BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSE JUAN ROLDAN, Claimant, vs. SMITHFIELD FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	File No. 19005723.01 ARBITRATION DECISION Head Note Nos.: 1100, 1108, 1800, 1801, 1803, 1803.1, 2206, 2209, 2401, 2502

STATEMENT OF THE CASE

Claimant, Jose Juan Roldan, has filed a petition for arbitration seeking workers' compensation benefits against Smithfield Foods, Inc., employer, and Safety National Casualty Corp., insurer carrier, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on January 7, 2021, via Court Call. The case was considered fully submitted on January 28, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-12, Claimant's Exhibits 1-6, Defendants Exhibits A-P with Exhibit O being three videos, and the testimony of the claimant.

ISSUES

1. Whether claimant sustained an injury on or about July 4, 2018, which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of permanent disability and, if so;
3. The appropriate commencement date of permanent disability benefits;
4. Whether the alleged disability is a scheduled member disability or an unscheduled disability;
5. The extent of claimant's scheduled member/industrial disability;
6. Whether Iowa Code Section 85.34(2)(v) applies;
7. Whether claimant gave timely notice under Iowa Code section 85.23 of the alleged neck and right shoulder injuries.
8. Whether claimant is entitled to reimbursement of independent medical examination (IME) under Iowa Code section 85.39

9. And the assessment of costs.

STIPULATIONS

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

The parties stipulate the claimant was an employee of the defendant at the time of the alleged injury.

The parties agree that the claimant's gross earnings at the time of the injury were $911.98 per week and that the claimant was single entitled to one exemption. Based on the foregoing, the weekly benefit rate is $567.18.

The parties agree the claimant has not been paid any weekly compensation prior to the hearing.

FINDINGS OF FACT

Jose Juan Roldan was a 54-year-old person at the time of the hearing. He has only minimal access to the English language which includes understanding and the ability to speak limited English words and phrases. He is not able to speak the language fluently nor read or write it. He does not type and uses the computer only to communicate to family back in Mexico.

Claimant immigrated to the United States in 2003 under somewhat tragic circumstances. He was transported via a truck and locked in the back. Because there was no air, nineteen individuals died. Claimant received treatment for post-traumatic stress disorder and depression following this incident.

His past work history included agricultural work and mail delivery. (See CE 2:24) His educational history includes up to through 6th grade. Because of his injury, he asserts he is not able to return to either agricultural laboring work or mail delivery due to the physical demands such as lifting and movement of the neck.

After immigrating, claimant obtained employment with defendant employer in January 2004 and has continually worked there through the period of his alleged injury and the hearing. Claimant underwent a pre-employment physical and he was passed to work without restrictions. At the time of the alleged injury, claimant was earning $17.75 an hour. (DE I:16) At the time of the hearing claimant was earning $18.70 per hour.

Claimant worked the Slicer Operator position at Pay Grade 2 on July 4, 2018, and then Operate Strap/Pack in Day Process on January 15, 2019. (CE 5:47) This position was eliminated and he was assigned the Side Strap/Trim position at the same Pay Grade 2. (CE 5:47)

Prior to July 2018, claimant reported to defendant employer's nursing station that he had pain in the right hand, left wrist, and left shoulder/neck. On June 1, 2004, claimant was treated for right wrist and right thumb pain. (JE 1:10) On May 28, 2009, he reported swelling in the right hand while pulling bellies. (DE E:7) He complained of left wrist pain on June 21, 2010. (DE F:10) On October 8, 2013, claimant returned to the nurse's station at work with complaints of left shoulder pain while working the belly table. (DE G) He was seen by Dr. Mason on October 21, 2013, for high blood pressure. (JE 2:13) It was noted that his work at defendant employer was physically difficult. He packed meat into boxes and then placed the boxes weighing over 60 pounds onto racks. He did 21 boxes per hour or a box every three minutes for nine or ten hours a day. He had performed this for ten years. Id. Dr. Mason suspected that he was developing arthritis due to heavy lifting and advised him to get a job that was not so physically taxing. (JE 2:13) An MRI of the left shoulder was conducted on November 6, 2013, showing moderate acromioclavicular degenerative joint disease with inferior osteophytes and capsular hypertrophy contributing to mass effect on myotendinous junction of supraspinatus. (JE 3:16) There was also reactive bone marrow change within the acromion and clavicle and lateral downscoping of the acromion with associated shoulder outlet stenosis. (JE 3:16)

His care was then transferred to Ryan C. Meis, M.D., at CNOS. (JE 4:18) At the February 2, 2014, visit, claimant's range of motion was reasonably well maintained but he had pain at the endpoints of the motion along with pain during empty can testing and tender to palpation over the posterior capsule and posterior aspect of the cuff. (JE 4:19) He was pain free and had full range of motion in the elbow and wrist. (JE 4:19) Radiographic studies showed no substantial arthritic changes in the glenohumeral or AC joint. (JE 4:19) Dr. Meis administered a steroid injection and placed claimant on work restrictions. (JE 4:21) By March 16, 2014, claimant had made substantial progress and he was returned to regular duties at work except for a permanent work restriction against hanging bellies. (JE 4:21) Dr. Meis wrote, "he understands that at age 47 that trying to find a position within the organization that may be a bit less labor intensive could be helpful for him." (JE 4:21)

On June 2, 2014, claimant presented to Dr. Mason with complaints of stress and headaches. (JE 2:14) He was advised to take off work and get good sleep. Id. He was seen on April 10, 2015, for his depression, anxiety and PTSD. (JE 2:15) David M. Tan Creti, M.D., noted that they had been in contact with defendant employer regarding claimant's compliance with his medication. Id. Dr. Tan Creti believed claimant was taking his medication regularly and could continue to work but that he would need periodic time off if there was a flare up of his condition where he could not sleep and thus would not be safe to work in the packing plant environment. Id.

Claimant testified that he initially reported pain in his neck, shoulders and down into his hands and fingers to his supervisor Darren. Darren told claimant to return to his job. There is no documentation of this. In an answer to an interrogatory, claimant set the manifestation date of the neck, shoulder, arm and hand pain on or around July of 2018. (Ex. K:30)

On October 4, 2018, claimant reported to the nurse's station that he was feeling pain in the upper extremity and left middle finger and that the pain developed three months ago when he was put into a new Slicer position. (CE 4:35) He attributed it to gripping the frozen bellies and putting them on a pallet. He was working as a Slicer on line 5 and the position did require him to reach above the shoulder level. The video of Bacon Slicer does not show overhead work, however, the job description indicates that workers would have to stack slabs up to 73 inches off the floor which was consistent with claimant's testimony. (See CE 4:41) Claimant is 66 inches tall. The internal notes indicate that the claimant presented "without Supervisor aware." (JE 1:8) This notation was consistent with claimant's testimony that his supervisor was indifferent to claimant's reports of pain. Claimant continued to present to the nurse's station on the 5th, 6th, and 8th with complaints of pain running into his shoulder. (JE 1:8) An incident report was created based on the first aid administered. (JE 4:36) He testified he did not remember marking the pain diagram which noted pain in the shoulder down to the left hand but did not include the neck. (Ex 4:35)

On October 9, 2018, claimant was seen at Crawford County Memorial Hospital by Todd Woollen, M.D., for complaints of pain and swelling in the left hand at the second and third ray DIP joints. (JE 6:27) He had pain upon palpation over the dorsal of the left forearm on the radial aspect, a small lump and tenderness in the medial and lateral epicondyles of the left elbow. (JE 6:27) X-rays of the hand were taken which showed proximal interphalangeal joint erosive arthritis most pronounced on the ulnar aspect of the fourth digit. (JE 5:25) Gouty arthritis or psoriatic arthritis were considered as possible diagnoses. (JE 5:25) At the time, his work involved separating frozen bellies which required considerable pulling force. (JE 6:27) Work seemed to be exacerbating the problem. (JE 6:27) It was recommended he refrain from pulling with force greater than five pounds and to follow up. (JE 6:28) Claimant testified that he reported bilateral shoulder and neck pain but that Dr. Woollen focused only on the hands. The nurse records from October 4, 2018, and October 8, 2018, document left shoulder and upper extremity pain. (JE 1:8) Claimant's account that he reported shoulder and bilateral arm pain extending into the hands and fingers is accepted.

Claimant was referred to Benjamin Paulson, D.O., on October 18, 2018, for an evaluation to determine whether claimant's finger and hand problems were work related. (JE 7:31) Dr. Paulson diagnosed claimant with joint osteoarthritis at the bilateral index and long finger DIP joints and bilateral forearm pain. (JE 7:32) Claimant was instructed to apply heat and over-the-counter analgesic creams and to return to work with no restrictions. (JE 7:33) Dr. Paulson opined that this DIP joint arthritis was part of the normal aging process and not the result of any work activities but rather that the arthritis would have occurred regardless of the job activities. (JE 7:37)

The job analysis dated December 16, 2018, cites repetitive motion, awkward body mechanics, lacerations, punctures, amputations, and a dull knife as potential ergonomic and safety hazards. (CE 4:38) The Slicer Operator-Bacon position required an operator to hoist the bacon slabs in a position, grab the bacon slab, stand the slab on its side length wise, stabilize it with a non-knife hand, grab the straight knife with a dominant hand using a power grip and cut off the edge of the slab. (CE 4:38) Some

positions required lifting a bacon slab into a hopper located 43 inches off the floor and stacking slabs up to 73 inches off the floor. (CE 4:39) Operators were to pick up sample boxes of product weighing 10 pounds and placing them onto a rack located 54 inches high. (CE 4:39) The 21 Operate Strapper - RTE position required a worker to move, lift and carry boxes weighing 50 pounds. (CE 4:41) Potential ergonomic and safety hazards for this position including repetitive motion, lifting boxes, and leaning forward. (CE 4:41) The 17 Pack in Cartons-RTE position required a worker to handle, slide, place a box onto a scaler and handle product weighing 4-12 pounds. (CE 4:43) Ergonomic and safety hazards included repetitive motion and awkward body mechanics including some extended reaching, twisting, neck flexion, and bending. (CE 4:43)

The Side Strap-Trim position required the use of a straight knife in the dominant hand and handling of a pork belly with the non-knife hand. (CE 4:44) Ergonomic and safety hazards included repetitive motion, awkward body mechanics, improper lifting technique's, laceration, puncture and amputation. (CE 4:44) The work duties detailed in these job descriptions do not match the videos taken by Mr. Gasner.

On November 10, 2020, Marlon Gasner PT, observed claimant's position as a slicer operator-bacon. (JE 12:136) He documented that the operator cuff off the side edge of a slab of meet and then would lift the slab and place it in the slicer. The weight of the slab varied from 11 pounds to 19 pounds. (JE 12:136) The workstation offered the ability to adjust the pallet height up to maintain optimal situation for trimming and that the operator would only need to flex the shoulder to approximately 90° or shoulder level. Mr. Gasner described this position as requiring no above the head or above shoulder lifting. (JE 12:136) Mr. Gasner concluded that "operator did not have prior injuries or dysfunction in the neck and/or shoulder regions, the physical demands of performing this job would not be detrimental to those regions." (JE 12:136)

He also reviewed the Chipper Hair-Roots position. This position required the use of a whizard knife to remove skin or hair roots as bellies move past the worker on a conveyor. The worker must use the opposite hand to place small cuts of pieces into a chute. The work was done at below shoulder level. The whizard knife weighs under 10 pounds and the pieces removed are only ounces in weight.

He also observed the position of Final Trim of Back ribs. This job consists of an employee receiving ribs on a moving line, sometimes flipping the ribs over, then using a straight knife to trim off any tails, fat ridges or blade meat so that the blade meat is one-inch thick. The employee would then slide the trimming into a tub to the side and throw the ribs onto a second conveyor. The ribs weighed 3-4 pounds each. The employee must reach forward to sharpen the knife on a regular basis. All work performed was below shoulder level. (JE 12:138)

Based on his observations, Mr. Gasner believed the claimant would be able to perform all of the job duties pursuant to the permanent work restrictions of no lifting above a shoulder and no lifting, pushing, pulling greater than 10 pounds. (JE 12:137-38)

Perhaps the position of Slicer Operator today does not require stacking slabs of meat 46 inches to 73 inches off the floor but it was when claimant was doing the job as claimant testified and as the job was described in defendant employer's job description. Claimant testified that the video taken by Mr. Gasner did not accurately portray how claimant conducted his work either in regards to the overhead work or the pace and based on the corroborative job description created by defendants, claimant's testimony is accepted over the video taken by Mr. Gasner.

After the claim was denied due to Dr. Paulson's opinions, claimant sought care with his own medical providers.

On December 7, 2018, claimant was seen by nurse practitioner DeRae Schroeder for follow up for his hypertension. (JE 8:56) His main concern was neck/ shoulder and bilateral arm pain along with numbness in the bilateral fingertips. (JE 8:56) He related that he had been moved to a different position on the line for the defendant employer and had to repeatedly move frozen meat, grabbing them with his hands and then putting them on a higher shelf above shoulder level. He did the work repetitively 8 to 10 hours a day, six days a week. (JE 8:1) ARPN Schroeder educated claimant that his work activities could definitely exacerbate his pains. (JE 8:57) On examination, claimant had full range of motion of his extremities and cervical spine. (JE 8:58) An EMG was conducted on January 3, 2019, and the results were normal. (JE 8:63) An MRI was conducted on January 14, 2019, which showed the following:

> C2-C3: No significant disc disease or stenosis.
> C3-C4: No significant disc disease or stenosis.
> C4-C5: There is a diffuse disc bulge disc osteophyte complex with effacement of anterior thecal sac. Mild right neuroforaminal narrowing.
> C5-C6: There is diffuse disc bulge/disc osteophyte complex with moderate spinal canal narrowing. Moderate to severe left neuroforaminal narrowing. Moderate right neuroforaminal narrowing.
> C6-C7: Mild diffuse disc bulge with a broad-based left paracentral disc protrusion. This produces mild effacement of anterior thecal sac. No significant neural foraminal narrowing.
> C7-T1: No significant disc disease or stenosis.
>
> IMPRESSION:
> Discogenic/degenerative disease. most prominent at C5-C6. with narrowing as described above.

(JE 8:64)

On January 31, 2019, claimant was seen by Ric E. Jensen, M.D., who started claimant on Mobic and Zanaflex for the pain. (JE 8:65) Dr. Jensen, a neurosurgeon, found that claimant's reports of pain was more consistent with shoulder issues than cervical ones and that his vague bilateral shoulder pains potentially represented mild to moderate rotator cuff disease or issues. (JE 9:79) During the examination, claimant exhibited reduced range of motion throughout all planes of motion of the cervical spine,

most marked on extension and right lateral rotation/flexion. (JE 9:79) Compression and torsion loading of the cervical spine elicited a mild to moderate paracervical pain with right-sided prominence. Forced extension all resulted in mild to moderate exacerbation of pain. (JE 9:79-80) The MRI studies showed evidence of mild degenerative cervical spondylosis extending from the C4-5 through C6-7 segments. (JE 9:80) Dr. Jensen concluded that it was likely that claimant had mild rotator cuff stress bilaterally and prescribed claimant pain medications. (JE 9:80)

Claimant returned to ARNP Schroeder for follow up on February 15, 2019, reporting that he moved to a new position for the defendant employer which was causing him more stress on his neck, increased pain and a lot of situational stress. (JE 8:65) He was advised to continue to take medications that were prescribed by the spine specialist. (JE 8:65)

On July 25, 2019, claimant returned to nurse practitioner Schroeder for follow up with the neck and shoulder pain. (JE 8:69) At this point, claimant had run out of his prescription medication and was taking no medication or doing non-pharmacological things for pain. (JE 8:69) NP Schroeder advised claimant to return to Dr. Jensen who was on medical leave. (JE 8:69)

On August 5, 2019, claimant sought care with Michael P. Luft, D.O., as claimant was concerned about his condition and wanted another opinion. (JE 11:90) His primary complaints were of neck and bilateral shoulder pain. (JE 11:90) Dr. Luft's initial diagnosis was of a strain of the right trapezius muscle along with neck pain. (JE 11:91) Claimant was started on a medrol dose pak for inflammation. Id.

After this visit on September 27, 2019, in a checklist letter, Dr. Luft agreed that claimant's work injuries aggravated an underlying degenerative disc disease in the neck. (JE 11:98) He agreed that claimant had deficits of range of motion in the neck and right shoulder as a result of some impairment in the right rotator cuff and neck. (JE 11:99) He opined claimant should operate under permanent work restrictions of no lifting above shoulder height and no lifting greater than 10 pounds with either arm with occasional reaching with either arm. (JE 11:99) Dr. Luft also agreed that claimant would likely need chronic pain management for the right rotator cuff and neck injuries which would include prescription medications, periodic physician visits and an MRI of the right shoulder. Id.

Claimant returned to Dr. Luft on November 11, 2019 requesting paperwork to be filled out for neck and shoulder pain for FMLA. (JE 11:101) Dr. Luft refilled claimant's medication after doing lab work and recommended ice to the area of pain along with exercises. (JE 11:103)

On January 3, 2020, claimant was seen by Dr. Luft for neck pain which claimant stated began approximately one year ago. (JE 11:113) Dr. Luft took claimant off work, advised him to continue with anti-inflammatories and instructed claimant to not lift above his shoulder at work. (JE 11:114)

He treated again on October 5, 2020, for neck pain and was given a week off of work by Dr. Luft to rest. (JE 11:123) He returned on October 23, 2020, with complaints of chronic right shoulder pain and neck pain from lifting at work. (JE 11:127) Claimant was concerned that he would be fired from his job because he was having difficulty performing his work duties. (JE 11:127)

NP Amanda LeFebvre wrote out a work excuse noting work restrictions of no heavy lifting greater than 10 pounds over his head. (JE 11:129) He was taken off of work from October 22, 2020, to October 26, 2020, because of the pain. (JE 11:130) He returned to Dr. Luft's office and because of the ongoing pain was kept off work until November 2, 2020. (JE 11:134)

Claimant underwent an IME with Sunil Bansal, M.D., on March 2, 2020. (CE 1:1) The cost was $576.00 for the examination and $2,056.00 for the report. (CE 1:15, 6:55) At the time of the examination, claimant was working for defendant employer repetitively turning pork bellies on the line. (CE 1:10) The meat weighed approximately 30 to 35 pounds and while it increases the pain in his back and neck, the job was easier than the previous position he held. Id. On examination there is tenderness to palpation of the cervical paraspinal musculature, greater on the left. Guarding was noted over the left cervical paraspinal's. He had full range of motion of the fingers but a loss of sensory discrimination over the ring and small fingers. (CE 1:11)

Absent further medical treatment, Dr. Bansal placed claimant at maximum medical improvement (MMI) on January 31, 2019. (CE 1:12) It was Dr. Bansal's opinion that the job duties claimant performed on a cumulative basis for the defendant was a significant contributory factor for his disc bulges and aggravation of the cervical spondylosis. (JE 1:12) His job requires him to repetitively and rapidly reach away from his body to pull heavy pieces of meat toward him, as well as working with frozen meat that requires a lot of force in his arms. His job also required repetitive flexion and extension of the neck. Cumulatively, these activities would greatly stress his cervical spine likely leading to some level of disc bulging. (CE 1:12)

Dr. Bansal assigned a 5 percent whole person impairment based upon radicular components, guarding and loss of range of motion. (CE 1;14) He also recommended further restrictions for claimant of no lifting greater than 10 pounds over shoulder level and to avoid work or activities that required repeated neck motion or that would place claimant's neck in a posturally flexed position for any appreciable duration of time which would be greater than 15 minutes. (CE 1:14)

Claimant underwent an IME with Todd J. Harbach, M.D., on August 6, 2020. In the history section, Dr. Harbach recorded that claimant has cervical pain with occasional paresthesias down the arm. (JE 7:42) According to the claimant, the onset of the neck pain began two years ago. The pain radiated to the bilateral upper arm, bilateral elbow, bilateral forearm, bilateral interscapular, bilateral wrist and bilateral hand. (JE 7:43)

During the examination, claimant exhibited normal range of motion in the elbow, upper extremities, shoulder and wrists. (JE 7:44-45) He did have some pain with active

range of motion in the cervical spine along with tenderness and decreased active range of motion. (JE 7;45) Dr. Harbach concluded that claimant's neck pain was aggravated by work but that the pain symptoms were not caused by his work. (JE 7:46) Dr. Harbach opined that the aggravation should be temporary in nature so long as aggravation is removed. (JE 7:46) Dr. Harbach recommended claimant undergo physical therapy but that he would impose no restrictions, although an FCE would be useful. (JE 7:47)

On October 22, 2020, Dr. Harbach issued another opinion more specifically stating that claimant's work duties were not the cause of degenerative changes in claimant's spine nor did the work for defendant employer prematurely lead to an accelerated problem in his neck that he would not have it normally on his own. (JE 7:48) Dr. Harbach did opine that claimant had a pattern of pre-existing degenerative problems due to repetitive work and that it was temporary in nature. (JE 7:49) "He does have degeneration in his neck," Dr. Harbach wrote, "which studies have shown is not caused by work, but rather by life in general and is mostly inherited. Work can certainly cause a disk herniation, which he really does not have, and it could aggravate pre-existing degenerative conditions, which I believe is what occurs with him." (JE 7:46) He also found Dr. Bansal's report to be reasonable but Dr. Harbach does not believe work can cause degeneration nor does work accelerate degeneration unless there is significant trauma. (JE 7: 46-47)

On November 9, 2020, Dr. Harbach issued another letter at the request of the defendants. (JE 7:52) In this letter, Dr. Harbach opined claimant required no restrictions as there was no instability in claimant's shoulder and no loss of range of motion. (JE 7:52) Because claimant had full range of motion and normal strength and no discomfort, he did not warrant an impairment rating. (JE 7:53) It is not clear whether Dr. Harbach forgot that he had recorded claimant had pain with active range of motion along with tenderness and decrease active range of motion in the cervical region on the date of the examination on August 6, 2020. However, it is accurate that Dr. Harbach did not record any pain or loss of function in the bilateral shoulders. (JE 7:53)

On November 17, 2020, Dr. Paulson filled out a checklist letter agreeing that claimant's DIP osteoarthritis involving the index and long finger of the left hand was of the normal aging process and degenerative in nature and that it was not work related. (JE 7:54) As for the shoulder complaints, Dr. Paulson agreed that claimant did not report pain in the shoulder, but that his pain was focused in his hands and forearms. (JE 7:55)

On November 14, 2020, in a checklist letter, Dr. Jensen opined that the cumulative effect of the claimant's repetitive and exertional upper body work for the defendant substantially aggravated an underlying cervical degenerative disc disease resulting in persistent symptoms that were likely to be permanent in nature. (JE 9:87) He agreed that claimant's impairment is a result of his neck injury was likely between 5 to 10 percent of the whole person and that he should have work restrictions of no repetitive lifting greater than 10 to 15 pounds maximum at shoulder level and below with only occasional lifting above shoulder level and no sustained forward flexion of his neck for more than 15 minutes at a time. (JE 9:88) He further agreed the claimant would

need conservative care for his work related back injury including a TENS unit, daily application of heat and cold, intermittent use of muscle relaxer medication and potentially more invasive care including neck surgery. (JE 9:88)

On November 23, 2020, Dr. Bansal provided an updated opinion letter in response to the opinions issued by Dr. Harbach. (CE 1:18) First, Dr. Bansal pointed out that Dr. Harbach stated that if he was removed from the workplace for a period of time, his cervical neck symptoms would improve. Id. Dr. Bansal noted that it was not logical for Dr. Harbach to then conclude that the work caused no permanent aggravation. Id. Dr. Bansal wrote that the degenerative changes of the spine are irreversible and any temporary removal from the workplace would serve to alleviate his symptoms but not cure them. Id.

Dr. Bansal also disagreed with the therapist Marlon Gasner's description and analysis as it was related by the claimant that he would perform the duties of his job several thousand times per day and this repetition and pace was not reflected in Mr. Gasner's review. (CE 1:19)

To the extent that claimant's credibility is in question, I find claimant to be a credible witness. His testimony was largely consistent and corroborated by documents not created by him. For instance, he stated that his supervisor was unsympathetic to his injury and in the nurses' notes, was documented that he had visited the nurses station without the knowledge of a supervisor. He testified that his job required repetitive movement and lifting above his shoulders. This was corroborated by the job descriptions. The defendants point out some inconsistencies in the reports of pain in claimant's neck. In the initial report of injury to the nurses' station, it was documented that he reported shoulder and upper extremity pain and on the pain diagram there was no notation regarding the neck. Claimant testified that he did report his neck injury but that it was not documented. Defendants argue that the medical records created contemporaneously show no reports of neck injuries or pain. However, in the first visit claimant had with the Worker's Compensation physician, only pain in the wrist and hands were noted despite claimant reporting shoulder pain to the nurse just days previous. Medical records are not always the definitive account of what occurred at a visit. The individuals who create these medical records are humans just as the claimant is as well. Errors can be made and omissions can occur. The totality of the records in connection with the testimony as well as the claimant's demeanor at hearing all support a finding that he was a credible witness.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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

source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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

Defendants assert claimant's current pain symptoms in his neck, shoulder, and upper extremities as well as hands are pre-existing conditions that would have resulted even if claimant was not working for defendant employer. Claimant did have a pre-existing arthritic condition which was likely caused by his work given the medical records of Dr. Meis who told claimant in 2014 that he should try to find a position at defendant employer which was less labor intensive.

In 2018, claimant began experiencing a gradual onset of pain due to his repetitive reaching, lifting, and protracted neck positioning. He reported pain in his fingers and hands radiating into the shoulder. He later would add a complaint of neck pain. The initial complaints of pain were the result of gripping the frozen meat and alleviated with rest. These were the complaints reported to the nurse's station, Dr. Woollen and then Dr. Paulson.

Claimant maintains he reported neck pain as well, but this was not documented until December 7, 2018, when claimant sought treatment on his own after his claim was denied. During the visit with ARNP Schroeder, claimant reported neck and shoulder pain but that the primary pain was in the upper shoulder and arm down into his hands. Due to the neck complaints, a cervical MRI was recommended.

Ultimately, claimant was diagnosed with degeneration in his discs in the cervical spine. Dr. Jensen, a neurosurgeon, felt claimant's reports of pain was more consistent with shoulder issues than cervical ones and even after the MRI studies showed degeneration, Dr. Jensen concluded that claimant likely had mild rotator cuff stress bilaterally. Claimant then sought out care with Dr. Luft who diagnosed claimant with a strain of the right trapezius muscle along with neck pain. After this visit on September 27, 2019, in a checklist letter, Dr. Luft agreed that claimant's work injuries aggravated an underlying degenerative disc disease in the neck. Dr. Bansal, the IME retained by claimant, also opined claimant suffered an aggravation or lighting up of a pre-existing condition.

Defendants present the expert opinions of Dr. Harbach and Dr. Paulson, both of whom opined that claimant's neck, shoulder, arm, hand and finger pain was associated with a degenerative condition. Defendants first argue that claimant did not present a consistent picture of injury, complaining first only of his hands and then later adding shoulder and neck and that claimant's prior history of similarly situated pain in the hands and wrists bolster the proposition that claimant's condition was related to osteoarthritis as a result of aging and not any work processes. Dr. Paulson said that 100 percent of the cause of claimant's osteoarthritis was a personal condition and not materially aggravated by work activities. Dr. Harbach opined that claimant's work duties were not the cause of degenerative changes in the spine nor did the claimant's work prematurely accelerate problems in claimant's neck that he would normally have suffered on his own. However, Dr. Harbach did opine that claimant's degenerative problems were due to repetitive work in the past but that current symptoms were temporary in nature. If the repetitive work was removed, claimant's symptoms would abate.

Like Dr. Bansal, I find Dr. Harbach's opinions puzzling. The experts agree that claimant has an underlying arthritic condition in his joints. Dr. Paulson found it in claimant's hands and the MRI revealed degeneration in the cervical region. Dr. Bansal, Dr. Harbach, Dr. Luft and Dr. Jensen all agreed that claimant suffered an aggravation of claimant's pre-existing condition, causing symptoms of pain and a reduction of range of motion and utility because of that pain. The difference is that Dr. Harbach does not believe work can cause a degeneration nor can it cause aggravation but he also says that work can aggravate pre-existing degenerative conditions which is what he believed happened to claimant. He also opined that the aggravation is temporary if claimant is removed from the offending aggravation.

Claimant's job required repetitive use of his upper extremities. The job descriptions noted that repetition was a known hazard in the various positions he held. As previously mentioned in the Findings of Fact, the physical therapist assessment of the jobs was given low weight as the assessment did not match the job description nor

that of the testimony of the claimant which was consistent with the job description. The repetitious use of claimant's upper extremities along with the forced flexion of his neck for extended periods of time are consistent with an aggravation or lighting up of his pre-existing degenerative condition.

Dr. Harbach's opinions are internally inconsistent and actually read as a support for claimant's allegations. The greater weight of the evidence supports a finding that claimant has suffered neck, shoulder and bilateral upper extremity pain from an aggravation or lighting up of his pre-existing degenerative condition in his neck and shoulder joints radiating into his bilateral upper extremities, wrists and hands.

Defendants assert that if the claimant's neck, shoulder and bilateral arm symptoms are causally connected to his work activities, proper notice was not given. Under the amended version of Iowa Code section 85.23, a claim is barred:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed. For the purposes of this section, "date of the occurrence of the injury" means the date that the employee knew or should have known that the injury was work-related.

Iowa Code section 85.23. Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). Once the employer met its burden, the pre-July 1, 2017 analysis would then shift the burden back to the employee to show the discovery rule exception applies. IBP, Inc. v. Burress, 779 N.W.2d 210, 219 (Iowa 2010). The changes in the statute do not abrogate the previous body of law regarding the date that the employee knew or should have known the injury was work related. In Iowa law, this is known as the manifestation date. "A cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant's employment." Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). Once both factors are satisfied, "the injury is deemed to have occurred." Id.

The first documented notice was given on October 4, 2018. In the report, he stated that the onset of the symptoms occurred approximately three months prior. Claimant testified, credibly, that he had reported his shoulder and arm pain to his supervisor several times only to be treated dismissively. Defendants argue that the manifestation date for claimant's neck, shoulder, and upper extremity pain was by July 4, 2018, and thus the first documented notice given on October 4, 2018, was late. In his deposition, claimant asserted he had pain from work in the first week of July and in his answers to interrogatories, claimant set July 2018 as the date of the first occurrence of his injury. Dr. Jensen also set the manifestation date in July 2018. Claimant's testimony

that he alerted his supervisor in the weeks preceding October 4, 2018, was accepted as credible and thus even if the manifestation date was July 4, 2018, claimant's claim would not be barred by lack of proper notice as it relates to his shoulders and arms.

As for the neck, the first documentation of claimant's neck pain was when he sought out care on his own with nurse practitioner DeRae Schroeder on December 7, 2018. He presented this issue to defendant employer on or about February 25, 2019 in the form of a medical certification note from his family physician. (JE 1:12) This is sufficient notice given the type of work claimant was performing and the possible risks of those jobs as described by the job descriptions such as awkward body mechanics and leaning forward. Claimant testified that his neck was in a fixed position looking down for long periods of time.

Claimant testified that he reported neck pain earlier, but even if he did not, the February 25, 2019, notice was sufficiently timely to alert the defendants that claimant may be suffering a neck related injury arising out of and in the course of his employment.

It is found that notice was properly given for the bilateral shoulders, arms, hands and wrists as well as the neck.

The next issue is that of industrial disability given that the injury in question involves the neck.

Industrial disability was defined in Diederich v. Tri-City Ry. 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).

Iowa Code section 85.34(2)(v) now provides:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment

> resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code section 85.34(2)(v). Claimant is currently earning more today than he was at the time of the injury due to raises. Since his injury, he has worked in the Chipper position which was a Grade 3 position but then moved to a Grade 1 position in January which is a lower pay grade than the Grade 2 Slicer Operator position he was in at the time of his injury in 2018.

Hourly wage is but one factor to consider in determining whether Iowa Code section 85.34(2)(v) applies. See McCoy v. Menards, File No. 1651840.01 (App April 2021). In this case, claimant returned to work and was offered the same position and the same wage that he had at the time of the injury. He voluntarily chose a different position because the one he was working was too physically taxing. Unfortunately, under the new provisions, the focus is on the work offered, as well as the salary or earnings. Claimant's current earnings are a grade 1, lower than the pay grade at the time of his injury but that is due to claimant's choice to move away from positions that could aggravate his condition. Thus, claimant's impairment is measured by his functional capacity.

Claimant's past work experience was in agriculture, postal delivery, and meat processing. These past positions require heavy lifting or use of force. Claimant has been advised to move into a less physically demanding job and he has done so. Work restrictions recommended by Dr. Bansal, Dr. Luft, and Dr. Jensen include no lifting greater than 10 -15 pounds. The current position fits claimant's restrictions although it still requires repetitive movement. He will need palliative care according to Dr. Bansal, Dr. Jensen, and Dr. Luft. Dr. Bansal assigned a 5 percent impairment and Dr. Luft a 5-10 percent impairment. Based on the foregoing, the 10 percent impairment of the whole person is adopted.

Dr. Bansal opined claimant reached MMI on January 31, 2019 when he last saw Dr. Jensen. Claimant continued to treat with his personal physician as well as Dr. Luft; however, the care has been conservative including occasional time off, medications, and at home remedies. It is found that claimant reached MMI on January 31, 2019.

Defendants assert that at the time Dr. Bansal performed his evaluation on July 14, 2018, no physician retained by the defendants offered an impairment rating. Dr. Bansal's IME was performed on March 2, 2020. (CE 1) At the time of Dr. Bansal's evaluation, claimant's claim had been denied based on Dr. Paulson's opinions on October 18, 2018.

Claimant also requests an assessment of costs. Rule 876 IAC 5.33 allows for the assessment of costs at the discretion of the deputy. Given that claimant has prevailed in this matter, the assessment of costs against defendant employer and insurer are appropriate.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant fifty (50) weeks of permanent partial disability benefits at the rate of five hundred sixty-seven and 18/100 dollars ($567.18) per week from January 31, 2019.

That defendants are to reimburse claimant for the independent medical examination of Dr. Bansal pursuant to Iowa Code section 85.39.

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

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

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including the report costs of Dr. Bansal.

Signed and filed this 2nd day of August, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Michael Miller (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.