BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

J. REFUGIO HERRERA, Claimant, vs. SMITHFIELD f/k/a or a/k/a FARMLAND FOODS, Employer, and SAFETY NATIONAL, Insurance Carrier, Defendants.	FILED APR 04 2018 WORKERS COMPENSATION	File No. 5062044 ARBITRATION DECISION Head Note Nos.: 1108, 1803, 3800

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, J. Refugio Herrera, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on June 30, 2016. Claimant alleged he sustained a work-related injury on September 1, 2015. (Original notice and petition)

For purposes of workers' compensation, Smithfield f/k/a Farmland Foods, is insured by Safety National Insurance Company. Defendants filed their answer on July 26, 2016. The defendants admitted the occurrence of the work injury. A First Report of Injury was filed on December 3, 2015.

The hearing administrator scheduled the case for hearing on July 26, 2017. The hearing took place in Sioux City, Iowa at the Iowa Workforce Center. The undersigned appointed Ms. Carin Eckhoff, as the certified shorthand reporter. She is the official custodian of the records and notes. Mr. Frank Gonzalez acted as the official Spanish interpreter.

Claimant testified on his own behalf. Defendants called Ms. Cindy Schweers, RN, Medical Manager at Smithfield, to testify at the hearing. Joint Exhibits 1 through 13 were admitted. Claimant offered Exhibits 1 through 25. Defendants' Exhibit

A was admitted. The parties also submitted post-hearing briefs on August 28, 2017. The case was deemed fully submitted on that date.

STIPULATIONS

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

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on September 1, 2015 which arose out of and in the course of his employment;
3. The alleged injury is a cause of both temporary and permanent disability;
4. Healing period benefits are no longer an issue;
5. The permanent disability is an industrial disability;
6. The parties agree any weekly benefit rate should be paid at $529.18 per week;
7. Defendants waive any affirmative defenses they may have had available to them;
8. Defendants state they will or already have paid the bill for the independent medical examination (IME) by Sunil Bansal, M.D.;
9. Prior to the hearing, defendants paid claimant fifty (50) weeks of permanent partial disability benefits at the incorrect rate of $515.68 per week; and
10. The parties agree claimant has paid the costs listed in his attachment.

ISSUES

The issues presented are:

1. The nature and extent of claimant's permanent partial disability;
2. Whether there was an underpayment of permanent partial disability with respect to the weekly benefit rate; and
3. Whether defendants are liable for the cost of the functional capacity evaluation performed by Daryl Short, DPT, of Short Physical Therapy, PLLC, in the amount of $900.00.

FINDINGS OF FACT

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

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

Claimant is 51 years old and married. He is right-hand dominant. Claimant was raised in Mexico where he attended school through the sixth grade. He abandoned school to assist his father with farming and ranching. Claimant speaks only Spanish. He is unable to speak, read or write English.

Claimant and his spouse reside in Denison, Iowa. The town has approximately 8,300 residents. It is the county seat for Crawford County. Smithfield is a major employer in that geographical region of the state. The company is engaged in processing pork.

Claimant came to the United States in 1995. His first job was in Worthington, Minnesota where he worked at the Monfort Pork Plant. Claimant worked at the plant for less than eight months. His job was to use a Whizard knife and to remove the hide from the cheeks of pigs. There was no heavy lifting involved. Claimant did have to engage in reaching.

Claimant commenced his employment with Farmland Foods, n/k/a Smithfield on October 8, 1996. His first job was trimming ribs. (Transcript, page 13) Claimant performed the position for two or three years. He described the job as:

> A. With a straight knife you remove the fat and sometimes hide that was on the ribs. And after you did that there was a scale in front of you, you weighed it and depending on what it weighed where you put it.
>
> Q. (By Mr. Byrne) Okay. So which hand did you use the straight knife in?
>
> A. In my right hand.
>
> Q. Did you have to do any lifting in that work?
>
> A. Just the rib, I don't know how much it weighed.
>
> Q. How much would you estimate?

A. I don't know. Five, 10 pounds.

Q. Okay. Did you have to do any overhead work in that job?

A. No.

Q. Did you have to do any reaching in that job?

A. Oh, yes.

Q. To do what?

A. Taking the fat, taking the hide off of it, the line is right here (indicating).

Q. Was that frequent reaching you had to do?

A. Yes, repeatedly.

Q. How often in seconds, for example, did you have to reach to do the work there?

A. Stretch my hand, do it fast, every two, three seconds.

(Tr., pp. 13-14)

The next job claimant held was the "miscellaneous position." He was assigned to perform various tasks based upon the needs within the plant. There were assorted tasks including lifting boxes of meat that could weigh up to 30 pounds. (Tr., p. 15)

Claimant then held the Whizard knife job for 13 years or more. He removed meat from the pork bellies. He held the knife in his right hand. The knife weighed only 2 or 3 pounds. There was no above the shoulder work but there were repetitive reaching and stretching movements. Claimant estimated he would reach every 2 to 3 seconds. He described the position as very fast paced. (Tr., pp. 16-17)

Occasionally, claimant worked in a position known as "the loins job." Claimant described the job as follows:

A. It's a curved knife and what you do, the loins are coming down the line. You have to stretch out and pull it towards you, and since the loins are frozen sometimes it's very hard and you have to trim the fat and the hide off of them. And it's repetitive, very fast.

Q. Okay. And how big are the loins typically?

A. Like this (indicating), about two feet long.

Q. Okay.

A. And they are in front of you. You have to stretch out.

Q. Okay. And what were - - what kind of – were you using a tool to trim them?

A. A knife that's in, like, an ark [*sic*] shape and it's - - you have to grab it with both hands and its got - - it's sharp on one side.

Q. And at what level of your body were you working?

A. Almost at my shoulder level.

Q. And with the arked [*sic*] knife, did you have that in - - which hand did you have that in?

A. In both hands. You have to use both hands. It's curved and you have to use both hands.

Q. Did you have to do much reaching in that job?

A. Yes, to grab the loin and use a lot of force since they were frozen.

Q. How often?

A. I don't know; two, three seconds every loin.

(Tr., pp. 17-18)

During direct examination, claimant testified how he was injured at Smithfield. He stated:

A. In the - - on August 31st they put me on the loins job and when I stretched out to pull the loin, I felt a sharp pain in my neck, shoulder, and shoulder blade.

Q. Okay. Continue.

A. I kept working. I just thought it was just occasional pain and it would go away. And the next day they put me back on my regular job with the whizard. And since I was stretching my hand out repeatedly and using the whizard, the pain started getting worse in my right neck, shoulder, and shoulder blade. And since the pain didn't go away, I went and reported it at the nurse's station that day.

(Tr., p. 19)

Because the loins were frozen on August 31st, claimant testified the job was more difficult than his other position. He said the frozen loins adversely impacted his hands, neck, shoulder and back. He was employing his entire body strength to cut the loins with the arced knife. (Tr., p. 20)

On September 1, 2015, claimant presented to the plant health department with complaints of pain in his right shoulder, trapezius, and scapular areas. (Joint Exhibit 1, p. 1) Claimant reported popping in his right shoulder. (Jt. Ex. 1, p. 1) R. Bumsted, RN, treated claimant with ice and advised claimant to take Tylenol every 5 hours. (Jt. Ex. 1, p. 1) Claimant returned to the health department on September 2, 2015; September 3, 2015, (2 occasions); September 4, 2015; September 5, 2015; September 8, 2015; September 6, 2015, (2 occasions); and on September 8, 2015 when a Biofreeze rub was applied to claimant's affected area. (Jt. Ex. 1, p. 1)

Defendants authorized treatment for claimant with Todd Woollen, M.D. Claimant visited the physician on September 21, 2015. Dr. Woollen noted: "WC Farmland right shoulder pain and numbness going into neck and down the side." (Jt. Ex. 2, p. 7)

Dr. Woollen's medical history included the following:

> He started a new job at work because they were short staffed. He was using the right shoulder more than he should have, he says, and started feeling pain. Pain started about 3 weeks ago. The pain goes down from the shoulder into the right lateral thorax. He has popping in the shoulder with active abduction by history. Now with the whizzer [*sic*] knife, he is having more pain in the shoulder. He has some numbness and pain in his neck as well. He has numbness in the posterior scapular area by history after he was working for a while. Pain "in the neck and all over the back after his [*sic*] been working for a while" as well. It sounds like he would probably benefit the most from physical therapy at this point. We will try some naproxen as below and refer to physical therapy up to twice a week for up to 3 weeks. We will see him back in 3 weeks.
>
> Pain greatest with repetitive motion of the right arm where he is extending his arm by history.

(Jt. Ex. 2, p. 7)

Dr. Woollen conducted a physical examination. He noted some minimal pain with abduction and internal rotation against resistance that localized inferior to the right axilla. The physician found claimant had some pain in the supraspinatus with external rotation against resistance. (Jt. Ex. 2, p. 7) Claimant was prescribed 500 mg of Naproxen to be taken twice per day. Claimant was restricted from pushing and pulling for no more than 3 hours per day. Physical therapy was also ordered.

Claimant returned to Dr. Woollen on October 21, 2015, after having attended physical therapy. Claimant reported the physical therapy had helped with the posterior shoulder pain in the region just medial to the scapula. (Jt. Ex. 2, p. 9) Claimant reported pain was radiating into his right biceps. Dr. Woollen recommended magnetic resonance imaging, (MRI) testing.

On October 29, 2015, MRI testing of the right shoulder occurred. (Jt. Ex. 4, p. 22) Craig W. Walker, M.D., interpreted the results as:

1. Superior labral tear from anterior mid to posterior superior with tear just propagating into the proximal long head biceps at the labral anchor.

2. Mild AC joint arthrosis with small subacromial spur which contributes to mild rotator outlet stenosis.

3. Mild supraspinatus tendinosis.

4. Small glenohumeral joint effusion with mild rotator interval synovitis.

5. Mild subacromial subdeltoid bursitis suggested.

6. Early degenerative changes glenohumeral joint.

(Jt. Ex. 4, p. 22)

Defendants authorized treatment for claimant with Diane Thi Tran, M.D., an orthopedic surgeon at Des Moines Orthopaedic Surgeons, P.C. Dr. Tran initially examined claimant on November 17, 2015. The surgeon commented in her clinical notes for the same date:

> Neck: No midline cervical spine tenderness. No neck pain or radiating upper extremity symptoms with neck range of motion.
>
> Right shoulder: He points to his mid-acromion for the majority of his pain. TTP of the acromioclavicular joint, lateral to the acromion, just inferior to the posterior joint line, and bicipital groove. No posterior joint line tenderness. Right AROM 165, 50, mid thoracic spine. Left AROM 165, 50, mid thoracic spine but one level higher. 5/5 abduction, internal rotation, and external rotation at 0 and 90 degrees of abduction. + Hawkins, mildly + Neers. No pain with cross body adduction, negative O'Brien, negative Speed, negative Yergason.

(Jt. Ex. 5, p. 27)

Dr. Tran provided the following assessment of claimant's condition:

Assessment:

- Subacromial/subdeltoid bursitis/impingement, right
- Primary osteoarthritis, acromioclavicular joint, right
- Proximal biceps/superior labral pathology, right
- This is a work-related shoulder issue
- Diabetes

Mr. Herrera is a 48 year old, right hand dominant gentleman with right shoulder pain. Based on the history and examination, I feel that the majority of his pain originates from subacromial bursitis/impingement. He may have some element of AC arthritis and SLAP tear noted on MRI, but my examination does not specifically localize his pain and tenderness to these areas. I would like to treat his pain conservatively with NSAIDs, a subacromial injection, and physical therapy. He has voiced his concerns about needing to have surgery, which I assured him that I do not feel is necessary at this time. If his symptoms do not greatly improve, we can revisit the SLAP/proximal biceps origin with an injection.

(Jt. Ex. 5, p. 28)

Dr. Tran injected claimant's right shoulder with a corticosteroid. Claimant tolerated the procedure well. The orthopedist advised claimant to use over-the-counter NSAIDs. (Jt. Ex. 5, p. 28) During direct examination, claimant testified the steroid injection helped very little. (Tr., p. 23)

Claimant next presented to Dr. Tran on December 3, 2015. Claimant reported:

HPI: Mr. Herrera returns for follow up. He says his pain is a little bit better especially in his neck, but he is not 100%. He still has a numbness sensation of his back and posterior shoulder. He still has a burning from the top of his shoulder to his mid-back.

(Jt. Ex. 5, p. 32)

Dr. Tran observed upon physical examination, claimant had some decreased sensation to light touch of the right paraspinal musculature around the thoracic and lumbar spine. There was winging of the scapula, especially on the right side. Dr. Tran also found tenderness to palpation of the acromioclavicular joint and the bicipital groove. Claimant expressed pain with cross body adduction. (Jt. Ex. 5, p. 32)

On December 9, 2015, Dr. Tran injected claimant's right bicipital sheath with a corticosteroid. Claimant tolerated the procedure well. (Jt. Ex. 5, pp. 34-35) Dr. Tran ordered physical therapy for claimant.

Claimant returned to Dr. Tran on January 7, 2016. He provided the subsequent history:

> **HPI:** Mr. Herrera returns for follow-up. He states the second injection, which was a biceps injection under ultrasound, helped him quite a bit, even more than the subacromial injection. He still says it hurts in his back and that he is having some continued pain between his shoulder blade and his spine. Also, there is still some numbness under his shoulder blade. He notes that his hand and forearm still "feel tired." The pain in the back of his shoulder blade is exacerbated by moving his head back and forth, which he has to do for his job since his position was switched. Otherwise overall he thinks the physical therapy is helping. They are doing back strengthening and shoulder exercises.

(Jt. Ex. 5, p. 36)

Dr. Tran only considered conservative treatment modalities. (Jt. Ex. 5, pp. 35-36) Claimant testified physical therapy helped until claimant had to return to light duty work. Then the pain would return. (Tr., p. 24)

On February 5, 2016, claimant again saw Dr. Tran. Claimant complained of numbness in his back. (Jt. Ex. 5, p. 38) He also reported his pain moved around his back. There was pain in his axilla. (Jt. Ex. 5, p. 38) Dr. Tran described claimant's complaints as "migratory." (Jt. Ex. 5, p. 39) The orthopedist opined claimant would always have some residual discomfort. Dr. Tran indicated claimant would never be 100 percent. (Jt. Ex. 5, p. 39)

Claimant presented to Dr. Tran on March 18, 2016. He had just completed physical therapy. Claimant reported his shoulder pain was occasional. However, he still had mid-back pain and numbness. Claimant stated the pain radiated down his posterior arm and into his hand. Claimant described the pain as constant. Work exacerbated the pain intensity, especially when claimant bent down at work. (Jt. Ex. 5, p. 42)

Dr. Tran did not believe additional formalized physical therapy was necessary. She recommended home exercises and massage therapy one time per week. (Jt. Ex. 5, p. 43) With respect to the back, Dr. Tran opined:

> As far as his back numbness and pain, this is not in a typical location of the arms and legs that is indicative of central or foraminal canal stenosis. I am not sure that workup with cervical and thoracic x-ray and MRI is not

> overzealous for the level of symptoms that he has and the expected likelihood of determining a definitive diagnosis. We could consider doing this or also getting an EMG, but again I doubt these invasive tests would be fruitful. I doubt that a referral to a spine surgeon would be helpful, but we can look into that. It had been my initial assessment that the pain was related to scapulothoracic motion and would improve with physical therapy; however, this has not turned out to be true. I think at this point, we should obtain FCE and see what permanent restrictions and disability he has. The patient seems to understand and agree with the plan.

(Jt. Ex. 5, p. 43)

Per the referral from Dr. Tran, claimant presented for his functional capacity evaluation, (FCE) on March 24, 2016. Marlon Gasner, DPT, PT, conducted the FCE. (Jt. Ex. 8, p. 57) Claimant demonstrated the ability to perform within the **MEDIUM** work category as defined by the U.S. Department of Labor and detailed in the Dictionary of Occupational Titles. (Jt. Ex. 8, p. 57) With respect to material handling, Mr. Gasner determined claimant could:

> Bilateral lift: 24 pounds
>
> Overhead lift: 14 pounds
>
> Frequent Bilateral Lift: 17 pounds; pushing 35 horizontal force pounds
>
> Bilateral carry: 24 pounds; pulling 52 horizontal force pounds. Claimant was able to engage in constant reaching as well.

(Jt. Ex. 8, pp. 57, 69-70)

Mr. Gasner also opined:

> Mr. Herrera demonstrated the ability to perform Dynamic Balance, Static Balance, Bending, Crawling, Fine Coordination, Firm Grasping, Repetitive Kneeling, Sustained Kneeling, Ladder/Other, Simple Grasping, Squatting, Stair Climbing and Walking with frequent tolerance. Above Shoulder Reach, Forward Reaching, Sitting and Standing were demonstrated on a constant basis. Mr. Herrera is able to work full time and perform sitting constantly and standing constantly throughout his workday.

(Jt. Ex. 8, p. 69)

Subsequent to the completion of the FCE, claimant saw Dr. Tran on April 8, 2016. Dr. Tran explained the results of the test to claimant. Dr. Tran agreed with the permanent restrictions detailed in the FCE report. She advised claimant to find a job

within the parameters of the FCE restrictions. Dr. Tran also deemed claimant to be at maximum medical improvement on April 8th. (Jt. Ex. 5, pp. 45-46)

Defendants returned claimant to Dr. Woollen on April 14, 2016. Claimant complained of mid-back pain. Dr. Woolen addressed the areas of the spine as the T-12 region midline, the T6-T7 paraspinal region and a broad area in the right thoracic back that measured nearly 10 cm in diameter at the T7-T9 area. (Jt. Ex. 2, p. 10) Dr. Woolens ordered MRI testing of the thoracic spine region. (Jt. Ex. 2, p. 10)

On April 18, 2016, management officials at Smithfield issued a statement to claimant regarding the permanent restrictions imposed by Dr. Tran. The statement provided in relevant part:

> I understand these restrictions are set by medical professionals in my best interest and will be honored by Smithfield Foods. I agree not to work outside of my restrictions at any time, at work or at home. I will notify my supervisor at once if am asked to perform duties that are not in accordance with my restrictions, as this is not permitted.
>
> Due to the permanency of the restrictions, I understand it is my responsibility to find a bid job that meets your restrictions.
>
> I will be allowed 60 days from today to find such a bid job. If at that time I have not found a job, the company will discontinue to "make work" for me. I understand that it is my sole responsibility to check job bids and contact my Human Resource Manager for any open positions.
>
> At the end of the 60 day period I will be placed on leave. I will need to contact Human Resources Department to determine my eligibility for FMLA or general leave of absence. During the time period I am on leave, it will be my responsibility to continue to check the job bids available to meet my particular restrictions.
>
> If at the end of my leave I have not found a job that meets my restrictions, my employment with Smithfield Foods may be terminated.
>
> I understand that if at any time I have questions about a job meeting my restrictions, I should contact the medical management or safety department. I understand that the failure to follow any of the above instructions will subject me to disciplinary action, up to and including termination.

(Jt. Ex. 1, p. 4)

Claimant underwent MRI testing of the thoracic spine on April 20, 2016. Kimberly A. Apker, M.D., interpreted the results. She found:

> Findings: Vertebral alignment is normal. No acute fractures identified. No marrow signal abnormality. Thoracic spinal cord is normal. Paraspinous soft tissues are unremarkable.
>
> Mild multilevel degenerative disc disease throughout the thoracic spine. No disc herniation or compromise of the spinal canal. Facet degenerative joint disease is seen in the mid and lower thoracic spine. Prominent facet hypertrophic changes at T10-T11 extends [*sic*] slightly into the posterior aspect of the spinal canal but do not abut or compress the cord.

(Jt. Ex. 4, p. 25)

Claimant returned to Dr. Woollen for a consultation concerning the results of the MRI. Dr. Woollen indicated the MRI was unremarkable. As a result, there would be no restrictions for claimant's back. (Jt. Ex. 2, p. 12) There would only be restrictions for the right shoulder. (Jt. Ex. 2, p. 12) Dr. Woollen agreed claimant was at maximum medical improvement. (Jt. Ex. 2, p. 12)

On June 10, 2016, claimant presented to Dr. Tran for the purpose of obtaining a permanent impairment rating for the right shoulder. (Jt. Ex. 5, p. 47) Claimant had many questions concerning his restrictions. He thought severe restrictions should be levied, given the pain he was experiencing in both shoulders, and in his back. Claimant admitted he was not engaging in home therapy. Dr. Tran noted claimant was somewhat distressed and displayed dissatisfaction in general. (Jt. Ex. 5, p. 47)

Dr. Tran described how she evaluated claimant's right shoulder. She wrote in her clinical notes:

> On the right shoulder I used goniometer for maximum active shoulder range of motion which he did, but expressed a lot of pain with doing these range of motion. Flexion 106, extension 26, abduction 92, adduction 14, internal rotation 24, external rotation 38.

(Jt. Ex. 5, p. 47)

Then Dr. Tran indicated:

> **Assessment:** impairment rating for work-related right shoulder issue.
>
> 1. The patient had no pre-existing condition that may have contributed to his permanent impairment.
>
> 2. Rating of permanent impairment is based off AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, pages 474 to 479.

A. In the flexion-extension motion there is 6.4% of right upper extremity impairment.

B. For abduction-adduction movement, there is 5% of right upper extremity impairment.

C. For internal and external rotation motion there is 5% of right upper extremity impairment.

D. This is a total of 16.4% of right upper extremity impairment due to abnormal shoulder range of motion.

E. According to page 439, Table 16-3, this results in a 10% impairment of the whole person.

(Jt. Ex. 5, p. 48)

Claimant was removed from performing work with the Whizard knife. (Jt. Ex. 1, p. 4) Members of management assigned light duty work for 60 days. Claimant used his left arm only. Claimant was unable to secure a position within the 60 day "make work" period that comported with the restrictions provided by Mr. Gasner and adopted by Dr. Tran. Management removed claimant from his light duty position. He was also removed from the plant in June of 2016. (Jt. Ex. 1, p. 6)

Claimant exercised his right to an independent medical examination pursuant to Iowa Code section 85.39. Sunil Bansal, M.D., M.P.H., examined claimant on August 2, 2016. Dr. Bansal conducted a physical examination of the right shoulder. The examiner found:

RANGE OF MOTION

Flexion: 112, 112, and 113 degrees

Abduction: 100, 98, and 101 degrees

Adduction: 23, 24, and 20 degrees

External Rotation: 47, 45, and 47 degrees

Extension: 30, 29 and 27 degrees

Internal Rotation: 42, 44 and 41 degrees

Special Testing:

Negative Neer's test.

Negative Speed's test.

Positive impingement test.

Negative apprehension test.

Positive O'Brien's test.

(Claimant's Ex. 1, p. 10)

Dr. Bansal also examined claimant's neck and back. The examiner discovered there was tenderness to palpation over the right lower trapezius and shoulder blade area. (Cl. Ex. 1, p. 10) The right and left leg raise tests were negative. (Cl. Ex. 1, p. 11) Dr. Bansal also performed range of motion testing for the neck and back. He found:

NECK RANGE OF MOTION

Flexion:	34 degrees
Extension:	32 degrees
Left Lateral Flexion:	25 degrees
Right Lateral Flexion:	37 degrees

BACK RANGE OF MOTION

Flexion:	88 degrees
Extension:	41 degrees
Left Lateral Flexion:	35 degrees
Right Lateral Flexion:	40 degrees

SENSATION:

RIGHT UPPER EXTREMITY

Using a two-point discriminator, there is a loss of sensory discrimination over the thumb and index finger.

UPPER EXTREMITY REFLEXES:

Right: +2 biceps, brachioradialis, and triceps.

Left: +2 biceps, brachioradialis, and triceps.

LOWER EXTREMITY REFLEXES:

Right: Patellar +2, Achilles +2, and hamstring +2.

Left: Patellar +2, Achilles +2, and hamstring +2.

(Cl. Ex. 1, p. 11)

Dr. Bansal diagnosed claimant with a work-related labral tear and rotator cuff tendinitis. (Cl. Ex. 1, p. 12) The independent medical examiner also diagnosed claimant with a work-related aggravation of multi-level degenerative disc disease and facet arthropathy of the cervical spine. (Cl. Ex. 1, p. 12)

The evaluating physician provided permanent impairment ratings for the right shoulder and the cervical spine. In his report, Dr. Bansal explained how he calculated his ratings. He elaborated:

> With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides)**, specifically Figures 16-40 through 16-46, we find that Mr. Refugion-Herreria is assigned: . . . **a 15 % upper extremity impairment, which is equal to a 9% impairment of the body as a whole.**
>
> Neck:
>
> In my medical opinion, a lack of adequate diagnostics/treatment has been performed to date, including an MRI of the cervical spine. Therefore, the following impairment **is provisional**. (emphasis added.) In the absence of further diagnostics/treatment, I assign the following impairment:
>
> With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides)**, Table 15-5, based on his current symptomatology and physical examination, he meets the criteria for a DRE Category II impairment. He has radicular complaints and loss of range of motion. He is assigned a **5% whole person impairment.**

(Cl. Ex. 1, p. 14)

Dr. Bansal concurred with the restrictions recommended by Mr. Gasner with one exception. Dr. Bansal opined claimant was capable of only occasional reaching with the right arm. Mr. Gasner allowed constant reaching. (Cl. Ex. 1, p. 15)

Claimant visited with his personal physician, Rose Mary Mason, M.D., on October 4, 2016. Claimant complained of neck pain with numbness and weakness in the right hand and pain down the right arm. (Jt. Ex. 9, p. 80) Dr. Mason ordered MRI testing of the cervical spine.

The MRI of the cervical spine took place on October 6, 2016. Jeremy M. Baum, M.D., interpreted the results as:

> **IMPRESSION:**
>
> 1) Mild degenerative changes of the spine as discussed above. There is no significant central canal stenosis. There is some mild neural foraminal narrowing as detailed above.

(Jt. Ex. 9, p. 82)

On October 12, 2016, Dr. Mason commented on the results of the cervical MRI. She wrote: "There is some disc bulging, but no significant herniated disc." (Jt. Ex. 9, p. 82)

The MRI cervical report was sent to Dr. Bansal for his professional opinion. Dr. Bansal stated the MRI suggested a disc protrusion at C5-C6 and a disc bulge at C6-C7. Dr. Bansal continued:

> In light of a direct correlation clinically to that pathology as well as recognizing that the cervical spine canal is extremely narrow, these discs are clinically significant. I would recommend referral to pain management for consideration of epidural injections.

(Cl. Ex. 1, p. 18)

Defendants sent claimant to Wade K. Jensen, M.D., for an independent medical examination. The examination occurred on November 16, 2016. (Jt. Ex. 10, p. 101) Claimant related a detailed history of his right shoulder and neck problems. Dr. Jensen conducted a physical examination. The physician noted in his report:

> Neck exam, he does have full range of motion. He has no Spurling signs. He maintains 5/5 strength deltoids, biceps, triceps, wrist flexion, wrist extension, grip and intrinsics. There are negative Hoffman signs in the upper extremities. Biceps, triceps, and brachioradialis reflexes all 2+. He is able to perform inline tandem gait without difficulty in the room today. Shoulder motions actively, he only gets to about 10 degrees bilaterally. Passively, I can get him to a full 170 degrees bilaterally. There do not appear to be any limitations. I see no obvious impingement on Hawkins and Neer testing gently today. He maintains 5/5 strength forward flexion

> and internal and external rotation bilaterally. Speed and Yergason tests are negative bilaterally.

(Jt. Ex. 10, p. 102)

Dr. Jensen diagnosed claimant as follows:

1. Mild right shoulder subacromial bursitis.
2. No evidence of cervical radiculopathy.
3. Mild pariscapular myofascial pain.
4. No myelopathy.

(Jt. Ex. 10, p. 102)

With respect to the cause of claimant's condition, Dr. Jensen opined:

> Response: I believe that the patient has a subacromial bursitis of the right shoulder, which has been worked up in the chart, treated and placed on medium-duty restrictions due to this. He has some periscapular dyskinesis, which causes some mild muscular paraspinal muscle spasms, which is the myofascial pain that he has near his neck. I believe his symptoms are all based around the fact that he is not using his upper extremities normally, guarding his right upper extremity, and causing myofascial-related discomfort.

(Jt. Ex. 10, p. 102)

Dr. Jensen deferred to the impairment rating provided by Dr. Tran as well as to the restrictions detailed by Mr. Gasner in the FCE report he issued. Dr. Jensen did not view any restrictions for the cervical spine to be appropriate. (Jt. Ex. 10, p. 102)

Dr. Jensen did not causally connect claimant's neck condition to his employment at Smithfield. (Jt. Ex. 10, p. 103) The evaluating physician explained his rationale for not finding causation. He wrote:

> Response: No. I do not think his neck symptoms are causally related to his employment at Farmland Foods. In fact, there is no documented information regarding his neck in the entire orthopedic care despite being treated by an orthopedic shoulder surgeon who commonly deals with neck problems and would be able to recognize the difference between a radiculopathy and a true shoulder pathology and appropriately assign the problem to his shoulder and not his cervical spine and it was not until an independent medical exam performed by Dr. Bansal brought up the fact

> that he may have cervical issues that the question was asked whether his neck was involved. Instead of Dr. Bansal making a reasonable and logical conclusion to pursue further imaging and work this up appropriately before signing [*sic*] an impairment rating and/or restrictions. This is essentially assigning the patient guilty before having an adequate trial. Therefore, I significantly object to the notion that the patient has multilevel degenerative disk disease or significant facet arthropathy based on the complete review of the medical records and review of the MRI and physical examination of the patient. He certainly does not have any radiculopathy, and therefore, there is no impairment rating. This should be zero and there definitely are no long-term restrictions for this problem.

(Jt. Ex. 10, p. 103)

Dr. Bansal reviewed the report provided by independent medical examiner, Dr. Jensen. Dr. Bansal issued a rebuttal report. (Cl. Ex. 1, p. 20) In strong language, Dr. Bansal wrote on December 7, 2016:

> Therefore, I would respectfully disagree with Dr. Jensen regarding the significance of the cervical disc pathology at C5-C6 and C6-C7. I am surprised that Dr. Jensen takes issue with my assignment of a <u>provisional</u> impairment rating for the cervical spine without an MRI. Notwithstanding, that I specifically qualified the impairment rating as provisional, I ask Dr. Jensen which of the DRE Category II criteria from Table 15-5 that I utilized required an MRI. DRE Category II criteria specifically includes <u>nonverifiable</u> radicular complaints, or radicular complaints not supported by an imaging or electrophysiological test. Verifiable radiculopathy by imaging moves one to a DRE Category III impairment of 15 to 18% of the whole person. Therefore, I stand by all my opinions stated in my August 8, 2016 and October 21, 2016 reports.

(Cl. Ex. 1, p. 20)

Dr. Mason issued her opinions regarding claimant's condition in a "check the box" opinion report that was signed on December 25, 2016. Dr. Mason checked, "Agree" with the following statements:

> Is it correct that it is your medical conclusion that, in addition to his work injury to Mr. Herrera's right shoulder, the cumulative effect of Mr. Herrera's repetitive and/or exertional work for Farmland coming forward to on or about September of 2015, at least in substantial part, aggravated and/or lit up an underlying degenerative condition in his neck?
>
> With respect to your 10/12/2016 hand-written note on the 10/6/16 cervical MRI report of Mr. Herrera that "there is some disc bulging, but no

> significant herniated disc," is it correct that your statement in that regard means that you do not believe the cervical MRI shows anything that would require surgical consultation, but that it is your opinion the MRI is clinically significant and is consistent with the neck symptoms noted on your examination of Mr. Herrera?
>
> Is it your medical conclusion that, while you are not specifically trained to assign specific (numeric) impairment ratings per the *Guides*, Mr. Herrera likely has some level of permanent impairment as a result of his work injury to his right neck, in addition the permanent partial impairment in his right shoulder, and that the permanent restrictions Dr. Bansal assigned as set forth in his August 2015 IME report regarding Mr. Herrera are reasonable in light of the work related right shoulder and neck injury sustained by Mr. Herrera?
>
> Is it your opinion that Mr. Herrera is in need of chronic pain management, including palliative care/treatment, and possibly epidural steroid injection(s), with a pain specialist in an effort to mitigate his symptoms, as a result of his September 2015 work injury to his neck, and his right shoulder?

(Jt. Ex. 9, pp. 86-87)

Claimant returned to Dr. Mason on January 5, 2017. (Jt. Ex. 9, p. 88) Claimant requested a referral to a pain specialist. Dr. Mason suggested Peter N. Piperis, M.D., a pain specialist in Omaha, Nebraska. (Jt. Ex. 9, p. 88) Claimant returned to Dr. Mason on January 13, 2017. The same complaints were voiced. Dr. Mason was successful in securing an appointment for claimant with Dr. Piperis.

Dr. Piperis examined claimant on January 23, 2017. (Jt. Ex. 11, p. 105) Claimant reported his pain was located in the neck with radiation towards the right lateral scapular region along with symptoms going down the right arm and over the lateral aspect of the right forearm. (Jt. Ex. 11, p. 105)

Dr. Piperis memorialized the findings of his physical examination. They included:

> **Musculoskeletal**
> gait and station
> overall: normal gait and normal station
> spine
> inspection: normal cervical alignment
> palpation: **tender over the Right cervical paravertebral musculature**
> range of Motion: negative cervical facet loading bilaterally, cervical extension without significant

limitation (70 degrees) and cervical flexion without significant limitation (90 degrees)

upper extremity

palpation – shoulder: **acromioclavicular joint tenderness Right**
Right ROM – shoulder: **pain with abduction** and **pain with internal rotation**

Neurologic

Sensation

overall: intact bilaterally from C4 – T1

motor

upper extremity strength full and equal for deltoids, biceps, wrist extensors, triceps, grip and intrinsic hand muscles

deep tendon reflexes

overall: DTR's intact and symmetric for biceps, brachioradialis and triceps tendons

pathologic reflexes

spurling's [*sic*] Test: Negative
Clonus: negative
hoffman's [*sic*] sign: negative

(Jt. Ex. 11, pp. 107-108)

Dr. Piperis diagnosed claimant with radiculopathy of the cervical region and right shoulder pain. (Jt. Ex. 11, p. 108) Electrodiagnostic studies of the right upper extremity were ordered. (Jt. Ex. 11, p. 109)

Marvin M. Hurd, M.D., performed electrodiagnostic studies on February 27, 2017. Dr. Hurd commented on the test results:

> **Comment:**
>
> Nerve conduction studies are normal, including the bilateral distal median conductions as well as the bilateral ulnar across elbow and more distal conduction studies.
>
> EMG reveals no abnormalities in the bilateral upper extremities and related cervical paraspinals.
>
> **Impression:**
>
> Normal study-
>
> There is no electrodiagnostic evidence of neuropathy or acute cervical nerve root irritation involving the bilateral upper extremity nerves and muscles examined.

(Jt. Ex, 12, p. 111)

Claimant returned to Dr. Mason on March 15, 2017. There was no improvement in claimant's condition. He complained of an inability to sleep due to pain issues. (Jt. Ex. 9, p. 97) Several medications were prescribed including Gabapentin, Diclofenac, and Trazodone. (Jt. Ex. 9, p. 97)

Dr. Mason examined claimant again on April 14, 2017. The physician referred claimant to the pain clinic at St. Anthony Regional Hospital in Carroll, Iowa. (Jt. Ex. 7, p. 54) Claimant underwent trigger point injections into the neck on June 12, 2017. Claimant testified the injections were of no benefit. (Tr., p. 33)

On June 2, 2017, claimant's counsel scheduled an FCE for claimant at Short Physical Therapy, PLLC. Daryl Short, DPT, conducted the FCE using the standardized WorkWell System. (Cl. Ex. 2, p. 42) The results of the FCE are duplicated in part:

Some Limitations:

1. Elevated work—weight or unweighted

2. Reaching

3. Lifting waist to/from floor up to 30 lbs.

4. Lifting waist to/from crown up o [*sic*] 10 lbs.

5. Front carry up to 25 lbs. up to 50 ft.

6. Right arm overhead lift up to 6 lbs.

Significant Limitations:

1. Lifting waist to/from floor up to 35 lbs.

2. Lifting waist to/from crown up to 20 lbs.

3. Front carry up to 30 lbs. up to 50 ft.

4. Right arm overhead lift up to 8 lbs.

Summary/Recommendations:

1. These projections are for an 8 hour per day and 40 hours per week at the levels indicated with the FCE Test Results and Interpretation.

2. The WorkWell Protocol includes functional lifting test items that the client performed over multiple trials and repetitions. Mr. Herrera's

capabilities are in the **lower medium** category (up to 25 lbs. on an occasional basis with front carry) of physical demand.

3. It is recommended Mr. Herrera due to his decreased right shoulder and neck range of motion, strength and endurance limit any material handling and non-material handling activities that involves reaching or elevated work above shoulder height to an occasional basis.

4. Mr. Herrera provided a valid effort.

(Cl. Ex. 2, pp. 43-44)

Dr. Bansal issued an updated report on June 12, 2017. (Cl. Ex. 1, p. 24) The topic of the report was claimant's restrictions. Dr. Bansal agreed 14 pounds was reasonable for over the shoulder lifting. Also, Dr. Bansal opined, claimant should engage in occasional reaching. (Cl. Ex. 1, p. 24)

With respect to returning to work, claimant testified during direct examination:

Q. Okay. Have you - - since you were removed from the plant in June of last year, have you bid on and actually tried to do work at the plant since then?

A. Yes, to go look for a job.

Q. Okay. And did you actually try to go back to the plant and try some jobs?

A. Yes, I tried to do, like, three jobs that they gave me.

Q. When was the fist [*sic*] job? What was the first time you went back and tried to do a job?

A. In August of 2016.

Q. Okay. And which job did you try to - - did you bid on and try to do there at the plant?

A. One that's called - - a job that's called trim pig wings.

Q. A job that's call pig wings?

A. Yes.

. . .

Q. Okay. And how long did you last in that job?

A. Two, three days. I don't remember.

. . .

Q. Okay. And so you lasted two or three days. After that did you try to return back to the plant and try another job?

A. Yes.

Q. Do you remember when that was?

A. In October.

Q. Okay. Of 2016?

A. Yes.

Q. Which job?

A. A job called trim jowls. I don't know what it's called, it's the cheeks.

. . .

Q. Okay. How long did you last in that job?

A. There I lasted about two, three hours.

. . .

Q. Okay. So after the October attempt did you get back into the plant again and try another job?

A. Yes, in June a job that the nurse gave me of this year.

Q. Okay. What - -

A. 2017.

Q. What job was that?

A. It's like a job, I don't remember exactly, like clean rib or clean - -

. . .

Q. Okay. And how long did you last in that job?

A. The most I lasted was one week.

. . .

Q. Are you still continuing to go every week to check and see what jobs they have posted that may be available to try to bid on?

A. Yes, every week.

Q. Do you want to go back to work?

A. Yes, I would like to work, but if there's no jobs with my restrictions what am I going to do?

(Tr., pp. 34-39)

Ms. Cindy Schweers testified for the defense. She is the medical manager at Smithfield Foods in Denison, Iowa. She oversees four other nurses and she manages all of the workers' compensation claims at Smithfield. Ms. Schweers testified about the program in place at the plant for placing injured workers. She testified:

Q. (By Mr. Clausen) Yes, when someone has permanent restrictions as Mr. Herrera does, what's the process that you use?

A. The process after an FCE - - or after they are placed on permanent restriction is it's a union contract that we have 60 days to help them find a job within the plant. And - - and after that time if they have not found anything they are asked to leave the plant and we do ask that they come in weekly to look at the jobs available and the jobs up for bid..

Q. Okay. So the 60 days, are they provided light duty during that time?

A. They are provided light duty during that time, yes.

Q. Okay.

A. We accommodate the personal restrictions - - permanent restrictions, yes.

Q. And this is all pursuant to a union contract?

A. Correct.

Q. Collective bargaining agreement?

A. Correct.

Q. After 60 days they are placed out of the plant?

A. They are placed out of the plant, yes.

Q. But they are encouraged to continue to look for a job?

A. Absolutely.

Q. And what is the time period between the time that they are placed out of the plant that they have to look for this job?

A. I believe - - I believe it's two years.

Q. Okay. Mr. Herrera testified that he thought it was 18 months; you think it's two years?

A. I do, but I'm - - I'm not positive on that.

Q. Okay. Somewhere between - -

A. 18 months and 24 months, yes.

Q. Fair enough. Somewhere between 18 months and 24 months - -

A. Yes.

Q. - - they have the chance to try to find - -

A. Yes.

Q. - - a bid job?

A. Yes.

Q. All right. And is that the period that Mr. Herrera is in now?

A. That is correct.

(Tr., pp. 59-60)

Nurse Schweers testified she identified some jobs she believed claimant could do within the parameters of his work restrictions. (Tr., p. 63) The medical manager testified she identified ten jobs. (Tr., p. 64) One of the positions was the "fat back knife." (Tr., p. 65) Claimant did not accept the job because he said it would cause more pain. It would hurt claimant's right shoulder and arm. (Tr., p. 66) There was another position known as the "scoop beps" in the bacon department. Claimant felt there was a possibility he could perform the necessary tasks required of the position. However,

after reviewing a videotape of the job, claimant felt it would cause more pain to his shoulder. (Tr., pp. 67-68) Ms. Schweers testified the job could be performed with one hand. (Tr., p. 69) Then the defense witness testified there were several other jobs. They included packing cartons of bacon and "repack, preprice, and pack off." (Tr., p. 71) The medical manager indicated claimant believed those two jobs would hurt his right shoulder. As a consequence, claimant did not bid on those jobs. Nurse Schweers also found two labeling jobs in the ready to eat department and one job in the ready to eat meat to table. She testified claimant informed her the jobs would hurt his right shoulder. (Tr., pp. 71-72) There was another position called "RTE or pig wings." (Tr., pp. 72-73) The job was self-paced and no lifting was involved. The meat was located within 24 inches of claimant. He did not bid on the position. According to Ms. Schweers, claimant believed the job would hurt his right shoulder. (Tr., pp. 72-73, 75) Then the bid job, "speciality [*sic*] meats operate 8614", was viewed by claimant. (Tr., pp. 73-74) Claimant indicated the job would hurt his right shoulder.

Ms. Schweers also testified about the procedures claimant followed when he would visit the plant and view the bid board for jobs. She testified during direct examination:

> A. My understanding, after I spoke with the interpreter, he would go down, our interpreter is located in our supply room. So he would go down to the supply room with those bid jobs and he would ask them to read off the bid jobs which they did and not all the interpreters would know what each of those jobs entailed. But he signed off of them and would leave the building.
>
> Q. Signed off that he - -
>
> A. He could not perform any of them.
>
> Q. So at some point this past summer did you meet with Mr. Herrera?
>
> A. Yes, I did.
>
> A. I- - I - - I - - well, I spoke with the interpreter in the supply room and I said, "Please, when he comes back in, would you send him up to my office so I can visit with him." So he did come up to my office and I just asked him - - I said I - - I believe there are some jobs on here that do meet your permanent restrictions and I would like you to view some of these jobs and see if you feel like you are capable of performing them.
>
> Q. And what did he say?
>
> A. So that is the job from June of this year - - that is the job he looked at and he asked that I - - and I did send the video and the job description

on to Mr. Gasner who felt that he - - felt that would be within his restrictions.

Q. Okay. And did Mr. Herrera try that job?

A. No.

(Tr., pp. 76-77)

RATIONALE AND CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler 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).

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (1956). It the claimant had a preexisting condition or disability that is materially, aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 135, 115 N.W.2d 812, 815 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 375, 112 N.W.2d 299, 302 (1961).

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

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

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

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

It is the determination of the undersigned deputy workers' compensation commissioner; claimant has successfully established he sustained injuries to his right shoulder and to his cervical spine. Both injuries arose out of and in the course of his employment as a result of a work injury on September 1, 2015. The right shoulder injury was never disputed. Defendants do dispute any injury to the cervical spine.

From the onset of his work injury, claimant has complained of cervical pain with radiculopathy down his right arm. He testified credibly. Prior to his work injury, claimant had no problems with his neck. There is no indication he sought treatment for his neck or upper back before he was injured on the job.

It is true; objective testing shows claimant has mild degenerative changes of the cervical spine. There is some disc bulging but no significant herniated discs. (Jt. Ex. 9, p. 82) Nevertheless, Dr. Bansal suggested a disc protrusion at C5-C6 and a disc bulge at C6-C7 were clinically significant. (Cl. Ex. 1, p. 18) The independent medical examiner related the cervical spine condition to claimant's work injury. Dr. Mason related the neck condition to claimant's work injury in question. (Jt. Ex. 9, pp. 86-87) Dr. Piperis diagnosed claimant with radiculopathy of the cervical region and right shoulder pain. (Jt. Ex. 11, p. 108) Even Dr. Jensen acknowledged claimant had myofascial pain of the neck. Claimant has met his burden of proof. His work injury materially aggravated, accelerated, worsened or lighted up his previous degenerative changes in his cervical spine.

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

The next issue for resolution is the extent of claimant's right shoulder injury, as well as the injury to the cervical spine. Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

Dr. Tran rated claimant's shoulder at ten percent to the body as a whole. Dr. Bansal rated the shoulder at nine percent to the body as a whole. He rated the cervical spine at five percent to the body as a whole. According to the two functional capacity examinations that were performed, claimant is able to perform work in the medium to low medium categories of work as defined in the U.S. Department of Labor's Dictionary of Occupational Titles.

Mr. Gasner, the physical therapist, recognized claimant was capable of lifting 24 pounds to shoulder level. Overhead lifting was limited to lifting 14 pounds on an occasional basis and 5 pounds on a frequent basis. There was disagreement whether claimant could engage in constant or occasional reaching. It is apparent to this deputy; constant reaching with the right arm and shoulder would be detrimental to claimant's condition. Therefore, occasional reaching with the right arm and shoulder is a more realistic restriction, given claimant's current condition.

There is a dispute between claimant and defendants whether claimant is fully motivated to return to work at Smithfield. He has made minimal attempts to seek a production job. He does not want to risk any shoulder or neck pain in any proffered position. It is doubtful claimant will ever find a job where he will function without some level of pain. Smithfield has been encouraging claimant to try various production jobs. At the time of the arbitration hearing, there were 100 bid jobs. This deputy is convinced the company is committed to finding a position for claimant within his restrictions.

Claimant is an older worker. He is unable to speak, read or write English. He only attended school until the sixth grade in Mexico. Claimant is an unskilled worker. Retraining is highly unlikely. Claimant resides in a geographical area where most of the job market centers around agriculture or meat production. Claimant's most realistic hope in the local job market is to accept a position within the Smithfield plant. Management at Smithfield has encouraged claimant to seek employment within the confines of his work restrictions.

Therefore, after considering all of the factors involving industrial disability; it is the determination of the undersigned; claimant has a permanent partial disability in the amount of 45 percent. Defendants shall pay unto claimant 225 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $529.18 per week. Defendants shall take credit for the payment of 50 weeks of permanency benefits previously paid to claimant at the incorrect benefit rate of $515.68 per week. The commencement date for the payment of permanency benefits was stipulated to be June 10, 2016.

Accrued benefits shall be paid in a lump sum, with interest paid according to law.

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

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

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

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

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

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

Claimant is requesting certain costs as detailed in Claimant's Exhibit 22. One of the items requested is Mr. Short's FCE report in the amount of $900.00. Defendants strongly resist paying for this cost.

Defendants correctly argue in their brief, the $900.00 cost is not reimbursable under rule 876 IAC 4.33. In the case, Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), the Iowa Supreme indicated only the costs associated with preparation of the written report of a claimant's independent medical examination can be reimbursed as a cost at hearing under 876 IAC 4.33.

In the present case, claimant alleges the $900.00 charged by Mr. Short is taxable under 876 IAC 4.33, the invoice shows only $350.00 of the total cost was allocated to the preparation of the report. Therefore, the most that could be allocated as a taxable cost would be $350.00.

However, the cost of preparing the report is not taxable in this case. The FCE report was not required by a medical provider in order to complete a medical report. Here, claimant's counsel requested the FCE. No medical provider requested a second FCE. Since the FCE was not necessary for a medical provider to complete a medical report, no portion of the Short FCE is taxable under rule 876 IAC 4.33.

The following costs are taxed to defendants:

$100.00 filing fee

$ 6.72 service fee

$ 6.72 service fee

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of five hundred twenty-nine and 18/100 dollars ($529.18) and commencing from June 10, 2016.

All past due benefits shall be paid in a lump sum together with interest as allowed by law.

Defendants shall take credit for all benefits previously paid to claimant.

Defendants shall pay the costs as detailed in the decision.

Defendants shall file all reports as required by law.

Signed and filed this 4th day of April, 2018.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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MAM/srs

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.