendants shall reimburse claimant's independent medical evaluation fee in the amount of three thousand six hundred forty and 50/100 dollars ($3,640.50).

Defendants shall reimburse claimant's costs in the amount of six hundred sixty-two and 92/100 dollars ($662.92).

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

Signed and filed this 18th day of February, 2021.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Mark Chipokas (via WCES)

Tyler Laflin (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.