**MARTIN MARTINEZ,**

**Claimant,**

**vs.**

**ANDREWS PRESTRESSED**

**CONCRETE,**

**Employer,**

**and**

**COMMERCE & INDUSTRY**

**INSURANCE CO.,**

**Insurance Carrier, Defendants.**

**File No. 5043800**
**1/1/2016**

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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ARBITRATION

DECISION

Head Note Nos.: 1108, 1202, 1400,1802, 1803, 1702, 2500, 3000,

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STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Martin Martinez, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on January 8, 2015. Claimant alleged he sustained a work-related injury on March 11, 2013. (Original notice and petition.)

Andrews Prestressed Concrete, Inc., was located in Clear Lake, Iowa. For purposes of workers' compensation, the employer is insured by Commerce & Industry Insurance Company. Defendants filed their answer on January 26, 2015. They denied the occurrence of the work injury. On January 8, 2015, claimant amended the petition to reflect alleged injuries to claimant's neck, upper back, left shoulder, left knee and to the body as a whole. (Amended Petition.) Defendants denied liability for the alleged injuries in their amended answer. It was filed on January 26, 2015. A first report of injury was filed on April 27, 2011.

The hearing administrator scheduled the case for hearing on March 11, 2016 at 1:00 p.m. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Janice Doud as the certified shorthand reporter. She is the official custodian of the records and notes. Mr. Ernest Nino-Murcia was sworn in as the state certified Spanish interpreter.

Claimant testified on his own behalf. Defendants elected not to call any witnesses.

The parties offered exhibits. Claimant offered exhibits marked 1 through 5, 7, 8, 10 11, 12, 13, and 14. Defendants offered exhibits marked A through S. The parties jointly offered exhibits marked 1 through 5. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on May 6, 2016. The case was deemed fully submitted on May 9, 2016.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

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

2. Claimant sustained an injury on March 11, 2011 which arose out of and in the course of his employment;

3. The injury is a cause of temporary disability during a period of recovery;

4. The injury is a cause of permanent disability;

5. Claimant's permanency is an industrial disability; and

6. The parties are able to stipulate as to the costs that were paid by claimant prior to the date of the hearing;

ISSUES

The issues presented are:

1. Whether claimant is entitled to healing period benefits from January 21, 2012 through April 26, 2012; and from July 23, 2013 through the present;

2. Defendants maintain during this same time, claimant had some employment;

3. What is the extent of permanent partial disability to which claimant is entitled?

4. What is the commencement date for any permanent partial disability benefits?

5. Is claimant entitled to a running award?

6. What is the proper weekly benefit rate for claimant? Claimant alleges the rate is $349.42 per week; defendants maintain the weekly benefit rate is $317.20 per week;

7. Defendants assert there was a lack of timely notice pursuant to Iowa Code section 85.23 for the alleged neck and upper back injuries;

8. Defendants assert the alleged neck and upper back injuries were not filed in a timely fashion according to Iowa Code section 85.26;

9. Claimant is requesting the payment of medical expenses pursuant to Iowa Code section 85.27;

10. Claimant is requesting the cost of an independent medical examination pursuant to Iowa Code section 85.39;

11. Claimant is seeking alternate medical care pursuant to Iowa Code section 85.27;

12. Defendants are seeking a credit for benefits previously paid; and

13. Claimant is seeking penalty benefits for the period from January 21, 2012 through April 26, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 41 years old and right-hand dominant. He is single with no children. Claimant was raised and educated in Mexico. He did not complete his vocational program to become an industrial electrician. (Transcript, page 15) Claimant speaks, reads and writes Spanish. He has only rudimentary skills in English. He attended 92 hours of classes in English as a second language. Claimant communicates with his family in Mexico via computer.

Claimant is morbidly obese. He is insulin dependent because of Type II Diabetes. He suffers from hypertension. He smokes tobacco products. Numerous health care providers have advised claimant to lose weight and to stop smoking. Those same health care professionals have informed claimant he would feel better if he made some lifestyle changes.

Claimant worked in a plastic recycling business in Mexico and he performed housing construction. He earned approximately $45.00 per week as a construction worker in Mexico. At the arbitration hearing, claimant admitted he worked in a window factory in Mexico.

In 2000 claimant arrived in the United States. He was first employed by CCL, a company that contracted with Armor Meats in the Mason City area. Claimant was hired to clean the various machines that processed meats. Claimant testified he cleaned two machines. He had to lift parts which weighed from 20 to 25 pounds. (Tr., p. 20) There was overhead work too. (Tr., p. 21) Claimant used a power hose to clean. (Tr., pp. 21-22)

Claimant also held a part-time job washing dishes in a local restaurant. He had to carry trays of dirty dishes, scrape off food, and place the dishes into the dish washer. There was very little overhead work. (Tr., p. 22) He had to clean the grease filters too. (Tr., p. 23) He worked in the restaurant for 3 to 4 years.

For a brief period of time, claimant worked in a greenhouse. This was a part-time position. Claimant's position involved moving plants. He was paid $7.75 per hour.

Claimant commenced employment with defendant-employer on August 21, 2006. (Exhibit L, page 1) He was hired as an assembler and a production worker. The company was engaged in the business of assembling beams and concrete for bridge construction. Claimant performed a variety of tasks. He enjoyed the job. The parties agreed claimant grossed $495.49 per week in wages. Unfortunately, the business is no longer in operation. The company ceased operation in July 2012.

Claimant sustained a work-related injury to his left shoulder on March 11, 2011. The left shoulder injury was reported to the employer on the same date. (Ex. Q.)

Defendants sent claimant to Healthworks Occupational Health on March 11, 2011. Jennifer M. Gibson, M.D., treated claimant for "a sharp pain in his left anterior shoulder that

radiated down his upper arm to his elbow." (Ex. A, p. 3) Claimant voiced pain in the front of his left knee. (Ex. A, p. 3) Dr. Gibson diagnosed claimant with:

ASSESSMENT:

> Mild knee sprain with more significant shoulder injury, possibly to biceps and rotator cuff. Hopefully, this is a tendinitis but there is a possibility of a tear if he was holding enough weight and was jerking the shoulder.

(Ex. A, p. 4)

On March 17, 2011, Dr. Gibson again examined claimant for parascapular bursitis, as well as rotator and biceps tendinitis. (Joint Exhibit 1, page 1) Claimant complained of biceps tenderness, subacromial tenderness, parascapular tenderness, pain with resisted abduction, and slight swelling of the left hand. (Jt. Ex. 1, p. 1) He also complained of left knee pain, and mid-upper back pain between the shoulder blades on the left. (Ex. 1, p. 1) Claimant was on light duty at work.

Claimant returned to Dr. Gibson on March 24, 2011. Claimant was continued on light duty. MRI testing was ordered but claimant was too obese to undergo the MRI. A CT arthrogram was ordered. According to Dr. Gibson on April 19, 2011, the results were within the normal range. (Jt. Ex. 1, p. 2) Dr. Gibson ordered pool therapy for left shoulder tendonitis. (Jt. Ex. 1, p. 4) Claimant was released from work from April 13, 2011 through April 29, 2011. (Jt. Ex. 1, p. 4)

On May 3, 2011, claimant again reported to Dr. Gibson with complaints of left shoulder pain and upper back pain. Claimant had returned to work performing one handed duty. He was only able to work for three days. (Ex. 1, p. 5) Dr. Gibson removed claimant from work on April 28, April 29, and May 2, 2011. (Jt. Ex. 1, p. 5)

Dr. Gibson referred claimant to Eric J. Pothoff, D.O., an orthopedic specialist in Mason City, Iowa. Dr. Pothoff diagnosed claimant with "Left shoulder pain secondary to strain". (Jt. Ex. 3, p. 3) The orthopedist made the following recommendations:

RECOMMENDATIONS:

> 1. Most of the patient's pain is not actually at the shoulder at this time. It is more into the trapezius, latissimus, and triceps region. I do not suspect any muscle tearing based on the examination today. I think that he most likely has a strain.
>
> 2. I did explain to the patient that based on the examination and radiographic findings to this point, I do not think he would benefit from any interventional treatment. I agree that continuing with conservative care, including therapy, is appropriate. I recommend having them do soft tissue modalities as well. He did ask about a CORTISONE injection and I figured this is an option for him.

> 3. Under sterile technique, the patient was injected with KENALOG 60 mg and PLAIN MARCAINE 2 cc into the subacromial space of the left shoulder. The patient tolerated this well.
>
> 4. Based on the examination today, I am doubtful how much improvement this is going to give him, as most of his symptoms are not even around the shoulder. I did give the patient the option of following up with us or following up with Jennifer M. Gibson, M.D., to see how well it worked for him. He states that he has an appointment with Dr. Gibson on June 3, 2011. I recommend that he keep that appointment. I really do not see any additional treatments that we could perform, so I did recommend that he return to Dr. Gibson for continued care.
>
> 5. I recommend that he continue with his present work restrictions up until that point.

(Jt. Ex. 3, p. 4)

Claimant returned to Healthworks Occupational Health for treatment. Sherman Jew, D.O., a specialist in pain management, began to treat claimant's left shoulder. (Jt. Ex. 1, p. 10) Dr. Jew treated claimant conservatively. A TENS unit was ordered. The physician restricted claimant from lifting more than 50 pounds, and no pushing or carrying greater than 50 pounds. (Jt. Ex. 1, p. 11)

When claimant returned to Dr. Jew on July 7, 2016, the left shoulder demonstrated some mild spasm of the trapezius and deltoid area. (Jt. Ex. 1, p. 12) There was pain at the acromioclavicular joint and claimant's range of motion was limited with above shoulder abduction or flexion. (Jt. Ex. 1, p. 12) Dr. Jew prescribed various prescription drug medications, including a Lidoderm patch. (Jt. Ex. 1, p. 13) The pain specialist continued to treat claimant for left shoulder pain. (Jt. Ex. 1, p. 14) Dr. Jew modified claimant's work restrictions. Another cortisone injection was administered. Claimant was advised to avoid any over the shoulder activity with the left arm. (Jt. Ex. 1, p. 15) On August 22, 2011, claimant reported his left shoulder was improving. (Jt. Ex. 1, p. 16)

On September 2, 2011, Dr. Jew observed the following:

> MUSCULOSKELETAL: The neck reveals mild spasm and palpable pain at the left SCM (sternocleidomastoid) area with multiple trigger points at the neck and upper shoulder area as well. Range of motion is good but he does have some stiffness with turning of the head/neck and also extension of the neck. There are no signs of erythema, edema or ecchymosis. Intact touch sensation. Negative sign for instability or impingement.
>
> The left shoulder still has mild palpable pain at the acromioclavicular joint, and mild palpable pain at the trapezius muscle, but otherwise, he had intact touch sensation. No erythema, edema or ecchymosis is noted. Range of motion is still

> somewhat limited. He cannot perform full flexion or full abduction due to stiffness and discomfort. There are no signs of instability. Questionable sign of mild impingement.
>
> The upper extremity has normal pulses and reflexes.

(Jt. Ex. 1, pp. 18-19)

Dr. Jew removed claimant from work on September 1, 2011 and September 2, 2011. Then Dr. Jew placed claimant on modified duty. Claimant was restricted from reaching away from his body with the left arm and he was to avoid repetitive work above shoulder level with the left arm. (Jt. Ex. 1, p. 19) By September 9, 2011, the range of motion in claimant's neck had improved and claimant only experienced some minor stiffness when turning or extending his neck. (Jt. Ex. 1, p. 21) Dr. Jew ordered x-rays of the cervical spine. (Jt. Ex. 1, p. 22) Dr. Jew interpreted the x-rays of the neck to be within the normal range. (Jt. Ex. 1, p. 24) The physician ordered EMG studies to determine whether there was any type of nerve irritation or dysfunction in the neck or shoulder area.

On October 31, 2011, Dr. Jew explained the results of the EMG testing with claimant. Dr. Jew elaborated:

> EMG study returned showing moderate carpal tunnel in the left hand. Also nerve conduction study of the left upper extremity and associated cervical paraspinal muscles revealed no significant abnormality. I shared the EMG result with the patient. However, I am not clear about a report where there is no muscle abnormality or nerve abnormality, is my question in terms of the EMG study. Therefore, I am going to call the neurologist whether he can help to explain and for me to explain to the patient as well. The patient has a nerve impingement based on the EMG besides the paraspinal muscle condition, which according to the report is normal muscle-wise. I shared also the EMG showing moderate carpal tunnel syndrome, which is not surprising given the patient does have a history of diabetes. I do not think the carpal tunnel can be a problem for the given patient does have a history of diabetes. I do not think the carpal tunnel can be a problem for the shoulder and neck pain as a retrograde type symptom, although cervical condition can certainly cause carpal tunnel syndrome in that direction but reverse direction I do not think likely.

(Jt. Ex. 1, p.26)

Dr. Jew included an addendum to his October 31, 2011 clinical note. He had consulted with neurologist, Rajinder K. Verma, M.D. Dr. Verma opined claimant's EMG showed no significant finding in the patient's left neck or shoulder region. (Jt. Ex. 1, p. 26)

Eventually, claimant underwent an open MRI. According to Dr. Jew, there were no major findings on the open MRI. (Ex. A, p. 11) The results showed some mild tendinopathy over the distal supraspinatus tendon. (Ex. A, p. 11)

On January 20, 2012, claimant returned to Dr. Jew for a follow-up appointment. Claimant reported he had been doing better as he had not been working for the prior few weeks. Dr. Jew returned claimant to work without restrictions effective the same date. (Ex. A, p. 13)

Unfortunately, members of management at Andrews Prestressed Concrete had laid off claimant from work on December 19, 2011. (Ex. L, p. 1) Effective January 31, 2012, certain managers determined claimant would not be returned to work.

Claimant was also treating with Erin C. Peterson, D.O., at the Physical Rehabilitation and Pain Services at Mercy Medical Center of North Iowa. (Jt. Ex. 4, p. 1) Dr. Peterson diagnosed claimant with:

1. Myofascial neck and trapezial region pain.

2. Anterior left shoulder pain, suspect biceps tendinopathy/strain

3. Paresthesias, left upper arm.

4. Work-related injury of March 2011.

(Jt. Ex. 4, p. 5)

Claimant underwent a functional capacity evaluation on November 21, 2012. (Jt. Ex. 4, p. 7) The evaluation demonstrated claimant was capable of performing in the light-medium category of work. Claimant could frequently lift 20 pounds with two hands. Claimant also had MRI testing of the cervical spine on December 3, 2012. The results were normal. (Jt. Ex. 4, p. 7)

On December 21, 2012, Dr. Peterson opined claimant had reached maximum medical improvement. (Jt. Ex. 4, p.8) Dr. Peterson imposed a 20-pound lifting restriction. (Jt. Ex. 4, p. 8)

On January 22, 2013, Charles Mooney, M.D., conducted an independent medical examination at the request of defendants. (Ex. G) Dr. Mooney determined claimant had a permanent impairment to the body as a whole in the amount of 7 percent. The impairment rating was given for the left shoulder only. (Ex. G, p. 2) Dr. Mooney found no permanent impairment for any cervical injury, loss of consistent cervical motion, or any other myofascial complaints. (Ex. G, p. 2)

Claimant requested another opinion regarding his left shoulder. He saw James V. Nepola, M.D., at the University of Iowa Hospitals and Clinics. The initial examination occurred on July 23, 2013. Dr. Nepola injected a mixture of lidocaine and Kenalog into the subacromial

space as well as the AC joint of the left shoulder. (Jt. Ex. 2, p. 2) On August 13, 2013, Dr. Nepola restricted claimant from lifting more than 1 pound with his left arm. (Jt. Ex. 2, p. 10) Claimant was restricted from reaching away from his body or from reaching above chest height with his left arm. (Jt. Ex. 2, p. 10)

Dr. Nepola ordered MRI testing of the left shoulder. The testing occurred on September 10, 2013. A left shoulder fluoroscopically guided arthrogram. Subsequent to the testing, defense counsel posed several questions to Dr. Nepola about claimant's left shoulder condition. The following are the questions and relevant answers:

a. Do you believe it is more likely than not that the tendinosis found via the 9/10/13 MRI was caused or materially aggravated by the work injury of 3/11/11?

> No, to the nearest degree of medical certainty, the tendinosis seen on the September 10, 2013 MRI was not likely caused or materially aggravated by the work injury of March 11, 2011. Rotator cuff tendinosis is a very common MRI finding in almost every patient, and it is unlikely that a single lifting/holding injury would cause or materially aggravate this finding.

b. Do you believe it is more likely than not that the possible SLAP lesion found via the MRI was caused or materially aggravated by the work injury of 3/11/11?

> It is possible that the SLAP lesion was caused or materially aggravated during the lifting/carrying incident of March 11, 2011. Lifting or holding a heavy load with the arm stretched away from the shoulder can cause or materially worsen a labral tear. I cannot state whether or not it is LIKELY that the incident caused or materially aggravated the shoulder condition until examination during arthroscopy. Imaging consistent with a labral tear does not necessarily mean a labral tear will be found during surgery. If there is no significant labral tear at arthroscopy, then the incident was unlikely to have caused or materially aggravated a labral tear. There is no other shoulder pathology seen on imaging which is likely to have been caused or materially aggravated either.

c. Are the current problems-even assuming a SLAP lesion exists-with Mr. Martinez's shoulder consistent with the mechanism of injury from 3/11/11?

> Yes, to the nearest degree of medical certainty, the current complaints are consistent with the mechanism of injury. As described above, lifting, holding, or carrying a heavy load, especially with the arm extended, "leverages" the shoulder and puts a high amount of strain on the shoulder joint. Mr. Martinez reported no symptoms in the shoulder prior to this incident, and at the least, the incident appears to have symptomatically "lit up" an underlying condition, and if there is labral pathology found, it would be likely that the incident materially aggravated or even caused the current condition, to the nearest degree of medical certainty.

(Jt. Ex. 2, pp. 19-20)

Dr. Nepola performed two surgeries on claimant's left shoulder. The first surgery occurred on January 30, 2014. Claimant underwent labral repair surgery. (Ex. I, p. 2) On December 4, 2014, claimant underwent a revision labral repair. (Jt. Ex. 2, p. 48)

Pursuant to Iowa Code section 85.39, claimant exercised his right to an independent medical examination with John D. Kuhnlein, D.O., MPH. The examination occurred on January 19, 2016. Dr. Kuhnlein issued a report with the date of January 29, 2016. Dr. Kuhnlein diagnosed claimant with:

> 1. Complaints of neck pain.
>
> 2. Left SLAP tear with December 4, 2014, SLAP repair (Nepola). Chronic left shoulder pain. There is no evidence in the operative report of a distal clavicle excision being performed.

(Ex. 1, p. 8)

Dr. Kuhnlein addressed the issue of medical causation in depth on page nine of his report. He opined:

> I am not able to attribute his neck pain to the March 11, 2011, injury. Neck complaints do not appear in the current records until September 2, 2011, when Dr. Jew described what appeared to be a new injury with notation of neck pain in the records thereafter. Mr. Martinez says that he had neck pain after the March 11, 2011, injury but it is not in the currently available record until September 2, 2011. This may be related to interpreting issues but it was not noted for six months when interpreters were present. The September 2, 2011, note authored by Dr. Jew describes what appears to be a new injury and from the record it would appear that a neck injury was directly and causally related to an injury sustained on or about the September 2, 2011, timeframe.
>
> Mr. Martinez sustained a shoulder injury directly and causally related to the March 11, 2011, injury. The mechanism of injury would be consistent with such an injury. Part of the very significant delay to proper diagnosis is that: (1) Proper diagnostics were difficult to perform because of his morbid obesity until the September 10, 2013, MRI arthrogram demonstrated the labral tear. (2) There was a delay to a proper specialist who would perform the proper test. While Dr. Potthoff saw him on May 24, 2011, he did not do any diagnostic studies that would have identified the labral tear, and it was only when the MRI arthrogram of September 10, 2013, that this was assessed appropriately. He did have another MRI of the shoulder, but no arthrogram was performed. I would agree with Dr. Nepola that the mechanism of injury would be consistent with such an injury.

(Ex. 1, p. 9)

Dr. Kuhnlein opined claimant reached maximum medical improvement on December 17, 2015. The independent medical examiner rated claimant as having a 5 percent permanent impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

With respect to permanent restriction, Dr. Kuhnlein based his opinion on the functional capacity evaluation that was performed on January 5, 2016 at WorkWell Systems, Inc. (Ex. 2) Claimant was placed in the medium to light level of work. (Ex. 2, p. 2) The physical therapist, Todd Schemper, PT, DPT, recommended:

> 1. These projects are for 8 hours per day and 40 hours per week at the levels indicated on the FCE Test Results and Interpretation grid.
>
> 2. The client's capabilities are largely within the medium category (front carrying up to 40 pounds on an occasional basis and 55 pounds on a rare basis) of physical demand characteristics. Specific capabilities are noted with the FCE Test Results and Interpretation grid.
>
> 3. His ability with waist to overhead lifting is within the light category lifting up to 15 pounds occasionally and 20 pounds rarely.
>
> 4. Recommend following the work restrictions from Dr. Nepola on 11/12/2015.
>
> 5. Please review the FCE Test Results and Interpretation grid for full details of this client's functional abilities.
>
> 6. Contact me for additional questions regarding this FCE report.

(Ex. 2, p. 3)

Dr. Nepola opined claimant reached maximum medical improvement on February 4, 2016. (Ex. S, p. 1) The orthopedic surgeon issued a report on March 30, 2016. In the report, Dr. Nepola opined claimant had a permanent impairment in the amount of 5 percent to the body as a whole. The rating was an assessment of claimant's level of impairment for the left shoulder as a result of the March 11, 2011 work injury. (Ex. S, p. 1) Dr. Nepola based his opinions in part on the functional capacity evaluation claimant underwent on March 28, 2016. Dr. Nepola opined the following restrictions should be imposed per Aaron Tim, DPT, at E3 Work Therapy Services:

> Per the FCE report he should have permanent restrictions including no 2-handed waist to floor lifting of more than 56 pounds, no 2-handed waist to crown lifting of more than 20 pounds, no left arm unilateral lifting of more than 27 pounds, no bilateral carrying of more than 35 pounds, no 2-handed static pushing of more than 165 pounds occasionally, no 2-handed static pulling of

> more than 155 pounds of force occasionally, forward and overhead reaching with the left arm limited to frequently, sustained elevated work with the left arm limited to occasionally. Per the FCE report this places him in the "Heavy demand vocation" according to the Department of Labor's Dictionary of Occupational Titles.

(Ex. S, pp. 1-2)

After claimant was terminated from his employment, he did attempt to secure other employment. He spent approximately one shift working for CCL at Armour cleaning machines. Claimant testified there were job duties at Armour he could not perform due to his left shoulder. (Tr. pp. 39-40)

Claimant also testified at his hearing; he worked at Las Palmas Restaurant for two weeks. (Tr. p. 41) Claimant testified he voluntarily terminated because he could not perform his duties at the desired speed expected of him. (Tr., p. 41) Claimant reported he worked one to one and one/half months at Las Palmas when he went to visit Dr. Kuhnlein, D.O., MPH, his independent medical examiner. The work occurred in 2014 but claimant did not supply any documentation to substantiate the number of days he worked at either employer. Nor did claimant supply relevant tax records for 2014.

Claimant's counsel retained the services of Mr. Phil Davis, M.S., a vocational specialist to provide a vocational opinion with respect to claimant's employability subsequent to his work injury on March 11, 2011. On page five of the vocational report, Mr. Davis wrote:

> *Abililty to obtain and/or maintain employment.*
>
> Mr. Martinez has been in the United States for the last 15 years. English language skills were not needed for any of his past employment, social or family related activities. Through the years, Mr. Martinez has acquired a limited understanding of the spoken English language. Mr. Martinez has independently pursued ESL classes, which I would opine, demonstrates his motivation to improve his English language skills.
>
> When taking into consideration all of the above factors to include his limited English language skills, his current physical restrictions, limited computer skills, and lack of significant transferable skills, Mr. Martinez's ability to obtain or maintain substantial, gainful employment, has currently been drastically reduced (greater than 90%) if not eliminate due to his work related injury and resulting physician imposed restrictions.

(Ex. 3, p. 5)

Defense counsel also obtained a vocational specialist to issue a vocational assessment. Ms. Lana Sellner, M.S., M.S., CRC, issued a report on March 8, 2016. Ms. Sellner opined

claimant could perform work in the sedentary to medium classifications of work as detailed in the Dictionary of Occupational Titles. Ms. Sellner concluded:

> **Recommendations and Conclusions:**
>
> Based upon the information presented, it is this consultant's opinion that Mr. Martinez continues to be employable. This consultant has considered Mr. Martinez's English skills, lack of computer knowledge along with his transferable skills. A labor market survey utilized his work experiences, transferable skills, education along with the restrictions imposed by Dr. Kuhnlein who adopted the FCE recommendations. At the time of this analysis, Dr. Nepola had not provided permanent restrictions.

(Ex. K, p. 8)

RATIONALE AND CONCLUSIONS OF LAW

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 Elec. 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).

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 an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522; 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

There is a lack of medical evidence and medical causation to relate claimant's cervical spine, lumbar spine or left hand pain to claimant's injury on March 11, 2011. The undersigned is persuaded by the opinions expressed by claimant's own independent medical examiner, Dr. Kuhnlein in his report at page nine. As previously stated, Dr. Kuhnlein provided a thoughtful opinion explaining why there was no medical causation for any claims other than for the left shoulder. There was no other medical provider to support claimant's claim for benefits for the neck, back or hand. Claimant takes nothing in the way of benefits

for those claims. He is not entitled to medical care for his neck, back or hand pursuant to Iowa Code section 85.27.

Since claimant takes nothing in the form of benefits for the neck, back or hand, defendants' affirmative defenses of notice pursuant to Iowa Code section 85.23 and the statute of limitations pursuant to Iowa Code section 85.26 are rendered moot. No additional discussion is necessary.

Claimant has established his left shoulder condition resulted in a permanent disability. When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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.

There are three functional impairment ratings for claimant's left shoulder. One rating equaled 7 percent to the body as a whole. The other two ratings were 5 percent to the body as a whole. The three ratings are fairly consistent with one another. The undersigned finds the most reasonable categories of work for claimant are the light to medium categories. It is doubtful claimant will be able to work over his shoulder on a sustained basis. Nevertheless, claimant is capable of some type of employment.

Claimant is 41 years old. It is true; claimant did not complete his education in Mexico. His English skills are at the elementary level. He has studied English as a second language but he is not well versed in reading and writing English. He will have to obtain employment where English is not a requirement.

Claimant's employer terminated him which is some indicia of his lack of employability. The employer was unwilling to accommodate claimant in its warehouse for an extended period of time.

Since he reached maximum medical improvement, claimant has not sought other employment. He is not especially motivated to secure a different job. Claimant contends he is not physically able to work but the results from the three functional capacity evaluations do not support claimant's contention.

After considering all of the factors in determining industrial disability; it is the determination of this deputy; claimant has a permanent partial disability in the amount of 55 percent. Defendants shall pay unto claimant 275 weeks of permanent partial disability benefits.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue for resolution is the issue of rate. All parties agree claimant was single on the date of his work injury. The parties stipulated claimant's gross earnings were $495.49 per week. The correct weekly benefit rate is in dispute.

On July 1, 2013, claimant provided a certified answer to defendants' interrogatories. With respect to interrogatories 1(a) 1(e) and 1(f) claimant answered:

> INTERROGATORY NO.1:
>
> a. Full name and all past names, aliases and nicknames by which you have been known;
>
> . . . .
>
> e. Your marital status and the name of your spouse now and at the time of the alleged injury;
>
> f. The name, date of birth and relationship to yourself of all persons other than your spouse who you claim as a dependent;
>
> ANSWER:
>
> a. Martin Martinez
>
> . . . .
>
> e. Single

f. N/A

(Ex. N, p. 3)

Later, claimant amended his answers to Interrogatory No. 1. However, claimant did not amend 1(a), 1(e) or 1(f). Those answers remained the same. Additionally, claimant set forth his own calculation of a proposed average weekly wage and rate within his discovery responses. Claimant utilized an exemption status of single with no dependents. (Ex. N, pp. 7-8)

Claimant's deposition was taken by defense counsel on February 18, 2016. The following questions were posed to claimant by defense counsel, Mr. Jordan Kaplan:

Q. (By Mr. Kaplan) You don't have any children; is that correct?

A. No.

Q. An no other dependents for tax purposes?

A. Just my parents.

Q. You don't claim your parents, though, on your taxes, as dependents; right?

A. Yes.

Q. Where do your parents live?

A. Mexico.

Q. So you have tax returns, then, from the last handful of years that would indicate that your parents are dependents?

A. The last ones I filed, yes.

(Ex. 10, p. 9)

Also, during the deposition, Mr. Kaplan inquired whether claimant had a middle name. Claimant stated his full name was Martin Martinez and he did not have a middle name. (Ex. 10, p.2)

During the arbitration hearing, claimant testified on direct examination as follows with respect to dependents for tax purposes:

Q. At the time of your injury, what was your marital status?

A. Single.

Q. At the time of your injury, do you recall how many dependents you were claiming on your tax returns?

A. Four.

Q. And who are these people that you're claiming and why do you claim them?

A. My parents and my two nieces and nephews, of whom I was in charge.

Q. And so a total of four people including yourself?

A. No.

Q. Four people in addition to yourself?

A. Yes.

MR. PLATT: Your Honor, we made a mistake on the hearing report then if he's testifying to that, but you can make that decision.

Q. Just so I'm clear, your father and who else were you claiming?

A. My father, my mother, and my nieces and nephews.

Q. And at the time of your injury, you were supporting them financially?

A. Yes.

Q. I'm going to ask you look at page N-3 in defendants' exhibits. I'm going to have the interpreter interpret a certain part of it. Part F asks the name, date of birth, relationship.

MR. PLATT: You can go ahead and read that.

Q. Your answer to that question was NA, or not applicable, or zero. Do you recall why or if there was any reason why you put there were no dependents when you answered you written interrogatories?

A. No, I don't remember.

Q. You don't remember why you put that down?

A. No.

Q. Do you know if you understood the question or not, or you just don't remember?

A. I think I didn't understand the question.

Q. You testified in – - or I should say did you talk about how many dependents you had in your deposition taken with the defendants' attorney?

A. Yes.

Q. And do you remember how many dependents you told the employer's attorney that you had during your deposition?

A. Oh, yes.

Q. Okay. And how many did you testify to, do you recall?

A. Three.

Q. And who are they?

A. My parents and my nephew.

Q. So as we're here today, you're saying at the time of your injury - - is the correct amount of dependents four at the time of your injury, excluding yourself?

A. Four besides myself.

(Tr. pp. 13-15)

During cross-examination, claimant testified about the dependents he claimed on his income taxes. He testified:

Q. (By Mr. Kaplan) Your mom and dad, you said you claim them as dependents for tax purposes; right?

A. And my nephew.

Q. And a niece as well; right?

A. That was four years ago. That was before I had my accident, and since then her mother has come back for her and taken her.

Q. All of these people - - the niece, the nephew, you mom and dad - - they all live in Mexico; right?

A. Yes.

Q. Do your parents work?

A. No. They're old now.

Q. Have they retired?

A. Yes.

Q. Do they pay their own living expenses?

A. My brother and I have to help them out.

Q. Who is Edward Vargas?

A. My nephew.

Q. Who did he live with in 2011?

A. With my parents.

Q. And what about the niece that you referred to? Where did she live in 2011?

A. With my parents.

(Tr. pp. 67-68)

On July 2, 2013, claimant responded to defendants' request for production of documents. (Ex. M) Exhibit M, pages 6 through 8 are copies of page 1 of the U.S. Individual Income Tax Returns (1040) for the years 2006, 2008, 2010. The name listed on the 2006 return is Arturo M. Martinez-Flores. The name listed on the 2008 tax return is Arturo M. Martinez-Flores. The name listed on the 2010 tax return is Arturo M. Martinez. On each return, the person lists the filing status as single. On the 2006 return the person lists himself as an exemption and 5 other dependents. (Ex. M, p. 6) The same exemptions are listed on the 2008 tax return. (Ex. M, p. 7) On the 2010 tax return, the person lists himself and the following individuals as dependents:

Eduardo Vargas Nephew

Anayansi Monroy Child

Arturo Martinez Parent

Gloria Flores Parent

There are a total of 5 exemptions. (Ex. M, p. 8)

This deputy finds the copies of the 1040 income tax returns to be suspicious in nature. Firstly, claimant does not use the name Arturo. The tax return is in the name of Arturo M. Martinez-Flores or Arturo M. Martinez. Secondly, Arturo Martinez lists Anayansi Monroy as his child on the 2010 tax return. Claimant testified he has no children. Thirdly, claimant did not supply any tax returns for the year he was injured. That year was 2011. Claimant worked 10 weeks in 2011 before he was even injured. He worked following his injury in 2011. There is no way of knowing what dependents, if any, were claimed in the year of claimant's work

injury. If claimant wanted to meet his burden of proof, the tax returns for 2011 would have been the best evidence he could have supplied. Claimant did not supply the necessary documentation to support his claim for the weekly benefit rate.

Claimant did not meet his burden of proof with respect to the matter of rate. It is determined claimant is single with no dependents. The correct weekly benefit rate is $317.20 per week. That is the rate defendants proposed prior to the arbitration hearing.

The next issues involve the payment of healing period benefits. Claimant is requesting benefits for two periods of time. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Effective January 20, 2012, Dr. Jew opined claimant was medically capable of returning to substantially similar employment as the job he had held at Andrews Prestressed Concrete. (Ex. A, p. 13) Dr. Jew wrote in his clinical notes for the same date:

> Patient was recommended to return February 9th for a followup. In the meantime, I am going to advance him to no formal restriction at work. I have refilled his Zanaflex medication. We will monitor how he does when he goes back to work in a couple of weeks. The patient understood and agreed with plan.

(Ex. A, p. 13)

Defendants neglected to tender an Auxier notice pursuant to Iowa Code section 86.13(2). Thirty days of benefits were paid but they were paid on or about June 18, 2012. The 30-day period was from January 21, 2012 through February 18, 2012. In other words, the benefits should be classified as healing period benefits that were not paid timely.

From February 19, 2012 through April 26, 2012 claimant is entitled to permanent partial disability benefits at the rate of $317.20 per week. This is a period of 9 weeks and 4 days of permanent partial disability benefits. Defendants shall take credit for the same period as permanency benefits.

Defendants admit claimant was in another healing period from April 27, 2012 through December 21, 2012. (Jt. Ex. 4, pp. 6-7) This is a period of 34 weeks and 1 day of healing period benefits at the rate of $317.20 per week.

Claimant was then due permanency benefits for the period from December 22, 2012 through July 22, 2013. This is a period of 30 weeks and 3 days. All weeks of permanency

benefits are due at the rate of $317.20 per week. Defendants shall take credit for these weeks as permanency benefits paid.

Claimant commenced healing period again when he began treating with Dr. Nepola. The healing period commenced on July 23, 2013. Dr. Nepola deemed claimant to be at maximum medical improvement on February 4, 2016. This is a total period of 132 weeks of benefits payable at the rate of $317.20 per week. Defendants shall take credit for benefits paid through February 4, 2016 as healing period benefits. Benefits paid after February 4, 2016 shall be credited as permanency benefits. All weekly benefits shall be paid at the rate of $317.20 per week.

The next issue for determination is the issue of penalty benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim¾the "fairly debatable" basis for delay. See

Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether

there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Because defendants did not tender an Auxier notice pursuant to Iowa Code section 86.13(2), claimant was entitled to 30 days of benefits. The benefits were paid in an untimely fashion. Defendants had no explanation for the late payments or for the failure to comply with the statutory provision. It is the determination of the undersigned; claimant is entitled to penalty benefits in the amount of $317.20.

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. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

The next issue for resolution is the matter of the cost of medical mileage incurred and detailed in exhibit 4, pages 1 through 12. Defendants are liable for the medical mileage incurred.

Claimant is requesting payment for the independent medical examination claimant had with Dr. Kuhnlein on January 19, 2016. 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).

Dr. Kuhnlein’s bill is detailed in exhibit 1, page 13. The total amount is $4,167.40. The independent medical examiner explained how he arrived at his costs. Given the nature of the detailed exam and the report, I find the bill was reasonable. Defendants are liable for the entire cost of the independent medical examination.

The final issue is the matter of the costs to litigate the claim. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant is requesting costs as detailed in Exhibit 11. Assessment of costs is a discretionary function of this agency. The following costs are assessed to defendants:

| | |
|---|---|
| Filing Fee | $100.00 |
| Vocational Report | $960.00 |

| | |
|---|---|
| IME Translation | $130.00 |
| Deposition Transcript | $90.45 |
| Total | $1,280.45 |

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant, two hundred and seventy-five (275) weeks of permanent partial disability benefits at the weekly benefit rate of three hundred seventeen and 20/100 dollars ($317.20) per week.

Defendants shall pay healing period benefits as detailed in the body of this decision and at the weekly benefit rate of three hundred seventeen and 20/100 dollars ($317.20) per week.

Defendants shall take credit for all benefits previously paid to date, and as characterized in the body of this decision.

Defendants shall pay three hundred seventeen and 20/100 dollars ($317.20) in penalty benefits pursuant to Iowa Code section 86.13.

Defendants shall pay medical mileage as detailed in the body of this decision, and as explained in Exhibit 4, pages 1 through 12.

Defendants shall pay the cost of the independent medical examination in the amount of four thousand one hundred sixty-seven and 40/100 dollars ($4,167.40).

Defendants shall pay costs in the amount of one thousand two hundred eighty and 45/100 dollars ($1,280.45).

Defendants shall pay all past due benefits in a lump sum with interest, as allowed by law.

Defendants shall file all requisite reports in a timely manner.

Signed and filed this ____21st_____ day of October, 2016.

_____

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
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