BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PETER LOFTHUS, Claimant, vs. KOCH BROTHERS, INC., Employer, and EMC INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5064144, 5064145 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1403.3, 2803

STATEMENT OF THE CASE

Peter Lofthus, the claimant, filed petitions in arbitration seeking workers' compensation benefits from the defendants, employer Koch Brothers, Inc., and insurance carrier, EMC Insurance Company (EMC). The agency held a hearing in this case on August 26, 2019, in Des Moines, Iowa, over which the undersigned deputy workers' compensation commissioner presided.

The hearing was supposed to be held regarding File Nos. 5064144 and 5064145. However, Lofthus voluntarily dismissed File No. 5064144, with the alleged injury date of December 6, 2013, during the hearing. (Hearing Transcript pages 3−4) This decision consequently addresses only File No. 5064145, with an alleged injury date of October 25, 2016. (Hrg. Tr. p. 4)

ISSUES

Under rule 876 IAC 4.149(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. Because Lofthus dismissed his petition in File No. 5064144, the parties clarified their positions on certain issues identified in the Hearing Report during colloquy at hearing. (Hrg. Tr. pp. 5−8) The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) Did Lofthus sustain an injury arising out of and in the course of his employment with Koch Brothers on October 25, 2016?

2) Did Lofthus give Koch Brothers timely notice of the alleged injury of October 25, 2016?

3) If Lofthus sustained an injury arising out of and in the course of his employment with Koch Brothers on October 25, 2016, did he give Koch Brothers timely notice of the injury?

4) If Lofthus sustained an injury arising out of and in the course of his employment with Koch Brothers on October 25, 2016, did it result in him sustaining a permanent disability?

5) If the alleged injury of October 25, 2016, resulted in a permanent disability, what is the extent of the disability?

6) Is Lofthus entitled to reimbursement for the cost of the independent medical examination (IME) performed by Sunil Bansal, M.D.?

7) Is Lofthus entitled to payment of medical expenses incurred for care on or after October 25, 2016?

8) Are costs taxed against the defendants under Iowa Code section 86.40?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Lofthus and Koch Brothers at the time of the alleged work injury.

2) If the alleged injury resulted in Lofthus sustaining a permanent disability:

    a. The disability is an industrial disability.

    b. The commencement date of permanent benefits is October 25, 2016.

3) At the time of the stipulated injury:

    a. Lofthus's gross earnings were $876.92 per week.

    b. Lofthus was married.

    c. Lofthus was entitled to four exemptions.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations. The parties are bound by their stipulations.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits 1−5;
- Claimant's Exhibits 1−7;
- Defendants' Exhibits A−F; and
- Hearing testimony by Lofthus.

After careful consideration of the evidence in the record, the undersigned makes the following findings of fact.

1. Education, Training, and Work History.

Lofthus was 60 years old at the time of hearing. (Hrg. Tr. p. 11) He is a high-school graduate. (Hrg. Tr. p. 12−13; Defendants' Exhibit A, Deposition Transcript p. 5) Lofthus enlisted in the United States Air Force at age 19. (Hrg. Tr. p. 13; Def. Ex. A, Dep. Tr. p. 6) Lofthus received about a year of training for his duties repairing graphic equipment. (Def. Ex. A., Dep. Tr. p. 6) Lofthus earned multiple certificates from the training that, in his estimation, are not of much worth outside the Air Force, though a basic electronics training carried over into civilian life somewhat. (Def. Ex. A, Dep. Tr. p. 16) He served in the Air Force for four years, leaving when his enlistment period ended. (Def. Ex. A, Dep. Tr. p. 6)

After his discharge, Lofthus got a job with a military contractor repairing computer hardware systems. (Def. Ex. A, Dep. Tr. p. 7) Lofthus earned about $60,000 per year in the job. (Def. Ex. A, Dep. Tr. p. 7) He lived and worked in Germany from 1983 until about 1991. (Def. Ex. A, Dep. Tr. p. 7)

Lofthus took a leave of absence to go on tour in Eastern Europe with a music group, in which he was lead singer, group leader, and on-road maintenance person. (Def. Ex. A, Dep. Tr. pp. 7, 9) The tour compromised his security clearance so he could not work in the contractor's secure areas anymore. (Def. Ex. A, Dep. Tr. pp. 7−8) Lofthus quit his job before the military contractor could fire him. (Def. Ex. A, Dep. Tr. pp. 7−8)

Lofthus returned to the United States after his resignation. (Def. Ex. A, Dep. Tr. p. 8) He worked odd jobs, including repairing farm equipment for about a year. (Def. Ex. A, Dep. Tr. p. 8) Lofthus then went back to Europe to be in the music group with which he had toured Eastern Europe. (Def. Ex. A, Dep. Tr. p. 9) In 1993, Lofthus married his wife and moved to Montana. (Def. Ex. A, Dep. Tr. p. 9)

Lofthus got a job doing repairs with Capital Business Systems, a company that sold and serviced photocopiers. (Def. Ex. A, Dep. Tr. p. 9) He made about $20,000 annually. (Def. Ex. A, Dep. Tr. p. 10) Lofthus stayed in his job after Stringer Business Systems bought the company in 1994 or 1995. (Def. Ex. A, Dep. Tr. p. 10)

In 1998, Lofthus and his wife moved to Des Moines, where he got a job repairing photocopiers with Koch Brothers. (Def. Ex. A, Dep. Tr. p. 10) He earned $25,000 or $30,000 per year. (Def. Ex. A, Dep. Tr. p. 11) In or around the year 2000, Lofthus transitioned to information technology (IT) work with Koch Brothers. (Def. Ex. A, Dep. Tr. p. 11; Hrg. Tr. p. 14) His job duties included installing and maintaining equipment such as computers, network hubs, cabling, routers, wireless access points, and services. (Hrg. Tr. p. 16)

With the change in jobs, Lofthus pursued additional IT knowledge. In or around 2000, he took computer networking classes for about six months at Hamilton College (Def. Ex. A, Dep. Tr. pp. 15−16) But Lofthus did not obtain a degree for the coursework he completed there. (Def. Ex. A, Dep. Tr. p. 15) He obtained a Microsoft networking certificate in the course. (Def. Ex. A, Dep. Tr. p. 16)

In 2017, Lofthus was earning about $40,000 annually working for Koch Brothers. (Def. Ex. A, Dep. Tr. p. 12) He went on vacation and Koch Brothers learned of multiple IT problems while he was on leave. (Def. Ex. A, Dep. Tr. p. 11) Koch Brothers concluded the cause of the problems was Lofthus not completing projects in a timely manner and not completing proper documentation. (Def. Ex. A, Dep. Tr. p. 11; Def. Ex. F) As a result, Koch Brothers terminated Lofthus's employment effective August 14, 2017. (Def. Ex. A, Dep. Tr. pp. 10−11; Def. Ex. F)

Lofthus's wife performed language interpretation work on her own for years. (Def. Ex. A, Dep. Tr. pp. 14−15) In mid-2018, she started her own business specializing in such services. (Def. Ex. A, Dep. Tr. pp. 14−15) Following Lofthus's termination, he briefly looked for a new job. (Def. Ex. A, Dep. Tr. p. 13) But Lofthus stopped trying to reenter the labor market because he decided to help his wife with her business—in part, because he believed he would not be able to take breaks to mitigate his neck pain like he could while working from home. (Def. Ex. A, Dep. Tr. pp. 12−13)

Lofthus works 30 to 40 hours weekly for his wife's business. (Def. Ex. A, Dep. Tr. p. 14) He does not earn a paycheck for the work. (Def. Ex. A, Dep. Tr. p. 13) He and his wife share her earnings. (Def. Ex. A, Dep. Tr. p. 13) Lofthus estimates he and his wife earned about $60,000 from the business in the first year. (Def. Ex. A, Dep. Tr. p. 14) Lofthus also helps with their son's home-schooling. (Hrg. Tr. pp. 49−50)

2. 1992 Injury.

While Lofthus was working for the music group in Europe in or around January of 1992, a car crashed into the back of the vehicle in which he was traveling. (Def. Ex. A, Dep. Tr. p. 20) The force of the collision caused an injury to his neck. (Def. Ex. A, Tr. p. 20) He wore a neck brace because of the injury. (Def. Ex. A, Tr. p. 20) Ultimately,

Lofthus fully recovered from the neck injury and did not seek treatment for his neck between his recovery and 2013. (Def. Ex. A, Dep. Tr. p. 21)

3. December 6, 2013 Injury.

Lofthus was involved in a car crash while driving a Koch Brothers vehicle home for lunch on December 6, 2013. (Hrg. Tr. p. 19; Def. Ex. A, Dep. Tr. pp. 17−18) Lofthus had to come to a complete stop while driving on the interstate because of a traffic jam. (Hrg. Tr. p. 19; Def. Ex. A, Dep. Tr. p. 17) After Lofthus stopped, a white van him crashed into the rear of his vehicle. (Hrg. Tr. p. 19; Def. Ex. A, Dep. Tr. p. 17)

The force of the collision knocked Lofthus's hat off his head and into the back seat. (Hrg. Tr. p. 19; Def. Ex. A, Dep. Tr. p. 18) It also totaled the back end of the car. (Hrg. Tr. p. 19; Def. Ex. A, Dep. Tr. p. 18) The bumper fell off the Koch Brothers car when he drove away from the crash scene. (Def. Ex. A, Dep. Tr. p. 18) Lofthus felt okay right after the crash, so he did not request an ambulance or seek care immediately after the crash. (Def. Ex. A, Dep. Tr. pp. 18−19; Joint Exhibit 2, p. 14)

Loftus reported the crash to Koch Brothers. (Def. Ex. A, p. 21) Koch Brothers recommended that he report it as a workers' compensation injury. (Def. Ex. A, p. 21) He later developed pain and tightness in his neck and upper back. (Jt. Ex. 2, p. 14) Lofthus requested care because of his symptoms. (Def. Ex. A, p. 21; Hrg. Tr. p. 25) The defendants arranged care with Richard McCaughey, D.O.

On December 9, 2013, Dr. McCaughey examined Lofthus. (Jt. Ex. 2, p. 14) With respect to both of his upper extremities, Lofthus denied any radiation of pain into them, numbness, tingling, or weakness. (Jt. Ex. 2, p. 14) Dr. McCaughey noted Lofthus exhibited some minimal pain behavior with palpation and recruitment of the neck and upper back paravertebral musculature. (Jt. Ex. 2, p. 14)

Dr. McCaughey diagnosed Lofthus with strains to his neck and upper back. (Jt. Ex. 2, p. 15) He prescribed some gentle independent stretching and for Lofthus to take Advil or Aleve as needed and per label instructions. (Jt. Ex. 2, pp. 14−15) Lofthus received no work restrictions. (Jt. Ex. 2, pp. 14−15)

Lofthus went to see his personal physician, Scott Fackrell, D.O., at Lakeview Family Medicine Center on December 12, 2013. (Jt. Ex. 1, p. 1; Def. Ex. A, Dep. Tr. p. 19) He was experiencing pain in the area of his lower neck and upper back. (Def. Ex. A, Dep. Tr. p. 19) Dr. Fackrell ordered x-rays, which Paul Keller, M.S., M.D., interpreted on December 12, 2013, as follows:

> FINDINGS: Changes of degenerative disc disease are present at the C5−6 and C6−7 disc levels. The vertebrae are otherwise normal in appearance and alignment. The cervical basilar relationships are normal. The prevertebral soft tissues are normal in appearance.
>
> IMPRESSION: No evidence of acute injury.

(Jt. Ex. 1, p. 2) Dr. Fackrell informed Lofthus he had a case of whiplash. (Def. Ex. A, Dep. Tr. pp. 19−20) Lofthus treated his neck pain with icing and painkillers. (Def. Ex. A, Dep. Tr., p. 19)

Lofthus completed an EMC Employee's Report that is dated December 27, 2013. (Cl. Ex. 2, p. 18) Lofthus describes neck, shoulder, and right-arm pain in the report. (Cl. Ex. 2, p. 18; Hrg. Tr. p. 20) He identified Dr. McCaughey as his treating physician and Dr. Fackrell as his personal physician on the form. (Cl. Ex. 2, p. 18)

Dr. McCaughey saw Lofthus again on January 27, 2014, with Nurse Case Manager (NCM) Pam Boles present. (Jt. Ex. 2, p. 16) Lofthus complained of ongoing neck tightness and tenderness. (Jt. Ex. 2, p. 16) He also noted some radiation of pain down his right arm and some tingling in his right hand. (Jt. Ex. 2, p. 16)

NCM Boles provided Dr. McCaughey the x-ray of December 12, 2013, ordered by Dr. Fackrell. (Jt. Ex. 2, p. 16) He noted the "C-spine x-ray report dated 12/12/2013 describes degenerative disk disease, C3−C7." (Jt. Ex. 2, p. 16) Dr. McCaughey decided to try a Medrol Dose-Pak, prescribed no work restrictions, and set up a follow-up appointment for a week later. (Jt. Ex. 2, p. 16)

On February 3, 2014, Lofthus followed up with Dr. McCaughey. (Jt. Ex. 2, p. 18) His symptoms had improved, with little to no tingling in his right upper extremity and less tightness in his upper back and neck. (Jt. Ex. 2, p. 18) Dr. McCaughey diagnosed him with an improving strain and directed him to continue to take Advil. (Jt. Ex. 2, pp. 18−19)

On February 17, 2014, Lofthus saw Dr. McCaughey for a follow-up exam. (Jt. Ex. 2, p. 20) He complained that his neck felt achy and he still had intermittent tingling in his right upper extremity despite his prescription for Medrol. (Jt. Ex. 2, p. 20) Dr. McCaughey did not recommend any more medication and ordered magnetic resonance imagining (MRI). (Jt. Ex. 2, pp. 20−21)

William Young, M.D., performed an MRI of Lofthus's cervical spine on February 24, 2014. (Jt. Ex. 2, pp. 23−24) His impressions of the MRI were:

1. No acute or subacute traumatic injury to the cervical vertebral column.
2. Moderately advanced degeneration at C5−C6 where there is pronounced diffuse disc bulging. There is some adjacent space margin spur formation and prepped even a tiny amount of lateral, intraforaminal disc herniation on the right side. There is bilateral neural foraminal narrowing or stenosis enough to cause C6 nerve root rotation radiculopathy especially on the right.
3. Disc bulging and mild neural foraminal narrowing at C6−C7, also slightly greater on the right without frank nerve root impingement at this level.
4. No central canal stenosis or spinal cord abnormality.

(Jt. Ex. 2, pp. 23−24)

Dr. McCaughey discussed the MRI with Lofthus on February 27, 2014. (Jt. Ex. 2, p. 25) Lofthus informed him that he was still experiencing some neck achiness and

stiffness as well as some dysesthesias down into his right thumb. (Jt. Ex. 2, p. 25) Dr. McCaughey noted Lofthus's radicular symptoms of the right upper extremity that potentially correlate with the MRI. (Jt. Ex. 2, p. 25) He discussed Lofthus's options with him, which included doing nothing to see if his symptoms subside, referral to a pain specialist, or referral to a spine surgeon. (Jt. Ex. 2, p. 25) Lofthus wanted to discuss matters with his wife, so they set up another appointment in two weeks. (Jt. Ex. 2, p. 25)

On March 13, 2014, Lofthus followed up with Dr. McCaughey. (Jt. Ex. 2, p. 27) He shared that he continued to be bothered by bouts of neck pain and numbness in his right hand. (Jt. Ex. 2, p. 27) With Lofthus's permission, Dr. McCaughey included NCM Bolles in the discussion of impression and the treatment plan moving forward. (Jt. Ex. 2, p. 27) The defendants arranged care with David Hatfield, M.D.

Dr. Hatfield examined Lofthus at Des Moines Orthopaedic Surgeons (DMOS) on May 2, 2014. (Jt. Ex. 3, pp. 33−34) Dr. Hatfield reviewed imaging of Lofthus's back with him and his wife. (Jt. Ex. 3, p. 33) They discussed Lofthus's treatment options, including continuing observation, epidural steroid injection, and surgery. (Jt. Ex. 3, p. 34) Lofthus opted to give more thought to his choices. (Jt. Ex. 3, p. 34) Because Lofthus thought he could get by without an injection, he never followed up with Dr. Hatfield. (Jt. Ex. 2, p. 29)

On July 23, 2014, Lofthus returned to Dr. McCaughey because he had an increase in neck pain with burning down his right arm after swimming. (Jt. Ex. 2, p. 29) Dr. McCaughey prescribed a tapering dose of prednisone and some Vicodin. (Jt. Ex. 2, p. 29) He assigned no work restrictions. (Jt. Ex. 2, p. 29−30)

Lofthus next saw Dr. McCaughey on August 15, 2014, to follow up after swimming lit up his symptoms. (Jt. Ex. 2, p. 31) Lofthus reported practically no residual neck pain or dysesthesias of his right upper extremity. (Jt. Ex. 2, p. 31) He felt the prednisone really helped. (Jt. Ex. 2, p. 31)

Dr. McCaughey assigned no work restrictions, but advised against "extreme activities" such as waterskiing and sports like tackle football. (Jt. Ex. 2, p. 31) He prescribed no additional medication to Lofthus. (Jt. Ex. 2, p. 31; Hrg. Tr. p. 25) Dr. McCaughey discharged Lofthus from his care because he did not anticipate any further difficulties, with the caveat that Lofthus could return for care as needed. (Jt. Ex. 2, p. 31) Lofthus did not return to Dr. McCaughey for care.

Barbara Geier, a senior claims adjuster with EMC, wrote Dr. Hatfield a letter dated December 1, 2014. (Jt. Ex. 3, p. 41) She asked questions about Lofthus's injury and care, including whether he had reached maximum medical improvement (MMI), whether he had sustained a permanent impairment resulting from the injury, and whether Dr. Hatfield believed he needed permanent work restrictions. (Jt. Ex. 3, p. 41)

Dr. Hatfield responded in a letter dated January 5, 2015. (Jt. Ex. 3, p. 42) Dr. Hatfield shared that it was his understanding the symptoms Lofthus was experiencing had resolved and, "Although imaging shows degenerative change C5−6 and C6−7, if as reflected above symptoms have resolved, I would regard his presenting symptoms as a

temporary exacerbation of an underlying degenerative condition." (Jt. Ex. 3, p. 42) Therefore, according to Dr. Hatfield, Lofthus sustained a zero percent impairment to the body as a whole as related to the 2013 crash. (Jt. Ex. 3, p. 42) He assigned no work restrictions. (Jt. Ex. 3, p. 42)

Lofthus occasionally experienced flare-ups of his symptoms when he would do jobs or an activity with his head tilted up. (Hrg. Tr. p. 25) He typically treated these flare-ups with ice and over-the-counter pain medication for about a week. (Hrg. Tr. p. 25)

Lofthus got treatment from Pulley Chiropractic Health Center from January 26, 2016, through November 2, 2016. (Jt. Ex. 4, p. 43) Pulley made notes for some of these visits, but not others. (Jt. Ex. 4, p. 43) The February 24, 2016 note is, "Neck." (Jt. Ex. 4, p. 43) For the June 10, 2016 appointment, Pulley noted, "Onset 6-7-16." (Jt. Ex. 4, p. 43) There are no notes for any of the other appointments at Pulley. (Jt. Ex. 4, p. 43)

Lofthus did not miss any time from work due to the 2013 work injury. No doctor prescribed permanent work restrictions necessitated by the injury he sustained in the car crash. No doctor found Lofthus to have sustained a permanent disability resulting from the 2013 work injury.

4. October 25, 2016 Injury.

On October 25, 2016, Lofthus was working for Koch Brothers at the office of a customer. (Hrg. Tr. p. 26; Cl. Ex. 3, pp. 21−22) The customer was converting a large conference room into a group work space. (Hrg. Tr. p. 26) The conference table had been left in the room, leaning against a wall so that it was blocking Lofthus's access to the jacks he needed to access to connect the computers to the network. (Hrg. Tr. p. 26; Cl. Ex. 3, p. 22)

An employee of the costumer's asked Lofthus and another individual if they could move the table. (Hrg. Tr. p. 26) They obliged by lifting the table onto a dolly and moving it into a storage area. (Hrg. Tr. p. 26) Lofthus estimated the table weighed about 200 pounds. (Hrg. Tr. p. 27; Cl. Ex. 3, p. 22)

Lofthus experienced no immediate pain from moving the table. (Hrg. Tr. p. 27) Several days later, however, he felt pain. (Hrg. Tr. p. 27; Cl. Ex. 3, p. 23) Because of the amount of Lofthus's health insurance deductible, he decided to treat it with ibuprofen and ice to see if the injury would heal itself. (Cl. Ex. 3, p. 23)

Lofthus felt strong pain in the base of his neck, radiating out into his shoulders and down both arms into his wrists and thumbs. (Hrg. Tr. p. 28) He testified he did not remember experiencing the radiating pain following the 2013 car crash. (Hrg. Tr. p. 28)

Koch Brothers designated Kent Festvog, the company's treasurer, as the person to whom employees reported injuries at the time in question. (Hrg. Tr. p. 30) On February 13, 2017, Koch Brothers filed a first report of injury with the agency for the injury. (Def. Ex. D, p. 14) The FROI identified October 25, 2016, as the date of injury.

(Def. Ex. D, p. 14) It also identified "APPX" (approximately) February 1, 2017, as the date on which Koch Brothers first knew of the condition. (Def. Ex. D, p. 14) There is no explanation on the FROI for why it uses the qualifier of approximately for the date of notice. (Def. Ex. D, p. 14) At the bottom of the FROI, it states Festvog prepared the document. (Def. Ex. D, p. 14)

Festvog did not testify in the hearing. There is no explanation in evidence about why Festvog used the "APPX" qualifier when filling the blank for the reported date of notice. It is more likely than not Festvog used an estimation of the approximate date because he did not know the exact date on which Lofthus reported the injury when he completed and filed the FROI.

On February 20, 2017, EMC contacted Lofthus regarding the injury he reported. (Cl. Ex. 3, p. 20; Hrg. Tr. p. 31) EMC ("Q") and Lofthus ("A") had the following exchange:

Q: Okay, alright, so um did you notify anybody at work, like your supervisor or anyone when this happened that weekend or when you noticed the pain in your back?

A: I don't think I said anything at that point.

Q: Alright, so when did you first notify your employer that you were having neck pain?

A: It was um I think it was, I finally decided I needed to do somethin' about the first week in January, I went over and talked to her, to Kent.

Q: I'm sorry, could you repeat the name again?

A: Kent [Festvog], he's our, he handles this stuff.

Q: Alright, you said you first told him January of this year?

A: Yeah.

Q: Okay, do you happen to know a date?

A: Oh, let's see I have the 5th.

Q: The 5th of.

A: I have an email that he fired back at me about that. It was about the 5th.

Q: Of January?

A: Yeah.

Q: That you notified um Kent, okay. Alright so um did you do any paperwork at that time to fill out a report for work comp?

A: Um, no, I'd never had this happen to me before so I didn't know what the procedures were. Um Kent directed me to get in touch with the, are you with EMC?

Q: Yes.

A: Okay, but with another person that dealt with that car accident from 2013.

Q: Okay.

A: He had me get in touch with her and that's when she told me that the Statute of Limitations had run out for that accident, the claims against that accident. Um and then I so that was around the 5th and then we've been kind of busy with implementing new servers and I assist on this so I kind of dropped the ball as far as that goes and didn't get back to him for I don't know, a couple weeks, and then finally my wife is the one that told me I need to get an official work comp claim thing form filed.

Q: Right.

A: I went over and talked to Kent about that and then we shipped that off.

(Cl. Ex. 3, pp. 23−24)

On February 12, 2019, the defendants deposed Lofthus. (Def. Ex. A, p. 1) At that time, Lofthus recalled contacting Festvog in December regarding the injury. (Def. Ex. A, Dep. Tr. p. 26) He could not remember if he did so verbally or by email. (Def. Ex. A, Dep. Tr. p. 26) According to Lofthus's deposition testimony, he and Festvog "kept missing each other." (Def. Ex. A, Dep. Tr. p. 26)

Lofthus further stated during his deposition, "And then in January, I think towards the end of January, I contacted him again and we finally got that paper filled out. The date on it says February 1st, I think. I did not write that date on there; he did." (Def. Ex. A, p. 1, Dep. Tr. p. 26)

During Lofthus's hearing testimony, he recounted notifying Festvog in person or by phone of the injury in December of 2016. (Hrg. Tr. p. 29) Lofthus was left with the impression Festvog was preparing for vacation. (Hrg. Tr. p. 29) Lofthus testified he contacted Festvog by phone or email in January of 2017, though he could not recall with certainty the manner in which he communicated with Festvog. (Hrg. Tr. p. 30) He also testified he could not remember an email exchange with Festvog on January 5, 2017, as detailed in the transcript of his statement to EMC. (Hrg. Tr. p. 32) Ultimately, Lofthus

testified he would believe the transcript of the EMC call on February 20, 2017, because it was much closer in time to the events in question and his memory at the time was therefore better. (Hrg. Tr. p. 32)

When asked on cross-examination about whether he sent Festvog an email, Lofthus testified, “I can’t dispute that either yes or no because I don’t have direct recall at the moment.” (Hrg. Tr. pp. 66−67) He also confirmed that, through counsel, he requested a copy of his emails for the time period in question and there was no email in which he provided notice of a work injury. (Hrg. Tr. p. 67)

EMC and Lofthus discussed care for the injury during the February 20, 2017 conversation. (Cl. Ex. 3, pp. 24−25) Lofthus shared that he went to Pulley a couple of times, but the care provided no reduction in his symptoms. (Cl. Ex. 3, p. 24) The Pulley medical records from these appointments make no reference to the work injury or any symptoms relating to it. (Jt. Ex. 4, p. 43) He further stated that he had not gone to a medical doctor for the pain. (Cl. Ex. 3, pp. 24−25) Loftus tried treating his injury with ibuprofen and ice instead. (Cl. Ex. 3, pp. 24−25)

Koch Brothers and Lofthus submitted a complete Employee’s Report to EMC. (Cl. Ex. 2, p. 19) Lofthus signed the report and it is dated March 2, 2017. (Cl. Ex. 2, p. 19) According to Lofthus’s hearing testimony, he completed the form on or around that date. (Hrg. Tr. pp. 35, 73.

The discussion of care culminated in the following between EMC (“Q” in the transcript) and Lofthus (“A” in the transcript):

> Q: Okay, um alright so are you wanting to see a doctor then for this injury?
>
> A: Well, it’s pretty much staying the same I think I probably need to at this point. I can’t keep taking Ibuprofen for a long time.

(Cl. Ex. 3, p. 25) The defendants did not arrange care following the call. (Hrg. Tr. p. 65)

Lofthus did not obtain care on his own for over a year after the call with EMC. On August 16, 2018, he went to Regenexx, where Paras Shah, M.D., saw him. (Jt. Ex. 5) Lofthus shared his injury history with Dr. Shah. (Jt. Ex. 5, p. 46) He did not report any other accidents, falls, traumas, or fractures as a cause of pain. (Jt. Ex. 5, p. 45) Lofthus did not have the MRI or x-rays to share with Dr. Shah. (Jt. Ex. 5, pp. 44−45) Based on the exam, Dr. Shah concluded Lofthus’s neck pain was consistent with myalgia or cervicalgia with cervical spondylosis without myelopathy without radiculopathy. (Jt. Ex. 5, p. 48)

Lofthus testified Regenexx provided no treatment to him, just a consultation. (Hrg. Tr. pp. 40, 65) He went there to see if he was a good candidate for a stem cell treatment. (Hrg. Tr. p. 40) But Regenexx turned him down as a candidate for the treatment because the risks outweighed the potential benefits. (Hrg. Tr. pp. 40−41, 66) Thus, the evidence establishes Lofthus received no benefit from his appointment at Regenexx.

On August 30, 2017, Lofthus went to Lakeview Family Medicine for a routine physical exam by Brett Stewart, PA-C. (Jt. Ex. 1, p. 3) Stewart requested an MRI of Lofthus's cervical spine. (Jt. Ex. 1, p. 8) George Brown, M.D., compared the MRI to Lofthus's prior MRI on February 24, 2014. (Jt. Ex. 1, p. 8) Dr. Brown found the following on September 19, 2017:

> C2−C3: Unchanged left side mild facet joint osteoarthritic changes noted without any significant neural foraminal narrowing.
>
> C3−C4: Mild left greater than right facet joint osteoarthritic changes are unchanged without neural foraminal narrowing.
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> C4−C5: Unchanged mild neural foraminal narrowing seen bilaterally secondary to small uncovertebral and facet joint spurs.
>
> C5−C6: Unchanged central disc bulging without spinal cord compromise. Bilateral disc bulge/uncovertebral joint spur combinations again indent the lateral margins thecal sac as well as moderately narrow the right and mildly to moderately narrow the left neural foramina, potentially irritating both C6 nerve roots.
>
> C6−C7: Slightly worse bilateral disc bulge/uncovertebral joint spur combinations now present which indent the lateral margins thecal sac as well as moderately narrow the bilateral neural foramina, potentially irritating both C7 nerve roots. Small facet joint spurs minimally contribute to neural foraminal narrowing on both sides as well.
>
> C7−T1: Very minimal right side neural foraminal narrowing seen without change due to tiny uncovertebral and facet joint spurs.
>
> Opinion:
>
> Slightly worse cervical spondylosis changes namely at the C6−C7 level. Recommend clinical correlation.

(Jt. Ex. 1, p. 8)

Lofthus was still experiencing symptoms at the time of hearing. In particular, Lofthus experienced discomfort in his neck when working on a computer for several hours. (Hrg. Tr. pp. 47−48) The pain is located in the area of his left collarbone. (Hrg. Tr. pp. 48−49) He was not experiencing radiculopathy. (Hrg. Tr. p. 49)

Lofthus treats the pain with ibuprofen, which he takes three times per day. (Hrg. Tr. p. 48) In the afternoon, Lofthus experiences pain even while taking ibuprofen if he has been in a vertical posture. (Hrg. Tr. p. 51) He typically lays down and ices the area in the afternoon because laying down horizontally alleviates his symptoms. (Hrg. Tr. p. 51)

Lofthus rated the pain he was experiencing at the time of hearing on a scale of zero (no pain) to ten (worst pain imaginable). (Hrg. Tr. p. 52) If Lofthus is not taking a painkiller such as ibuprofen, his pain rates at a three or four during the day and increases to a five or six in the afternoon. (Hrg. Tr. p. 52) But if he takes a painkiller, his pain level is a zero or one out of ten. (Hrg. Tr. p. 52)

5. IME by Charles Mooney, M.D.

Dr. Mooney performed an IME of Lofthus and issued a report dated June 21, 2019. (Def. Ex. B, p. 2) As part of assessing Lofthus's physical condition, Dr. Mooney reviewed medical records from the following providers:

- Lakeview Family Medicine;
- Iowa Methodist Medical Center;
- Methodist Occupational Health and Wellness;
- DMOS;
- RAMIC Medical Imaging;
- Pulley Chiropractic Health Center; and
- Regenexx. (Def. Ex. B, p. 2)

With respect to the 2017 MRI, Dr. Mooney noted, "This is referenced in the medical record as having slightly worse cervical spondylosis changes namely at C6−7 level, but no other advancing degenerative or new disc herniation." (Def. Ex. B, p. 4)

Dr. Mooney examined Lofthus. (Def. Ex. B, pp. 4−7) Lofthus rated his pain on a scale of zero to ten, with zero being no pain and ten being the worst pain imaginable, as one at the time of the exam. (Def. Ex. B, p. 5) He also told Dr. Mooney that it could be as high as eight with certain activities. (Def. Ex. B, p. 5) Moreover, Lofthus reported occasional aching pain across the left collarbone and that his grip strength is not as strong as it once was in either hand. (Def. Ex. B, p. 5) Dr. Mooney found Lofthus demonstrated "no loss of sensation in any dermatomal fashion to light touch or pinprick." (Def. Ex. B, p. 7)

In Dr. Mooney's assessment, Lofthus presented evidence of cervical degenerative disc disease, most pronounced at C5−6 and C6−7 with cervical spondylosis. (Def. Ex. B, p. 7) However, Dr. Mooney found Lofthus "does not demonstrate evidence of cervical radiculopathy or myelopathy on examination." (Def. Ex. B, p. 7) On the question of causation, Dr. Mooney opined:

> It is my opinion that his current complaints are related to his underlying findings of degenerative disc and spondylosis of the cervical spine. It is my opinion that the incident of 12/06/2013 and the undocumented incident of 10/25/2016 would have created only a temporary exacerbation of these underlying findings and the incidence [sic] themselves are not directly causal to his current complaints. Further, there is no objective evidence to

> conclude that either incident caused an objective advancement of the underlying condition.

(Def. Ex. B, p. 7)

Dr. Mooney found Lofthus reached MMI for the 2013 injury on August 15, 2014. (Def. Ex. B, p. 8) On the question of permanent impairment, Dr. Mooney concurred with Dr. Hatfield's assignment of a zero percent impairment rating for the 2013 injury. (Def. Ex. B, p. 8) Dr. Mooney found Lofthus reached MMI with respect to the 2016 injury on January 25, 2017, and opined that Lofthus had "no partial permanent impairment according to the Fifth Edition AMA Guide also providing DRE category I and 0% impairment." (Def. Ex. B, p. 8) He assigned no permanent work restrictions. (Def. Ex. B, p. 8)

6. IME by Sunil Bansal, M.D., M.P.H.

On May 15, 2019, Dr. Bansal performed an IME of Lofthus at the Iowa Injury Institute. (Cl. Ex. 1, p. 1) As part of the IME, Dr. Bansal reviewed the first report of injury for the December 6, 2013 injury, first report of injury for the October 25, 2016 injury, transcript of the call between EMC and Lofthus on February 20, 2017, and the following medical records:

- Lakeview Family Medicine (April 19, 2005−August 31, 2018);
- Dr. McCaughey, Methodist Occupational Health and Wellness (December 9, 2013−August 15, 2014);
- Iowa Radiology (December 12, 2013);
- Ramic Medical Imaging (February 24, 2014);
- Dr. Hatfield, DMOS (May 2, 2014−January 5, 2015);
- Alliance Radiology (September 19, 2017);
- Dr. Shah, Regenexx (August 16, 2018);
- Dr. Mooney, Iowa Occupational Medicine Consulting Services (June 21, 2019); and
- Pulley Chiropractic Health Center (January 26, 2016−November 2, 2016). (Cl. Ex. 1, pp. 2−8).

Dr. Bansal also performed a physical examination of Lofthus. (Cl. Ex. 1, pp. 9−10) Lofthus informed Dr. Bansal he continues to have an intermittent pinching pain in his arms as well as stiffness and popping in his neck. (Cl. Ex. 1, p. 9) According to Dr. Bansal's report, Lofthus's "neck pain occasionally radiates down his left arm into his hand, and his left arm is [a] bit weaker than his right." (Cl. Ex. 1, p. 9)

Dr. Bansal noted tenderness to the touch over the cervical paraspinal musculature that was greater on the left side. (Cl. Ex. 1, p. 9) He also tested Lofthus's sensation. Using a two-point discriminator, he found a loss of sensory discrimination over Lofthus's right thumb and the same over his right index and long fingers. (Cl. Ex. 1, p. 9)

In the IME report, Dr. Bansal answered a series of questions posed by Lofthus's attorney about the December 6, 2013 injury and October 25, 2016 injury. (Cl. Ex. 1, pp. 10−15) Dr. Bansal diagnosed Lofthus with aggravation of cervical spondylosis resulting from the 2013 injury. (Cl. Ex. 1, p. 10) On the question of permanent impairment, Dr. Bansal opined he was unable to provide a rating because he examined Lofthus after the 2016 injury and noted Dr. Hatfield gave a zero percent impairment rating. (Cl. Ex. 1, p. 13)

With respect to the 2016 injury, Dr. Bansal diagnosed Lofthus with a re-aggravation of the cervical spondylosis at C6−C7 caused by lifting the table. (Cl. Ex. 1, p. 13−14) According to Dr. Bansal, "The mechanism of a bend and lift as he performed on October 25, 2016 is highly pathognomonic for aggravated disc bulging." (Cl. Ex. 1, p. 14 (citing Nachemson, AL, "Disc Pressure Measurements," Spine 1981 Jan-Feb; 6(1) 93-7)) Based on the mechanism of injury and Dr. Brown's interpretation of the 2017 MRI, Dr. Bansal concluded that lifting the conference table aggravated Lofthus's disc-bulging at C6−C7. (Cl. Ex. 1, p. 13 (quoting Dr. Brown's MRI report, Jt. Ex. 1, p. 8)) He further found that the change in imaging findings are consistent with a clinical change as he developed left arm radiculopathy after the 2016 injury. (Cl. Ex. 1, p. 14)

Dr. Bansal found Lofthus reached maximum medical improvement (MMI) on May 15, 2019. (Cl. Ex. 1, p. 14) He recommended maintenance care of intermittent epidural/facet injections and/or radiofrequency ablation, or other treatment recommended by a pain specialist. (Cl. Ex. 1, p. 14) On the question of permanent impairment, Dr. Bansal opined:

> Based on his current symptomatology and physical examination, he qualifies for a DRE category II impairment. He fits several criteria, including radiculopathic complaints, guarding, loss of range of motion, and considerable pain. He is assigned a **5% whole person impairment based on Table 15-5.**

(Cl. Ex. 1, p. 15 (emphasis in original)) Dr. Bansal assigned Lofthus permanent work restrictions of no lifting over 25 pounds and avoiding activities that require repeated neck motion or that place him in a posture that includes his neck in a flexed position for more than 15 minutes. (Cl. Ex. 1, p. 15)

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended provisions of the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the alleged date of injury is on or after July 1, 2017. See id. at § 24(1); see also Iowa Code § 3.7(1). The alleged date of injury in this case is October 25, 2016. (Hrg. Rpt., p. 1) Therefore, the 2017 amendments do not apply in this case, except for the provisions governing interest, if applicable, under the Commissioner's decision in Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

1. Causal Connection.

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).

Lofthus obtained an MRI as part of his 2017 physical. Dr. Brown, a treating physician, interpreted the MRI. He found in pertinent part:

> C5−C6: Unchanged central disc bulging without spinal cord compromise. Bilateral disc bulge/uncovertebral joint spur combination again indent the lateral margins thecal sac as well as moderately narrow the right and mildly to moderately narrow the left neural foramina, potentially irritating both C6 nerve roots.

> C6−C7: Slightly worse bilateral disc bulge/uncovertebral joint spur combinations now present which indent the lateral margins thecal sac as well as moderately narrow the bilateral neural foramina potentially irritating both C7 nerve roots. Small facet joint spurs minimally contribute to neural foraminal narrowing on both sides as well.
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> ****
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> Opinion:
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> Slightly worse cervical spondylosis changes namely at the C6−C7 level. Recommend clinical correlation.

Lofthus has consistently complained of radiculopathy dating back to Dr. McCaughey and Dr. Hatfield's treatment of his 2013 injury. Lofthus credibly testified that the symptoms have worsened. After the 2016 injury, he experiences radiculopathy in both upper extremities.

Dr. Mooney, the defense expert, summarized Dr. Brown's findings as concluding Lofthus had "slightly worse cervical spondylosis changes namely at C6−7 level, but no other advancing degenerative or new disc herniation." He concluded that Lofthus "does not demonstrate evidence of cervical radiculopathy or myelopathy on examination." Dr. Mooney gave no discussion of Dr. Brown's observations of changes to Lofthus's back from 2014 to 2017 that could be causing irritation to both C6 nerve roots and both C7 nerve roots.

Dr. Mooney opined that Lofthus's underlying degenerative disc and spondylosis of the cervical spine were temporarily aggravated by first the 2013 injury and then the 2016 injury. He concluded "these underlying findings and the incidence [sic] themselves are not directly causal to his current complaints. Further, there is no objective evidence to conclude that either incident caused an objective advancement of the underlying condition." Dr. Mooney did not discuss Dr. Brown's findings in this part of his report.

Dr. Bansal, the doctor Lofthus chose to perform an IME, tested Lofthus's sensation. Using a two-point discriminator, he found a loss of sensory discrimination over Lofthus's right thumb and the same over his right index and long fingers. This finding conflicts with Dr. Mooney's conclusions.

Further, Dr. Bansal opined that lifting the table is highly pathognomonic for aggravated disc bulging. Dr. Bansal also quoted the change in Lofthus's back identified by Dr. Brown in his comparison of the 2014 and 2017 MRIs. Based on the mechanism of injury and Dr. Brown's findings, Dr. Bansal diagnosed Lofthus with a re-aggravation of the cervical spondylosis at C6−C7 caused by lifting the table.

Dr. Bansal's opinion on causation is more credible than Dr. Mooney's. Unlike Dr. Mooney's report, Dr. Bansal's contains discussion of Dr. Brown's findings when comparing Lofthus's 2014 and 2017 MRIs and how they relate to causation. There is no evidence in the record that Lofthus sustained an injury between the 2014 MRI and the

2017 MRI, besides when he lifted the table, that might have caused the observed changes. Bending and lifting is consistent with the type of injury evidenced by Lofthus's symptoms and Dr. Brown's observations. And the weight of the evidence establishes Lofthus experienced radiculopathy and reduced sensation in his upper extremities following the 2016 injury. For these reasons, Dr. Bansal's opinion on causation is more persuasive than Dr. Mooney's. Lofthus has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with Koch Brothers on October 25, 2016.

2. Notice of Injury.

In pertinent part, the Iowa Workers' Compensation Act requires an injured employee to give the employer notice of the alleged work injury within 90 days of the date of its occurrence. Iowa Code § 85.23. If the injured employee fails to give the employer timely notice of the injury under the statute, the employee receives no workers' compensation benefits. Id. The purpose of the notice requirement is to give the employer an opportunity to investigate the alleged injury while the information regarding it is fresh. Dillinger v. City of Sioux City, 368 N.W.2d 176, 180 (Iowa 1985).

"Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence." Driscoll v. Cargill, Inc., File No. 5058759 (App. Apr. 3, 2020) (citing DeLong v. Highway Comm'n, 295 N.W.2d 91 (Iowa 1940)). The defendants contend that Lofthus's testimony on when he notified Koch Brothers is self-serving and therefore not credible. According to the defendants, the timeline of events following the 2013 injury shows that Lofthus knew the proper reporting procedure for work injuries and allows for the inference that he did not timely report his 2016 injury. They argue that the dates on the EMC injury report and the first report of injury allow for the inference Lofthus did not give timely notice to Koch Brothers of the work injury.

Lofthus contends the defendants have failed to meet their burden to prove lack of timely notice in this case. Lofthus argues that the defendants' failure to have Festvog testify at hearing on the issue allows for a negative inference against the defendants with respect to the events in question. According to Lofthus, Festvog's failure to testify is fatal to the defendants' lack-of-notice defense.

First, the difference in the timing of Lofthus reporting his 2013 and 2016 injuries is not compelling evidence on the question of timely notice in this case due to the different circumstances in each instance. Lofthus sustained his 2013 injury when he was rear-ended while driving a Koch Brothers car. The damage to company property was immediately evident to Lofthus. Consequently, Lofthus immediately reported the car crash to Koch Brothers even though he did not immediately experience symptoms of an injury due to the crash. Thus, the evidence establishes it is more likely than not the damage to the Koch Brothers vehicle Lofthus was driving was a motivating factor in his decision to immediately report the crash despite his lack of physical symptoms at the time. In contrast, no Koch Brothers property was damaged in the incident that caused Lofthus's 2016 injury.

Festvog and Lofthus completed the FROI for Lofthus's 2016 injury on or about February 13, 2017. On the FROI, Festvog identified February 1, 2017, as the approximate date of notice, with no additional explanation. The 90th day following October 25, 2016, is January 23, 2017. Thus, the use of the "APPX" qualifier making February 1 the approximate date of notice has significance because if Festvog's estimate is off by slightly more than a week, Lofthus's notice is untimely and his claim for compensation relating to the injury is barred by statute. Unfortunately, Festvog did not testify at hearing to give additional information about the timeline of events. Festvog's testimony would have been valuable is considering the notice issue in this case.

Lofthus is the only person who has made statements on the timeline in question. On February 20, 2017, Lofthus told EMC he received an email from Festvog regarding the injury on January 5, 2017. During Lofthus's deposition, he testified that he informed Festvog verbally or by email after the two kept missing one another.

However, at hearing, Lofthus also testified he requested some work emails through counsel during the litigation of this case and no such email was found. Further, Lofthus initially testified at hearing he told Festvog over the phone or by email before deferring to his 2017 statement to EMC because his memory of the events in question was better closer in time to when they occurred. Doing so effectively means Lofthus is deferring to the earlier account of events in which he stated Festvog sent him an email on January 5, 2017, regarding the injury he reported. Lofthus is thus relying on the statement he made to EMC that he regarding an email dated January 5, 2017, that was never found and is not in evidence.

While Festvog might have emailed Lofthus to verify his report of a workers' compensation injury, regardless of the method by which Lofthus informed him of the injury, it stands to reason that if Festvog sent such a confirmation email, it would have been produced during discovery in this case. The fact that the defendants found no such email during litigation makes it more likely than not Festvog did not send the email, as Lofthus told the EMC representative he did. This calls into question the timeline of events Lofthus provided.

This is a close call because, on the one hand, Festvog did not testify. On the other, Lofthus affirmatively asserted to an EMC representative that he had an email from Festvog, dated January 5, 2017, regarding the incident, but that email is not in evidence. Taken together, the evidence, or lack thereof, establishes it is more likely than not that Lofthus's statement to EMC that Festvog emailed him on January 5, 2017, regarding the work injury he reported to Festvog, is not credible.

If Lofthus sent such an email, it is more likely than not that the defendants would have produced it during the litigation of this case. Further, there is no evidence suggesting the email might have been deleted as part of a data purge or other standard operating procedure by Koch Brothers. There is an insufficient basis in the record from which to conclude Festvog sent Lofthus an email about the October 25, 2016 injury on January 5, 2017. Because Lofthus's account is not credible, the approximate date

Festvog provided on the FROI is more persuasive despite the fact the defendants could have called Festvog to testify at hearing but did not.

For these reasons, it is more likely than not that Lofthus gave Festvog notice on or about February 1, 2017, after the 90-day statutory deadline passed. The defendants have shown by a preponderance of the evidence that it is more likely than not that Lofthus failed to give notice of the October 25, 2016 injury within 90 days of its occurrence. Because of the lack of timely notice, Lofthus shall receive no compensation relating to the injury.

3. Reimbursement for the Costs of Dr. Bansal's IME.

An employee alleging a work injury that occurred on or before June 30, 2017, may receive reimbursement for an IME if the criteria under Iowa Code section 85.39 are met even if the employee is barred from receiving compensation due to the employee's failure to give timely notice under Iowa Code section 85.23. Miracle v. UFP Tech., Inc., File No. 5056559 (App. Mar. 13, 2019). Under section 85.39, a claimant is entitled to reimbursement for an IME with a doctor of the claimant's choice "[i]f an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low."

Dr. Mooney opined that lifting and moving the table while at work did not cause Lofthus's injury. Dr. Mooney also provided an opinion on Lofthus's permanent impairment relating to the October 25, 2016 incident. He concluded Lofthus had a permanent impairment rating of zero percent as it relates to the 2016 incident while working at Koch Brothers.

Dr. Mooney's IME report is dated June 21, 2019. There is no indication of another permanent impairment rating obtained by the defendants. Dr. Bansal evaluated Lofthus on May 15, 2019. While Dr. Bansal's physical examination of Lofthus occurred before Dr. Mooney issued a report, Dr. Bansal reviewed Dr. Mooney's report, and the opinion on Lofthus's permanent impairment relating to the October 25, 2016 incident contained therein, as part of the records review he conducted. Because Dr. Bansal reviewed the impairment rating Dr. Mooney assigned as part of the IME process, Lofthus is entitled to reimbursement for the cost of Dr. Bansal's IME report in the amount of $2,891.00 under section 85.39.

CONCLUSION

It is therefore ordered:

1) The defendants shall reimburse Lofthus two thousand eight hundred ninety-one and 00/100 dollars ($2,891.00) for Dr. Bansal's IME under Iowa Code section 85.39.

2) Because of the lack of timely notice under section 85.23, Lofthus shall take nothing other than reimbursement of the cost of Dr. Bansal's IME from this case.

3) The parties shall be responsible for paying their own hearing costs under section 86.40 and rule 876 IAC 4.33.

Signed and filed this 30th day of November, 2020.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Neal (via WCES)

Valerie Foote (via WCES)

Lindsey Mills (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.