BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID GRUVER, Claimant, vs. LENNOX INDUSTRIES, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 20014345.01 ARBITRATION DECISION Head Note Nos.: 1100, 1108.50, 1402.20, 1402.30, 2502, 2701, 2701, 2907, 4400

STATEMENT OF THE CASE

Claimant David Gruver filed a petition in arbitration seeking worker's compensation benefits against Lennox Industries, Inc., employer, and Indemnity Insurance Company of North America, insurer, for an alleged work injury date of September 3, 2020. The case came before the undersigned for an arbitration hearing on December 2, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via Court Call with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 7,[1] and Defendants' Exhibits A through F.

[1] Claimant's exhibit 3 is the First Report of Injury (FROI) that was filed in this case. A FROI is only admissible to show that defendants had notice of the injury, pursuant to Iowa Code section 86.11. No information contained in the FROI may be used as evidence, except for notice. Arndt v. City of LeClaire, 728 N.W.2d 389, 394 (Iowa 2007). Admission of the report was a mistake, as defendants are not claiming

Claimant testified on his own behalf. Tyler Schilling testified on behalf of the employer. The evidentiary record closed at the conclusion of the evidentiary hearing on December 2, 2021. The parties submitted post-hearing briefs on January 10, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of his employment on September 3, 2020;
2. If so, whether claimant has reached maximum medical improvement;
3. If so, whether the injury resulted in permanent disability;
4. Payment of medical expenses;
5. Payment of claimant's independent medical examination under Iowa Code §85.39;
6. Alternate medical care under Iowa Code §85.27; and,
7. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

At the time of hearing, claimant was a 61-year-old person. (Hearing Transcript, p. 8) Claimant and his wife live in Marshalltown, Iowa, where he has lived his whole life. (Tr., p. 9) Claimant graduated from Marshalltown High School in 1978, and began working for defendant employer, Lennox Industries, in 1983. (Tr., pp. 9-10) Claimant's first job at Lennox was working a paint line, which involved unloading painted parts for furnaces. (Tr., p. 10) After about a year in that position, claimant transferred to running a 600-ton punch press. (Tr., p. 11) Claimant was in that position for about ten years, after which he went to the shipping department for a couple of years. At that point, claimant left Lennox and drove a semi-truck for Midland Transportation for a 17-month period, until Lennox opened a warehouse operation, and he reapplied.

When claimant returned to Lennox, he was hired as a shag driver. Claimant worked in that position for 13 to 15 years, until 2012, when he had low back surgery. (Tr., p. 12) According to medical records, claimant had a L5 -S1 fusion in 2012. (Joint Exhibit 4, p. 28) Claimant testified that following surgery, he was off work for about five months. (Tr., p. 12) He returned to shag driving for a couple of weeks, and then he was moved to a forklift position. He testified that he thought he was moved in order to help him heal from surgery and not reinjure himself. Claimant has ongoing issues with his low back, but is not claiming any low back problems are work related. (Tr., pp. 12-13)

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a notice defense in this case. While the document remains in the record, it was not reviewed or considered in any way by the undersigned, and claimant's assertions about the information contained in the report are not considered.

Claimant described varying job duties he has performed as a forklift driver. He testified that while most of the work is done using the forklift, there is some manual work as well. (Tr., p. 14) Over the years, he has worked in forklift positions both loading and unloading trucks; unloading the conveyor belt and putting product in the warehouse; and performing "cross dock" duties. (Tr., pp. 13-16; Defendants' Exhibit E, Deposition Transcript, pp. 11-19) Claimant testified that Lennox uses a Basiloid system for their forklifts. (Def. Ex. E, Dep. Tr., p. 14) He explained that a Basiloid system involves specific blades in different sizes that attach to the forklift, and lids on top of the boxed product that correspond to the blades. The blades go into the lid in such a way that prevents damage to the product when lifting it with the forklift. Claimant testified that the blades for the Basiloid system would have to be manually changed several times throughout a shift as different sizes and weights of products required different blades. (Tr., pp. 14-15)

Claimant testified at his deposition that when he initially returned from back surgery and was moved to forklift operator, he was in a position loading trucks. (Def. Ex. E, Dep. Tr., p. 11) The job consisted of picking product for pallets with the forklift, and then loading the product onto trucks. (Def. Ex. E, Dep. Tr., p. 11; Tr. p. 13) While the work was mainly done using the forklift, at times claimant would have to manually transfer individual items from one pallet to another. (Def. Ex. E, Dep. Tr., p. 13) Claimant testified that product could weigh up to 80 or 90 pounds. (Tr., p. 16; Def. Ex. E, Dep. Tr., p. 11) However, the job description for his position indicates employees only need the ability to lift up to 50 pounds. (Def. Ex. C, p. 17)

Claimant was in the loading position for four or five years, when his foreman, Steve Brandt, moved him to a position unloading the conveyor line that came from the factory to the warehouse. (Def. Ex. E, Dep. Tr., pp. 11-13) Claimant testified that he was moved because the employees were having difficulty keeping up with unloading, and Mr. Brandt did not want the line to shut down. (Def. Ex. E, Dep. Tr., pp. 13-14) Claimant explained that there were three legs coming down conveyors from the plant to the warehouse, and the job involved removing product from the conveyor line with the forklift, and then taking the product to designated areas. (Def. Ex. E, Dep. Tr., p. 16) Claimant did not have to lift anything manually in that position unless a box came in ripped or otherwise unable to be moved using the Basiloid system. (Def. Ex. E, Dep. Tr., p. 17) However, at times, especially when the line was not running, claimant would be assigned to other jobs, including "picking cross dock." (Def. Ex. E, Dep. Tr., p. 17; Tr., p. 15)

Claimant explained that picking cross dock is when a load includes parts that come from a different area of the warehouse. (Tr., p. 15) He would have to go to the other area and handpick the parts for that particular load. Claimant testified that products and parts he handled while doing cross dock duties could vary in size, and weighed anywhere from 1 to 90 pounds. (Tr., p. 16) For example, he would have to obtain compressors that weigh 60 to 80 pounds. (Def. Ex. E, Dep. Tr., p. 18) When picking compressors, he would try to get the pallets as close together as he could with the forklift, and then slide the compressor from one pallet to the other by hand. Claimant could not say with any specificity how often he performed cross dock duties, as it varied

and depended on each order. (Tr., p 16; Def. Ex. E, Dep. Tr., p. 19) In order to perform cross dock duties, the Basiloid blades would be removed from the forklift. (Def. Ex. E, Dep. Tr., p. 18)

In July of 2021, claimant was moved from the conveyor back to the loading position. (Def. Ex. E, Dep. Tr., p. 27) Claimant remained in that position at the time of hearing. (Tr., p. 13)

Claimant has alleged an injury to his neck and bilateral shoulders, which occurred on September 3, 2020. (Tr., pp. 16-17) Prior to the alleged date of injury, claimant had experienced problems with his neck and shoulders, which he attributed to repetition at work. (Tr., pp. 21-22) Medical records indicate that claimant has had neck pain off and on since at least 2006, which previously improved with physical therapy. (Jt. Ex. 1, p. 4) On May 22, 2008, claimant saw Charles Mooney, M.D., for an evaluation of neck and low back pain related to work activities. (Jt. Ex. 2, p. 18) At that time he reported doing much better, and Dr. Mooney's assessment was "resolving temporary aggravation of underlying degenerative arthropathy of the cervical and lumbar spine." He had previously been restricted from driving the shag truck for two weeks prior. (Jt. Ex. 2, p. 19) However at that time, he was released to full duty work.

Claimant has also had prior complaints with his bilateral shoulders. (Jt. Ex. 1, p. 4) In 2010, it was noted that he had right shoulder pain, possibly some rotator cuff problems and impingement and tenderness over the AC joint. (Jt. Ex. 4, p. 22) It was also noted that he had previous neck pain requiring physical therapy four years prior. On September 30, 2010, he had a right shoulder injection, and was referred to an orthopedic surgeon for follow up. (Jt. Ex. 1, pp. 11-12; Jt. Ex. 4, p. 23) However, later medical records indicate claimant cancelled that appointment. (Jt. Ex. 1, pp. 4; 11)

In 2012, claimant was treating with David Hatfield, M.D., for his chronic low back problems. (Jt. Ex. 5) On April 11, 2012, he reported significant neck symptoms as well. (Jt. Ex. 5, p. 38) At that time, Dr. Hatfield noted that if his symptoms became significantly worse in the future, he would obtain a cervical MRI. On June 11, 2012, Dr. Hatfield noted that he appeared to have some degenerative changes in his neck, and may require intervention in the future. (Jt. Ex. 5, p. 39) In November 2013, cervical spine X-rays showed reversal of the normal curve, with minimal degenerative changes in the lower cervical spine and relatively well-preserved disc space heights and no significant disc-osteophyte complexes. (Claimant's Exhibit 1, p. 6) In June 2014, Dr. Mooney again diagnosed claimant with a temporary aggravation of his cervical degenerative joint disease, and sent him for physical therapy. Additional cervical X-rays taken in 2016 showed minimal degenerative changes of the lower cervical spine. [2]

On October 16, 2019, claimant saw Christina Woodhouse, M.D., his primary care physician. (Jt. Ex. 1, p. 6) Dr. Woodhouse noted claimant complained of shoulder pain in the muscle area that radiated down his arm, and that his arm occasionally goes numb. She stated that claimant "works using a forklift and loading a trailer – says it

[2] These records are not in evidence but are summarized in Dr. Kuhnlein's IME report. (Cl. Ex. 1, p. 6)

doesn't bother his symptoms too much to do work." (Jt. Ex. 1, pp. 6-7) She suggested physical therapy, but claimant declined as he could not afford the co-payments. (Jt. Ex. 1, p. 7) He was given home exercises to try instead. On October 28, 2019, claimant returned to Dr. Woodhouse, who noted pain in both shoulders, left worse than right, and complaints of numbness and tingling down his right arm. (Cl. Ex. 1, p. 6) A left shoulder X-ray showed severe acromioclavicular (AC) joint osteoarthritis with large undersurface osteophytes with no significant subacromial space narrowing. (Cl. Ex. 1, pp. 6-7)

On September 3, 2020, the alleged date of injury, claimant testified that he was working cross dock duties, and had to move a compressor from one pallet to another. (Tr., p. 18) As he was moving the compressor to the second pallet, it slipped, so he quickly reacted to grab it so it would not fall to the floor. Claimant testified that when this happened, he felt pain in his neck and shoulders. He testified similarly at his deposition. However, at his deposition, he appears to have been less certain about the particular date. His deposition testimony was that as he was sliding the compressors from pallet to pallet, he strained his arm and neck, and it kept aching. (Def. Ex. E, Dep. Tr., pp. 20-21) He thought this happened in "maybe September 2020." (Def. Ex. E, Dep. Tr., p. 21) He also testified that it was only his left shoulder that had problems. (Def. Ex. E, Dep. Tr., p. 20) However later in his deposition, he stated that he did have pain in both shoulders, but more in the left. (Def. Ex. E, Dep. Tr., p. 29)

Claimant testified at hearing that he reported the injury on September 3, 2020. (Tr., pp. 18-19) Again, in his deposition testimony, he appears to have been less certain of the exact date. (Def. Ex. E, Dep. Tr., pp. 24-25; 46-52) He said that he told Mr. Brandt, who then took him to see Tyler Schilling, the warehouse manager. Claimant testified that Mr. Brandt and Ms. Schilling asked claimant if the injury happened at work, and whether he wanted to claim workers' compensation. (Tr., p. 19) He replied "Yes, it happened, 6 o'clock in the morning at work." He said that Mr. Brandt and Ms. Schilling then told him to think about whether he wanted to file a workers' compensation claim, and go home and talk it over with his wife, which he found strange. Claimant returned to work, and testified that later in the day he was called back to Ms. Schilling's office, where the safety director was also present along with Mr. Brandt. (Tr., pp. 19-20) He said at that time, he was told that they had to call human resources to "protect themselves," and that they were not just going to write him out a check. (Tr., p. 20) They also told him it would be a "long investigation" and again suggested he think about it and talk to his wife. Claimant testified that he asked to see the workers' compensation doctor, which used to be Dr. Mooney, and was told that they only had a physician's assistant (PA) at that time. However, no appointment was ever made for him to see the PA. (Tr., p. 20) Claimant's deposition testimony on the subject was nearly identical to his hearing testimony. (Def. Ex. E, Dep. Tr., pp. 24-25; 46-52) Claimant also testified that he had reported to Mr. Brandt in the months or weeks prior to September 3, 2020 that his neck and shoulders had been bothering him due to an "overload of work," but nothing had been done. (Tr., p. 17)

Tyler Schilling testified on behalf of the employer. (Tr., p. 63) At the time of hearing she was employed by Lennox as the operations manager, overseeing the facility as a whole. Ms. Schilling testified that as part of her job duties, she makes

anywhere from two to six rounds through the facility during each of her shifts, and says goodbye to employees at the end of first shift. (Tr., p. 65) She had been at Lennox for about two years at the time of hearing, and was familiar with claimant. (Tr., p. 63) In her job as operations manager, Ms. Schilling is responsible for providing information to the insurance company regarding reported workplace injuries. (Tr., p. 66) She is not the person who makes decisions regarding compensability of work injuries.

Ms. Schilling testified that claimant did not report a work injury to her on September 3, 2020. (Tr., p. 67) Rather, she testified that he and Mr. Brandt came to her office with a question on September 21, 2020. According to Ms. Schilling, claimant advised that he had an upcoming appointment in October for his lower back, and he wanted to know what to say if the doctor asked him if it is work related. (Tr., pp. 67-68) She then asked him if he had an injury while working, or could think of anything specific that had happened. According to Ms. Schilling, claimant said, "No. All I can think of is I was a forklift driver for 35 years. I'm sure that does wear and tear." (Tr., p. 68) She then asked if he wanted to report it as work related, and claimant said no, and that he just wanted her opinion as to what he should tell his doctor in October. She advised that she could not give him that answer, as it is something he must decide. Defendants did not submit any documentation or other evidence to support Ms. Schilling's testimony.

Ms. Schilling stated that claimant never reported a work injury to her at that time or at any time following that conversation. It was not until after claimant's petition was filed that she learned about his claim. She testified that on November 20, 2020, she was made aware claimant had filed a petition claiming work-related injuries occurring on September 3, 2020. (Tr., p. 68) She testified that she asked Mr. Brandt whether claimant reported any problems to him, and he said claimant did not. (Tr., pp. 74-75) Mr. Brandt did not testify at hearing. When asked why claimant was never referred for medical care related to his claim, Ms. Schilling stated it was because he never asked for medical care or reported a work injury. (Tr., p. 75) Once the petition was received, it was not her decision whether to accept or deny the claim. (Tr., pp. 75-76) However, based on her observations, she does not believe claimant sustained a work-related injury on September 3, 2020. (Tr., p. 76) She testified that on September 3, 2020, claimant was not in a position that did any manual picking, meaning he would not have been performing cross dock duties. Defendants offered no documentary evidence to support Ms. Schilling's testimony.

Defendants argue that claimant is not a credible witness, and point to several alleged inconsistencies in his testimony that "cannot be explained by nervousness or a faulty memory." (Def. Brief, p. 1) However, while claimant and Ms. Schilling offer two different versions of what claimant reported and when, there was nothing about either witnesses' demeanor to suggest either was intentionally lying. I believe it is more likely that there was some confusion on claimant's part regarding the actual date he reported the injury, and some miscommunication or confusion on Ms. Schilling's part as to what claimant was attempting to report. There is no testimony from Mr. Brandt, who was also present, to shed additional light on the situation. However, looking at the evidence as a whole, claimant's testimony is supported by the record. While he was not a perfect historian, few individuals are. I had the opportunity to observe him testify under oath. He

engaged in appropriate eye contact, his rate of speech was appropriate, and he did not make any furtive movements. I find his testimony reasonable and consistent with the other evidence I believe. Overall, I find that claimant was a credible witness. Additionally, defendants are not claiming a notice defense. There is no dispute they were timely notified of claimant's allegations. As such, the actual date and content of the conversation in September is not a determinative factor when considering whether claimant's alleged injuries are work related.

Claimant saw Dr. Woodhouse on September 3, 2020. (Jt. Ex. 1, p. 8) Her record indicates he presented for a medication check, but also lists shoulder pain and neck pain under chief complaints. Her notes regarding the shoulder pain are nearly identical to the year prior, in that she recorded that work does not bother his symptoms too much. (Jt. Ex. 1, p. 9) He had started on home physical therapy exercises. He reported that in the last week pain had started worsening in both shoulders, and his neck was also sore. There is no mention in the record of any incident with a compressor slipping from a pallet at work, although claimant testified he told her about the incident. (Tr., pp. 25; 41-42) Dr. Woodhouse's plan indicated she would discuss his shoulders with orthopedics. (Jt. Ex. 1, p. 9)

Claimant testified that he was not told why medical care was not being provided, so after his claim was denied, he sought out care on his own. (Tr., pp. 20-21) Claimant's next medical appointment for his shoulders was at McFarland Clinic, where he saw David Sneller, M.D., on February 17, 2021. (Jt. Ex. 4, p. 30) Dr. Sneller's record indicates he had experienced both right and left shoulder pain for four to five years, left worse than right. The record notes that claimant "does a lot of lifting at work, but no one discrete injury." He also complained of left forearm numbness and neck pain. On physical examination, he had full range of motion and excellent strength, with a little bit of prominence of the AC joint and mild impingement. X-rays showed some AC degenerative joint disease. (Jt. Ex. 6, pp. 53-54) Dr. Sneller stated that while he had some arthritis of the AC joint, the rest of his shoulder looked good. (Jt. Ex. 4, p. 30) He thought the problem could be coming from claimant's neck, based on it being bilateral shoulder pain, and with the left forearm numbness. He did not believe claimant needed physical therapy or an MRI. Instead, he recommended injections, and provided injections in both shoulders that day. (Jt. Ex. 4, p. 30)

Claimant returned to Dr. Woodhouse on March 18, 2021. (Claimant's Exhibit 1, p. 8)[3] She noted that claimant's neck pain had worsened, with numbness and tingling in his upper extremities and bilateral shoulder pain. At that time, claimant reported having problems working because of his symptoms. Dr. Woodhouse ordered a cervical spine X-ray. (Cl. Ex. 1, p. 8) The X-ray was done on April 15, 2021, and showed mild cervical degenerative disc disease, most significant at C5-C6. Dr. Woodhouse then recommended a cervical MRI. (Jt. Ex. 1, p. 13) The MRI took place on April 27, 2021, and showed multilevel degenerative changes. (Jt. Ex. 6, pp. 55-56) He returned to Dr. Woodhouse on April 28, 2021, who noted the MRI showed fairly severe arthritis with

[3] Dr. Woodhouse's record of this date is not in evidence, but is summarized in Dr. Kuhnlein's IME report.

narrowing of the spinal canal and multiple bone spurs. (Cl. Ex. 1, pp. 8-9) Claimant was referred to Cassim Igram, M.D. (Cl. Ex. 1, p. 9)

Claimant saw Dr. Igram on May 12, 2021. (Jt. Ex. 8, p. 67) Dr. Igram documented claimant's symptoms of chronic low back pain, as well as the more recent neck pain with subjective paresthesias in his left upper extremity in the C7 distribution. He noted claimant was working as a forklift operator, and reported he was only able to sit in the forklift for about two hours before the pain becomes severe. Dr. Igram reviewed the MRI, and with respect to the cervical spine, noted multilevel degenerative changes, as well as bilateral neuroforaminal stenosis at multiple levels. (Jt. Ex. 8, p. 69) Dr. Igram did not note any significant impingement, however, and did not recommend any further surgical intervention at that time. He recommended continuing with conservative management of both his neck and low back pain with anti-inflammatory medications, as-needed injections, and physical therapy. (Jt. Ex. 8, p. 69)

Claimant continued to report ongoing shoulder and neck pain to Dr. Woodhouse at his regular personal health visits. (Jt. Ex. 1, pp. 14-15) At some point he was referred to Ikigu Thuku, M.D. (Jt. Ex. 9, p. 70) On July 19, 2021, Dr. Thuku stated that claimant's neck pain was most likely related to cervical spinal enthesopathy, cervical facet arthropathy, cervical spinal stenosis, or left shoulder osteoarthritis. The record notes that claimant injured his neck at work when he was lifting a heavy object, and also has pain radiating into his left shoulder. He was referred for aquatic therapy and dry needling around the area. (Jt. Ex. 9, p. 70) Claimant testified that he was not able to attend therapy, due to his work schedule and location. (Tr., pp. 27-28)

Claimant returned to McFarland Clinic on September 7, 2021, where he saw Jonathon Geisinger, M.D. (Jt. Ex. 4, p. 31) He noted neck pain for several years, with pain going into his left upper extremity in a C6 distribution. He stated his symptoms were worse with sitting, standing, walking, and lying down. Dr. Geisinger reviewed imaging and noted X-rays of the cervical spine showed degeneration at C5-C6. (Jt. Ex. 4, p. 32) The cervical MRI showed a right-sided disc herniation at C4-C5, and a left-sided disc herniation at C5-C6. He noted that claimant did not have symptoms to correlate the herniation on the right, but did have a C6 radiculopathy on the left. He had good strength in his upper extremities. Dr. Geisinger discussed claimant's opinions included an epidural steroid injection in his neck, or a fusion surgery at C5-C6. However, in order to be a surgical candidate he would need to stop smoking and reduce his hemoglobin A1c level.

On September 27, 2021, he saw Carol Barlow, ARNP at Dr. Woodhouse's office, and reported ongoing cervical radiculopathy down the left arm, which was being denied by the employer as work-related. (Jt. Ex. 1, pp. 16-17) She noted that claimant was being followed by neurosurgery related to his abnormal cervical MRI. (Jt. Ex. 1, p. 16) Claimant testified that he would like to get additional treatment for both his neck and bilateral shoulders. (Tr., pp. 27; 33)

Claimant attended an independent medical evaluation (IME) at defendants' request with David Berg, D.O., on September 21, 2021. (Def. Ex. A) Dr. Berg's report is dated October 14, 2021. (Def. Ex. A, p. 1) Dr. Berg reviewed medical records and physically examined claimant. His report indicates that claimant denied any specific incident or injury that resulted in his current symptoms other than cumulative daily work driving a forklift. However, in the next paragraph, Dr. Berg notes that claimant indicated his symptoms began "on 9-3-2020 while he was lifting a compressor and developed pain over the anterior aspect of his left elbow associated with ecchymosis." (Def. Ex. A, p. 1) He noted claimant's symptoms included cervical pain with radiation to his left upper extremity, occipital headaches, pain in his left forearm, and paresthesia in his left hand. He denied any right upper extremity symptoms.

In reviewing the medical records, Dr. Berg notes occasions prior to 2020 when claimant was found to have work-related temporary aggravations of the degenerative disease of his cervical spine, including 2004 and 2008. (Def. Ex. A, pp. 1-2) He also noted claimant's prior right shoulder injection in 2010, and additional prior complaints of cervical symptoms. (Def. Ex. A, p. 2) Dr. Berg did not review any medical records after the MRI report dated April 27, 2021. (Def. Ex. A, p. 3)

Dr. Berg described claimant's symptoms as left sided occipital headaches, left shoulder pain, pain in the left forearm, and nonanatomic paresthesia in his left forearm and hand, as well as mild right shoulder pain in the subacromial space. (Def. Ex. A, p. 3) On physical examination he had full range of motion of the cervical spine and both upper extremities. (Def. Ex. A, p. 4) He noted the left AC joint was quite prominent, with mild tenderness and visible hypertrophy. He further noted slight left biceps weakness compared to the right, with a distal biceps deformity on the left with a mild "reverse Popeye deformity." He also noted "profound" left elbow supination weakness, associated with significant radial head and distal long head biceps insertion tenderness. He opined that his findings represented "complete or near complete avulsion of the long head of the biceps tendon from the radial head." (Def. Ex. A, p. 4)

Dr. Berg opined that his most significant finding on examination was the significant supination weakness of the left elbow and forearm, which represents the biceps tendon rupture. Dr. Berg explained that with this type of injury, the muscle is literally torn away from the bone, and it is a traumatic, painful injury. (Def. Ex. A, pp. 4-5) He states that in most cases, it is repaired surgically, sooner rather than later, but in this case there is no indication as to when the injury occurred. (Def. Ex. A, p. 5) When he asked claimant when it occurred and how long he had been that weak, claimant could not describe any specific injury and stated it must have occurred on September 3, 2020 when he was lifting. When asked if there was any ecchymosis, claimant said there was. However, Dr. Berg notes that claimant was evaluated by Dr. Woodhouse on September 3, 2020, and there is no mention of elbow pain, swelling, or ecchymosis. Further, Dr. Berg notes it is very unlikely that claimant would be able to continue his regular job following this elbow injury.

Dr. Berg noted that the elbow injury would explain "almost all" of claimant's left upper extremity symptoms. He reported pain in the left shoulder where the biceps tendon attaches, which extends to the left elbow, which results in his elbow pain, weakness in the left elbow, and to a lesser extent biceps strength. It also results in pain radiating down the forearm to the wrist, and paresthesias in the hand from the radial nerve. Dr. Berg further noted that this may explain the weakness with wrist extension, or it may be due to disuse of the elbow. Dr. Berg then said that the C6 nerve is not being affected in the cervical area as most of the shoulder muscles and the deltoid muscle are intact, and the muscles that pronate the forearm are also supplied by the C6 nerve and those muscles have 5 of 5 strength. (Def. Ex. A, p. 5)

With respect to claimant's shoulders, Dr. Berg noted moderate degenerative AC joint disease, left greater than right. He assumed that the 2010 and 2021 injections were successful, as claimant did not seek any further treatment with respect to his shoulders based on records he was provided. He suspected chronic tendinosis as a result of the degenerative disease, but said claimant "does not seem to be symptomatic for this."

Dr. Berg then responded to several questions posed by defense counsel. He started by noting that claimant has had acute exacerbations and remissions of cervical pain since 2004. (Def. Ex. A, p. 5) His diagnosis was progressive degenerative disc and facet joint disease of the cervical spine, and degenerative AC joint disease, left greater than right, in the shoulders. He noted that he suspects chronic rotator cuff "tendinosis, not tendonitis," with no evidence of rotator cuff tear. (Def. Ex. A, pp. 5-6) Finally, he had a rupture of the long head biceps of the left shoulder. (Def. Ex. A, p. 6) With respect to the mechanism of injury, he noted that claimant believes his symptoms are secondary to driving a forklift at work, which requires repetitive cervical motions, as well as loading and unloading material from his forklift, and that claimant denied any specific incident or injury responsible for his symptoms. (Def. Ex. A, p. 6)

With respect to causation, Dr. Berg opined that claimant's work activities on September 3, 2020, did not substantially aggravate, accelerate, worsen, or "light up" his cervical or shoulder conditions. Dr. Berg explained that pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, MRI findings are of "no value" when determining impairment unless the patient's symptoms and physical finding correlate with the finding on the MRI. In this case, Dr. Berg opined they do not. He stated that in order for the shoulders to be affected based on the April 27, 2021 MRI, the C5 and predominately the C6 nerve would need to be affected. However, he found no motor or sensory deficit involving the C6 nerve in either upper extremity or shoulders, and noted that claimant did not have any symptoms, complaints, or physical findings in the right shoulder or upper extremity. As such, he concluded there was no correlation with claimant's cervical spine condition and his bilateral shoulder pain. (Def. Ex. A, p. 6)

The next question was more generally whether Dr. Berg believed claimant's neck and/or bilateral shoulder conditions to be work related, and whether his condition extends to his neck or is confined to his shoulders. Dr. Berg referred back to his prior response, but also noted that claimant has progressive degenerative disease of his spine, which seems to be far beyond that expected for his age. He noted that work or

non-work activity does not result in degenerative disease of the spine or any other joint, with few exceptions. However, claimant does experience temporary aggravations of his underlying degenerative disease, both in his cervical and lumbar spine, which result in cervical and low back pain. He then explained that degenerative disease of the spine advances with age irrespective of activity, and does not improve. He then discusses potential levator scapula syndrome as the etiology of claimant's occipital headaches, as opposed to degenerative spine disease. (Def. Ex. A, pp. 6-7) With respect to his shoulder pain, Dr. Berg noted that work related conditions resulting in shoulder pathology would involve the majority of claimant's work being done above shoulder level, which is not the case. (Def. Ex. A, p. 7) He further noted that claimant's shoulder pain resolves with cortisone injections, which would indicate "a temporary inflammatory process, likely tendonitis." [4] Dr. Berg stated that tendonitis is not ratable based on the AMA Guides. (Def. Ex. A, p. 7)

Dr. Berg concluded that there is no objective evidence for any permanent impairment, and that claimant had reached maximum medical improvement (MMI) but it would be speculative for him to say when. He did not believe that claimant's shoulder or cervical complaints were related to his employment, and did not recommend any work restrictions. With respect to future medical treatment, he recommended physical therapy for temporary exacerbations of his conditions. (Def. Ex. A, p. 7)

Claimant attended a second IME about one week later with John Kuhnlein, D.O., on September 28, 2021. (Cl. Ex. 1, p. 4) Dr. Kuhnlein's report is dated November 4, 2021. Dr. Kuhnlein provided a fairly accurate description of claimant's job duties when compared to the job description. (Cl. Ex. 1, pp. 4-5; Def. Ex. C, p. 17) Dr. Kuhnlein discussed claimant's prior medical history, including his 2004 and 2008 temporary aggravations of his underlying cervical condition, as diagnosed by Dr. Mooney. (Cl. Ex. 1, p. 5) He also noted his treatment for neck pain and right shoulder pain in 2010, and subsequent work-related temporary aggravation of his cervical condition in 2014. (Cl. Ex. 1, p. 6) Finally, he noted claimant's more recent 2019 shoulder complaints and treatment. (Cl. Ex. 1, pp. 6-7)

Claimant reported to Dr. Kuhnlein that his 37-year employment with Lennox, driving a forklift and manually picking compressors off the floor, cumulatively caused his shoulder and neck problems. (Cl. Ex. 1, p. 7) However, he also described a specific incident on September 3, 2020, in which he was picking product and went to move a 60-to-80-pound compressor. He indicated that he lost control of the compressor, and it started to slip, so he reached to catch it quickly and immediately developed "superior left shoulder pain and numbness extending into the biceps to the forearm and his entire left hand. He also noted central and left-sided neck pain radiating across the trapezius and into the left arm." (Cl. Ex. 1, p. 7) Claimant stated that as he continued working that day, his left arm symptoms continued to the point he could barely use it. He told Dr. Kuhnlein that his symptoms were worse the next day, so he reported to his foreman who asked if it was a work injury. Claimant said yes, but no paperwork was completed,

[4] I note that in two prior instances Dr. Berg noted his suspicion that claimant had tendinosis, even going so far as to say "not tendonitis" on page 6. (Def. Ex. A, pp. 5-6)

and he was told to go home and talk to his wife about whether he wanted to pursue it as a work injury. Then, a couple of hours later, he met with the safety director and other managers, who again questioned him about whether he wanted to pursue a workers' compensation claim, and again told him to talk it over with his wife.

Dr. Kuhnlein and claimant discussed Dr. Woodhouse's September 3, 2020 medical record. Dr. Kuhnlein notes that there is mention of shoulder pain in the record, but part of it is exactly the same as her October 14, 2019 note, meaning it may have been carried over from the prior appointment. He also notes that Dr. Woodhouse reported claimant stating his pain had started worsening the week before, with pain in both shoulders and his neck. Claimant told Dr. Kuhnlein that he was not sure whether he told Dr. Woodhouse about the work injury at that visit, and he does not know why the record would say it was not bothering him to do work. (Cl. Ex. 1, pp. 7-8) In any event, claimant told Dr. Kuhnlein that at that time, his low back pain was more significant, so he decided to seek treatment for that issue first, despite his ongoing shoulder and neck pain. (Cl. Ex. 1, p. 8) Then, after his workers' compensation claim was officially denied, he sought treatment on his own with Dr. Sneller.

Dr. Kuhnlein reviewed the remainder of the medical records with claimant. He denied telling Dr. Sneller there was "no discrete injury" when he saw him in February 2021, as he recalls telling him about the incident involving the compressor slipping. (Cl. Ex. 1, p. 9) At the time of Dr. Kuhnlein's IME, claimant stated he had constant waxing and waning neck pain radiating to the trapezius. He described an occipital headache. He described aching and sharp pain and numbness in the anterior left arm extending to the hand, describing it as a "tendon" from his wrist to the biceps being stretched. He complained of weakness and stated that he can barely use his left arm. He complained of pain when picking anything up, and reported pain at a level 5 of 10 at that time. He stated his pain ranges anywhere from a level 3 to level 9, but is usually a level 6. Claimant further described intermittent superior right shoulder pain, and constant left shoulder pain with any motion. (Cl. Ex. 1, p. 10) He noted that his left shoulder is weak, makes cracking noises, and has pain with motion, while his right shoulder has good motion and less weakness. He also noted numbness from his neck to his wrist and hand on the left, but not the right. While his left shoulder pain is usually around a level 8 of 10, his right shoulder is usually at a level 2.

When discussing his work activities, claimant noted that he had used most of his vacation time for medical appointments. He takes pain medications at work, along with ibuprofen, to help him get through the day. He stated that he was performing the same job as before, but rarely got off the forklift and tries not to use the left arm at work. He denied any physician-imposed restrictions. He noted that he was having problems with nearly all his work activities at that time, and that his neck pain and left shoulder symptoms had gotten worse over the last three months. He also noted the headaches had developed related to the neck pain recently. (Cl. Ex. 1, p. 10) He noted that his low back, neck, and left arm pain awaken him at night. (Cl. Ex. 1, p. 11) Finally, he noted that he had not played golf, or gone fishing or hunting for some time. He tried to play golf but was unsuccessful. He also used to ride a motorcycle more frequently, but could not do so anymore due to the weakness in his left arm. (Cl. Ex. 1, p. 11)

On physical examination, Dr. Kuhnlein noted decreased range of motion in the left shoulder compared to the right, with pain behaviors noted with left shoulder adduction. (Cl. Ex. 1, p. 12) Claimant also complained of biceps and forearm tenderness on the left, but unlike Dr. Berg, Dr. Kuhnlein found no Popeye deformity. Dr. Kuhnlein also noted pain and tenderness in the left arm and shoulder when performing a variety of tests, while the right arm and shoulder were largely normal. (Cl. Ex. 1, p. 12) Dr. Kuhnlein also measured elbow joint range of motion, which was largely normal, and found normal grip strength bilaterally, and slightly decreased shoulder strength on the left versus right. (Cl. Ex. 1, p. 13) He also found some decreased sensation in the left arm and hand, and claimant complained of left-hand numbness.

Dr. Kuhnlein's diagnoses were multilevel degenerative cervical disc disease with central canal and neural foraminal stenosis; complaints of right shoulder pain with a right shoulder strain; and complaints of left shoulder pain with a left shoulder strain. (Cl. Ex. 1, p. 13) With respect to causation, Dr. Kuhnlein first noted that cervical X-rays from 2004 showed no acute bony abnormalities or significant degenerative changes in the cervical spine. He further noted that at the time, Dr. Mooney felt that the cervical spine condition represented temporary aggravation of underlying degenerative disc disease related to claimant's work, as his work included significant driving, looking behind him, and repetitive motion of the neck looking up in order to see various products. (Cl. Ex. 1, p. 14) He also pointed out that claimant was again treated for temporary work-related aggravation of his underlying cervical disc disease in 2008, and even taken off shag driving for two weeks at one point. As such, he opined that as early as 2004, Dr. Mooney felt that claimant's work duties represented risk factors for temporary aggravations of claimant's underlying cervical degenerative disc disease. Again, in 2013, Dr. Mooney found an aggravation of the cervical degenerative condition caused by claimant's work driving a forklift.

Dr. Kuhnlein noted that claimant has continued the same work for Lennox for a number of years, and described work in the heavy physical demand level, with significant cervical stressors based on lifting at different levels, including over the shoulder, representing a cervical stressor. He also noted driving the forklift over uneven floors, which would provide spinal jarring, and at times picking up various parts in awkward positions. Overall, Dr. Kuhnlein noted that claimant had a history of temporary work-related aggravations of his preexisting degenerative neck condition, and continued to perform work with cervical stressors over the years. Then, on or about September 3, 2020, he had a specific incident with moving a compressor that caused the immediate onset of neck pain radiating to his left shoulder and arm. Claimant told Dr. Kuhnlein that his employer tried to dissuade him from making a workers' compensation claim, consistent with his testimony. After the claim was ultimately denied, diagnostic testing claimant sought on his own showed progression of his cervical degenerative disease from prior years as he continued to perform work with cervical stressors. (Cl. Ex. 1, pp. 14-15)

Dr. Kuhnlein concluded that it is more likely than not that claimant's work for Lennox represented a substantial, more than minor factor in his degenerative disc disease progression on a cumulative basis as he was exposed to cervical stressors over the years. (Cl. Ex. 1, p. 15) He also noted that if the history of the acute injury on September 3, 2020 is accurate and substantiated, that incident would represent an aggravation of the preexisting cervical degenerative disc disease.

With respect to claimant's shoulders, Dr. Kuhnlein noted that claimant performed work in the heavy physical demand category at or above shoulder height on a routine basis. As such, he opined that claimant's work more likely than not presented cumulative shoulder stressors. He noted that the only diagnostic studies done on the shoulders following the alleged September 3, 2020 incident took place in February 2021, making it unknown whether a soft tissue injury might have occurred as a result of the acute injury. He also noted that Dr. Sneller felt the shoulder complaints might have been related to claimant's cervical spine issues, but did not pursue further diagnostic studies to rule out shoulder pathology. As such, Dr. Kuhnlein could not provide anything further about the etiology of the shoulder injuries.

Regarding future medical care, Dr. Kuhnlein opined claimant would benefit from a pain consultation for his cervical spine pain, and evaluation and workup of his shoulder conditions to determine whether there was any soft tissue pathology. (Cl. Ex. 1, p. 15) Dr. Kuhnlein stated that claimant reached MMI for the aggravation of the cervical condition on or about May 12, 2021, when he saw Dr. Igram. (Cl. Ex. 1, p. 16) However, he stated claimant had not reached MMI for the shoulder conditions, as no workup has been undertaken aside from plain X-rays.

Dr. Kuhnlein provided an impairment rating using the AMA Guides. Using the DRE method, he placed claimant in DRE Cervical Category II, and assigned 5 percent whole person impairment. He did not believe shoulder impairment could be assigned as claimant has not reached MMI for the shoulder conditions. However, for administrative purposes, he provided a rating of 6 percent upper extremity (4 percent whole person) for the right shoulder, for deficits in range of motion. He provided a rating of 14 percent upper extremity (8 percent whole person) for the left shoulder, due to deficits in range of motion and motor deficits. Using the combined values chart, Dr. Kuhnlein provided a 16 percent whole person impairment rating. (Cl. Ex. 1, p. 16) He recommended restrictions of lifting 20-pounds occasionally from floor to waist, and no over shoulder work. He recommended sitting, standing, and walking on an as-needed basis, and limiting crawling to occasional.

I find that overall, Dr. Kuhnlein's opinions with respect to claimant's neck are more convincing. Specifically, Dr. Berg's opinion regarding the neck is contrary to the bulk of the other medical evidence in the record. For example, when claimant saw Dr. Geisinger on September 7, 2021, he noted that claimant had a left-sided disc herniation at C5-C6, with C6 radiculopathy on the left. (Jt. Ex. 4, p. 32) However, Dr. Berg stated that claimant had no motor or sensory deficit involving the C6 nerve in either upper extremity or shoulders. (Def. Ex. A, p. 6) Dr. Berg did not review medical records after April 27, 2021, so he had not seen Dr. Geisinger's report. Nor had he reviewed Dr.

Igram's report or the records from claimant's treatment with Dr. Thuku. Given that he did not have complete information, his opinion is not entitled to the same weight as Dr. Kuhnlein's opinion.

Additionally, Dr. Berg's finding that all of claimant's left upper extremity symptoms were caused by a left elbow injury, specifically a rupture of the long head of the biceps, is suspect. Dr. Berg is the first and only physician to find a Popeye deformity on physical examination. A week after Dr. Berg's exam, Dr. Kuhnlein specifically noted no Popeye deformity was present. Further, there is no record of claimant complaining of elbow pain or swelling to any of his medical providers. Dr. Berg notes that a ruptured biceps tendon is a painful and traumatic injury, and claimant would not likely be able to continue his regular job following this type of injury. (Def. Ex. A, pp. 4-5) Yet claimant could not describe a specific incident that would have caused the ruptured tendon, and there is no evidence of him missing work related to any such injury in the record. Dr. Berg's diagnosis is not supported by the other medical evidence, and does not make sense when looking at the record as a whole.

Overall, Dr. Berg's report is not credible when compared to Dr. Kuhnlein's opinion. Dr. Kuhnlein was provided with more complete medical records, including Dr. Berg's report, and his diagnoses and opinions make more sense when viewing the record as a whole, with one exception. That is Dr. Kuhnlein's understanding that claimant was required to do heavy work at or above shoulder height on a routine basis. Claimant specifically denied that he has to do much above-the-shoulder lifting in his job at Lennox. (Tr., p. 54) That being said, Dr. Kuhnlein noted that the acute incident claimant reported with the compressor slipping may have cause bilateral shoulder strains. (Cl. Ex. 1, p. 15) Additionally, Dr. Sneller thought the shoulder complaints may be related to claimant's cervical spine, but without further workup, Dr. Kuhnlein could not specifically opine regarding the etiology of the shoulder injuries.

I find that the preponderance of the evidence proves that claimant sustained an injury to his cervical spine arising out of and in the course of his employment with Lennox. Claimant had a history of temporary aggravations to his degenerative cervical spine condition, which previously always improved with conservative treatment. However, on or around September 3, 2020, claimant lost his grip on a compressor and in moving quickly to catch it, further aggravated his neck and bilateral shoulders. His neck symptoms have not improved, and have worsened to the point he has radiating pain into his left shoulder and arm. Dr. Geisinger has noted he may be a surgical candidate if he is able to quit smoking and get his diabetes better controlled. No doctor had ever previously recommended surgery for claimant's neck. Finally, Dr. Kuhnlein opined that his exposure to cervical stressors over the years at Lennox, as well as the acute injury that occurred with the compressor, represent a substantial aggravation of claimant's preexisting degenerative disc disease in his cervical spine. As such, defendants are responsible for claimant's treatment related to his cervical spine injury.

With respect to claimant's bilateral shoulders, there is simply not sufficient evidence to find that claimant sustained an injury to both shoulders arising out of and in the course of employment on or around September 3, 2020. While claimant has

previously sustained temporary aggravations of his preexisting osteoarthritis in the shoulders, there is insufficient evidence to prove his current condition represents a permanent bilateral shoulder injury arising out of and in the course of his employment. As Dr. Kuhnlein noted, claimant may have sustained a soft tissue injury when the compressor incident occurred, but the only diagnostic studies after the incident were plain X-rays taken on February 17, 2021. Therefore, it is impossible to know if a traumatic soft tissue injury was sustained. To the extent his shoulder pain may be related to his cervical spine, it would be considered sequelae or part of the same injury. However, as Dr. Kuhnlein noted, without further workup, the etiology of the shoulder injuries is unknown. As such, claimant has not met his burden to prove that he sustained a separate injury to his bilateral shoulders arising out of and in the course of his employment on or around September 3, 2020.

Claimant testified that he continues to have symptoms of neck and shoulder/arm pain, left worse than right. (Tr., p. 24) He testified that he can hardly use his left arm, has no strength left, and it hurts to pick anything up. Claimant also testified that following the September 3, 2020 incident, his supervisor at the time, Mr. Brandt, did not assign him to do as much physical lifting as before, and mainly left him to unload the conveyor using the forklift. (Tr., p. 28) He also testified that he used to work more overtime hours, but since the incident he has tried and physically cannot do it anymore. (Tr., pp. 28-29) However, on cross-examination claimant admitted that in July of 2021, he did request additional overtime. (Tr., pp. 42-43) He explained that he requested the overtime because the only overtime available was in his area, unloading the conveyor. (Tr., p. 43) As a result, he did not think it was fair that employees outside that area would be allowed to do the overtime, and he did not believe other employees outside the area did the job correctly, leaving him with more work. However, since moving to the unloading position, he has not worked much overtime, because he has tried, and he cannot do it anymore. (Tr., p. 59)

Ms. Schilling testified that in July 2021, overtime was removed and the plant went to a rotation system to assign the available overtime. (Tr., p. 69) As it was not claimant's turn on the list, he was not given the overtime that week. He approached Ms. Schilling and told her that if he could not get the overtime, he did not want to be in that position any longer. Ms. Schilling and claimant's supervisor[5] then made the determination to move him to another area. She further testified that up until the time he changed positions, he was working overtime, and all overtime at the plant is voluntary. (Tr., pp. 69-70)

After being moved to the truck loading position in 2021, he has found the job to be more physically demanding than the unloading position, and testified he struggles doing the job. (Tr., pp. 29-30) He stated that his current job leaves him with constant aching and pain down his left arm and shoulder, and that his forearm is constantly numb. He also continues to have pain in his neck, which radiates down into his shoulders and arm. (Tr., pp. 30-31; 55) He testified that prior to the September 2020

[5] At the time of claimant's transfer, Mr. Brandt was no longer his supervisor as he had been terminated from employment. Claimant's supervisor was then Jeff Blackford. (Tr., pp. 84-85)

incident, his neck and shoulder symptoms would come and go, and he was able to tolerate it. (Tr., p. 31; 55) However, since September 2020, his symptoms have become more constant and more severe, and have affected his ability to work and participate in other activities such as golf and riding his motorcycle. He did testify that he has ridden his motorcycle from his home back to the plant after his lunch break on a few occasions, but he lives one mile from the warehouse and it is only a 3-minute drive. (Tr., pp. 55-56) He also has to have his grandson do his yard work now, and is not able to hunt.

Claimant testified that he would like to get better, and wants additional treatment. He has made a claim for alternate medical care pursuant to Iowa Code section 85.27. He further argues that he has not reached MMI for his injuries. While Dr. Kuhnlein found he had reached MMI for his neck, he had not seen Dr. Geisinger's record suggesting a cervical injection and noting that claimant may be a surgical candidate. (Jt. Ex. 4, p. 32) Dr. Thuku also recommended aquatic therapy and dry needling, which claimant could not pursue due to his work schedule and the location of the therapy clinic. Given that there are available treatments that may improve claimant's condition, he is not at MMI with respect to his cervical condition. As such, the issue of permanent partial disability is not ripe for consideration at this time. Claimant is entitled to additional treatment for his cervical spine injury, with providers of his choosing.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). 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, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). The words "arising out of" refer 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, 128 (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 at 311. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. 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 at 150.

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).

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. Id.; see also Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The first issue for consideration is whether claimant has sustained an injury arising out of and in the course of his employment. Defendants argue that claimant has not met his burden to prove his injuries were caused by his employment. A large portion of the argument is based on defendants' position that claimant is not credible, and in turn, Dr. Kuhnlein's opinion is not credible. However, as noted above, I found that overall, claimant was a credible witness.

When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). While not the best historian, claimant's testimony was consistent regarding his gradually increasing symptoms in the weeks prior to September 2020, and the mechanism of injury when the compressor he was moving slipped and he felt an immediate increase in pain. The only portion of his testimony that was not wholly consistent was the exact date when the incident occurred. I do not find the minor inconsistencies in his testimony warrant a finding that he is not a credible witness. Based on my personal observations of his rate of speech, eye contact, and body language, I found him to be a credible witness at hearing.

I also found Dr. Kuhnlein's report to be more credible than Dr. Berg's opinions with respect to the neck injury. Dr. Kuhnlein opined that claimant's exposure to cervical stressors over the years at Lennox, as well as the acute injury that occurred with the

compressor, represent a substantial aggravation of claimant's preexisting degenerative disc disease in his cervical spine. As outlined above, I found that claimant has met his burden to prove he sustained a cervical spine injury arising out of and in the course of his employment with defendant employer.

With respect to claimant's bilateral shoulders, there is simply not sufficient evidence to find that claimant sustained an injury to both shoulders arising out of and in the course of employment on or around September 3, 2020. While claimant has previously sustained temporary aggravations of his preexisting osteoarthritis in the shoulders, there is insufficient evidence to prove his current condition represents a permanent bilateral shoulder injury arising out of and in the course of his employment. As Dr. Kuhnlein noted, claimant may have sustained a soft tissue injury when the compressor incident occurred, but the only diagnostic studies after the incident were plain X-rays taken on February 17, 2021. Therefore, it is impossible to know if a traumatic soft tissue injury was sustained. To the extent his shoulder pain may be related to his cervical spine, it would be considered sequelae or part of the same injury. However, as Dr. Kuhnlein noted, without further workup, the etiology of the shoulder injuries is unknown. As such, claimant has not met his burden to prove that he sustained a separate injury to his bilateral shoulders arising out of and in the course of his employment on or around September 3, 2020.

Because claimant's cervical spine injury is work related, the next issue to determine is whether he has reached MMI related to that injury. Maximum medical recovery is achieved when healing is complete, and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). I found that there are available treatments that may improve claimant's condition, based on the recommendations made by Dr. Thuku and Dr. Geisinger. As such, claimant is not at MMI with respect to his cervical condition.

The next issue to determine is claimant's request for alternate medical care pursuant to Iowa Code section 85.27. Under Iowa law, the employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). If the employee establishes the compensability of the injury at a contested case hearing, then the statutory duty of the employer to furnish medical care for compensable injuries emerges to support an award of reasonable medical care the employer should have furnished from the inception of the injury had compensability been acknowledged. Id.

Defendants have never authorized medical care for claimant's condition, as they have maintained their denial. Therefore, claimant has proven that the employer is not authorizing medical care that is effective and reasonably suited to treat his injury.

Defendants shall authorize and pay for all reasonable and causally related expenses with respect to claimant's ongoing treatment related to his cervical spine injury, including but not limited to additional treatment with Dr. Thuku and Dr. Geisinger, or other physicians at McFarland Clinic.

Claimant seeks reimbursement for medical expenses he incurred based on defendants' denial of his claims. Under Iowa law, once defendant denied compensability for claimant's alleged injuries, it lost the right to choose the medical providers for that care during the period of denial. "[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros., 779 N.W.2d at 204. Further, when compensability is contested, "the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care." R. R. Donnelly & Sons v. Barnett, 670 N.W.2d at 197-198 (Iowa 2003). As such, claimant is entitled to reimbursement for medical care he received related to the cervical spine injury after the date of defendants' denial.

Claimant has submitted a summary of medical expenses for which he seeks reimbursement. (Cl. Ex. 6) Claimant is not entitled to reimbursement for medical bills unless claimant shows that they were paid from his own funds. See Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890 (Iowa Ct. App. 1983). Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See also: Carl A. Nelson & Co. v. Sloan, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323.

Not all of the claimed expenses are related to treatment for claimant's cervical spine injury. I find claimant is entitled to reimbursement for the following charges from McFarland Clinic: cervical spine X-ray on April 15, 2021; the radiology charge on April 23, 2021; the cervical MRI on April 27, 2021; Dr. Thuku office visit on July 19, 2021; cervical X-Ray on September 7, 2021, and Dr. Geisinger office visit on September 7, 2021. (Cl. Ex. 6, pp. 37-39) It appears claimant paid $100.52 out-of-pocket for the cervical MRI, and the remainder were paid by insurance. Defendants are responsible to reimburse those charges. Defendants are also responsible for the charges from the University of Iowa on May 12, 2021, for which claimant paid nothing out of pocket. (Cl. Ex. 6, p. 39) The remainder of the medical expenses listed in exhibit 6 are either not related to claimant's cervical spine injury, took place prior to defendants' denial of the claim, or do not contain supporting medical records in evidence to prove they are causally related. For example, it is unclear whether any of the charges for prescription medication from Walgreens is related to claimant's neck injury. As such, those charges cannot be awarded.

The next issue to determine is whether claimant is entitled to reimbursement for Dr. Kuhnlein's IME charges under Iowa Code section 85.39, and taxation of costs. In this case, the employer sought an independent medical evaluation from Dr. Berg, which took place on September 21, 2021. His report is dated October 14, 2021, and in addition to an opinion regarding causation, he also opined that claimant did not have permanent impairment. Claimant sought his own IME with Dr. Kuhnlein, whose examination took place on September 28, 2021, and whose report is dated November 4, 2021.

Iowa Code section 85.39(2) states, in relevant part:

> If 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, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015) (hereinafter "DART"). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (Appeal December 2015). If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. DART, 867 N.W.2d at 847 (citing Iowa Code § 85.39).

An evaluation of permanent disability requires the physician to do more than conduct a physical examination. It requires a physician to consider permanent impairment utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. IBP, Inc. v. Harker, 633 N.W.2d 322 327 (Iowa 2001) ("the legislature meant to allow the employee to obtain a disability rating from a physician of his 'own choice' when the physician *chosen by* the employer gives a disability evaluation unsatisfactory to the employee").

The evaluating physician cannot be said to have completed his evaluation until a report is formulated. This is so because the "evaluation of permanent disability" contemplated by Iowa Code section 85.39 is more than just a medical examination and includes formulation of a permanent impairment rating. See DART, 867 N.W.2d at 843 (noting the claimant may qualify for reimbursement pursuant to Iowa Code section 85.39 "[i]f the evaluation by the physician retained by the employer includes a permanent disability rating.") Therefore, the evaluation performed by Dr. Berg was not

completed until he formulated and stated his opinion in a written report. Logic dictates that claimant could not believe Dr. Berg's stated opinion to be too low until the opinion was stated.

In this case, claimant proceeded with an IME performed by Dr. Kuhnlein before the evaluation of permanent disability had been finalized and provided by Dr. Berg. Claimant failed to establish entitlement to reimbursement of his IME with Dr. Kuhnlein. Id. at 844 ("An employer, however, is not obligated to pay for an evaluation obtained by an employee outside the statutory process.")

That being said, the Supreme Court in DART noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an IME, a claimant can still be reimbursed at hearing for the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. DART, 867 N.W.2d at 846-847. Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Dr. Kuhnlein provided an itemized bill for his IME, which shows $3,794.00 of his total fee is related to preparing the written report. (Cl. Ex. 7, p. 42) As such, I find that the cost of the report is reimbursable pursuant to 876 IAC 4.33. With respect to the remainder of claimant's requested costs, I find that claimant was generally successful in his claim, and an award of additional costs is appropriate. I exercise my discretion and award claimant the cost of the filing fee in the amount of $103.00. (Cl. Ex. 7, p. 41)

ORDER

THEREFORE, IT IS ORDERED:

Claimant is entitled to alternate medical care. Defendants shall immediately authorize and timely pay for claimant's continuing care related to the compensable cervical spine injury with providers of claimant's choice, including but not limited to Ikigu Thuku, M.D. and Jonathon Geisinger, M.D., or other qualified medical providers at McFarland Clinic.

Defendants shall reimburse claimant for his out-of-pocket expenses for causally related medical care, as outlined in this decision, in the amount of one hundred 52/100 dollars ($100.52).

Defendants shall reimburse claimant's health care and/or insurance providers for medical treatment causally related to the compensable cervical spine injury, as outlined in this decision.

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

Defendant shall reimburse claimant's costs in the amount of three thousand eight hundred ninety-seven and 00/100 dollars ($3,897.00), which represents three thousand seven hundred ninety-four and 00/100 dollars ($3,794.00) for Dr. Kuhnlein's report, and one hundred three and 00/100 dollars ($103.00) for the filing fee.

Signed and filed this 14th day of April, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Ballard (via WCES)

Robert Gainer (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.