

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN SOUTHALL,

Claimant,

vs.

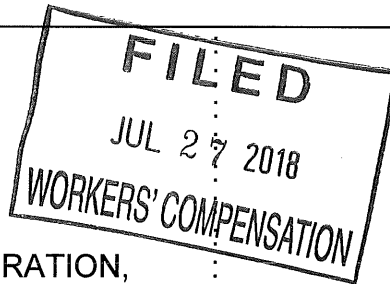
ALTER TRADING CORPORATION,

Employer,

and

ARCH INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5058563

ARBITRATION
DECISION

Head Note Nos.: 1402.40; 1803; 1804;
2501; 2700; 3002; 4100

Claimant John Southall filed a petition in arbitration on March 7, 2017, alleging he sustained a mental injury and injuries to his left hip, left shoulder, lungs, nervous system, and body as a whole while working for the defendant, Alter Trading Corporation ("Alter"), on September 2, 2014. Alter and its insurer, the defendant, Arch Insurance Company ("Arch"), filed an answer on March 29, 2017, admitting Southall sustained injuries to his left hip, left shoulder, and lungs, but denying Southall sustained injuries to other parts of his body.

An arbitration hearing was held on March 13, 2018, at Iowa Workforce Development in Waterloo, Iowa. Attorney Benjamin Roth represented Southall. Southall appeared and testified. Attorney Troy Howell represented Alter and Arch. Frank Barbeau, III, appeared and testified on behalf of Alter and Arch. Joint Exhibits ("JE") 1 through 14, Exhibits 1 through 7, and Exhibits A through Z were admitted into the record. The record was held open through May 18, 2018, for the receipt of post-hearing briefs and for the deposition of Ryan Besh. The briefs were received, the deposition was not taken, and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Alter and Arch waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Alter and Southall at the time of the alleged injury.

2. Southall sustained injuries to his left shoulder, left clavicle, left scapula, face, left-sided ribs, left hip, pelvis, and lungs, and a closed head injury on September 2, 2014, which arose out of and in the course of his employment with Alter.

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

4. The alleged injury is a cause of permanent disability.

5. Temporary benefits are no longer in dispute.

6. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.

7. At the time of the alleged injury Southall was married and entitled to two exemptions.

8. Prior to the hearing Southall was paid 125 weeks of compensation at the rate of \$600.42 per week.

9. Costs have been paid.

ISSUES

1. What is the nature of injury?

2. Did Southall sustain mental, nervous system, and spine injuries as a result of the work injury?

3. What is extent of disability?

4. Has Southall established he is permanently and totally disabled under the statute or under the common law odd-lot doctrine?

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

6. What is Southall's rate?

7. Is Southall entitled to payment of medical expenses set forth in Exhibit 2?

8. Is Southall entitled to penalty benefits?

9. Should costs be assessed against either party?

FINDINGS OF FACT

Southall is the father of three adult children and lives with his wife in Cedar Falls, Iowa. (Exhibit S, page 86; Tr., p. 17) Southall graduated from high school with a C

average. (Tr., p. 17; Ex. T, p. 91) Southall testified he struggled with English and language arts, but he enjoyed science and math. (Tr., p. 17)

Southall had childhood asthma, which resolved when he was thirteen. (Ex. T, p. 103) Southall has a history of smoking 1.5 packs of cigarettes per day for thirty years. (JE 3, p. 66) He quit smoking in 2000. (JE 3, p. 66; Ex. T, p. 102) Southall denies having any lung problems prior to his September 2014 work injury. (Ex. T, p. 103) Southall is right-hand dominant. (Tr., p. 17) At the time of the hearing he was sixty-six. (Tr., pp. 16, 54)

Southall worked at the same location from 1970, with a brief stint in the military, until his retirement on July 7, 2017. (Tr., p. 18) In April 1970, Weissman Iron and Metal hired Southall to work in the parts department where he checked and inspected engine parts. (Exs. S, p. 86; T, p. 94; Tr., p. 19) After about ten months, Southall was drafted into the infantry during the Vietnam war, but he was discharged before he was deployed due to a skin problem, and he returned to Weissman Iron and Metal. (Tr., p. 18; Ex. T, p. 94) When he returned to work at Weissman Iron and Metal Southall worked as a maintenance mechanic. (Ex. T, p. 94)

In 1996, the Weissman family sold the business to Recycling Industries. (Tr., p. 19) Recycling Industries closed in December 2000. (Tr., p. 19; Ex. T, p. 95) Southall was unemployed for a period of time until Alter acquired the property and reopened the yard in August 2001. (Tr., p. 19)

In the 1970s, Weissman Iron and Metal sent Southall to a three-day crane maintenance and repair school. (Tr., pp. 17-19; Ex. T, p. 91) Southall has not attended any additional schooling. (Ex. T, p. 92)

Alter operates a metal recycling business. (Tr., p. 19) Southall worked as a maintenance mechanic for Alter. (Tr., pp. 20, 55) If something broke, he fixed it. (Tr., p. 20) If something needed to be built, Southall built it. (Tr. p. 20) Southall testified, "I did whatever they needed me to do." (Tr., p. 20) Southall did not always work in maintenance. (Tr., p. 20) For the first six years of his employment with Alter Southall drove a lugger truck. (Tr., p. 20) Before Alter acquired the business Southall was the fill-in driver. (Tr., p. 21)

When Alter acquired a new shredder to grind up cars, Alter assigned Southall to oversee the operation of the shredder and Southall no longer drove the lugger truck. (Tr., p. 20) Southall also performed "[a] lot of welding," and electrical repairs. (Tr., pp. 20-21) Southall testified his job was physical and he had to lift up to fifty pounds by himself prior to his work injury, and he had to do quite a bit of reaching overhead for electrical work. (Tr., pp. 21-22) Southall used machines or coworkers to help him lift items weighing more than fifty pounds. (Tr., pp. 21-22)

Southall performed mostly stick welding and wire welding for Alter. (Tr., p. 22) His job required him to engage in a lot of climbing, and to work on his hands and knees.

(Tr., p. 22) Prior to his work injury, Southall worked mandatory and voluntary overtime. (Tr., pp. 22-23) Southall reported he typically worked fifty plus hours per week. (Tr., p. 23) Southall testified he loved his job because he never really had to do the same thing day after day and he never looked for other employment from 1970 until he retired in July 2017. (Tr., p. 24)

Southall has also operated Howard's Bike Shop, a used bicycle and repair shop, since April 1987. (Exs. S, p. 87; T, pp. 92-93) Southall's father started the business. (Tr., p. 57; Ex. T, p. 93) Southall testified his bicycle business is a hobby and he performs most of his work between April and October each year for customers. (Tr., p. 50) Southall orders parts from a supplier each season online, using his computer. (Tr., p. 60)

Southall reported that before his work injury his health was in good shape. (Tr., p. 24) He was diagnosed with a heart condition, and he underwent two work-related hernia surgeries, one hemorrhoid surgery, and one back surgery. (Tr., pp. 24-26) Southall did not receive any workers' compensation settlements related to his hernia surgeries. (Tr., p. 26) Southall denied having any ongoing problems from his conditions following the various surgeries. (Tr. 24)

On September 2, 2014, Southall received a radio communication from the crane operator at Alter, Tim Macomber, that the magnet on the crane was not working. (Tr., p. 26) Southall walked across the yard to the crane and he thought a fuse had blown. (Tr., p. 27) Southall took his volt meter, climbed the ladder on the side of the crane onto the platform, and he cannot recall what happened next. (Tr., pp. 27-28) Southall fell eight to ten feet from the crane onto the ground onto his left chest and face. (Tr., p. 27; JE 2, p. 2) The surface was dirt. Southall was unconscious. (JE 2, p. 2)

Southall was transported to Allen Memorial Hospital and air lifted to the University of Iowa Hospitals and Clinics ("UIHC") for treatment. (JE 2, p. 1) UIHC staff documented Southall had a right lung contusion with hemo/pneumothorax, multiple rib fractures, a flail chest, a right medial orbital wall fracture, a left temporal bone fracture, a left medial/lateral orbital wall fracture, a right maxillary fracture, a right temporal lobe contusion, and right squamosal fracture, a left subdural hemotoma/epidural with pneumocephalus in t-lobe, left fracture of the greater sphenoid wing, a left anterior pubic ramus and left obturator ring fracture. (JE 3, p. 7) Hospital staff noted Southall had an altered mental status, and he was intubated due to acute respiratory failure with bilateral chest tubes. (JE 3, pp. 8-13)

At the UIHC, Southall underwent computerized tomography scans. (JE 3, pp. 15-22) The reviewing radiologist listed an impression of left sacral longitudinal fracture, multiple left rib fractures from the first through ninth ribs, a left comminuted clavicular fracture, right temporal lobe cerebral contusions and small subarachnoid hemorrhage, nondisplaced fracture of the left temporal bone with an underlying small epidural and subdural hematoma, extensive subcutaneous emphysema, multiple fractures involving the bilateral maxillary bones, left sphenoid bone, and left squamous portions of the

temporal bone, bilateral orbital fractures, subcutaneous emphysema of the bilateral upper chest wall, right pneumothorax, bilateral atelectasis and contusion of the left lung with small amount of hemorrhage, hematoma to the left of the bladder, intramuscular hematomas in the left piriformis, left obturator internus, and left obturator externus, spleen laceration, and hemangioma of the liver. (JE 3, pp. 15-22)

Southall was discharged from the UIHC on September 12, 2014, with diagnoses of a flail chest, traumatic epidural hematoma, subdural hemorrhage, cardiac contusion, altered mental status, left hemopneumothorax, and hyperkalemia. (JE 3, pp. 1-2) Upon discharge from the UIHC, Southall was admitted to Covenant Medical Center in Waterloo for rehabilitation and he was examined by Barbara Malicka-Rozek, M.D., a physiatrist. (JE 4; Ex. Y) Dr. Malicka-Rozek continued Southall's pain management, and ordered physical, occupational, recreational, and speech therapy. (JE 4, pp. 3-4)

Southall had difficulty getting out of bed, walking and climbing stairs, using his left upper extremity, and performing self-care, including brushing his teeth. (JE 6, p. 1) His physical therapist worked on these issues and his gait impairment. (JE 6, pp. 1-4) Southall relayed he was having difficulty with word finding, which his physical therapist observed during treatment. (JE 6, p. 4) Southall testified he was discharged from Covenant Medical Center after approximately twenty days. (Tr., p. 29)

On Friday, October 24, 2014, Southall attended a follow-up appointment at the UIHC with Ambur Reddy, M.D., a neurosurgeon. (JE 3, p. 51) Dr. Reddy noted Southall's diplopia had resolved and he was able to bear weight with a walker. (JE 3, p. 51) Southall did not voice any complaints during his appointment with Dr. Reddy. (JE 3, p. 51) Dr. Reddy issued a note opining Southall could return to work anytime from a neurological standpoint. (JE 3, p. 55) Dr. Reddy documented he explained, "several more months of headaches, dizziness, and memory loss is not unusual" after a head injury. (JE 3, p. 52)

Southall attended an appointment with Richard Naylor, D.O., a board certified orthopedic surgeon, on October 28, 2014. (JE 5, p. 1; Ex. Z) Dr. Naylor examined Southall, diagnosed him with a closed fracture of the left pubis, a left clavicle fracture, closed fracture of multiple ribs, left shoulder pain, reviewed his imaging, and ordered physical therapy and magnetic resonance imaging. (JE 5, pp. 1-3) Southall continued to treat with Dr. Naylor. (JE 5, pp. 4-8)

Alter and Arch paid Southall temporary total disability benefits from September 3, 2014, until December 2, 2014. (Ex. 5) Southall returned to light duty work on December 3, 2015, answering telephones. (Tr., pp. 32, 40-41, 60-61; Ex. T, p. 97) Southall also straightened the filing system in the maintenance shop. (Tr., p. 61) Southall removed out-of-date material and discarded it. (Tr., p. 61) Southall continued to work in the maintenance shop until he was released to full duty in May 2015. (Tr., pp. 62-63; Ex. T, p. 97) Southall reported he returned to work a few hours per day each week, and his hours gradually increased until he was working eight hours per day. (Ex.

S, p. 89) Southall relayed that when he returned to work following his work injury the harder he worked the worse his pain would become. (Tr., p. 40)

Southall underwent left shoulder magnetic resonance imaging on January 5, 2015. (JE 7) The reviewing radiologist listed an impression of an "[e]xtensive labral tear involving the entire labrum," a "[t]ear of the posterior band of the inferior glenohumeral ligament at its humeral attachment site (PHAGL lesion), in addition to other findings. (JE 7, p. 2)

During an appointment on January 12, 2015, Dr. Naylor noted magnetic resonance imaging revealed a tear of the posterior band of the interior glenohumeral ligament at is humeral attachment site, but no rotator cuff tear, offered surgery, which Southall declined, and he imposed restrictions of no work at or above shoulder height, and lifting, carrying, pushing, and pulling up to ten pounds occasionally. (JE 5, pp. 8-9) Dr. Naylor released Southall to return to full duty without restrictions on May 20, 2015. (JE 5, pp. 10-20)

Southall returned to his duties as a maintenance mechanic at Alter after Dr. Naylor released him to full duty. (Tr., p. 63; Ex. T, pp. 97-98) After Southall returned to full duty he occasionally performed mandatory overtime. (Tr., p. 63) The only job at Alter Southall could not perform when he returned to work was the job of driving the truck. (Tr., pp. 63-64; Ex. T, p. 99)

Southall testified when he returned to work he had to perform everything differently and he did not like his climbing duties because his balance is poor and he did not want to fall again. (Tr., pp. 41-42) The shredder tower is three-and-a-half stories tall with ninety steps. (Tr., p. 43) Southall relayed before his work injury he could climb to the top of the shredder without stopping and after his work injury he had to stop to catch his breath while climbing the shredder. (Tr., pp. 43-44) Southall reported before his work injury he could lift fifty pounds, and after his work injury he could only lift twenty-five pounds, requiring him to ask for assistance from others with heavier items. (Tr., p. 42)

On November 25, 2015, Dr. Naylor issued a permanent impairment rating, finding:

[o]riginal consultation was on September 27, 2014 where he had taken a fall 8 to 10 feet off a crane. He sustained multiple rib fractures on the left, left shoulder pain, left clavicle fracture and left-sided superior and inferior pubic rami fractures. On his last clinic followup of 05/20/2015 he was made at maximum medical improvement on that visit. His lower extremity had resolved completely with no pain over the fracture sites, nontender range of motion and strength of the bilateral lower extremities. Left upper extremity had forward flexion 0-150, abduction 0-140, external rotation 0-60, internal rotation 0-70, external rotation, abduction, and strength and forward flexion strength were all 4/5+.

According to the AMA guidelines, fifth edition, forward flexion 0-150 is a 2% upper extremity impairment. Abduction 0-140 is 2% upper extremity impairment. External rotation 0-60 degrees is 0% impairment rating. Internal rotation 0-70 is a 1% upper extremity impairment. When it comes to strength, his external rotation strength 4/5+ is a 1% upper extremity impairment. Abduction strength 4/5+ is a 2% upper extremity impairment and flexion strength 4/5+ is a 3% upper extremity impairment. This gives him a total of 14% upper extremity impairment with conversion of upper extremity impairment of 14% to a whole person impairment equals 8% whole person; otherwise, he is released to full duty status without restrictions and he can return to clinic on a p.r.n. basis.

(JE 5, p. 22; Ex. G, p. 29)

Patrick Hartley, M.D., a pulmonology, critical care, and occupational medicine physician, and the Medical Director of the Occupational Medicine Clinic at the UIHC performed an independent medical examination for Alter and Arch on August 12, 2015. (JE 3, p. 56; Ex. X) Dr. Hartley reviewed Southall's medical records and examined him. (JE 3, pp. 56-65) Dr. Hartley opined Southall's work-related injury was a substantial contributing factor to his current respiratory impairment, noting Southall presented with obstructive lung disease with some degree of reversibility post inhaled bronchodilator on spirometry. (JE 3, p. 64) Dr. Hartley concluded Southall was not at maximum medical improvement for his lung injury, he recommended a chest computerized tomography scan, noting it is unclear whether his obstructive lung disease is related to his history of cigarette smoking or is a consequence of his lung injury, and he recommended Southall be treated with an inhaled beta-agonist rescue inhaler and an inhaled steroid. (JE 3, pp. 64-65)

Dr. Hartley requested and received additional medical records concerning Southall. (JE 8, p. 1) Dr. Hartley issued an opinion letter on November 24, 2015, noting after reviewing the additional records "it remains my opinion, to a reasonable medical certainty, that his occupational injury in September 2014 with associated chest trauma is a substantial contributing factor to his current pulmonary impairment" and noted Southall's history of cigarette smoking is also a significant contributing factor to his pulmonary impairment, and noted he did not have access to any pre-injury pulmonary function testing to determine the extent of the preexisting impairment. (JE 8, pp. 1-2)

Pursuant to a request by Alter and Arch, Dr. Hartley issued an opinion letter on January 12, 2016, again noting his opinion remained unchanged that Southall's work injury and his history of cigarette smoking are both significant contributing factors to his pulmonary impairment, and noted he was unable to determine if Southall had reached maximum medical improvement because he had not evaluated him since August 2015. (JE 8, pp. 3-4)

During a follow-up appointment on February 24, 2016, Dr. Hartley again opined to a reasonable degree of medical certainty Southall's work-related lung injury was a

substantial contributing factor to his respiratory impairment, as was his history of cigarette smoking. (JE 3, p. 66) Dr. Hartley noted Southall continued to report dyspnea while climbing a piece of equipment that is four stories high at work, and wheezing on exertion. (JE 3, p. 66)

Dr. Hartley diagnosed Southall with an altered mental state, flail chest, left hemopneumothorax, hyperkalemia, cardiac contusion, traumatic epidural hematoma, subdural hemorrhage, dyspnea, and chronic obstructive pulmonary disease with emphysema, and noted his symptoms were unchanged. (JE 3, pp. 66-68) Dr. Hartley found Southall was at maximum medical improvement with respect to his 2014 lung/chest wall injury, and opined his lung and chest wall injury is a substantial contributing factor to his pulmonary impairment, ordered no restrictions, and noted Southall was performing his regular duties without significant limitation. (JE 3, p. 70) Dr. Hartley limited his opinions to Southall's respiratory conditions.

On March 9, 2016, Dr. Hartley issued an impairment rating for Alter and Arch. (JE 8, pp. 5-6; Ex. I, pp. 32-33) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Hartley opined Southall had sustained a Class 2 respiratory impairment of the whole person based on his pulmonary function and exercise test results, and assigned an impairment rating of twenty-five percent of the whole person. (JE 8, p. 5; Ex. I, p. 32) Dr. Hartley recommended Southall attend follow-up care with his primary care provider for management of his COPD and recommended no work restrictions. (JE 8, p. 5; Ex. I, p. 32)

On August 5, 2016, Southall returned to Dr. Malicka-Rozek. (JE 4, p. 6) Dr. Malicka-Rozek noted Southall was working full-time without restrictions, and he was complaining of limited range of motion and pain in his left shoulder, left hip pain and ambulation difficulties, numbness and tingling around his left orbital area, memory deficits and word finding problems, balance difficulties, and a loss of smell. (JE 4, p. 7) Dr. Malicka-Rozek recommended physical therapy for Southall's left hip pain and range of motion, an evaluation of his memory deficits and word finding problem with a neuropsychologist, and an evaluation of his balance difficulties which could be related to a "cranial nerve injury VIII" by a physical therapist. (JE 4, p. 11) Dr. Malicka-Rozek recommended home exercises for Southall's left shoulder pain and limited range of motion, to wait for improvement of his left ribcage pain, and noted she did not have anything to offer for his numbness and tingling sensory changes "related to injury of cranial nerves, especially cranial nerve V and VII due to several facial bone fractures." (JE 4, p. 11)

Pursuant to a request from counsel for Alter and Arch, Dr. Hartley sent a letter on September 23, 2016, as follows:

[a]s we discussed, Mr. Southall has evidence of emphysema on his chest CT that is related to his past history of cigarette smoking and is unrelated to his work-related injury in September 2014. It is my opinion, to a

reasonable medical certainty, that his smoking related emphysema was present prior to his injury in September 2014.

Mr. Southall has chronic obstructive pulmonary disease (COPD), related to his cigarette smoking. His emphysema, which as discussed in the preceding paragraph is noted on chest CT, is part of the spectrum of disease that constitutes COPD. His pulmonary function tests are also consistent with this diagnosis. Nonetheless, it is my opinion, to a reasonable degree medical certainty, that his work-related injury, was a substantial contributing factor to the degree of pulmonary impairment noted on pulmonary function testing. He is at maximum medical improvement with regard to his work-related lung and a chest wall injury. The relative contributions of his smoking-related emphysema/COPD and his work related injury are difficult to apportion exactly, as there is little or no guidance in the published medical literature to assist with this. However, it is my opinion, that at least 25% of the calculated impairment rating (which was 25% of the whole person as documented in my letter dated 3/9/16) is attributable to his smoking-related disease.

It is my opinion, that any future care related to Mr. Southall's lung disease is causally related to his nonwork related COPD. His bronchodilator inhalers and oral prednisone treatments prescribed by his primary care provider since September 2014 are for his smoking-related lung disease and not for the treatment of his work-related lung injury.

(JE 8, p. 7; Exs. O, p. 75; P, p. 79)

Southall continued to complain of problems with his balance and memory. (JE 9, pp. 3-4) His primary care provider, Cindy Huwe, M.D., recommended neuropsychiatric testing in October 2016. (JE 9, p. 4)

In November 2016, Southall underwent neuropsychological testing with Karla Brennscheidt, Psy.D. (JE 10) Dr. Brennscheidt examined Southall, reviewed his medical records, administered testing, and issued her report on December 20, 2016. (JE 10) Southall complained to Dr. Brennscheidt of word-finding problems, poor retention of information he reads, losing his train of thought several times per day, and requiring extra time to complete work. (JE 10, p. 3) Southall relayed he has to think about the various steps he needs to take to complete a repair at work, which used to be automatic and he has to check his work two to three times to ensure he has completed the required steps. (JE 10, p. 3) Dr. Brennscheidt noted the testing results were valid. (JE 10, p. 5) While Southall's intellectual functioning, visual perception and non-verbal reasoning skills, and auditory learning fell within the average range, Dr. Brennscheidt noted he demonstrated weak visual analysis, planning, and integration, he had delayed recall, falling below the first percentile for his age group, his visual special learning and immediate recall fell below the second percentile for his age group, and his mental flexibility and set shifting skills fell in the impaired range. (JE 10, pp. 6-7) Dr.

Brennscheidt concluded Southall's core weaknesses are in auditory verbal learning and visual memory, noting he requires more time to learn and remember, which would affect his work performance. (JE 10, pp. 7-8)

Southall continued to complain about gait difficulties and left hip pain while working. (JE 11) Southall received additional physical therapy from March 21, 2017 through June 21, 2017. (JE 11)

Following his work injury, Southall struggled to weld over his head with his left arm. (Tr., pp. 42-43) Southall testified before his work injury he could weld with his right hand, but after his work injury he had to use both hands to weld, and if he had a hard time reaching he would use a stool or ladder to elevate himself to perform the task. (Tr., p. 43)

Southall reported when he returned to work he was "about four times slower at doing [his] job" because "before the accident, most everything [he] did was automatic" and after the accident he "had to think – everything [he] did, [he] had to do step by step, and every step [he] had to – [he] had to think how [he] had to do this." (Tr., p. 44) When Southall returned to work he relied on service manuals to assist him with his job duties, which he did not use before his work injury. (Tr., p. 45)

After his work injury Southall reported he was exhausted after work. (Tr., p. 47) He would go home, eat supper, clean up, and go to bed. (Tr., pp. 47-48) Before his work injury Southall would "do the running" and work on bicycles in the evening after work. (Tr., p. 48)

On July 7, 2017, Southall retired from Alter. (Tr., pp. 48, 65; Ex. T, p. 94) Southall reported he retired because he believed there was more to life than going to work, coming home, eating, cleaning up, going to bed, and getting up and going to work each day. (Tr., pp. 48-49) Southall relayed he retired early and he had planned to retire after he reached fifty years of employment, at age seventy. (Tr., p. 49) Southall worked full duty from May 2015 until his retirement, with the exception of two hospitalizations for pancreatitis and when his gallbladder was removed, unrelated to his work injury. (Tr., p. 66)

After his work injury and before his retirement Southall received two pay increases from Alter. (Tr., p. 67) Alter did not encourage Southall to retire. (Tr., pp. 67-68)

Barbeau worked with Southall at Alter starting in 2011. (Tr., p. 73) Barbeau worked in the yard for one year and then became the yard manager and he worked with Southall until his retirement in July 2017. (Tr., p. 73) Barbeau testified Southall was mobile and worked on his feet most of the day and he welded objects daily. (Tr., p. 75) Barbeau reported Southall was physically capable of performing his work after he returned to full duty until his retirement. (Tr., pp. 76-77)

Ryan Besh prepared an affidavit for Southall. (Ex. 7) Besh did not appear at the hearing. Besh agreed that following his work injury Southall was “different mentally. . . . He thought more slowly and he had memory problems” that Besh never noticed before Southall’s work injury. (Ex. 7) Besh also agreed Southall appeared to be limited physically when he came back to work following his work injury and he could not lift his left arm above his head, he needed assistance with physical things, and he would become short of breath while climbing the stairs on the crane. (Ex. 7) Barbeau testified Southall worked with Besh for thirty years and they are good friends. (Tr., p. 78)

Sunil Bansal, M.D., an occupational medicine physician, conducted an independent medical examination for Southall on September 29, 2017. (Ex. 1) Dr. Bansal reviewed Southall’s medical records and examined him. (Ex. 1, p. 1) Dr. Bansal diagnosed Southall with a right temporal lobe subdural hematoma, traumatic brain injury with memory loss, migraines, dizziness/vertigo, concentration impairment, and balance impairment, right medial orbital wall fracture, left temporal bone fracture, left medial/lateral orbital wall fracture, right maxillary fracture, right temporal lobe contusion, right squamosal fracture of the greater sphenoid wing, multiple left rib fractures, fracture through the mid shaft of the left clavicle, with upward displacement of the distal fracture fragment, extensive labral tear involving the entire labrum, tear of the posterior band of the inferior glenohumeral ligament, T1 and T9 fractures, left fracture of the greater sphenoid wing, and left anterior pubic ramus and left obturator ring fractures. (Ex. 1, pp. 25-26) Dr. Bansal opined as a result of his September 2014 work injury Southall sustained injuries to his left shoulder, left hip, lungs, and nervous system, and he sustained mental sequelae. (Ex. 1, p. 26)

Dr. Bansal noted before the work injury Southall was not experiencing head or neurological deficits, and since his traumatic brain injury Southall has had migraine headaches, dizziness, and cognitive impairments. (Ex. 1, p. 27) Dr. Bansal placed Southall at maximum medical improvement for his neurological condition on November 26, 2016, left shoulder on May 20, 2015, chest and lungs on February 24, 2016, face on October 9, 2014, and back, pelvis, and left hip on August 5, 2016. (Ex. 1, p. 28)

Using the AMA Guides, Dr. Bansal found:

NEUROLOGIC:

Mr. Southall suffers from a constellation of neurological impairments classified under the general descriptor “traumatic brain injury.” While the Guides do not proffer an absolute tabular impairment percentage for traumatic brain injuries, it is left to the medical examiner to infer from the Guides a ratable percentage based on qualitative categories set forth. This inference is based on correlating neurological impairments into functional impairments.

He has no impairment of his long term memory, but has noticed trouble with his short-term memory and concentration. He can be told the name

of a new acquaintance, but cannot recall the name of the person after a short period of time. However, he does recognize the person's face later. He had no difficulty with his memory prior to his fall at work. He now has to rethink the way in which he solves mathematical computations, as the way he used to do this now makes no sense to him.

The National Institute of Neurological Disorders states that cognitive and emotional symptoms include behavioral or mood changes, confusion, and trouble with memory, concentration, attention, or thinking are quite common ("NINDS Traumatic Brain Injury Information Page." National Institute of Neurological Disorders and Stroke. 2008-09-15).

The Guides base neurological impairments on the clinical dementia rating scale (CDR). Looking at Tables 13-5 and 13-6, we find that Mr. Southall has mostly elements of Class 1 (CDR of 0.5). I assign a rating of 5% of the whole person based on the above assessment.

FACE:

With reference to the AMA Guides of Evaluation for Permanent Impairment, Fifth Edition, based on Table 11-5, guidance from Section 11.3, and Guide examples 11-9 and 11-10, we find that Mr. Southall meets the criteria of a Class II impairment. The example in 11-9 assigns a 3% impairment for his orbital bone fractures. He also had four other facial fractures. I assign a 15% impairment of the body as a whole.

CHEST/LUNGS:

Under the AMA Guides of Evaluation for Permanent Impairment, Fifth Edition, Table 5-12, there are specific PFT criteria given to rate pulmonary impairment.

Date of Service February 24, 2016. Pulmonary function tests.

FVC:	3.71
FVC %Predicted:	90
FEV-1:	1.64
FEV-1 %Predicted:	53
FVC Post:	4.09
FVC %Predicted Post:	99
FVC %Change:	10
FEV-1 Post BD:	1.85
FEV-1 %Predicted Post:	60

FEV-1 %Change: 13
 FEV-1/FVC Post: 0.44

Based on Table 5-12, he meets the criteria for a Class 3 impairment, as his FEV1 is between 51 and 59%. He is assigned a 26% whole person impairment.

LEFT SHOULDER:

With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, specifically Figures 16-40 through 16-46 and comparing to the right shoulder, we find that Mr. Southall is assigned:

	RANGE OF MOTION	% UE Impairment
Flexion:	151, 150, and 148 degrees	2
Abduction:	140, 142, and 139 degrees	2
Adduction:	28, 26, and 24 degrees	1
External Rotation:	65, 66, and 64 degrees	0
Extension:	38, 38, and 36 degrees	1
Internal Rotation:	62, 63, and 61 degrees	2

This equals an 8% upper extremity impairment, which is equal to a 5% impairment of the body as a whole.

BACK:

With reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, based on his current symptomatology and physical examination, he shares some elements of a DRE Category II impairment. He has loss of range of motion and guarding. He has positive provocative testing of his left sacroiliac joint. He is assigned a 3% whole person impairment based on Table 15-3.

PELVIS/LEFT HIP:

Furthermore, per Table 15-19, he is assigned a 5% whole person impairment for his pelvic fractures.

COMBINED TOTAL USING THE COMBINED VALUES CHART IS 5 + 15 + 26 + 5 + 3 + 5 = 48% WHOLE PERSON IMPAIRMENT.

(Ex 1, pp. 29-31)

Dr. Bansal assigned restrictions of no safety sensitive duties, such as climbing ladders or operating machinery, secondary to headaches, memory difficulties, and dizziness, "jobs requiring intact cognitive functioning," no lifting greater than ten pounds occasionally, or five pounds frequently and no lifting over shoulder level with the left arm, and with respect to his chest, lungs, back, pelvis and left hip, avoid multiple steps or inclines, no prolonged standing or walking greater than thirty minutes, and advised Southall not drive a truck. (Ex. 1, p. 31) Dr. Bansal recommended additional medication for headaches, a surgical consultation if Southall's left shoulder worsens, and necessary medication and treatment for his back, pelvis, left hip, and left shoulder. (Ex. 1, pp. 31-32)

None of Southall's treating providers have recommended any ongoing treatment. At the time of the hearing Southall did not have any medical appointments scheduled for his work injuries.

Following his work injury Southall complained of problems reading small print, and twitching, numbness, and tingling of the lateral canthus of the left eye. (JE 12) Southall treatment with Benjamin Mason, M.D., with the Wolfe Eye Clinic. (JE 12) During an appointment with Dr. Mason in September 2017, Dr. Mason noted the numbness, tingling, and even mild spasm on the left side around the orbit are "likely related to the fracture," and noted if it "were to get bad enough [Southall] could consider Botox for significant spasms." (JE 12, p. 4)

In November 2017, Mathew Thurtell, M.D., an ophthalmologist with the UIHC, examined Southall. (JE 13) Dr. Thurtell found his neuro-ophthalmic examination was unremarkable. (JE 13, p. 4) Dr. Thurtell documented Southall's neuropsychological testing revealed deficits in higher visual function, and noted the deficits are common following a traumatic brain injury, but there was not much that could be done to address the issues. (JE 13, p. 4) Southall reported eye discomfort and Dr. Thurtell noted he had subtle findings to suggest left dry eye syndrome, with Schirmer's testing confirming decreased tear production in that eye, and he recommended Southall use artificial tears, and to follow up with Dr. Mason. (JE 13, p. 4)

Alter and Arch obtained an independent medical examination from Michael Cullen, M.D., a board certified neurologist and psychiatrist specializing in neurology, in February 2018. (Exs. U-W) Dr. Cullen reviewed Southall's medical records, including Dr. Brennscheidt's report, and examined him. (Ex. U) Dr. Cullen opined Southall has sustained no residual neuropsychological issues or deficits as a result of the September 2014 work injury, and found he sustained no neuropsychological permanent impairment or does not require permanent restrictions as a result of the September 2014 work injury. (Ex. U, p. 112)

Southall testified at hearing he has pain all the way around his left shoulder which becomes worse when he uses his shoulder, or lifts, pushes, or pulls items over ten pounds or reaches. (Tr., p. 33) Southall relayed he has a difficult time squatting and he has a difficult time twisting at the waist due to his left hip injury. (Tr., pp. 34-35)

Southall occasionally experiences pain underneath his left arm where his ribs were fractured, but reported it is "nothing that stops me from doing something," but twisting is difficult. (Tr., p. 35)

Southall testified prior to his work injury he was not short of breath, but since his work injury he experiences shortness of breath, especially when he exerts himself, climbs steps, walks up hills, and carries things. (Tr., p. 35) When Southall experiences shortness of breath he stops and catches his breath, and may use his rescue inhaler. (Tr., p. 36)

Southall contends he has short-term memory loss since the accident. (Tr., p. 36) Southall testified, "[i]f I'm – if I'm doing something, I'll forget what I've done. If I read something, I'll forget what read. I guess I've – I've – people have asked me that question, and the best way I can – the way I explained it is, I can meet somebody, shake their hand, turn 360 degrees and have no clue what their name is." (Tr., p. 36) Southall denied having memory problems prior to the September 2014 work injury. (Tr., p. 36)

Southall avers his ability to think has been affected by his work injury. (Tr., pp. 36-37) Southall reported, "the way I do math is different. And the way I've explained this to people is, somebody asks me how long I'd been married, and I go back and I – I used to just say for years. That's just a – now I go, okay. I was married in 1983, so '83 to 2000 is 17. 2000 to - - and I'm going to use 2017, because that's when this was asked - - is 17. So I add 17 and 17 is 34. Before I'd just say 34 years." (Tr., p. 37)

Southall testified since his work injury he has problems concentrating and "I lose my thoughts. I'll be talking to somebody, and right in the middle, I'll just forget what I was talking about and --." (Tr., p. 37) He also relayed he has a difficult time coming up with the words to express himself when communicating, and he is more emotional than before the accident. (Tr., pp. 37-38)

Southall reported he continues to experience numbness around the left side of his left eye, his eye feels like it is twitching all the time, and he gets headaches behind his left eye. (Tr., p. 38) Southall denied having problems with his vision. (Tr., p. 38)

Southall testified his sense of smell has worsened since the accident, and he has balance problems. (Tr., p. 39) Southall reported his balance problems affect his ability to ride his bicycle. (Tr., pp. 39-40) Before his work injury Southall enjoyed riding his bicycle two to three times per week, and relayed he cannot ride a bicycle anymore. (Tr., pp. 39-40; Ex. T, pp. 104-05) Southall testified, "[t]he only time I get on a bicycle is after I fix it, I'll ride it down into the street and back, just to make sure it works right." (Tr., p. 40)

Southall used to golf before his work injury. (Tr., p. 53; Ex. T, p. 104) Southall testified he cannot golf anymore because his shoulder will not rotate enough to swing a golf club. (Tr., p. 53; Ex. T, p. 104) Southall also reported he does not sleep well at night and he wakes up every hour because he becomes stiff and sore, and he cannot tolerate lying on his left side. (Tr., p. 53)

At hearing Southall testified he spoke with a welding shop in December 2017, and told the shop to give him a call if the shop needed help. (Tr., p. 68) Southall testified he believes he can weld and reported he inquired with the shop about work because he does not have enough to do in the winter. (Tr., pp. 68-69) Southall has not applied for any other employment since his retired. (Tr., p. 69)

Before he retired Southall worked on bicycles on Saturday for his business. (Tr., pp. 51, 59) After his work injury, from April to October he worked on bicycles twenty to twenty-five hours per week. (Tr., pp. 50-51, 59; Ex. T, p. 93) Southall performs his duties without assistance, but relayed he has to recheck himself numerous times like he had to when he worked for Alter. (Tr., p. 51) Southall testified it takes him double the amount of time to work on a bicycle than it did prior to his work injury. (Tr., pp. 52-53) Southall relayed his work on bicycles is lighter than his work at Alter, and reported he lifts up to twenty pounds while working on bicycles. (Tr., p. 51)

CONCLUSIONS OF LAW

I. Rate

Alter and Arch contend Southall's average weekly wage is \$941.77, and his rate is \$600.42. (Defendants' Brief at 27) Southall avers his average weekly wage is \$974.65, resulting in a weekly rate of \$619.06. (Claimant's Brief at 10-11) In support of his argument Southall contends Alter and Arch incorrectly excluded the pay period ending August 31, 2014, improperly included the pay period of July 21, 2014 through July 27, 2014, which is not a representative week because Southall nearly always worked overtime and he took vacation time that week, documented his earnings were only \$862.88 for the period ending July 13, 2014, when the correct amount is \$1,018.88, which is explained by the exclusion of vacation pay Southall received that week, and calculated the wrong earnings for the week of June 29, 2014 because 47.5 hours multiplied by \$19.50 is \$926.25, not \$903.43. (Claimant's Brief at 10-11)

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). Under Iowa Code section 85.36(6),

[i]n the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ

of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

The basis of compensation is the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. "The term "weekly earnings" is defined in Iowa Code section 85.36 as,

gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed.

The term "gross earnings" is defined as,

[r]ecurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code § 85.61(3).

Rule 876 Iowa Administrative Code 8.2, provides,

[t]he word "overtime" as used in Iowa Code section 85.61 means amounts due in excess of the straight time rate for overtime hours. Such excess amounts shall not be considered in determining weekly wages within Iowa Code section 85.36. Overtime hours at the straight time rate are included in determining gross weekly earnings.

Thus, under the administrative rule, overtime hours at the straight time rate are included in determining gross weekly earnings.

The work injury occurred on September 2, 2014. The record reflects Southall earned wages the week before the wages he earned were paid. The week of August 25, 2014 through August 31, 2014, should be included in the rate calculation. For the thirteen weeks prior to the work injury Southall worked the following hours and received the following wages:

Pay Period	Hours	Rate	Hol./Per./Vac. Hrs	Gross Pay
8/25-8/31	50.00	\$19.50		\$975.00
8/18-8/24	48.75	\$19.50		\$950.63
8/11-8/17	49.25	\$19.50		\$960.38
8/4-8/10	49.75	\$19.50		\$970.13
8/3-7/28	50.25	\$19.50		\$979.88
7/21-7/27	29.25	\$19.50	8.00	\$726.38
7/14-7/20	48.25	\$19.50	8.00	\$1,096.88
7/7-7/13	44.25	\$19.50	8.00	\$1,018.88
6/30-7/6	48.25	\$19.50		\$940.88
6/23-6/29	47.50	\$19.50		\$926.25
6/16-6/22	49.25	\$19.02		\$936.74
6/9-6/15	56.00	\$19.02		\$1,065.12
6/2-6/8	49.50	\$19.02		\$941.49

(Ex. 3, p. 1)

Looking at the payroll information provided by the parties, the week of July 21, 2014 through July 27, 2014 is not representative. Southall worked 29.25 that week and he typically worked more than 40 hours, even when he also received eight hours of holiday, personal, or vacation pay. The week of May 26, 2014 through June 1, 2014, Southall received gross pay of \$908.21, which included 39.75 regular and overtime hours, and eight hours of holiday pay. (Exs. 3, p. 2; M, p. 68) This week is representative. Alter and Arch failed to include the holiday pay for the week of July 7, 2014 through July 13, 2014, but included the holiday pay for the week of July 21, 2014 through July 27, 2014. (Exs. M; 3) There is also an error for the week of June 23, 2014 through June 29, 2014. (Exs. M; 3)

For the thirteen representative weeks prior to the work injury Southall received gross wages of \$12,670.47, divided by thirteen, results in an average weekly wage of \$974.65. The parties stipulated at the time of the work injury Southall was married and entitled to two exemptions. Under the 2014-2015 Ratebook, in effect at the time of the work injury, Southall's weekly rate is \$619.06.¹

¹ <https://www.iowaworkcomp.gov/pdfs?title=ratebook>.

II. Nature of the Injury

The parties stipulated Southall sustained injuries to his left shoulder, left clavicle, left scapula, face, left-sided ribs, left hip, pelvis, and lungs, and a closed head injury on September 2, 2014, while working for Alter. Southall contends he also sustained mental and nervous system or neurological injuries and an injury to his spine as a result of the work injury.

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

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

A. Evaluation of Dr. Bansal's Assignment of Permanency for the Spine

Dr. Bansal assigned a permanent impairment rating of three percent using Table 15-3 of the AMA Guides addressing the lumbar spine. (Ex. 1, p. 30) Later in his report he assigned a permanent impairment rating of five percent for the pelvic fractures Southall sustained. (Ex. 1, p. 31) In his report, Dr. Bansal lists Southall's diagnoses at pages 25 and 26. He diagnosed Southall with T1 and T9 fractures, and pelvic fractures of the pubic ramus and left obturator ring. Dr. Bansal did not diagnose Southall with any condition of the lumbar spine related to the work injury. (Ex. 1, p. 26) Dr. Bansal did not indicate the work injury aggravated, accelerated, worsened, or lighted up a preexisting cervical, thoracic, or lumbar spine condition. (Ex. 1) Dr. Bansal did not issue a supplemental opinion assigning a permanent impairment rating for the thoracic fractures. I do not find his opinion concerning the alleged "back" injury persuasive. Southall has not met his burden of proof he sustained a permanent impairment to his cervical, thoracic, or lumbar spine as a result of the work injury.

B. Memory and Learning Deficits

Southall fell approximately ten feet from a crane onto his left chest and face and he was unconscious. (JE 2, p. 2) Southall sustained right temporal lobe cerebral contusions, a subarachnoid hemorrhage, a nondisplaced fracture of the left temporal bone with an underlying small epidural and subdural hematoma, multiple fractures involving the bilateral maxillary bones, left sphenoid bone, and left squamous portions of the temporal bone, bilateral orbital fractures. (JE 3, pp. 16-18) Southall was discharged from the UIHC on September 12, 2014, with diagnoses of a flail chest, traumatic epidural hematoma, subdural hemorrhage, cardiac contusion, altered mental status, left hemopneumothorax, and hyperkalemia. (JE 3, pp. 1-2)

After his release from the UIHC, Southall complained to his physical therapist that he was having difficulty with word finding, which the physical therapist documented was observed during treatment. (JE 6, p. 4)

Dr. Reddy was Southall's treating neurosurgeon at the UIHC. On October 24, 2014, Dr. Reddy released Southall to return to work without restrictions from a neurological standpoint. (JE 4, p. 55) While Southall did not complain of any ongoing problems during his appointment, Dr. Reddy documented he explained "several more months of headaches, dizziness, and memory loss is not unusual" after a head injury. (JE 3, p. 52)

Southall complained of persistent memory problems, and he requested authorization for the neuropsychological testing. On September 14, 2016, Alter and Arch denied liability for any memory deficit arising out of and in the course of Southall's employment. (Ex. N, p. 73)

Dr. Brennscheidt, a psychologist, performed a neuropsychological evaluation of Southall, which revealed deficits in auditory verbal learning and visual memory. (JE 10, pp. 7-8) Dr. Brennscheidt recommended a referral to ophthalmology to rule out post-trauma vision syndrome, and to psychology to evaluate and treat post-traumatic stress disorder symptomology. (JE 10, p. 8) Subsequent ophthalmological evaluation did not reveal any additional permanent impairment to Southall's vision. No evidence was presented concerning evaluation or treatment for post-traumatic stress disorder.

Dr. Thurtell, a treating ophthalmologist, documented Southall's neuropsychological testing revealed deficits in higher visual function, and noted the deficits are common following a traumatic brain injury, but there was not much that could be done to address the issues. (JE 13, p. 4)

Dr. Bansal, a board certified occupational medicine physician, and Dr. Cullen, a board certified neurologist and psychiatrist specializing in neurology, provided expert opinions. Neither physician provided treatment to Southall, but both reviewed Dr. Brennscheidt's report and testing. Dr. Bansal assigned a five percent rating to Southall for a neurological impairment. Dr. Cullen found Southall had sustained no impairment. Neither physician diagnosed Southall with a mental health impairment.

Dr. Cullen's brief report does not address Dr. Brennscheidt's findings showing deficits in auditory verbal learning and visual memory. (Ex. U) His report contains summary conclusions with no analysis or discussion of Southall's premorbid history. I do not find it persuasive. Dr. Bansal's report, on the other hand, is detailed and discusses Southall's reported memory and concentration problems and premorbid history. (Ex. 1, pp. 21, 27, 29) Dr. Bansal noted Southall had no problems with his memory prior to his fall at work. (Ex. 1, p. 29) Dr. Bansal's findings are supported by Dr. Brennscheidt's report. Southall has established he sustained a permanent neurological impairment as a result of the work injury.

III. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

Southall contends he is permanently and totally disabled under the statute and under the common law odd-lot doctrine. Alter and Arch reject his assertion.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

Southall was involved in a serious, traumatic work injury when he fell ten feet, and sustained a left sacral longitudinal fracture, multiple left rib fractures from the first through ninth ribs, a left comminuted clavicular fracture, right temporal lobe cerebral contusions and small subarachnoid hemorrhage, nondisplaced fracture of the left temporal bone with an underlying small epidural and subdural hematoma, extensive subcutaneous emphysema, multiple fractures involving the bilateral maxillary bones, left sphenoid bone, and left squamous portions of the temporal bone, bilateral orbital fractures, subcutaneous emphysema of the bilateral upper chest wall, right pneumothorax, bilateral atelectasis and contusion of the left lung with small amount of hemorrhage, hematoma to the left of the bladder, intramuscular hematomas in the left piriformis, left obturator internus, and left obturator externus, fractures of the left clavicle, fractures of the ribs, spleen laceration, and hemangioma of the liver. (JE 3, pp. 15-22) Southall was air lifted to the UIHC where he received treatment. He was then transferred to a rehabilitation center in Waterloo. Southall had an excellent recovery and he returned to full-duty work. While Southall returned to full-duty work, he has sustained permanent impairments as a result of his work injuries.

None of Southall's treating physicians assigned any permanent restrictions for his work injuries. Dr. Bansal assigned work restrictions of no climbing of ladders, operating machinery, or "jobs requiring intact cognitive functioning," no lifting greater than ten pounds occasionally, no lifting greater than five pounds frequently, no lifting over shoulder level with the left arm, no prolonged standing or walking greater than thirty minutes at a time, and avoiding multiple steps or inclines. (Ex. 1, p. 31) I do not

find Dr. Bansal's restrictions persuasive. Southall continued to work without restrictions for two years and he performed his normal duties, with the exception of occasionally driving a truck, until he retired. Southall relayed he lifts twenty pounds while working on bicycles, which is also inconsistent with Dr. Bansal's findings.

Southall's education is limited and he was an average student. Southall worked at the same location from 1970 through 2017, performing the same duties for most of his career. He has also operated a hobby bicycle repair business for thirty years. Southall continues to repair bicycles and he orders parts for the bicycles using a computer.

Southall is not motivated to work outside of his hobby bicycle repair business. He retired on July 7, 2017. At the time of the hearing in March 2018, Southall had not formally applied for any work; he was not actively looking for work. Southall testified in December 2017, he inquired whether a welding business needed help because he believes he can still weld. Southall welded daily at Alter. Given his age, education, functional disability, experience, ability to engage in similar employment, and all factors of industrial disability, I conclude Southall has sustained a sixty percent industrial disability.

Southall has not met his burden of proof he is permanently and totally disabled under the odd-lot doctrine. Southall has not formally applied for any work since he retired on July 7, 2017. Southall lives in the Waterloo area, an urban area. Southall presented no evidence at hearing concerning the market for welders or other occupations in the Waterloo area. Southall has not established he is unable to perform services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

IV. Commencement Date for Permanency

Arch and Alter contend the commencement date for permanency is April 20, 2015. Southall avers the commencement date for permanency is December 3, 2014. In Evenson v. Winnebago Indus., Inc., the Iowa Supreme Court held that the healing period lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first." 818 N.W.2d 360, 372-74 (Iowa 2016). Alter and Arch paid Southall temporary total disability benefits from September 3, 2014, until December 2, 2014, when he returned to work. (Ex. 5) When Southall returned to work, permanency commenced.

V. Penalty

Southall seeks an award of penalty benefits based on underpaid benefits, late paid benefits, delay in paying Dr. Naylor's impairment rating, and delay in paying Dr. Hartley's impairment rating. Alter and Arch contend no penalty benefits should be awarded because Southall was released to return to work without restrictions.

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

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

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against

the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

This case reveals an ongoing pattern of underpaid and late paid benefits. Alter and Arch did not conduct a reasonable investigation in this case, nor did they contemporaneously convey the reasons for the underpaid and late paid benefits. Imposition of a fifty percent penalty is warranted.

A. Underpaid Rate

Southall's attorney sent a letter to the attorney for Alter and Arch on August 20, 2015, stating,

my legal assistant has requested a copy of your client's rate calculation, as her calculation is significantly higher than the weekly rate that is being paid by your client.

If it is determined that an incorrect rate amount has been calculated, I would request that the underpayment that has accrued to date, along with appropriate interest, be sent directly to this office.

(Ex. 6, p. 1)

Alter and Arch did not immediately respond to the August 20, 2015 letter. On June 7, 2016, the attorney for Alter and Arch sent a response letter, stating,

[t]emporary benefits were previously paid based on a comp rate of \$461.91; however, the correct comp rate is \$600.42. The TTD principal that is owed as a result of the underpayment is \$1,714.77, with step one interest of \$3.49 and step two interest of \$257.22. The TPD principal that is owed as a result of the underpayment is \$1,540.62, with step one interest of \$3.49 and step two interest of \$205.28. The interest was calculated through June 1, 2016. Therefore, the total owed for the underpayment of TTD and TPD benefits, with interest through June 1, 2016 is \$3,724.87.

(Exs. 6, p. 2; K, p. 58)

Exhibit 5 contains the history of temporary total disability, temporary partial disability, and permanent partial disability payments made to Southall by Alter and Arch. Alter and Arch did not contemporaneously convey the reason for the underpayment to Southall and instead waited over nine months to respond. Imposition of a penalty is warranted.

Alter and Arch paid thirteen weeks of temporary total disability benefits between September 3, 2014 through December 2, 2014. The underpayment each week was \$138.51. The total amount of the underpayment of temporary total disability is \$1,800.63. Southall is entitled to an award of penalty benefits of \$900.31 for underpaid temporary total disability payments.

Alter and Arch admitted in the August 2016 letter Southall was underpaid \$1,540.62 in temporary partial disability benefits. (Exs. 6, p. 2; K, p. 58) Southall is also entitled to an award of \$770.31 in penalty benefits for underpaid temporary partial disability benefits.

In the August 2016 letter, counsel for Alter and Arch noted Southall had been paid \$5,542.92 or twelve weeks of permanent partial disability benefits. (Exs. 6, p. 2; K, p. 58) The underpayment each week is again \$138.51. Alter and Arch underpaid Southall \$1,662.12 in permanent partial disability benefits. Southall is entitled to an award of \$831.06 in penalty benefits. Thus, Southall is entitled to a combined award of \$2,501.68 for underpaid temporary total, temporary partial, and permanent partial disability benefits.

B. Late Payments

Southall also seeks penalty benefits based on late-paid benefits. Exhibit 5, documents the following late payments:

Type	Period	Issue Date	Amount
TTD	9/3/14-9/9/14	9/11/14	\$461.91
TTD	9/10/14-9/30/14	10/3/14	\$923.82
TTD	11/5/14-11/18/14	11/19/14	\$923.82
TTD	11/19/14-11/25/14	12/2/14	\$461.91
TPD	12/8/14-12/14/14	1/16/15	\$144.16
TPD	12/15/14-12/21/14	1/16/15	\$102.08
TPD	12/22/14-1/11/15	2/11/15	\$62.91
TPD	1/12/15-1/18/15	2/11/15	\$56.41
TPD	1/19/15-2/1/15	2/11/15	\$14.16
PPD	4/20/15-5/10/15	5/18/15	\$1,385.73
PPD	5/11/15-5/17/15	5/22/15	\$461.91
PPD	5/17/15-5/23/15	5/29/15	\$461.91
PPD	5/24/15-5/30/15	6/5/15	\$461.91
PPD	5/31/15-6/6/15	6/12/15	\$461.91

Type	Period	Issue Date	Amount
PPD	6/7/15-6/13/15	6/19/15	\$461.91
PPD	6/14/15-6/20/15	6/26/15	\$461.91
PPD	6/21/15-6/27/15	7/2/15	\$461.91
PPD	6/28/15-7/4/15	7/9/15	\$461.91
PPD	7/5/15-7/11/15	7/16/16	\$461.91

The late payments total \$8,694.10. Alter and Arch did not contemporaneously convey the reason for the late payments. Southall is entitled to an award of \$4,347.05 in penalty benefits for late paid benefits.

C. Failure to Pay the Treating Physicians' Ratings

1. Dr. Naylor's Rating

On November 25, 2015, Dr. Naylor, the treating physician, issued an eight percent whole person permanent impairment rating. (JE 5, p. 22; Ex. G, p. 29) An eight percent permanent impairment rating equals forty weeks of benefits. Alter and Arch paid \$5,542.92, or twelve weeks of permanency benefits prior to June 7, 2016. (Ex. 6, p. 2) The commencement date for permanency is December 3, 2014. The underpaid rate of \$461.91 times forty is \$18,476.40. While this rate is the underpaid rate, an award of penalty benefits was made above based on the underpaid rate for permanency benefits for the twelve weeks. Subtracting \$5,542.92 from \$18,476.40 is \$12,933.48.

Alter and Arch did not present any evidence at hearing they investigated Dr. Naylor's impairment rating. Nor did they obtain a contrary opinion from another physician. Alter and Arch did not contemporaneously convey the reason for their failure to pay Southall Dr. Naylor's impairment rating. Southall is awarded penalty benefits of \$6,466.74.

2. Dr. Hartley's Rating

On March 9, 2016, Dr. Hartley, the treating physician, assigned a twenty-five percent whole person impairment rating. (JE 8, p. 5; Ex. I, p. 32) A twenty-five percent permanent impairment rating equals 125 weeks of permanent partial disability benefits. No benefits were paid after receipt of Dr. Hartley's rating in March, April, May, June, or July 2016. Alter and Arch did not present any evidence at hearing they investigated Dr. Hartley's impairment rating. Nor did they obtain a contrary opinion from another physician. Alter and Arch did not contemporaneously convey the reason for their failure to pay Southall Dr. Hartley's impairment rating.

In July 2016, four months later, counsel for Alter and Arch contacted Dr. Hartley concerning his opinions on causation and permanency. (JE 8, p. 7; Exs. O, p. 75; P, p. 79) On September 23, 2016, Dr. Hartley responded, attributing twenty-five percent of

his twenty-five percent rating to smoking-related disease, or attributing 6.25 percent to smoking-related disease and 18.75 percent to the work injury. (JE 8, p. 7; Exs. O, p. 75; P, p. 79) 18.75 percent of 500 weeks is 93.75 weeks.

Counsel for Alter and Arch sent a letter to Southall's counsel on September 28, 2016, notifying Southall he had instructed his clients to pay an additional seventeen percent whole person impairment based on Dr. Hartley's letter of September 23, 2016, stating "6.25% of 25% pulmonary whole-person impairment rating is causally related to Mr. Southall's smoking-related disease (COPD and emphysema)." (Ex. P, p. 77)

Alter and Arch did not issue payment based on Dr. Hartley's rating until October 18, 2016, thirty-two weeks after Dr. Hartley issued his original March 9, 2016 rating. (Exs. 6, p. 6; Q, p. 81) Thirty-one weeks of late benefits at the rate of \$600.42 is \$18,613.02. As noted above, Alter and Arch did not present any evidence at hearing they investigated Dr. Hartley's impairment rating in March, April, May, or June 2016. Nor did they obtain a contrary opinion from another physician. Dr. Hartley has consistently opined the work injury contributed to the development of Southall's pulmonary dysfunction. Alter and Arch did not contemporaneously convey the reasons for their failure to pay Southall Dr. Hartley's impairment rating. Southall is awarded penalty benefits of \$9,306.51.

The total amount of the penalty awarded to Southall based on the underpayments, delayed payments, and failure to pay the treating physicians' impairment ratings is \$22,621.98.

VI. Medical Expenses and Costs

Southall seeks to recover the \$1,700.00 cost of Dr. Brennscheidt's evaluation. The breakdown of the cost was \$400.00 for the evaluation, \$700.00 for testing, \$300.00 for a feedback session with rehabilitation recommendations, and \$1,000.00 for her report. (Ex. 2, p. 1) Dr. Brennscheidt provided Southall a \$700.00 self-referred patient discount, reducing the total amount of the bill to \$1,700.00. (Ex. 2, p. 1)

Southall requested authorization for the neuropsychological testing. On September 14, 2016, Alter and Arch denied liability for any memory deficit arising out of and in the course of Southall's employment. (Ex. N, p. 73)

An employer is required to 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. Iowa Code § 85.27(1) (2013). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id.

As analyzed above, I found Southall has established he sustained a permanent neurologic impairment to his memory as a result of the work injury. On August 5, 2016, authorized treating physician, Dr. Malikca-Rozek recommended Southall's memory

deficits and word finding problem be evaluated by a neuropsychologist. (JE 4, p. 11) Southall is entitled to recover the cost of the evaluation and assessment.

Rule 876 IAC 4.33(6), provides,

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Dr. Brennscheidt's bill is itemized. (Ex. 2, p. 1) Under the rule, Southall is entitled to recover the cost of two doctors' and practitioner's reports. 876 IAC 4.33(6)(6). Southall is entitled to recover the \$1,700.00 cost of Dr. Brennscheidt's evaluation, testing, and report.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits, at the rate of six hundred nineteen and 06/100 dollars (\$619.06) per week, commencing on December 3, 2014.

Defendants shall take credit for all benefits previously paid.

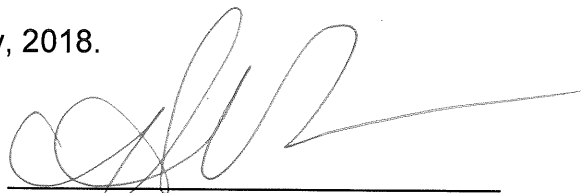
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable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

Defendants shall pay Southall twenty-two thousand six hundred twenty-one and 98/100 dollars (\$22,621.98) in penalty benefits.

Defendants are assessed one thousand seven hundred and 00/100 dollars (\$1,700.00) for Dr. Brennscheidt's evaluation, testing, and report.

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

Signed and filed this 27th day of July, 2018.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.