BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDALL K. SIMMS,

Claimant,

vs.

SCHINDLER ENTERPRISES,

Employer,

ZURICH AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5046931

ARBITRATION

DECISION

Head Note Nos. 1802; 1803

STATEMENT OF THE CASE

Randall K. Simms filed a petition for arbitration seeking workers' compensation benefits from Schindler Enterprises and Zurich American Insurance Company.

The matter came on for hearing on August 4, 2015, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of joint medical exhibits A through J; defense exhibits M through Q; and claimant exhibits 1 through 9; as well the sworn testimony of claimant, Randall Simms. The parties briefed this case and the matter was fully submitted on October 5, 2015.

ISSUES

1. Whether the claimant should be allowed to amend his petition to include the issue of "odd-lot" to his petition.

2. Whether the claimant suffered a cumulative injury to his bilateral hands, wrists and/or arms. Defendants have conceded responsibility for the injury to the claimant's right shoulder.

3. Whether the claimant is entitled to healing period benefits from November 19, 2013, through March 26, 2015. Defendants have conceded liability for healing period benefits from November 19, 2013, through February 2014. The dispute is whether the benefits paid between February 26, 2014, through March 26, 2015, are appropriately considered HP or PPD. This dispute hinges upon the determination of medical causation of the condition in claimant's hands, wrists and arms.

4. The commencement date for permanent partial disability benefits, if any are owed, is disputed as outlined above. Defendants contend the appropriate commencement date is February 26, 2014, while claimant asserts the appropriate date is March 27, 2015.

5. The extent of the claimant's industrial disability is in dispute. Claimant alleges permanent total disability and, at hearing, asked to amend his petition to include an odd-lot theory to conform to the proof. Defendants concede claimant has some industrial disability but that claimant is not totally disabled. Defendant also objects to claimant's motion to amend to include an odd-lot theory, arguing prejudice.

6. The parties dispute the defendants entitlement to a credit for the benefits paid as set forth in the previous issues.

7. Whether the claimant is entitled to medical expenses.

8. Whether the claimant is entitled to IME expenses.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. The parties had an employer-employee relationship at the time of the work injury.

2. The claimant sustained a cumulative injury to his right shoulder which arose out of and in the course of employment on November 19, 2013.

3. The parties agree that the claimant's work injury is a cause of temporary disability during a period of recovery as well as some level of permanent disability. The parties further stipulate that disability is an industrial disability.

4. Affirmative defenses have been waived.

5. The weekly rate of compensation is $1,000.86 per week based upon gross wages of $1,849.03 and being single with one exemption.

FINDINGS OF FACT

Randall "Randy" Simms is a 63 year old resident of Cumming, Iowa. At the time of hearing, he lives on an acreage near Norwalk. Mr. Simms testified credibly at hearing. His testimony was consistent with his prior sworn testimony and the medical documentation in the record. There was nothing in his demeanor which caused the undersigned any concern about his truthfulness.

Randy began high school at Valley High School where he had difficulty with his academics. He testified he had difficulty with math and reading in particular. He testified he has never been a good reader although he has no learning problems. He transferred to Des Moines Tech to receive vocational training in auto mechanics. Randy graduated from Des Moines Tech in 1970. He testified he had no interest in going to college because of his difficulty in school.

After high school, Randy started working as a maintenance mechanic for Armstrong Rubber in 1970. This was fairly heavy industrial work installing and repairing machines and equipment. From 1973 to 1975 and 1977 to 1979, Randy held a couple of jobs as an auto mechanic. This was also fairly heavy and involved substantial use of his arms. Randy briefly worked for Plumb Supply as a truck driver. He delivered plumbing supplies. Some of the supplies were quite heavy. From 1979 to 1981, Randy worked as a machinist for Davidson Machine Shop. This was also fairly heavy work which required lifting.

In approximately 1981, Randy entered a union apprenticeship program in the elevator trade. This included on-the-job apprenticeship training as well as some classroom work. Randy has basic computer skills to use the internet and send emails for example. He describes himself, however, as being computer illiterate. He does not know how to use even basic computer programs.

For his first three years, during the period of apprenticeship, Randy was a helper. In 1984, Randy completed his apprenticeship and became a mechanic. His primary job was installing elevators. The regular duties installing elevators are set forth in claimant's exhibit 1. The job required heavy lifting and the repetitive use of his arms. He became a service mechanic for the employer in approximately 1990. Instead of installing elevators and escalators he began repairing them. The work still involved heavy lifting and the repetitive use of his arms and shoulders. He often had to lift or exert force from awkward positions. Randy performed this job until he retired. The terms of his employment were governed by a collective bargaining agreement which is in the record. (See Cl. Ex. 2) He earned $41.06 per hour as a mechanic with good benefits.

Randy is also a skilled auto mechanic. He is able to repair his own personal vehicles. He also actively engages in the hobby of race car engine building, which he has done for 30 years. (Cl. Ex. 9, Depo, p. 46) In fact, Randy has a garage/auto shop with a lift where he works on his personal cars, race cars and other cars he takes to car shows. (Cl. Ex. 9, Depo, pp. 30-31; 44; 52) He also engages in the hobby of figure-eight auto racing. He has a business with his son called Simms Racing.

Records indicate that as early as April 2008, Mr. Simms reported some symptoms in his hands to his chiropractor. Michael Welch, D.C., documented "occasional hands $4^{th}/5^{th}$ digits go to sleep, wrist catches. (Ex. A, p. 3) In December 2008, Randy reported the problem in his hands to his family physician, William

Chase, M.D. (Ex. D, pp. 82-83) He reported pain in his finger joints in both hands. "He finds it difficult to grip things. This is a problem because he is an elevator mechanic." (Ex. D, p. 82)

Randy testified he began using steroid injections to mask symptoms so that he could keep working. He began seeing an orthopedic surgeon, Patricia Kallemeier, M.D., in July 2009. (Ex. E, p. 106) Dr. Kallemeier performed a full workup and fully documented his complaints and symptoms at that time. He received his first injections in July 2009. (Ex. E, p. 108) When he returned in September 2009, he was pain free. (Ex. E., p. 108) The pain, however, eventually returned and he began a series of injections over the next several years, during which time, the pain also moved into his wrists. (Ex. E, pp. 110-123) Again, Randy testified that he essentially used these injections to mask his symptoms so that he could keep working. In October 2011, Dr. Kallemeier recommended fusion surgery. (Ex. E, pp. 113-114) Randy testified he wanted to keep working so he opted to continue having the injections. He testified that the injections would provide several months of pain relief so he could continue working. As time went on, the relief provided became shorter.

In 2013, Randy also began to develop pain in his right shoulder. In January 2013, he underwent an MRI which showed several tears in his shoulder tendons. (Ex. F, p. 153) Jon Gehrke, M.D., opined that Randy's "work activities have certainly aggravated this over the last several months, and we will go ahead and give him an injection today." (Ex. F, p. 154)

His final round of injections for his hands and wrists occurred in June 2013. At that visit the following is documented. "He [Mr. Simms] will be retiring in seven months and hopefully this will help some of his pain symptoms." (Ex. E, p. 121)

In September 2013, Dr. Gehrke reevaluated Randy's right shoulder. He reaffirmed the work-relatedness of the right shoulder condition and recommended surgery. (Ex. F, p. 155)

The parties stipulated that Mr. Simms sustained an injury to his right shoulder which arose out of and in the course of his employment. The parties further stipulated that his right shoulder injury manifested on November 19, 2013, which is the date surgery was performed. (Ex. F, p. 156) This was Randy's first day of lost work for his shoulder condition. Specifically, Dr. Gehrke performed a right rotator cuff repair, subacromial decompression, and a distal clavicle excision. (Ex. F, p. 156) He confirmed that the condition was substantially aggravated by his work activities in a check-off letter to claimant's counsel in January 2014. (Ex. F, pp. 159-62) In February 2014, Randy returned to Dr. Gehrke and reported that his symptoms were much improved and he had already finished with physical therapy. He recommended the claimant avoid lifting heavy objects and return as needed. (Ex. F, p. 163)

Randy retired on January 31, 2014. He prepared a letter to Brad Keehn on January 6, 2014 which stated that, "due to my recent rotator cuff repair, I feel returning to perform the physical requirements of my position would jeopardize the healing progress I have made." (Cl. Ex. 4, p. 68)

In September 2014, Dr. Gehrke provided specific medical restrictions in a check-off report to claimant's counsel. (Ex. F, p. 166) Randy is limited to "20 pounds lifting; avoid lifting overhead; and avoid repetitive work with arms extended overhead or arms extended out away from the body." (Ex. F, p. 166)

In October 2014, Randy was advised at that time that further injections in his hands and wrists were not a good idea. (Ex. E, p. 124) He agreed to surgery. On December 5, 2014, Dr. Kallemeier performed a complex fusion surgery on Randy's left wrist. (Ex. E, pp. 131-33) Following a period of recuperation, Randy characterized the surgery as a success. While he lost a great deal of range of motion, the surgery stopped the grinding sensation, as well as much of the pain.

Randy returned to Dr. Gehrke in February 2015, with continued shoulder complaints. "Over the last couple of months he has noted a bit of pain in the shoulder with stressing his rotator cuff. He reports he is certainly better than he was postoperatively but he has occasional discomfort in the shoulder." (Ex. F, p. 167) At the time of hearing, he still has intermittent aching and weakness in his right shoulder. Activity increases his symptoms of pain.

Dr. Kallemeier opined Randy reached maximum medical improvement from his left wrist on March 26, 2015. Randy testified credibly that he still has ongoing symptoms in both wrists and hands. His right wrist has grinding sensation and pain depending on activity level. His left wrist has decreased range of motion and occasional pain. Randy is right handed. He has difficulty with his activities of daily living, in particular, carrying and gripping, especially in the right arm. Randy testified his muscles started to deteriorate in the right arm. Randy testified he really does not use his hands repetitively at all any longer, particularly for any sustained period of time.

Randy has continued to operate his racing business with his son. Randy continues to race in the senior division in Dallas and Warren counties. He is able to perform all of the aspects of figure-eight race car driving and he has had decent success. This includes making repairs and otherwise working on vehicles, getting in and out of the race cars (through a window) and physically racing. As mentioned previously, I have found Randy to be generally credible. Randy did, however, downplay the athleticism and physical requirements of race car driving, at least to some degree. Randy does use a special type of steering system which he referred to as "Quick Steer", which he testified limits his reaching or any forceful steering.

In May 2015, Dr. Kallemeier prepared a thorough and detailed impairment rating. She opined he has a 6 percent right upper extremity impairment and an 11 percent left upper extremity impairment. (Ex. E, pp. 145-47)

There are additional expert and vocational reports in this file as well.

John Kuhnlein, D.O., prepared a report in June 2015. (Ex. H) He performed a thorough evaluation and review of the records. Randy testified that he spent between 2 to 3 hours in Dr. Kuhnlein's office. Dr. Kuhnlein thoroughly understood the medical history. He opined that Randy suffered from the following diagnoses: (1) right rotator cuff tear; right shoulder impingement syndrome; (2) right wrist arthritis, right digital arthritis and (3) left wrist arthritis and scapholunate collapse. (Ex. H, p. 194) He opined that these conditions were substantially aggravated by his work as an elevator technician. He assigned an 8 percent disability rating for the right shoulder; an 8 percent rating for the right wrist/hand; and an 11 percent rating for the left wrist/hand. (Ex. H, p. 195) In addressing restrictions, Dr. Kuhnlein opined the following.

> Mr. Simms is retired at this point, and return to work is unlikely given his upper extremity condition. It is clear from the examination he would not be ableo to perform his material handling functions on a regular basis.
>
> With respect to material handling, Mr. Simms would be capable of lifting 10 pounds occasionally from floor to waist, 20 pounds occasionally from waist to shoulder with both hands, and I would not allow him to work over shoulder height.
>
> I would not allow him to work on ladders because of an inability to maintain a 3-point safety stance. . . . He should not work above shoulder height.

(Ex. H, p. 196) He should not use vibratory tools and only occasionally should he use manual tools.

Both parties retained vocational experts. Jane Yaffe-Rowell prepared a report for the claimant in July 2015. She opined Randy has sustained a total loss of access to the job market. (Ex. I, p. 210) Candice Kaelber opined that claimant is able to work in the light work classification and named specific positions in the labor market he could perform. (Ex. J, p. 242)

In retirement, Randy earns a full union pension of approximately $3,600.00 per month. At the time of hearing he was 63 years old and he applied for Social Security Retirement benefits. There is no doubt that Randy is unable to perform the work required of an elevator mechanic as a result of the work-related conditions in his right shoulder and bilateral arms. His restrictions clearly prevent him from returning to such employment. He has not, however, sought work, which makes it difficult to assess his precise loss of earning capacity.

CONCLUSIONS OF LAW

The first issue is whether the claimant should be allowed to amend his petition to include the issue of odd-lot. At hearing, claimant moved to amend his petition to include the issue odd-lot. The odd-lot doctrine is a procedural pleading which shifts the burden from the claimant to the employer once certain criteria are met.

Rule 4.9(5) states leave to amend "shall be freely given when justice so requires."

Defendants resist on the basis of prejudice, citing Eberhart v. Curtin, 674 N.W.2d 123, 126-27 (2004).

The Iowa Workers' Compensation Act is intended to provide parties with a speedy and efficient forum to resolve work injury disputes.

> The fundamental reason for the enactment of [the workers' compensation act] is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.
>
> It was the purpose of the legislature to create a tribunal to do rough justice — speedy, summary, informal, untechnical.

Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921); Marovic v. PMX Industries, 693 N.W.2d 779, 787 (Iowa 2005). Rule 4.9(5) is read in conjunction with this basic principle of the Iowa Workers' Compensation Act, which is why amendments shall be "freely given" when justice requires.

Motion for leave to amend is denied. The odd-lot theory is a procedural and technical issue which must be plead specifically to place a party on notice that the burden to produce evidence may shift. As noted in Eberhart, the failure to timely raise this issue is prejudicial in a significant way. I find there is little difference in raising this burden shifting issue at the end of hearing or the beginning.

Having stated this, and ruled as such, it is noteworthy that there is very little actual prejudice to the defendants in this case. The defendants prepared their defense quite thoroughly. Defendants retained a vocational expert who provided specific opinions relevant to the odd-lot burden shifting issues. To allow the amendment, however, at the date of hearing would be to punish the defendants for being well-prepared.

In the final analysis, I find it would not have made any difference whether the petition is amended or not for reasons which will be evidence as set forth and explained in detail below.

The next issue is whether the claimant suffered a cumulative injury to his bilateral hands, wrists and/or arms. The defendants conceded the injury to the right shoulder. The only question is whether the claimant also suffered a cumulative injury to his bilateral hands, wrists and arms which manifested on the same date. I find that the claimant has carried his burden of proof.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995).

An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The greater weight of evidence has established that the claimant aggravated degenerative conditions in his wrists and hands from his repetitive work activities. This condition manifested on November 19, 2013, when he first went off work for these conditions. This conclusion is based upon the claimant's credible testimony regarding the onset of symptoms, the evidence of his repetitive work duties and the medical records. In particular, I rely quite heavily upon the opinion of the treating surgeon, Dr. Kallemeier and the claimant's expert, Dr. Kuhnlein.

The next issue is the claimant's entitlement to healing period benefits. Claimant is seeking healing period benefits between November 19, 2013, and March 26, 2015. The defendants have paid benefits during this time, however, they contend the payments converted from healing period to permanent partial disability

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The greater weight of evidence supports that the claimant was in an active healing period for his right shoulder and bilateral arms from the date of his surgery, November 19, 2013, through March 26, 2015, the date he reached maximum medical improvement from his left wrist surgery. Healing period benefits are owed for this period of time.

The next issue is the nature and extent of claimant's industrial disability. The parties have stipulated that the disability is industrial. Claimant contends he is permanently and totally disabled. Defendants contend his industrial disability is moderate or minor.

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 R. Co., 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 the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, 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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

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

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

I find that the claimant has suffered a 75 percent loss of earning capacity as a result of his November 19, 2013, work injury. The claimant has failed to demonstrate that he is permanently and totally disabled.

Randy was 63 years old at the time of hearing. He has been an elevator mechanic for the past 30 plus years. He now has serious functional disabilities in his bilateral wrists, hands, as well as his right shoulder. The ratings and diagnoses of the treating and evaluating physicians are quite consistent and believable. I find the restrictions suggested by Dr. Kuhnlein provide an accurate assessment of Randy's abilities.

Mr. Simms is retired at this point, and return to work is unlikely given his upper extremity condition. It is clear from the examination he would

not be able to perform his material handling functions on a regular basis.

> With respect to material handling, Mr. Simms would be capable of lifting 10 pounds occasionally from floor to waist, 20 pounds occasionally from waist to shoulder with both hands, and I would not allow him to work over shoulder height.
>
> I would not allow him to work on ladders because of an inability to maintain a 3-point safety stance. . . . He should not work above shoulder height.

(Ex. H, p. 196)

Although claimant is close to a normal retirement age, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995). However, this agency does consider voluntary retirement or withdrawal from the work force unrelated to the injury. Copeland v. Boones Book and Bible Store, File No. 1059319, (App. November 6, 1997). Loss of earning capacity due to voluntary choice or lack of motivation is not compensable. Id.

Randy retired at the end of January 2014, approximately 10 weeks after he went off work for his shoulder injury. He has not looked for work at all. His decision to attempt no work search is not unreasonable. He appears to have chosen to retire. Instead he is drawing a union pension and his Social Security retirement. In June 2013, several months before the actual manifestation of his injury, he mentioned to his physician that he planned to retire in seven months. The record does also suggest that part of the reason he planned to retire was because of his work injuries, and specifically, his fear of setbacks.

There is no doubt in this record that Randy is not able to go back to his employment as an elevator mechanic. (Ex. J, p. 244) Elevator mechanic positions are high-skill, high-demand positions. He earned in excess of $40.00 per hour with union benefits.

Both vocational reports in the record are flawed, however, I find that the claimant has failed to prove that he is permanently and totally disabled. I find that, while his restrictions are severe, he is capable of gainful employment. Ms. Kaelber listed 13 jobs she felt he could perform within his restrictions. (Ex. J, pp. 241-45) It is noted that some of those positions are not actually within his restrictions. Some, however, are. I find that claimant could likely work in security, loss prevention, or light delivery type work.[1] If he chose to re-enter the workforce, he would likely be able to earn wages in

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[1] While I have rejected the claimant's motion for leave to amend his petition to assert odd-lot, I note that he would not have succeeded under this theory in any event. Even if the burden of production

the $10.00 to $15.00 per hour range with limited or no benefits. It is perfectly reasonable for Randy to retire at age 63 instead of seeking out a job which would likely pay in the $10.00 per hour range. This, however, does not change the fact that Randy probably could find gainful employment in that pay range.

There was a great deal of evidence in the record regarding Randy's racing business/hobby, including testimony of the claimant, his son and another racer named Dan Wauters. Earnest Hemmingway is famously as stating the following: "There are only three sports: bullfighting, motor racing, and mountaineering; all the rest are merely games." There is also a video of Randy racing which shows the sport has an element of danger. It is noted that figure-eight auto racing is a high intensity, high energy sport which does, in fact, require a substantial amount of physicality and athleticism. Randy is able to compete at a high level in this sport. He is able to pull himself in and out of a race car, work on his vehicles and otherwise race in a competitive and somewhat dangerous sport. None of this evidence changes the fact that Randy can no longer work as an elevator mechanic, which is the only real job he has held for the past 30 plus years. It does, however, lend credibility to the defendants' assertion that he would likely be able to work in gainful employment if he chose to re-enter the workforce.

When considering all of the factors of industrial disability, the claimant has suffered a 75 percent loss of earning capacity. This entitles the claimant to 375 weeks of benefits commencing March 27, 2015.

The next issue is medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. Iowa Code section 85.27 (2013). For all claimed medical expenses, the claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, to an order directing the responsible defendants to make payments directly to the provider. Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Defendants should also pay any lawful late payment fees imposed by providers. Laughlin v. IBP, Inc., File No. 1020226 (App., February 27, 1995).

Claimant's exhibit 7 is a summary of Randy's medical expenses paid by his private health insurer. A careful review of this summary reveals that the bills reflected in the summary correspond to the medical treatment he received on his right shoulder and bilateral wrists and hands. The defendants are responsible for the bills outlined in claimant's exhibit 7.

The claimant seeks payment for IME expense with Dr. Kuhnlein.

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had been shifted to the defendants, I find the defendants would have met their burden with Ms. Kaelber's report.

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). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The defendants argue that they are only responsible for the portion of the IME related to the shoulder because the bilateral upper extremities claim was denied and they never obtained a rating of impairment. I disagree. The claimant suffered one injury which affected his right shoulder and his bilateral hands and arms. The claimant is entitled to an IME for his November 19, 2013, work injury. Dr. Kuhnlein's fees attached to the hearing report associated with that evaluation are fair and reasonable. I award the claimant the full IME expense in the amount of $2,840.00.

The final issue is costs. Claimant seeks costs in the amount of $2,976.80. Costs are discretionary. The final issue is taxation of costs. "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code section 86.40 (2013); see also, 876 IAC section 4.33.

I award claimant costs in the amount of $2,226.80.

ORDER

THEREFORE IT IS ORDERED

Defendants shall pay healing period benefits commencing on the date of injury through March 26, 2015, at the stipulated rate of one thousand and 88/100 dollars ($1,000.88) per week.

Defendants shall pay the claimant three hundred and seventy-five (375) weeks of permanent partial disability benefits at the stipulated rate of one thousand and 88/100 dollars ($1,000.88) per week from March 27, 2015.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for weeks previously paid.

Defendants shall reimburse the claimant's private health insurer as outlined in claimant's exhibit 7.

Defendants shall pay the claimant's IME expense in the amount of two thousand eight hundred forty and no/100 dollars ($2,840.00).

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

Costs in the amount of two thousand two hundred twenty-six and 80/100 dollars ($2,226.80) are taxed to defendant.

Signed and filed this 29th day of July, 2016.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JLW/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.