BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES BENI, Claimant, vs. LOWE'S HOME CENTERS, INC., Employer, Self-Insured, Defendant.	:	File Nos. 5058973, 5058974 A R B I T R A T I O N D E C I S I O N Headnotes: 1402.30, 1700, 1803, 2502

STATEMENT OF THE CASE

Claimant, James Beni, filed petitions in arbitration seeking workers' compensation benefits from Lowe's Home Improvement, self-insured employer as defendant. This matter was heard in Des Moines, Iowa on August 15, 2018.

The record in this case consists of Joint Exhibits 1-8, Claimant's Exhibits 1-9, Defendant's Exhibits A through F, and the testimony of claimant and Kelly Kenne.

By order of delegation of authority, Deputy Workers' Compensation Commissioner Jim Christenson was appointed to prepare the findings of facts and proposed decisions in these cases.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

For file number 5058973 (date of injury: August 14, 2011):

1. Whether claimant sustained an injury to his upper extremity and hand that arose out of and in the course of employment.

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Commencement of benefits.

4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

For file number 5058974 (date of injury: November 3, 2013):

1. Whether claimant sustained an injury to his upper extremity and hand that arose out of and in the course of employment.

2. The extent of claimant's entitlement to permanent partial disability benefits.

3. Commencement of benefits.

4. Whether claimant is entitled to reimbursement for an independent medical evaluation (IME) under Iowa Code section 85.39.

5. Whether apportionment under Iowa Code section 85.34(7)(b) applies.

FINDINGS OF FACT

Claimant was 63 years old at the time of hearing. Claimant graduated from high school. Claimant worked as a journeyman carpenter. He worked in his own business building and remodeling kitchens and basements. Claimant also built furniture. Claimant worked as a contractor for approximately 20 years. (Exhibit 7, pages 67-68; Ex. D, p. 10)

Claimant began with Lowe's in 2007. Claimant worked as a Pro Service Specialist. (Ex. 7, pp. 67-68; Ex. D, pp. 9-10) As a Pro Service Specialist, claimant is responsible for acquiring new commercial business for Lowe's, and maintaining established business with Lowe's. (Ex. D; Transcript pp. 104-105) Claimant's job duties include calling area contractors, answering phones, writing quotes, drawing blueprints, and putting together material lists. Claimant helps homeowners and do-it-yourself customers to find materials. (Ex. 7, pp. 67-68; Tr. p. 105) Claimant also helps customers load and unload materials. Lowe's job description indicates claimant's job requires him to be able to lift up to 200 pounds with assistance and 50 pounds by himself. (Ex. 8)

Claimant's prior medical history is relevant. Claimant had a left knee replacement in 2010. (Ex. 7, p. 69) He underwent a right hip replacement on April 16, 2018. (Ex. 7, pp. 69-70)

On August 14, 2011 claimant was helping a customer lift a garage cabinet. Claimant went to reach around the cabinet while carrying it and heard a pop in his right shoulder. (Ex. 7, p. 70)

On August 19, 2011 claimant was evaluated at Concentra as having a possible rotator cuff syndrome on the right. Claimant was prescribed physical therapy and treated with medications. (Jt. Ex. 1, p. 1)

Claimant ultimately was evaluated by Delwin Quenzer, M.D. on October 20, 2011. Based, in part, on claimant's September 6, 2011 MRI, Dr. Quenzer found claimant had a chronic impingement on the right shoulder with a partial-thickness rotator cuff tear. Claimant was returned to physical therapy, treated with medication and given work restrictions. (Jt. Ex. 1, p. 3; Jt. Ex. 2, pp. 29-30)

Claimant returned to Dr. Quenzer on November 17, 2011 with complaints of continued shoulder pain. Claimant had numbness and tingling in the thumb, index and middle finger. Claimant indicated he had these symptoms in the past and they had recently recurred. (Jt. Ex. 2, p. 32)

Claimant returned to Dr. Quenzer on December 15, 2011. Claimant had continued right shoulder pain. He was assessed as having a partial-thickness tear in the right rotator cuff and probable carpal tunnel syndrome or cubital tunnel syndrome. Surgery was discussed and chosen as a treatment option. (Jt. Ex. 2, pp. 34-36)

On January 17, 2012 claimant underwent EMGs on the right upper extremity. Testing was consistent with a mild right carpal tunnel syndrome. (Jt. Ex. 2, pp. 37-38)

Dr. Quenzer opined it was not probable claimant's carpal tunnel syndrome was caused or materially aggravated by the August 2011 injury. (Jt. Ex. 2, p. 39)

On February 12, 2012 claimant was evaluated by Timothy Schurman, M.D. for an IME regarding the right hand. Dr. Schurman opined claimant had a work-related right carpal tunnel syndrome. (Jt. Ex. 3, pp. 86-87)

Claimant was unclear at hearing if he was sent to Dr. Schurman by Dr. Quenzer. (Tr. pp. 29, 72)

Claimant underwent right shoulder surgery on March 21, 2012. A subacromial decompression, a distal clavicle excision, and a right carpal tunnel release were performed. Surgery was performed by Dr. Quenzer. (Jt. Ex. 2, pp. 41-43)

Claimant returned in follow up with Dr. Quenzer on May 1, 2012. Claimant had catching in the right shoulder. Claimant had continued right shoulder pain. Claimant was treated with medications and continued on physical therapy. (Jt. Ex. 2, pp. 49-51)

Claimant was given a right shoulder injection by Dr. Quenzer on June 6, 2012 due to continued right shoulder pain. (Jt. Ex. 2, pp. 52-53)

Claimant saw Dr. Quenzer in follow up on June 27, 2012. Claimant had complaints of continued right shoulder pain. Dr. Quenzer recommended a second right shoulder surgery. (Jt. Ex. 2, pp. 54-58)

On August 20, 2012 claimant underwent a second shoulder surgery consisting of a redo of the distal clavicle excision. (Jt. Ex. 2, pp. 59-60)

Claimant returned to Dr. Quenzer on November 8, 2012. Claimant had continued pain, difficulty with sleeping and difficulty with using his right hand. Claimant was given a right shoulder injection. (Jt. Ex. 2, pp. 68-70)

Claimant returned to Dr. Quenzer on December 18, 2012. Claimant had right shoulder weakness and loss of range of motion. An MRI arthrogram was recommended. (Jt. Ex. 2, p. 72)

An MRI arthrogram was performed on January 4, 2013. It showed a moderately severe glenohumeral osteoarthritis and a full-thickness rotator cuff tear. Claimant was referred to another orthopedic surgeon. (Jt. Ex. 2, p. 75)

Claimant was evaluated by Kyle Galles, M.D., an orthopedic surgeon, on February 19, 2013 for a second opinion. Dr. Galles found claimant at MMI following the second surgery. He indicated if claimant did not want a right shoulder replacement, a functional capacity evaluation (FCE) was warranted. (Jt. Ex. 4, pp. 88-90)

Claimant underwent an FCE on April 16, 2013. It found claimant gave valid effort. The FCE found claimant was able to work in the light to medium physical demand level. Claimant was limited to lifting up to 10 pounds and carrying 25 pounds. (Jt. Ex. 5)

On April 23, 2013 Dr. Quenzer found claimant at MMI. He limited claimant to not lifting on the right upper left chest level. Claimant was not to do any overhead lifting on the right. (Jt. Ex. 2, pp. 79-82)

Claimant returned to Dr. Galles on May 30, 2013. Dr. Galles indicated claimant should consider a right shoulder replacement in the future. He reiterated his opinions following a July 22, 2013 exam. (Jt. Ex. 4, pp. 92-101)

In a May 31, 2013 report, Dr. Quenzer found claimant had a 25 percent permanent impairment to the right upper extremity, converting to a 15 percent permanent impairment to the body as a whole, as per the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 2, pp. 83-85)

On November 3, 2013 claimant was lifting a bucket of drywall compound when his left shoulder gave out.

On December 13, 2013 claimant underwent an MRI of the left shoulder. It showed a moderate glenohumeral joint osteoarthritis, degenerative fraying and tearing of the superior labrum. (Jt. Ex. 1, p. 25)

On January 24, 2014 claimant had a total right shoulder replacement and a proximal biceps tenodesis. Surgery was performed by Dr. Galles. (Jt. Ex. 4, pp. 106-107)

Claimant saw Dr. Galles on May 13, 2014. Claimant had good progress with the right shoulder surgery. Claimant had constant pain on the left. Claimant was given an injection in the left shoulder. (Jt. Ex. 4, pp. 116-117)

On June 17, 2014 claimant saw Dr. Galles in follow up. Claimant's right shoulder was improving. Claimant's left shoulder had continued pain. A total shoulder replacement on the left was discussed. (Jt. Ex. 4, pp. 118-120)

On July 17, 2014 Dr. Galles found claimant at MMI regarding his right shoulder. He gave permanent restrictions of no lifting more than 30 pounds and instructed claimant to minimize repetitive work over the shoulder level. (Jt. Ex. 4, pp. 123-125)

On July 31, 2014 claimant underwent a left total shoulder arthroplasty and proximal biceps tenodesis. (Jt. Ex. 4, pp. 126-127)

In a January 7, 2015 note claimant was found to be at MMI for the left shoulder. Claimant was limited to lifting 30-40 pounds. (Jt. Ex. 4, pp. 144, 149-150)

Records indicate claimant had continued left shoulder pain following surgery. Claimant was given a left shoulder injection on September 16, 2015. (Jt. Ex. 4, p. 157) A CT arthrogram on October 26, 2015 showed only a mild AC joint arthrosis. (Jt. Ex. 4, p. 158) Claimant had good, but short-term relief, regarding the injection. Arthroscopic surgery was discussed as a treatment option. (Jt. Ex. 4, pp. 159-160)

On December 15, 2015 claimant underwent a left shoulder acromioplasty. Surgery was performed by Dr. Galles. (Jt. Ex. 4, p. 161)

Records indicate claimant had problems with his left shoulder following surgery. Claimant was eventually referred to James Nepola, M.D. at the University of Iowa Hospitals and Clinics (UIHC). (Jt. Ex. 4, p. 174)

On May 10, 2016 claimant was evaluated by Dr. Nepola at the UIHC. Claimant had continued pain in the left shoulder following surgery in December of 2015. Dr. Nepola believed claimant's pain was caused by his bicep. A diagnostic injection to the proximal bicep was recommended. (Jt. Ex. 8, pp. 227-229) The diagnostic injection was later performed on May 24, 2016. (Jt. Ex. 8, pp. 231-232) Based on claimant's response to the diagnostic injection, and CT scan, a revision of the left shoulder replacement was recommended. (Jt. Ex. 8, p. 238)

On September 1, 2016 claimant had a total left shoulder arthroplasty revision. (Jt. Ex. 8, pp. 246-247, 251-252, 260)

Claimant underwent follow up care at the UIHC from September of 2016 through June of 2017. (Jt. Ex. 4, pp. 263-287)

Claimant returned to Dr. Nepola on July 25, 2017. Claimant was found to be at MMI. He was restricted on the left shoulder to no heavy vibratory machinery. (Jt. Ex. 8, pp. 287-290)

Claimant returned in follow up with Dr. Galles on May 2, 2018. Clamant had continued left shoulder pain. He was found to be at MMI. Dr. Galles restricted claimant to lifting 30 pounds and no over the shoulder work. (Jt. Ex. 4, pp. 185-186)

In a May 2, 2018 letter Dr. Galles found claimant had a 26.4 percent permanent impairment to the left upper extremity. He found claimant had a 20.4 percent permanent impairment to the right upper extremity. He limited claimant to no lifting more than 30 pounds and to minimize work over shoulder height. (Jt. Ex. 4, p. 187)

In a May 19, 2018 report Brent Koprivica, M.D., gave his opinions of claimant's condition following an IME. Clamant had constant left shoulder pain. He had intermittent right shoulder pain. Claimant indicated the right carpal tunnel release was successful. Claimant had numbness in the ring and little finger on both the right and left hands. (Ex. 1, pp. 1-19)

Dr. Koprivica opined claimant had a material aggravation of the right carpal tunnel syndrome from the 2011 shoulder injury. He opined claimant had a right ulnar neuropathy from the 2011 injury. (Ex. 1, p. 24) He believed claimant had reached MMI for the right shoulder on June 17, 2014. (Ex. 1, pp. 24-25)

Dr. Koprivica opined claimant had a permanent impairment to the right carpal tunnel, ulnar neuropathy and right shoulder for a combined 45 percent impairment to the right upper extremity. (Ex. 1, pp. 27-28)

Dr. Koprivica believed claimant had ulnar neuropathy on the left due to his left shoulder condition. He opined claimant had reached MMI for the left shoulder on July 25, 2017. (Ex. 1, pp. 29-31)

Dr. Koprivica believed claimant had a combined left upper extremity impairment of 49 percent. (Ex. 1, pp. 30-33)

In a June 12, 2018 report, Carma Mitchell, M.S., C.R.C., gave her opinions regarding claimant's vocational opportunities. Ms. Mitchell opined, given claimant's limitations, experience and education, claimant was precluded from all of his past work. She opined claimant had loss of access to approximately 29 percent of the labor market. (Ex. 3)

In a July 13, 2018 report Dr. Koprivica indicated he had read medical records from Dr. Nepola and Dr. Galles. He opined these records did not change the opinion expressed in his May 19, 2018 report. (Ex. 2, p. 3)

At the time of hearing claimant testified he earned $20.79 per hour and worked between 39-40 hours per week. (Tr. p. 14) Claimant believed he was limited to lifting

30 pounds. He said Lowe's has accommodated his permanent restrictions. (Tr. pp. 33-34)

Claimant says he has difficulty with sleeping due to his shoulder injury. (Tr. p. 41)

Claimant testified he could not return to work in the construction trades given his lifting and physical limitations. (Tr. pp. 63-64)

Claimant testified he makes more per hour at the time of hearing than he did at the time of the injury. (Tr. pp. 65-66)

Kelly Kenne testified he is the assistant store manager at Lowe's where claimant works. He testified he is claimant's direct supervisor. (Tr. p. 103) Mr. Kenne testified claimant does minimal lifting at work. (Tr. p. 107) He said claimant has a 30-pound lifting restriction that is accommodated by Lowe's. (Tr. p. 108)

CONCLUSIONS OF LAW

The first issue to be determined, for both files, is whether claimant sustained a work-related injury to his arms or hands. The parties stipulate, as to both files, claimant sustained a work-related shoulder injury. The parties dispute whether claimant has also sustained work-related injuries to his arms and hands.

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

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 claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa

1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

The medical records indicate claimant had prior carpal tunnel symptoms before the August of 2011 injury. In November of 2011 claimant told Dr. Quenzer he had prior symptoms of dysesthesias. (Jt. Ex. 2, p. 32)

Dr. Quenzer treated claimant for over one and a half years. He performed surgery on claimant. Dr. Quenzer is an orthopedic surgeon specializing in upper extremities. He opined it was not probable claimant's carpal tunnel syndrome was related to his work at Lowe's. (Jt. Ex. 2, p. 39)

Dr. Schurman evaluated claimant once for an IME. He opined claimant's injury caused claimant's carpal tunnel syndrome. (Jt. Ex. 3) This opinion is based on an understanding that claimant had no prior carpal tunnel symptoms before the 2011 injury. (Jt. Ex. 3, p. 87) This is incorrect. As Dr. Schurman's opinion is based upon a false understanding of claimant's prior medical history, it is found the opinions of Dr. Schurman regarding the cause of claimant's carpal tunnel syndrome are found not convincing.

Claimant contends Dr. Schurman was authorized by defendant to evaluate him. Defendant contends that because Dr. Schurman's report notes he conducted an IME, Dr. Schurman was not authorized by defendant. The record is unclear if Dr. Schurman was, or was not, authorized by defendants to provide an IME. However, it does not matter if Dr. Schurman was authorized or not authorized by defendant to evaluate claimant. His opinion regarding causation is based upon an incorrect history. For that reason, Dr. Schurman's opinion regarding causation is found not convincing.

Claimant was also evaluated on one occasion by Dr. Koprivica for an IME. Dr. Koprivica opined claimant had a work-related ulnar neuropathy and carpal tunnel syndrome. (Ex. 1, pp. 24-25, 28) Dr. Koprivica's opinions regarding work-related carpal tunnel syndrome and ulnar neuropathies are problematic for several reasons.

First, claimant told Dr. Koprivica he had persistent burning and tingling in the ring and pinky fingers of both hands. (Ex. 1, p. 19) This history is contrary to the medical records from Dr. Nepola from 2016 and 2017 indicating claimant had no burning, tingling or numbness in the upper extremities. (Jt. Ex. 8, pp. 255, 310) In 2018 claimant told Dr. Galles he had occasional tingling in the small and ring fingers when laying on his back. (Jt. Ex. 4, p. 184)

Second, Dr. Koprivica diagnosed and rated claimant for ulnar neuropathies bilaterally. He recommended claimant have EMGs for the purpose of diagnosis. (Ex. 1, pp. 25, 31) It is unclear how Dr. Koprivica is able to diagnose ulnar neuropathies bilaterally without an EMG study. It is unclear why he would diagnose and rate claimant for ulnar neuropathies, and yet in the same report recommend EMGs be performed to test claimant for ulnar neuropathy.

Third, Dr. Koprivica indicates he agrees with Dr. Schurman's opinion that the August of 2011 injury materially aggravated claimant's preexisting carpal tunnel syndrome. (Ex. 1, p. 24) That is not Dr. Schurman's opinion. As noted above, Dr. Schurman believes claimant had no prior symptoms of carpal tunnel syndrome and opined claimant's August of 2011 injury caused a carpal tunnel syndrome.

Fourth, Dr. Koprivica guesses claimant developed an ulnar neuropathy as a result of the shoulder surgery. (Ex. 1, p. 25) There is no evidence in the record to support this opinion.

Finally, Dr. Koprivica also guesses claimant's alleged work activities at Lowe's caused his carpal tunnel syndrome. (Ex. 1, p. 25) There is no evidence in the record claimant engaged in repetitive activities at work. There is no evidence claimant's work, before August of 2011, caused a cumulative injury causing claimant's carpal tunnel syndrome.

Dr. Koprivica's history of claimant's symptoms regarding persistent numbness in the upper extremities is wrong. Dr. Koprivica makes a diagnosis of bilateral neuropathy at the elbow with no diagnostic studies. He misquotes Dr. Schurman's opinion regarding carpal tunnel syndrome. He opines claimant developed neuropathies in his upper extremities by surgery. He opines claimant's upper extremity condition was caused by repetitive work before the August of 2011 injury. For these reasons, the opinions of Dr. Koprivica regarding causation and permanent impairment are found not convincing.

Dr. Quenzer opined it was not probable that claimant developed carpal tunnel syndrome on the right as a result of the August of 2011 injury. The opinions of Dr. Schurman and Dr. Koprivica regarding causation and permanent impairment are found not convincing. Based on this, claimant has failed to carry his burden of proof he developed carpal tunnel syndrome, an ulnar neuropathy, or any other type of neuropathy in his hand or upper extremities as a result of either work injury.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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.

Claimant was 63 years old at the time of hearing. Claimant graduated from high school. He worked as a journeyman carpenter. Claimant had his own business remodeling kitchens and basements. Claimant worked as a contractor for 20 years before working at Lowe's.

Regarding his right shoulder, claimant has had several shoulder surgeries, including a right total shoulder replacement. Dr. Galles limited claimant to lifting up to 30 pounds and to minimize repetitive work over the shoulder regarding his right upper extremity. Dr. Galles found claimant had a 24 percent permanent impairment to the right upper extremity. (Jt. Ex. 4, pp. 123-125, 182-183, 187) According to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition a 20 percent permanent impairment to the upper extremity converts to a 12 percent permanent impairment to the body as a whole. (Guides, p. 439)

As noted, Dr. Koprivica's opinions regarding permanent impairment are found not convincing.

Claimant continues to work at Lowe's. The record indicates claimant's employer has accommodated his 30-pound lifting restriction as per Dr. Galles.

Ms. Mitchell opined claimant is precluded from all jobs involving heavy or very heavy lifting and two-thirds of the jobs regarding medium work. She opined claimant has lost access to 29.5 percent of the labor market. (Cl. Ex. 3, p. 47)

Defendants offered no expert vocational testimony regarding claimant. As a result, Ms. Mitchell's opinions regarding loss of access to the labor market is uncontradicted.

Claimant continues to work at Lowe's. Claimant earns more per hour at the time of hearing than he did at the time of injury. Both claimant and Mr. Kenne testified claimant is accommodated in his job as per the permanent restrictions given by Dr. Galles.

When all relevant factors are considered, it is found claimant has a 30 percent permanent impairment and loss of earning capacity as a result of the August 14, 2011 injury.

Regarding the November 3, 2013 injury, claimant had several left shoulder surgeries. He ultimately underwent two arthroplasties for the left shoulder. (Jt. Ex. 8, p. 246) Claimant was found to be at MMI regarding the left shoulder on July 25, 2017. (Jt. Ex. 8, p. 388) Dr. Galles opined claimant had permanent restrictions of not lifting over 30 pounds and to minimize work over the shoulder on the left. (Jt. Ex. 4, pp. 185-187) He found claimant had a 26.4 percent permanent impairment to the left upper extremity. (Jt. Ex. 4, p. 187) According to the Guides, a 26.4 percent permanent impairment converts to a 16 percent permanent impairment to the body as a whole.

Claimant has a 12 and a 16 percent permanent impairment to the body as a whole for the left and right shoulders. According to the combined values charts in the Guides, this results in a 26 percent permanent impairment to the body as a whole.

As noted above, Ms. Mitchell has found claimant has lost access to 29.5 percent of the labor market. This opinion is unrebutted. Claimant continues to work at Lowe's and is accommodated with his permanent restrictions by Lowe's.

When all relevant factors are considered, it is found claimant has a 60 percent loss of earning capacity or industrial disability regarding the November 3, 2013 date of injury.

Defendant's counsel spends approximately five and a half pages of his 53-page brief attacking claimant's credibility. The allegations regarding credibility are considered minor discrepancies in the record. Some of the alleged issues concerning credibility are regarding that claimant still hunts. One of the allegations involves claimant buying Lowe's products that had been returned and later selling those products on the Internet. The record indicates claimant does purchase product from Lowe's that has been returned to Lowe's. Claimant's supervisor knows of this activity. There is no evidence in the record that this practice violates any of the rules of the employer. Suggestions, raised by defendant's counsel, that claimant is in fact stealing from his employer, are unfounded.

Based on the comparison of the testimony to the records, it is found claimant is credible.

The next issue to be determined is the commencement date of benefits. Permanent partial disability benefits commence on the earliest date when claimant returns to work, is medically capable of performing substantially similar work, or achieves maximum medical improvement. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

Regarding the 2011 injury, claimant returned to full-time work on April 16, 2012. (Jt. Ex. 2, pp 45-47) Claimant's permanent partial disability benefits for the 2011 injury should commence on April 16, 2012. Regarding the 2013 injury, Dr. Galles first found claimant at MMI as of January 7, 2015. (Jt. Ex. 4, pp. 142-144) Claimant's permanent partial disability benefits for the 2013 injury should commence on January 7, 2015. Iowa Code section 85.34(1); Evenson, 881 N.W.2d at 372.

The next issue to be determined is whether claimant is due reimbursement for an IME.

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.

Defendant is 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).

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Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Quenzer, an employer-retained physician, evaluated permanent impairment in a May 31, 2013 report. (Jt. Ex. 2, pp. 83-85) Dr. Galles, another employer-retained physician, evaluated permanent impairment on May 2, 2018. (Jt. Ex. 4, p. 188) Dr. Koprivica's evaluation was performed on May 21, 2018. (Cl. Ex. 1) Given the chronology of the exams, claimant is due reimbursement for the Koprivica IME.

The final issue to be determined is whether apportionment under Iowa Code section 85.34(7)(b) applies.

Iowa Code section 85.34(7) (a) provides that "An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer."

However, Iowa Code section 85.34(7)(b)(2) states:

> If ... an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u," and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

The legislative history relevant to the above statutory provision indicates, "The general assembly intends that an employer shall fully compensate all of an injured employee's disability that is caused by work-related injuries with the employer without compensating the same disability more than once." 15 Iowa Practice, Workers' Compensation, § 13.6, page 164 (2014-2015) (citation omitted).

In this case, defendant should fully compensate claimant for the entire disability caused by his shoulder injuries. However, because the provisions of 85.34(7)(b) apply, the loss of earning capacity should be apportioned.

Claimant sustained a 60 percent industrial disability as a result of the combined effects of the 2011 and 2013 injuries. Claimant sustained a 30 percent industrial disability as a result of the 2011 injury. As a result, defendant is only required to pay an additional 150 weeks of permanent partial disability benefits regarding the 2013 injury.

ORDER

Therefore, it is ordered:

Regarding file number 5058973 (date of injury: August 14, 2011):

That defendant shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of four hundred seventy-three and 79/100 dollars ($473.79) per week commencing on April 16, 2012.

That defendants shall pay accrued benefits due in a lump sum.

Regarding file number 5058974 (date of injury: November 3, 2013):

That defendant shall pay claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of five hundred thirteen and 52/100 dollars ($513.52) per week commencing on January 7, 2015.

That defendant shall pay accrued benefits in a lump sum.

For both files:

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be 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. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

That defendant shall reimburse claimant for the costs of Dr. Koprivica's IME including mileage.

That defendant shall receive a credit for benefits previously paid.

That defendant shall pay costs.

That defendant shall file subsequent reports with this agency as required under rule 876 IAC 3.1(2).

Signed and filed this 7th day of November, 2019.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Woollums (via WCES)
James Neal (via WCES)
Paul Powers (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 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.