BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID MALUAL, Claimant, vs. FARMLAND FOODS, INC., Employer, and SAFETY NATIONAL, Insurance Carrier, Defendants.	FILED APR 13 2017 WORKERS COMPENSATION	File No. 5052300 ARBITRATION DECISION Head Note Nos.: 1803, 1804, 2204, 2501, 4100

Claimant David Malual filed a petition in arbitration on May 18, 2016, alleging he sustained injuries to his neck and body as a whole while working for the defendant, Farmland Foods, Inc. ("Farmland"), on October 13, 2014. Farmland and its insurer, the defendant, Safety National Casualty Corporation ("Safety"), filed an answer on June 3, 2016, admitting Malual had sustained a work injury.

An arbitration hearing was held on January 4, 2017 in Sioux City, Iowa. Attorney Jennifer Zupp represented Malual. Malual appeared and testified. Bichok Mabor appeared on behalf of Malual, but did not testify. Attorney Timothy Clausen represented Farmland and Safety. Bill Mischnick and Cindy Schweers appeared on behalf of Farmland and Safety, but did not testify. Exhibits 1 through 46 and A through F were admitted into the record. The record was left open through February 6, 2017, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Farmland and Safety waived all affirmative defenses.

STIPULATIONS

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

2. Malual sustained an injury on October 13, 2014, which arose out of and in the course of his employment with Farmland.

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

4. The alleged injury caused a permanent disability.

5. The disability is an industrial disability.

6. The commencement date for permanent partial disability benefits is the date Malual reached maximum medical improvement.

7. Although entitlement to benefits cannot be stipulated, Malual was off work from March 15, 2015 through September 9, 2015, and September 15, 2015 through April 11, 2016.

8. At the time of the alleged injury, Malual's gross earnings were $814.01 per week, he was single and entitled to one exemption, and the parties believe his weekly rate is $495.93.

9. Although medical expenses are in dispute, the fees or prices charged by providers are fair and reasonable, and the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and the defendants are not offering any contrary evidence.

10. Credits are not in dispute.

ISSUES

1. What is the nature of Malual's injury; has Malual sustained a mental health sequela from his work-related neck injury?

2. Did Malual reach maximum medical improvement on September 10, 2015, when he was released by Shumaker, ACNP, or on April 12, 2016, when he last saw Dr. Shumaker?

3. What is the extent of Malual's disability; has Malual established he is permanently and totally disabled under the statute or under the odd-lot doctrine?

4. Is Malual entitled to reimbursement for or payment by the defendants of the cost of any or all of the "unauthorized" medical care, consisting of five emergency room services and/or ambulance services on December 17, 2014, May 5, 2015, May 11, 2015, and June 9, 2015 (Crawford County Memorial Hospital), and August 27, 2015 (Alegent Health Community Memorial Hospital)?

5. Did Farmland and Safety abandon Malual's care when his treating neurosurgeon, Dr. Shumaker, failed to personally see Malual at any time from the date of his discharge from surgery, March 25, 2015, until February 4, 2016, thus making all "unauthorized" medical care Malual received in the interim, compensable?

6. If Farmland and Safety abandoned care, is Malual entitled to reimbursement for or payment by Farmland and Safety of the cost of ongoing, unauthorized medical services after the treating neurosurgeon agreed to see Malual again on February 4, 2016?

7. Is Malual entitled to ongoing medical care per the recommendations of Dr. Dumba, Dr. Archer, and/or Dr. Bansal as well as mental health counseling with New Directions Mental Health Center?

8. Is Malual entitled to reimbursement for any or all of the medical bills he paid out of pocket, totaling $1,107.09, as reflected in Exhibit 24?

9. Is Malual entitled to the balance of medical mileage owed for any or all of the dates of service reflected in Exhibit 25, totaling $1,712.59?

10. Is Malual entitled to reimbursement of $1,946.00 for a second independent medical examination under Iowa Code section 85.39, conducted on July 14, 2016, when Farmland and Safety's retained physician, Dr. Shumaker, issued two impairment ratings on October 2, 2015 and May 2, 2016?

11. Should penalty benefits be imposed on Farmland and Safety under Iowa Code section 86.13 for late temporary total disability and permanent partial disability payments form August 26, 2015 through September 30, 2015, and June 16, 2016 through July 13, 2016, totaling $4,534.29; if so, in what amount?

12. Is Malual entitled to reimbursement of $100.00 for the filing fee, $614.10 for the deposition transcripts of Bichok Mabor, Majok Gatwech, and Manase Wal, $50.00 for a report from Lynnette Aschinger, LISW, and $1,946.00 for Sunil Bansal, M.D.'s July 14, 2016 report, if not awarded under Iowa Code section 85.39?

FINDINGS OF FACT

Malual was born in South Sudan and he attended school in Arabic through the sixth grade. (Transcript, page 11) When a civil war broke out, Malual moved with his family to Northern Sudan for one year where he attended school in English. (Tr., p. 11) In 1984 Malual moved to Ethiopia and attended school in English. (Tr., p. 11) Malual did not graduate from high school in Ethiopia. (Tr., p. 12) Malual left Ethiopia when he was thirty-nine and moved to Texas. (Tr., p. 12) Malual is a smoker. (Exhibit 40, p. 639) At the time of the hearing Malual was fifty-six. (Tr., p. 9)

In 1999 Malual moved to Marshalltown, Iowa, and he worked for Swift and Company, a meat packing plant. (Tr., pp. 13-14) Malual worked in production, driving hooks. (Tr., p. 13) Malual shocked animals coming off the truck for processing. (Tr., p. 13) Swift and Company fired Malual in 2002. (Tr., p. 14) After his termination, Meskwaki Casino hired Malual to work on the count draft team, where he opened

machines, removed the money, and took the money to a room to be counted. (Tr., p. 14; Ex. 27, p. 493)

Malual left Iowa and moved to Salt Lake City, where he worked in a detergent factory packing product. (Tr., pp. 15-17; Ex. 27, pp. 492, 494) While he was living in Utah Malual worked on his GED. (Tr., pp. 15-17; Ex. 27, p. 492)

Malual moved back to Iowa and worked at Wild Rose Casino in Clinton and Meskwaki Casino. (Tr., pp. 14-15; Ex. 27, p. 493) Malual worked in the slots department at Wild Rose Casino, calculating the state and federal income tax due from customers who had winnings at the casino. (Tr., pp. 17-19; Ex. 27, p. 494) Malual completed his GED. (Ex. 27, p. 492) Malual moved back to Marshalltown and he worked as a valet for Meskwaki Casino, and he studied nursing at Marshalltown Community College. (Tr., pp. 17-19; Ex. 27, pp. 492-94) Malual obtained a certified nurse's aide certificate, but he did not complete the nursing program. (Tr., p. 19)

On January 22, 2013, Malual commenced his employment with Farmland. (Tr., p. 20) Malual testified he left the casino to work for Farmland because he was paid a higher wage. (Tr., pp. 20-21) Malual moved from Marshalltown to Denison. (Ex. 37, p. 9) Farmland assigned Malual to work in packaging, where he put labels on items he placed into bigger boxes and stacked the boxes onto pallets. (Tr., pp. 21-22) Malual testified that when Farmland hired him he did not have any problems with his neck or left shoulder. (Tr., p. 22)

Sunil Bansal, M.D., an occupational medicine physician, completed an independent medical examination for Malual, which included a review of Malual's medical records. (Ex. 11) Dr. Bansal documented Malual sustained injuries to his cervical spine and left shoulder prior to his employment with Farmland. (Ex. 11, p. 242) Dr. Bansal noted on January 2, 2001, Malual received medical treatment at the McFarland Clinic, complaining of neck pain and difficulty swallowing. (Ex. 11, p. 242) Malual reported his two roommates beat him and had tried to strangle him. (Ex. 11, p. 242) On August 22, 2003, Malual was involved in another altercation. (Ex. 11, p. 242) His left shoulder was dislocated, and he complained of "numbness and decreased sensation in the tips of his fingers, and decreased range of motion." (Ex. 11, p. 242)

Dr. Bansal noted in July 2009, Malual attended an appointment with James Demmel, M.D., complaining of,

> pain that starts in the neck on the left, and radiates into his left neck and shoulder. It shoots down the arm to the middle of the hand, where he seems to have tingling and sometimes an itching sensation of the hand. It is worse when he extends his head or moves his head to the left. Especially when he moves his head to the left, the pain will be quite sharp. He denies any specific injury. Six years ago he dislocated his left shoulder, but does not seem to be having any problems with the left shoulder now.

(Ex. 11, p. 242) Dr. Bansal documented magnetic resonance imaging from July 31, 2009, revealed left cervical spine bulging discs at C3-4 and C6-7, and in September 2009, Dr. Demmel assessed Malual with a herniated disc on the left at C3-C4, and ordered physical therapy. (Ex. 11, p. 243) Malual continued to treat with Dr. Demmel through June 13, 2012. (Ex. 11, pp. 244-45)

Malual reported a work injury at Farmland on October 13, 2014. (Ex. B) Malual completed a signed statement, which states he was stacking boxes while his coworker, Rafael Guzman, was wrapping a pallet with plastic, and "he pushed really hard on my head. He bumped me with his hip." (Ex. B, p. 3) Malual reported he was experiencing discomfort in his head and neck. (Ex. B, p. 4)

During his deposition on September 12, 2016, Malual testified he was injured when his coworker, Guzman, was wrapping a pallet with plastic and "he came he kick my neck with his knee." (Ex. 37, p. 20) When questioned further about the incident Malual relayed while Guzman was wrapping the pallet:

> he kick my neck between – space between two pallet is not enough space, a foot or maybe 24 inches, something like that. And he kick my neck and pull it at the same time and then I fall into that pallet and I try to get up and then everything in my head went black and I can't see. And then after some time my vision – when I began to see, my vision – when I shook my head before I see clear he came back and say, "My friend. I'm sorry. I didn't see you. I didn't see you." Because my system was process what happened.

(Ex. 37, p. 21) Malual testified he was unconscious and then told his coworker, "I hear you," and reported "[a]nd then I shook my head, then I began to see again and my neck began pounding like this (indicating) and then I feel like my neck was bleeding. So I touch it like this, there is no blood" and he called his supervisor. (Ex. 37, p. 21)

At hearing Malual testified at the time of his work injury he was bending down in between two pallets when Guzman came up on his left side and hit the left side of his neck with his knee. (Tr., pp. 22-23, 60, 63-67) Malual relayed the blow knocked him against the pallet and he blacked out for a minute or two. (Tr., pp. 65-66) Malual testified Guzman's knee struck him only in the neck and Guzman's knee was the only thing that hit him that day. (Tr., pp. 68-69)

Malual testified at hearing that after the impact his vision went "red bloody" and while he was trying to hold something Guzman told him, "[m]y friend, I didn't see you. I didn't see you." (Tr., p. 65) Malual relayed he responded, "[h]old on. I hear you. I hear you." (Tr., p. 66) Malual reported he could see again, but thought his neck might be bleeding. (Tr., p. 66) Malual touched his neck and found it was not bleeding. (Tr., p. 66)

Guzman completed a statement that was translated from Spanish into English, which states, "I don't know what happened. If I hit him or not. I did not pay attention."

(Ex. C, p. 7) Malual testified Guzman's statement is wrong. Malual reported Guzman told him, "My friend, I'm sorry. I didn't see you. I didn't see you." (Tr., p. 62)

Another employee, Hob Lai, completed a statement on November 5, 2014, stating Lai did not see anything or hear anything the night of the injury. (Ex. D, p. 8) Malual denied Lai was near him on the date of the accident. (Tr., p. 62)

Malual reported the injury to his supervisor. (Tr., pp. 23, 61) Malual complained of pain in the left side of his neck and upper trapezius muscle. (Tr., p. 23; Exs. 9, p. 209; A, p. 1) Malual went to the nurses' office to receive treatment for his injury. (Exs. 9, p. 209; A, p. 1) Malual saw a nurse who applied ice to the area. (Exs. 9, p. 209; A, p. 1) Malual testified he told the nurse he blacked out, but contends the nurse did not write it down. (Tr., p. 66)

Malual returned to the nurses' office the next day and requested a referral to a physician. (Exs. 9, p. 210; A, p. 1) The nurse instructed him to apply ice. (Ex. 9, p. 210) Malual returned to the nurses' office for the next several days. (Exs. 9; A)

On October 22, 2014, Malual attended an appointment with Meleah Jensen Schneider, PA, with McFarland Clinic and requested a note for work. (Ex. 14, p. 261) Malual told Jensen Schneider on October 13, 2014, he was stacking boxes on a pallet and a coworker was wrapping a pallet next to him with plastic wrap and his coworker hit Malual with his hip. (Ex. 14, p. 261) Malual relayed he had been experiencing significant left neck and shoulder pain and Farmland had told him Farmland would not send him to a doctor until three weeks had passed from the date of his injury. (Ex. 14, p. 261)

Jensen Schneider examined Malual, assessed him with neck and shoulder pain, noted he was a smoker, restricted him from working, prescribed meloxicam, and instructed him to follow up with his employer and/or his family doctor for further care. (Ex. 14, pp. 261-63) Jensen Schneider noted Malual had experienced a work injury on October 13, 2014, and that he could return to work on October 22, 2014, with restrictions of no lifting, pushing, or pulling over ten pounds with the left arm. (Ex. 14, p. 264)

On October 24, 2014, Malual attended an appointment with Julie Graeve, ARNP, at CCMH Clinic, complaining of left upper extremity pain and neck pain. (Ex. 4, p. 65) Graeve assessed Malual with left shoulder pain and torticollis, and prescribed meloxicam. (Ex. 4, p. 66) Malual was restricted from working from October 21, 2014 through October 24, 2014. (Ex. 4, p. 67)

On October 29, 2014, Farmland documented Malual had restrictions of no lifting, pushing, or pulling over ten pounds with his left arm. (Ex. 9, p. 211) Malual continued to report to work and to the nurses' office every day. (Ex. 9, pp. 211-12)

Malual returned to the CCMH Clinic on October 31, 2014, and was examined by Todd Woollen, M.D., a family practice physician. (Ex. 4, p. 68) Malual complained of

left shoulder and neck pain. (Ex. 4, p. 68) Dr. Woollen continued Malual's meloxicam prescription, recommended magnetic resonance imaging, and ordered restrictions of no rotation of the neck. (Ex. 4, pp. 68-71) Malual received the imaging and the reviewing radiologist listed an impression of:

> 1. Moderate left paracentral/foraminal disc extrusion C3-C4 compressing the cervical spinal cord and severely narrowing the left neural foramen.
>
> 2. Focal intrinsic signal abnormality within the left lateral aspect of the cervical spinal cord at C3-C4, most likely myelomalacia.
>
> 3. Severe left and moderate right neuroforaminal narrowing C6-C7.

(Ex. 17, p. 341)

During a follow-up appointment on November 17, 2014, Malual complained of pain and numbness into his left middle finger. (Ex. 4, p. 72) Dr. Woollen noted an x-ray revealed narrowing of C6-7 bilaterally, but worse on the right, and that magnetic resonance imaging confirmed Malual had a pinched nerve. (Ex. 4, p. 72) Dr. Woollen referred Malual to Dean Wampler, M.D., an occupational medicine physician, and recommended he continue with his restrictions. (Ex. 4, pp. 72-73)

On November 24, 2014, Dr. Wampler conducted an independent medical examination of Malual. (Ex. 6, p. 166) Dr. Wampler reviewed Malual's medical records and examined him. (Ex. 6, pp. 166-68) Dr. Wampler diagnosed Malual with a left trapezius muscle strain with associated radiculitis, without radiculopathy, and opined "[h]is dramatic symptom exaggeration and pain behaviors suggest significant non-medical factors are affecting his pain and recovery." (Ex. 6, p. 170) Dr. Wampler recommended Malual continue taking anti-inflammatory medication and receive physical therapy. (Ex. 6, p. 170) Malual received physical therapy from November 28, 2014 through December 10, 2014. (Ex. 21, pp. 375-81)

Malual returned to Dr. Wampler on December 12, 2014, claiming physical therapy was making him worse. (Ex. 6, p. 173) Dr. Wampler documented, "I explained to David that his symptoms and increase in pain are not expected from the nature of the injury he sustained. I told him that in order to get some benefit of doubt, I am going to ask him to undergo nerve conduction testing and EMGs." (Ex. 6, p. 173) Dr. Wampler imposed restrictions of lifting one to ten pounds occasionally and eleven or more pounds on a limited basis. (Ex. 6, p. 176)

On December 17, 2014, Malual sought emergency medical care at Crawford County Memorial Hospital, complaining of left arm pain with occasional shaking. (Ex. 3, p. 39) Hospital staff documented Malual reported he was injured on October 13, 2014 at work when he "got kicked by a co-worker to [the left] neck area" and that he had seen Dr. Woollen. (Ex. 3, p. 39) The physician listed an impression of cervical disc disease with radiculopathy, prescribed Vicodin, instructed Malual to follow up with Dr. Woollen,

and certified Malual was physically unable to work from December 16, 2014 through December 22, 2014. (Ex. 3, pp. 42-43)

Marvin Hurd, M.D., conducted nerve conduction studies and electromyography on Malual on January 5, 2015. (Ex. 13) Dr. Hurd listed an impression of "distal left median neuropathy – consistent with left carpal tunnel syndrome" and found there was "no electrodiagnostic evidence of acute cervical nerve root irritation involving the left upper extremity." (Ex. 12, p. 260)

On January 7, 2015, Malual attended an appointment with Dr. Wampler to discuss the results of the electromyography and nerve conduction studies. (Ex. 6, p. 177) Dr. Wampler documented he told Malual there was no sign of any nerve damage originating from his neck, and while he has some modest abnormalities on his cervical magnetic resonance imaging, "there is no anatomical correlation to the vaguely located pains in his shoulder and arm," and there were no electromyography abnormalities. (Ex. 6, p. 177) Dr. Wampler continued Malual's restrictions until he could be evaluated by a neurosurgeon. (Ex. 6, pp. 178-79)

Malual attended an appointment with Grant Shumaker, M.D., a neurosurgeon with CNOS, on January 13, 2015. (Ex. 5, p. 74) Dr. Shumaker assessed Malual with "relatively atypical left-sided neck, shoulder, and arm pain with EMG showing no evidence of radiculopathy" and incidental carpal tunnel impingement unrelated to his work exposure. (Ex. 5, p. 76) Dr. Shumaker recommended selective nerve root blocks, prescribed hydrocodone, and imposed restrictions of sedentary work, up to ten pounds. (Ex. 5, pp. 76-78) Dr. Shumaker performed the root blocks on January 15, 2015, and January 22, 2015. (Ex. 19, pp. 370-72)

Malual attended a follow-up appointment with Dr. Shumaker on February 3, 2015. (Ex. 5, pp. 99-100) Dr. Shumaker assessed Malual with neuropathic pain syndrome and a C3-4 disc herniation. (Ex. 5, p. 100) Dr. Shumaker recommended an "anterior cervical discectomy and fusion C3-4 in order to decompress the spinal cord." (Ex. 5, p. 100) Dr. Shumaker did not impose any restrictions pending surgery. (Ex. 5, p. 103) Malual testified he continued to work until his surgery. (Tr., p. 70)

On March 25, 2015, Malual underwent an anterior C3-4 discectomy, with placement of a fibular allograft and cervical plate. (Exs. 5, p. 109; 19, p. 373) Following surgery Dr. Shumaker restricted Malual from working, lifting over ten pounds, and driving for two weeks. (Exs. 5, pp. 104, 109; 19, p. 374)

On April 1, 2015, Malual contacted CNOS and spoke with Tami Michels, RN, and reported he was having pain in his neck and numbness in his hand. (Ex. 5, p. 92) Michels informed Malual he should take his oxycodone if he was still having pain. (Ex. 5, p. 92)

On April 7, 2015, Malual attended a follow-up appointment with Nicole Rosenkrans, ARNP, with CNOS. (Ex. 5, p. 110) Rosenkrans documented Malual reported improvement with his pain syndrome, but noted he was still experiencing

weakness in his left hand, with numbness and tingling. (Ex. 5, p. 110) Rosenkrans refilled Malual's oxycodone, and prescribed Neurontin and physical therapy. (Ex. 5, p. 111) Rosenkrans restricted Malual from working and documented "[p]atient will call only once a week with updates." (Ex. 5, p. 112)

Malual contacted CNOS on April 22, 2015, and reported he had not started physical therapy, and that he wanted to come to Dakota Dunes for physical therapy, but Farmland wanted him to have therapy in Denison, where he lives. (Ex. 5, p. 90) Brenda Mahnke, RN, spoke with Malual and told him he needed to attend physical therapy in Denison. (Ex. 5, p. 90) Mahnke documented Malual asked for her full name and badge number, she responded that she would have his case manager call him, and Malual hung up the telephone on her. (Ex. 5, p. 90)

On April 27, 2015, Malual contacted CNOS and reported he was having swallowing difficulties, food was going through his nose, and he could not breathe while lying down. (Ex. 5, p. 89) Melissa Levering, RN, spoke with Malual and advised him to see his primary care provider. (Ex. 5, p. 89) Levering documented Malual stated he did not want to go to his primary care provider. (Ex. 5, p. 89)

Shortly before 6:00 a.m. on May 5, 2015, Malual called an ambulance. (Ex. 10) Malual complained of pain in his neck and left shoulder, that his entire left arm was numb down to his fingers, and that he could not move his arm. (Ex. 10, p. 219) Malual was transported to the emergency room at Crawford County Memorial Hospital. (Ex. 10, p. 222) At the hospital Malual complained of severe neck pain and left arm pain following physical therapy the day before. (Ex. 3, p. 45) Malual was assessed with a severe cervical muscle spasm and the emergency room physician placed Malual's left arm in a sling for comfort. (Ex. 3, p. 45) The hospital staff recommended Malual follow up with Dr. Shumaker during his appointment scheduled that day. (Ex. 3, p. 45)

Malual testified he did not call Farmland before he went to the emergency room because Farmland had not permitted him to go to the emergency room or to the doctor in the past. (Tr., pp. 29, 74) Malual reported on December 15, 2014, he called the nursing office and asked to go to the emergency room and he was told they would transfer the call to human resources for approval. (Tr., p. 29; Ex. 9, p. 214) Malual reported no one called him back. (Tr., pp. 29-30) Farmland documented Malual did call on December 15, 2014, but when the call was transferred back to the nurses' office, Malual was not on the line. (Ex. 9, p. 214)

On May 5, 2015, Malual attended an appointment with Rosenkrans at CNOS at 11:24 a.m., complaining of continued pain after therapy. (Ex. 5, p. 113) Rosenkrans documented Malual reported the therapist forced him to stretch too much and aggravated his left-sided neck and upper arm pain. (Ex. 5, p. 113) Rosenkrans encouraged Malual to resume physical therapy, and to follow up in one month. (Ex. 5, p. 114) Rosenkrans issued a note restricting Malual from working through June 3, 2015, and prescribed diazepam for muscle pain and spasms. (Ex. 5, pp. 114-16)

Malual called CNOS on May 7, 2015, and spoke with Nancy Beekman, LPN, complaining of pain poking in his neck and reporting he believed physical therapy three times per week was too much. (Ex. 5, p. 87) Levering spoke with Dr. Shumaker and told Malual he needed to continue with physical therapy three times per week, and if the therapist wanted to change the amount of therapy CNOS would send a new order. (Ex. 5, p. 87)

The next day, on May 8, 2015, Malual called CNOS and spoke with Beekman, reporting the Neurontin and Valium were not helping, and requesting oxycodone. (Ex. 5, p. 86) Beekman responded that Dr. Shumaker was out of town at a clinic that day. (Ex. 5, p. 86) Levering returned a call to Malual and told him he had only taken Valium for one day and that he needed to give the medication a chance, and to call with an update in one week. (Ex. 5, p. 86)

The morning of May 11, 2015, Malual contacted CNOS and reported the Valium was not working, and requested hydrocodone and oxycodone. (Ex. 5, p. 85) Mahnke mailed a script for the requested prescriptions. (Ex. 5, p. 85) Later that same morning Malual called CNOS and he was upset that no one had called regarding his medication switch and he stated he wanted a prescription for oxycodone. (Ex. 5, p. 83) Michels spoke with Malual and informed him CNOS had mailed the script for hydrocodone, and Malual relayed he "keeps calling here and no one is calling him back – he wants to know why." (Ex. 5, p. 83)

The afternoon of May 11, 2015, Malual returned to the emergency room at Crawford County Memorial Hospital. (Tr., pp. 32, 77; Ex. 3, p. 51) Malual testified he did not call Farmland before going to the emergency room "[b]ecause they won't approve it, so they know they – I called them before and they can't approve it." (Tr., p. 32) Malual did not contact Dr. Shumaker's office before he went to the emergency room that day. (Tr., p. 79) Steven Lapke, M.D., the treating physician, recommended Malual follow-up with his neurosurgeon and physical therapy for management of his pain, and documented he refused Malual's request for narcotics. (Ex. 3, p. 51)

On June 3, 2015, Malual attended a follow-up appointment at CNOS with Rosenkrans, complaining of increasing pain in his left upper extremity and worsening weakness. (Ex. 5, p. 120) Rosenkrans documented Malual was also complaining of pain radiating in his right upper extremity, he relayed physical therapy was making him worse, and he reported he was not taking the Neurontin. (Ex. 5, p. 120) Rosenkrans provided Malual with a Neurontin prescription, refilled his hydrocodone, and recommended repeat magnetic resonance imaging and electromyography of the bilateral upper extremities. (Ex. 5, p. 121) Rosenkrans restricted Malual from working. (Ex. 5, p. 121)

Malual returned to the emergency room at Crawford County Memorial Hospital on June 9, 2015, complaining of chronic pain. (Ex. 3, p. 56) Malual was examined and instructed to address his pain with his neurosurgeon. (Ex. 3, p. 56)

On June 10, 2015 Malual contacted CNOS, and reported his neck was improving "but the left lower area is still making him suffer" and he is experiencing numbness and had gone to the emergency room the day before and received an injection that helped a little. (Ex. 5, p. 80) Malual relayed he was experiencing pain when the hydrocodone wears off before the next dose is due. (Ex. 5, p. 80) Beekman returned a call to Malual and told him she would increase his gabapentin, but CNOS could not offer much more until his studies were completed. (Ex. 5, p. 80)

Malual called CNOS the next morning, June 11, 2015, complaining of difficulty swallowing, eye problems, and that he was unable to sleep while taking gabapentin, and left arm numbness. (Ex. 5, p. 79) Malual inquired whether he could stop taking the gabapentin and Michels advised him he could discontinue the medication if he chose to do so, but CNOS would not prescribe additional medication at that time. (Ex. 5, p. 79)

Malual underwent cervical magnetic resonance imaging on June 29, 2015. (Ex. 5, p. 125) The reviewing radiologist listed an impression of "[i]ncreased cord signal within the left spinal cord at C3/C4. Finding is likely secondary to myelomalacia." (Ex. 5, p. 125)

On August 3, 2015, Malual underwent electromyography with William Anderson, M.D. (Ex. 5, p. 133) Dr. Anderson found,

> [t]his is an abnormal study secondary to findings of a mild to moderate median mononeuropathy at the wrist, i.e. carpal tunnel syndrome seen bilaterally. There is no additional electrographic evidence for compressive neuropathy involving the upper extremities, and no electrographic evidence for cervical radiculopathy or brachial plexopathy on the right or left.

(Ex. 5, p. 133)

Malual attended an appointment with Sandra Shumaker, ACNP, at CNOS, on August 6, 2015, complaining of posterior neck pain, limited range of motion, and bilateral upper extremity weakness. (Ex. 5, pp. 134-35) Dr. Shumaker recommended magnetic resonance imaging to assess for a neoplastic lesion at the C3-4 level, and a functional capacity evaluation. (Ex. 5, p. 135) Dr. Shumaker restricted Malual from working until his functional capacity evaluation and imaging were completed. (Ex. 5, p. 136)

The imaging was completed on August 26, 2016, and the reviewing radiologist listed an impression of:

> 1. Prior C3-4 ACDF with ventral plate stabilization. Mild left cord non-enhancing myelomalacia. Residual mild central canal stenosis and mild bilateral osseous foraminal narrowing unchanged from 06/29/2015.

2. C6-7 dorsal disc/osteophyte complex causing minimal central canal stenosis but moderate-severe bilateral osseous foraminal narrowing.

3. C2-3 mild right osseous foraminal narrowing.

4. No abnormal cervical cord, epidural or intradural enhancement.

(Ex. 19, p. 366)

Malual attended a functional capacity evaluation in Omaha on August 27, 2015. (Tr., pp. 33, 80; Ex. 8, p. 205) The physical therapist documented, "David demonstrated multiple findings of inconsistent and submaximal effort during functional testing. His subjective complaints of pain and portrayed restrictions appear out of proportion with his objective findings of dysfunction." (Ex. 8, p. 207) The physical therapist reported accurate functional restrictions could not be outlined because the test results were invalid. (Ex. 8, p. 205)

Malual went to the emergency room at Alegent Creighton Health after his functional capacity evaluation, complaining of numbness on the left side of his neck and left arm. (Ex. 1, p. 11; Tr., p. 33) Malual testified, "I did it because I was unconscious that day and then I end up in the emergency room." (Tr., p. 33) Malual did not contact Farmland before going to the emergency room. (Tr., p. 34) The medical staff documented they spoke with Dr. Shumaker regarding Malual and they recommended he follow up with Dr. Shumaker as scheduled. (Ex. 1, pp. 1-2) Malual testified he went to the emergency room on May 5, 2015, May 11, 2015, and August 27, 2015 because he felt abandoned and no one scheduled an appointment for him with his neurosurgeon. (Tr., p. 35)

On September 9, 2015, Malual called CNOS to inquire what Dr. Shumaker was going to do about his pain. (Ex. 5, p. 142) Mahnke documented she spoke with Dr. Shumaker, who responded Malual's imaging looked fine, but he was waiting until he received the functional capacity evaluation report. (Ex. 5, p. 142)

Dr. Shumaker received the functional capacity report, which he noted was invalid. (Ex. 5, p. 145) On September 10, 2015, Dr. Shumaker documented Malual's imaging showed expected post-operative changes, he noted Malual could return to work, and he imposed permanent restrictions of lifting fifty pounds occasionally, one to thirty-three percent of the time, twenty-five pounds frequently, thirty-four to sixty-six percent of the time, and ten pounds constantly, sixty-seven to 100 percent of the time. (Ex. 5, p. 145) Malual testified he cannot lift fifty pounds and he believes the restriction is incorrect. (Tr., p. 35)

Malual reported Farmland called him and informed him they had work for him. (Tr., pp. 33-35) Malual testified Farmland assigned him to monitor the ceiling, which required him to flex his neck upwards and watch for condensation. (Tr., pp. 36-37) Malual testified he tried to perform the job, but he could not do it because his neck would not go up. (Tr., p. 37)

Malual relayed he reported his pain to the nurses at Farmland and they did not send him to the doctor, so he sought care on his own with Michael Luft, D.O., with Denison Family Health Center. (Tr., p. 38) On September 15, 2015, Malual attended an appointment with Jennifer Muff, ARNP, who works with Dr. Luft, complaining of arm pain and numbness, and shoulder pain and weakness. (Ex. 7, p. 180) Muff documented Malual was seeking a second opinion concerning his condition. (Ex. 7, p. 181) Dr. Luft examined Malual, and completed Family Medical Leave paperwork, documenting Malual should not work until further notice. (Ex. 7, pp. 183-88) Malual has not returned to work. (Tr., p. 39)

On October 2, 2015, Dr. Shumaker issued an impairment rating. (Ex. 5, p. 146). Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Shumaker found Malual "has a 25% permanent partial impairment of the Body As A Whole using table 15-5, DRE IV." (Ex. 5, p. 146)

Malual attended an appointment with Dr. Luft on October 5, 2015, complaining of neck pain and immobility of his cervical spine. (Ex. 7, p. 189) Dr. Luft assessed Malual with neck pain and a cervical disc disorder with radiculopathy. (Ex. 7, p. 189) Dr. Luft recommended Malual be referred to a neurosurgeon or orthopedic surgeon. (Ex. 7, p. 190) Dr. Luft filled out disability paperwork noting Malual was totally disabled from September 9, 2015 through November 9, 2015. (Ex. 7, p. 192)

On October 19, 2015, Malual attended a follow-up appointment with Dr. Luft, complaining of neck pain, immobility, and difficulty breathing while lying down. (Ex. 7, p. 194) Dr. Luft determined Malual continues to be disabled, and recommended a neurosurgery or orthopedic surgery consult. (Ex. 7, p. 195)

During his appointment with Dr. Luft on October 28, 2015, Malual complained of neck pain, and pain radiating down his left arm. (Ex. 7, p. 198) Dr. Luft recommended Malual see a neurosurgeon, and opined he continued to be totally disabled. (Ex. 7, pp. 199-200)

On November 20, 2015, Malual returned to Dr. Luft complaining of neck pain, and that he is "not able to move his head, rotation and flexion and extension and numbness down his left arm." (Ex. 7, p. 201) Dr. Luft again recommended Malual see a neurosurgeon, prescribed hydrocodone, and opined Malual is totally disabled from work. (Ex. 7, pp. 202-04)

Dr. Bansal conducted an independent medical examination of Malual in November 2015, and issued his report in December 2015. (Ex. 11) Dr. Bansal diagnosed Malual with a C3-C4 disc herniation, status post anterior cervical discectomy at C3-C4, with placement of a fibular allograft and cervical plate. (Ex. 11, p. 238) Dr. Bansal opined the medical care Malual had received for his injury has been reasonable and necessary for his condition. (Ex. 11, p. 238) Dr. Bansal placed Malual at maximum medical improvement on September 10, 2015, the date of his last appointment with Dr. Shumaker. (Ex. 11, p. 238) Using Table 15-5, of the AMA Guides, Dr. Bansal opined Malual meets the criteria from DRE Category IV, status post C3-C4 fusion, and found

he continues to have pain and radiculopathy, and assigned a twenty-eight percent whole person impairment. (Ex. 11, p. 239) Dr. Bansal recommended a ten pound lifting restriction with no lifting above shoulder level, and "to avoid work or activities that require repeated neck motion, or that place his neck in a posturally flexed or extended position for any appreciable duration of time (greater than 15 minutes)." (Ex. 11, p. 239)

On December 31, 2015, Malual attended an appointment with John Massey, M.D., a pain specialist. (Ex. 18, p. 344) Dr. Massey listed an impression of cervical postlaminectomy syndrome, cervical spondylosis with myelopathy, cervicalgia, diagnosed Malual with depression, recommended a neuropsychological evaluation, and prescribed Cymbalta to reduce neurogenic discomfort. (Ex. 18, pp. 344-48)

During his appointment on January 14, 2016, Dr. Massey noted,

> [w]e are concerned that we are dealing with primarily some type of central nervous system dysfunction. This may be an individual who is developing some type of conversion disorder or somebody who is experiencing psychological distress as physical symptoms and it may also be somebody who is either cautiously or subconsciously manipulating symptoms. He obviously has subjective report of pain after his fusion surgery but his functional limitations exceeded those that we would expect given the findings. In order to try to determine how to improve his situation we are going to ask him to undergo neuropsychological evaluation with Dr. Arias. It is our hope we can get some better information regarding symptom validity and also whether or not the patient is subconsciously manipulating symptoms.

(Ex. 18, p. 354) Dr. Massey restricted Malual to light duty with no use of the left shoulder and no lifting or regular twisting. (Ex. 18, p. 356)

On February 4, 2016, Malual attended a follow-up appointment with Dr. Shumaker, complaining of severe left base neck pain and diffuse numbness in his left arm with an inability to move the left arm. (Ex. 5, p. 151) Dr. Shumaker recommended magnetic resonance imaging and a nerve conduction study/electromyography of the left arm. (Ex. 5, p. 151)

On February 8, 2016, Malual attended an appointment with Ziad Zawaideh, M.D., a family practice physician, complaining of pain in the left side of his neck and shoulder, double vision, and numbness in his right hand. (Ex. 22, p. 382) Dr. Zawaideh assessed Malual with a cervical disc disorder, cervicalagia, cervical region radiculopathy, and radiculopathy, site unspecified. (Ex. 22, p. 383) Dr. Zawaideh prescribed Percocet, completed disability paperwork for Malual, and restricted Malual from working. (Ex. 22, pp. 383-93)

Malual attended a neuropsychological evaluation with Robert Arias, Ph.D., on February 22, 2016. (Ex. 2) Dr. Arias administered Green's Word Memory Test, the Test of Nonverbal Intelligence-III ("TONI-III"), Test of Memory Malingering, Grooved

Pegboard, Judgment of Line Orientation, Rey-Osterreith Complex Figure, California Verbal Learning Test-II ("CVLT-II"), Visual Reproduction Subtest of the Wechsler Memory Scale ("WMS-IV"), Wisconsin Card Sorting Test ("WCST"), and the Minnesota Multiphasic Personality Inventory ("MMPI-2"), interviewed Malual, and reviewed his medical records. (Ex. 2, pp. 31-32, 35-36). Dr. Arias did not assign Malual a diagnosis, and opined:

> [t]hese results revealed clear evidence of noncredible symptoms, cognitively, somatically, and emotionally. Specifically, his performance on several cognitive symptom validity indicators was well outside of normal limits, and performance was also atypical on other standardized cognitive measures. His MMPI-2 results also revealed a high level of somatic symptom magnification, yet a pronounced attempt to portray himself in a socially desirable light. These findings are congruent with information in records, including "findings of inconsistent and submaximal effort" in an August 31, 2015 FCE. He also has been noted to have "exaggerated" hand grasp weakness with restricted range of motion and pain. Dr. Wampler also observed dramatic pain behaviors, yet no signs of nerve damage originating from his neck nor any anatomical correlation to the vaguely located pains in his shoulder and arm. He was unable to identify a medical basis for the patient's dramatic complaints and bizarre pain behaviors. Secondary gain factors are the most parsimonious explanation for these convergent data.
>
> From a behavioral standpoint, the patient is highly deactivated, reported being off his feet more than 23 hours per day. There are also solicitous responses from his sister-in-law and nephew, which further encourage the presenting pain behaviors, deactivation, and, "portrayal of a disabled patient role." Given the aggregate of these findings, I would opine within a reasonable degree of neuropsychological certainty, that there are no neuropsychological sequelae from the October 13, 2014 alleged work related injury.

(Ex. 2, p. 29)

Malual attended a follow-up appointment with Dr. Zawaideh on March 7, 2016. (Ex. 22, p. 399) Dr. Zawaideh continued Malual's Percocet, noted he was also taking oxycodone and Cymbalta, noted Malual was having difficulty performing his activities of daily living, and that he was unable to work. (Ex. 22, pp. 399-401)

Dr. Shumaker ordered magnetic resonance imaging, which was conducted on March 8, 2016. (Ex. 19, p. 367) The reviewing radiologist listed an impression of:

> 1. Remote C3-4 ACDF with ventral plate, unchanged chronic mild left cord myelomalacia. Anterior superior C4 spinous process mildly displaces cord ventrally C3-4 with mild central canal stenosis, unchanged. Residual mild bilateral osseous foraminal stenosis.

2. New small right dorsal disc herniation C2-3 with slight right cord dorsal displacement and mild right osseous foraminal narrowing.

3. C6-7 dorsal [*sic*] bulging annulus and bilateral uncovertebral osteophytes L>R, minimal central canal stenosis with moderate left and mild right osseous foraminal narrowing.

4. D4-5 [*sic*] mild right osseous foraminal narrowing.

(Ex. 19, p. 368)

During a follow-up appointment with Dr. Massey on March 10, 2016, Malual complained of numbness and weakness in both arms, in his shoulders, and in his mid back, and pain. (Ex. 18, p. 357) Dr. Massey noted no providers had been able to identify an anatomical explanation for Malual's complaints, and recommended work conditioning. (Ex. 18, pp. 359-60) Dr. Massey continued Malual's restrictions. (Ex. 18, p. 364)

On April 4, 2016, Malual attended an appointment with Dr. Zawaideh, complaining of neck pain after being kicked in the neck by a coworker on October 13, 2014. (Ex. 22, p. 402) Dr. Zawaideh continued Malual's Percocet prescription. (Ex. 22, p. 403)

Malual returned to Dr. Shumaker on April 12, 2016. (Ex. 5, p. 161) Dr. Shumaker noted the nerve conduction study/electromyography of the left arm dated March 8, 2016, showed mild to moderate left carpal tunnel syndrome with no evidence of radiculopathy. (Ex. 5, p. 161) Dr. Shumaker opined "[u]nfortunately the patient at this point appears to have a non-physiologic pain syndrome without evidence of a complex regional pain syndrome." (Ex. 5, p. 161) Dr. Shumaker concluded there are no further surgical options for Malual and he failed a functional capacity evaluation on validity criteria. (Ex. 5, p. 161) Dr. Shumaker opined Malual was at maximum medical improvement and released him to full-time work with a fifty pound lifting restriction. (Ex. 5, p. 161)

On May 2, 2016, Dr. Shumaker issued a note opining Malual had reached maximum medical improvement, and assigning a twenty-five percent permanent impairment under the AMA Guides. (Ex. 5, p. 165)

Malual attended an appointment with Dr. Zawaideh on May 2, 2016, complaining of left arm pain and cervical pain. (Ex. 22, p. 405) Dr. Zawaideh documented "[p]atient has gone to lengths of trying to imobilize [*sic*] his left arm in an arm sling and this was not recommended but patient states that it feels better and wants to continue with this – after discussion with patient he was scheduled to Midwest Neurosurgery" to see Douglas Long, M.D., a neurosurgeon. (Ex. 22, p. 405) During his follow-up appointment on May 19, 2016, Malual was still wearing the arm sling, which Dr. Zawaideh discussed with him. (Ex. 22, p. 407)

Malual attended an appointment with Dr. Long and Brittany Kotera, PA, on May 9, 2016, complaining of neck pain and bilateral upper extremity paresthesias. (Ex. 16) Dr. Long documented Malual reported the pain in his left arm had resolved, but he was experiencing global left arm numbness and tingling into his middle, ring, and little fingers of his right hand. (Ex. 16, p. 338) Dr. Long noted Malual's magnetic resonance imaging revealed postoperative changes with chronic mild left chord myelomalacia, and a new small right dorsal disk herniation at C2-3, resulting in mild dorsal cord displacement. (Ex. 16, p. 339) Dr. Long documented Malual "is unwilling to participate in a physical exam due to the severity of his left-sided neck pain," but based on his medical records, he did not believe surgical intervention would be beneficial. (Ex. 16, p. 339)

Malual discontinued treating with Dr. Zawaideh, and on August 1, 2016, he attended an appointment with Joseph Dumba, M.D., a family practice physician, complaining of severe neck and shoulder pain, inability to use his arms, difficulty eating, left hand contractures, and weakness in his right hand. (Ex. 15, pp. 327, 333) Dr. Dumba completed disability paperwork for Malual restricting him from working. (Ex. 15, pp. 327-29) Dr. Dumba prescribed oxycodone and recommended Malual be examined by a neurosurgeon. (Ex. 15, pp. 331, 335)

Dr. Bansal received additional medical records and issued a supplement report on August 16, 2016. (Ex. 11, pp. 241-57) Dr. Bansal opined he agreed with Dr. Shumaker that Malual reached maximum medical improvement on April 12, 2016. (Ex. 11, p. 254) Dr. Bansal diagnosed Malual with C3-C4 disc herniation, status post anterior cervical discectomy at C3-C4 and fusion, and left shoulder adhesive capsulitis secondary to several months of daily sling use. (Ex. 11, p. 254)

Dr. Bansal noted that Malual received a left arm sling from an emergency room physician on May 6, 2015, and

> then took it upon himself to start continually using the sling starting in January 2016, as he was having left arm pain. Unsurprisingly, starting in February 2016 he had a new complaint of loss of range of motion of his left arm. It is well known that it is completely unadvisable to keep an arm in a sling for any prolonged duration, as this will lead to a frozen shoulder.

(Ex. 11, p. 255) Dr. Bansal opined he agreed with Dr. Zawaideh that Malual developed a frozen shoulder from his chronic use of a sling, which has rendered his left arm without much functionality. (Ex. 11, p. 256) Dr. Bansal found there was insufficient medical information to attribute any work-relatedness to the left carpal tunnel syndrome, and he did not assign an additional permanent impairment to Malual. (Ex. 11, pp. 256-57)

Lynnette Aschinger, LISW, sent a letter to Malual's counsel on September 19, 2016, noting "[a]fter reviewing the medical reports, providing diagnostic assessment, biopsychological assessment and personal interview [*sic*] I have determined that David is challenged with depressive symptoms that is [*sic*] caused by constant pain." (Ex. 12, p. 258) Aschinger reported she offered Malual counseling and he stated "he prefers to

use his natural and family supports instead of formal outpatient services." (Ex. 12, p. 258) Aschinger documented because Malual relayed he did not believe counseling would be helpful, he would not receive services with an outpatient counselor. (Ex. 12, p. 258)

Lisa Krause-Reinert, LISW, prepared a statement on October 18, 2016, stating Malual was seen for psychotherapy at New Directions Mental Health Counseling Center, and completed an intake. (Ex. 39, p. 630) Krause-Reinert noted Malual was diagnosed with major depressive disorder, recurrent, with moderate to severe symptoms, and opined it is very important for Malual to attend therapy on a regular basis to ensure his mental health symptoms do not become worse. (Ex. 39, p. 630)

During his deposition, Dr. Massey testified Malual complained of pain in his beck and bilateral arms, and numbness in his bilateral hands, which would not be expected with a C3-4 issue. (Ex. F, pp. 11-12) Dr. Massey did not see anything during his treatment of Malual that would require him to wear a left arm sling. (Ex. F, pp. 13-14, 18) Dr. Massey reported that Malual's subjective complaints of numbness and weakness did not correlate with objective testing that was performed. (Ex. F, pp. 18-19) Dr. Massey opined he agrees with Dr. Long's opinion that no surgical intervention is warranted. (Ex. F, p. 21)

Dr. Massey opined there is no clinical reason or objective diagnostic reason for Malual to be on oxycodone. (Ex. F, p. 26) Dr. Massey reported his use of oxycodone could actually inhibit his ability to recover, noting,

> there is a lot of evidence that opioid pain medications can decrease a person's functionality and reduce their ability to perform daily activities unless they are given for the right reason and the right patient, and all of the evidence that I had with his patient is to the contrary where I think he would be precisely the kind of patient that I would not recommend we not give medications with high potential for abuse.

(Ex. F, pp. 26-27) Dr. Massey further opined that Malual did not need additional magnetic resonance imaging in August 2016. (Ex. F, p. 27) Dr. Massey testified he did not believe Dr. Bansal's findings were based on objective findings, or accurately reflect his limitations.

Malual has complained that as a result of his work injury his neck will not turn, he has double vision, he cannot smell or taste anymore, he has finger pain, he cannot feel three of his fingers, and he has left-sided numbness. Dr. Massey testified Malual's complaints would not be side effects causally related to his alleged work injury, his C3-4 fusion, or a C6-7 untreated disc herniation. (Ex. F, pp. 35-39) Dr. Massey noted a problem at C5-6 could present symptoms of finger pain and the inability to feel three fingers, but he did not see anything in Malual's records to indicate he has a C5-6 problem. (Ex. F, pp. 36-37) And Dr. Massey noted nerve conduction studies did not show a C5-6 problem. (Ex. F, p. 37) Dr. Massey testified a person who has had C3-4 surgery should be able to move his head. (Ex. F, p. 37)

On November 8, 2016, Malual attended an appointment with David Archer, M.D., a family medicine physician, complaining of neck and upper back pain, numbness in his left arm, and an inability to use the left arm. (Ex. 41, p. 655) Dr. Archer noted that Malual was injured when he was "palletizing and was bent over and was accidentally kicked by another worker who was wrapping in the left side of his neck, causing him to fall into the pallet of boxes w/ immediate onset of pain." (Ex. 41, p. 655) Dr. Archer examined Malual and ordered magnetic resonance imaging of Malual's cervical spine and thoracic spine. (Ex. 41, pp. 655-57)

Malual received magnetic resonance imaging of his shoulders and cervical spine on December 12, 2016. (Ex. 42) With respect to his left shoulder, the reviewing radiologist listed an impression of:

1. No full-thickness rotator cuff tear.

2. Small partial undersurface tears of the supraspinatus and infraspinatus tendons as described above. Moderate supraspinatus and infraspinatus tendinosis.

3. Mild biceps tenosynovitis.

4. Mild to moderate hypertrophic change of the acromioclavicular joint.

5. Incomplete fusion of the acromion, os acromiale, however no edema/inflammation.

6. Small inferior acromial spur.

7. Labrum appears intact. No muscular atrophy or fatty infiltration.

(Ex. 42, p. 658-659) With respect to the right shoulder, the reviewing radiologist listed an impression of:

1. No full-thickness rotator cuff tear.

2. Moderate supraspinatus and infraspinatus tendinosis.

3. Small partial undersurface tears infraspinatus tendon detailed above.

4. Moderate hypertrophic change of the acromioclavicular joint.

5. Mild subacromial and subdeltoid bursitis.

6. Mild biceps tenosynovitis.

(Ex. 42, p. 660) With respect to his cervical spine and thoracic spine, the reviewing radiologist listed an impression of:

> 1. Previous anterior fusion at C3-4 producing some artifact.
>
> 2. C3-4 leftward discovertebral complex causing some narrowing. The left cord here shows high T2 signal and atrophy consistent with myelomalacia in this region. No enhancement. Moderate to severe left foraminal stenosis.
>
> 3. Other levels of degenerative and hypertrophic changes causing some central and foraminal narrowing detailed above.
>
> 4. No marrow edema or enhancing mass.

(Ex. 42, p. 661)

Malual sent the imaging to Dr. Bansal to review and Dr. Bansal opined the imaging indicated Malual has rotator cuff tendonitis and the left shoulder imaging also indicates a partial tear of the rotator cuff. (Ex. 43, p. 667) Dr. Bansal could not opine to a degree of medical certainty whether the work injury was a contributing factor for Malual's bilateral rotator cuff pathology, and noted:

> [n]otwithstanding, given the backdrop of having an underlying left rotator cuff tear, it was even more problematic for Mr. Malual to have remained in a sling for at least a period of several months. The rotator cuff tendonitis implies an inflammatory reaction has occurred. Completely restricting mobility as from chronic use of a sling would further cause adhesions to occur, aggravating a frozen shoulder.

(Ex. 43, p. 667) Dr. Bansal reaffirmed Malual engage in no overhead work, and noted he has almost no mobility in his left shoulder, rendering his arm "essentially nonfunctional" and noting "from a practical standpoint, Mr. Malual has a [*sic*] no use of the left arm restriction." (Ex. 43, p. 667)

Malual believes his shoulder condition is related to his work injury. Malual testified he has chronic pain in both sides of his shoulders, he cannot move his left shoulder because it hurts so much, his arm is completely numb and hurts, and he does not have any feeling in the fingers of his left hand. (Tr., pp. 48-49)

Malual contends he has double vision, which started with physical therapy, he cannot smell as a result of the surgery, he cannot eat solid food since the surgery because the food comes through his nose and in the wrong direction, causing him to cough, and he has symptoms all over his body, including his stomach, and pain radiating from his neck into his left leg. (Tr., pp. 103-08) Malual denied he had these symptoms before his work injury. (Tr., p. 107)

Malual avers he has sustained mental health problems because of his injury. (Tr., pp. 45-46) He testified,

> I have fear and I have too many imagine dream when I notify that my employer send me surveil and it cause me all those things why would they do that? It's like I feel like they are coming to hurt me. And when I sleep and they quarrel and they come as a dream in my – in my sleep and it cause me not to sleep, and when there is nobody I'm not comfortable being by myself.

(Tr., pp. 46-47)

Malual reported since his injury he cannot cook, wash dishes, vacuum, clean his home, mow the grass, or shovel snow. (Tr., pp. 50-51) Malual testified he has difficulty buttoning a shirt and his pants because his right three fingers do not function well. (Tr., pp. 51-52) Malual stated someone helped him dress for the hearing and he wears stretchy pants because they are easier to put on. (Tr., p. 52) Malual relayed he cannot put on his shoes and always wears sandals because they are easy to put on. (Tr., p. 52) Malual testified does not drive because he cannot turn his neck or use his shoulder, and he has double vision. (Tr., p. 53)

Malual testified he does not believe he could perform his work at Farmland, Swift and Company, at the casinos, or in the detergent facility. (Tr., p. 55) Malual reported he could not make the calculations at the casino because of his double vision. (Tr., p. 55) At the time of the hearing Malual was taking oxycodone and gabapentin, which he reported make him fall asleep. (Tr., pp. 9-10)

CONCLUSIONS OF LAW

I. Nature of the Injury

The parties have stipulated Malual sustained a permanent impairment to his neck while working for Farmland on October 14, 2014. Malual contends he sustained a mental health sequela as a result of his work injury. Farmland and Safety reject his assertion.

At page 6 of his post-hearing brief, Malual acknowledges he "is not making any claim that his carpal tunnel diagnoses are work-related." Pages 17 through 27 of Malual's post-hearing brief address Malual's claim that he is permanently and totally disabled under the statute, or alternatively under the odd-lot doctrine. In the Impairment and Restrictions section of his post-hearing brief addressing the extent of disability, at pages 20 through 27, Malual asserts he has functional problems with his hand and fingers, inability to use his left hand and arm and former use of a sling, and asserts at page 27,

> [t]he record is undisputed that prior to this serious, neck/shoulder/bilateral arm injury Claimant was a hard-working, motivated, independent, and

> honest individual with no problems of any kind that impaired his ability to work a full-time job, sometimes seven days per week. After the injury, and presently, Claimant cannot even manipulate his own buttons on his shirt or tie his own dress shoes. (Trans. 52) He wears stretchy pants and sandals, including in the winter, the day before his trial, because they are easier for him to put on. (Trans. pgs. 52-53). He has help with almost every activity of daily living and, perhaps more-significantly than anything else in the record, he has three doctors who were not chosen by any lawyers who have all opined that he is not capable of work of any kind.

Based upon these arguments, it appears Malual is alleging he also sustained shoulder, bilateral arm, and finger injuries or sequelae as a result of his work injury.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is

insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

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

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

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

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

A. Alleged Physical Injuries

Farmland and Safety have stipulated Malual sustained a work injury to his neck, which required him to undergo an anterior C3-4 discectomy, with placement of a fibular allograft and cervical plate. The record does not support Malual sustained work-related injuries to other areas of his cervical spine. Drs. Shumaker and Bansal found Malual sustained a C3-C4 disc herniation, which required him to undergo a cervical discectomy. They did not find Malual sustained an injury to any other areas of his cervical spine as a result of his work injury on October 13, 2014. No physician has opined that Malual's alleged problems with his left shoulder, arms, fingers, double vision, inability to eat solid food, stomach problems, or leg pain are related to his work injury. The evidence supports the only physical injury Malual sustained as a result of his October 13, 2014 work injury was a C3-C4 disc herniation, which required him to undergo a cervical discectomy.

B. Alleged Mental Health Sequela

Malual contends he has sustained mental health problems because of his injury. (Tr., pp. 45-46) He testified,

> I have fear and I have too many imagine dream when I notify that my employer send me surveil and it cause me all those things why would they do that? It's like I feel like they are coming to hurt me. And when I sleep and they quarrel and they come as a dream in my – in my sleep and it cause me not to sleep, and when there is nobody I'm not comfortable being by myself.

(Tr., pp. 46-47) Farmland and Safety aver Malual has failed to establish he sustained a mental health sequela.

Malual attended a neuropsychological evaluation with Dr. Arias, a neuropsychologist, on February 22, 2016. (Ex. 2) Dr. Arias administered Green's Word Memory Test, the TONI-III, Test of Memory Malingering, Grooved Pegboard, Judgment of Line Orientation, Rey-Osterreith Complex Figure, CVLT-II, WMS-IV, WCST, and the MMPI-2, interviewed Malual, and reviewed his medical records. (Ex. 2, pp. 31-32, 35-36) Dr. Arias did not assign Malual a diagnosis, and opined "there are no neuropsychological sequelae from the October 13, 2014 alleged work related injury." (Ex. 2, p. 29)

Malual attended appointments with two social workers, Aschinger and Krause-Reinert. (Exs. 12; 39) On September 19, 2016, Aschinger prepared a statement noting "[a]fter reviewing the medical reports, providing diagnostic assessment, biopsychological assessment and personal interview [*sic*] I have determined David is challenged with depressive symptoms that is [*sic*] caused by constant pain." (Ex. 12, p. 258) The record does not contain information documenting what medical reports Aschinger reviewed, what diagnostic assessments she performed, or what was involved with her "biopsychosocial assessment." The record is also void of information concerning Aschinger's training and experience diagnosing and treating individuals with mental illness. Aschinger reported she met with Malual on three occasions, but she does not provide the dates she met with him. (Ex. 12, p. 258)

On October 18, 2016, Krause-Reinert also prepared a statement stating Malual had been seen for psychotherapy and diagnosed with major depressive disorder, recurrent with moderate to severe symptoms. (Ex. 39, p. 630) Krause-Reinert noted his "[f]unctioning ability was very low due to David's physical bone problems which causes [*sic*] him chronic substantial pain." (Ex. 39, p. 630) Krause-Reinert recommended continued therapy and noted, "[t]his prognosis will be evident until David is able to receive the surgical treatment to repair the area which creates the source of his chronic nerve pain which affects David's mood." (Ex. 39, p. 630) The record does not contain any documentation regarding treatment Malual was receiving from Krause-Reinert, how many times she had examined him, what assessments she performed, if any, or what documentation she reviewed in reaching her conclusions, and how she reached her conclusions. (Ex. 39, p. 630) The record is also void of information

concerning Krause-Reinert's training and experience diagnosing and treating individuals with mental illness.

Malual criticizes Dr. Arias' opinions, arguing "[i]t is curious that only one week prior to Dr. Arias' appointment, Dr. Zawaideh, who was not hired by Defendants, put in a disability application form that Claimant was 'very depressed secondary to his disability'" and Farmland and Safety failed to provide Dr. Arias with that report. (Claimant's Post-Hearing Brief at 28) Malual further asserts Dr. Massey prescribed, Cymbalta, which is a depression medication. (Claimant's Post-Hearing Brief at 28) Dr. Massey documented, "[w]e'll start the patient with some medications designed to reduce neurogenic discomfort were going to start him on some Cymbalta. We do not suspect he is motivated to obtain medication but we would expect limited role for opioid management in the long-run." (Ex. 18, p. 348) Dr. Massey's note does not support Malual's argument.

I find the opinion of Dr. Arias more persuasive than the opinions of Aschinger and Krause-Reinert. Dr. Arias is a trained neuropsychologist. Aschinger and Krause-Reinert are licensed social workers. Dr. Arias saw Malual one time, for purposes of performing a neuropsychological examination and he administered neuropsychological testing. Krause-Reinert did not identify how many times she met with Malual, what assessments she performed, if any, what documentation she reviewed, and how she reached her conclusions. In her report, Krause-Reinert does not note if the problems stem from Malual's C3-C4 disc herniation, which required him to undergo a cervical discectomy, other areas of his cervical spine, his shoulders, arms, or fingers. Aschinger reported she met with Malual on three occasions, but does not indicate what occurred during each occasion, and whether she was treating Malual. Aschinger did not provide any information concerning what medical reports Aschinger reviewed, what diagnostic assessments she performed, or what was involved with her "biopsychosocial assessment." Malual has not met his burden of proof that he sustained a mental health sequela as a result of his October 13, 2014, work injury.

II. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

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

disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

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

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

As discussed above, Malual has established he sustained a work-related C3-C4 disc herniation, which required him to undergo a cervical discectomy. Malual has not established he sustained any other physical or mental health impairments or sequelae as a result of the October 13, 2014 work injury. Malual has a significant impairment to his left shoulder and left upper extremity, including finger contractures, due to wearing a sling on his own for many months. Drs. Bansal and Zawaideh both noted use of the sling was not recommended. (Exs. 11, pp. 255-27; 22, p. 405) Malual's use of the sling over the course of several months has resulted in a significant impairment affecting his ability to work. Malual's left shoulder and left upper extremity conditions were not caused by his October 13, 2014, work injury. Farmland and Safety are not responsible for the impairment caused by Malual's use of the sling.

Drs. Bansal and Shumaker have both opined Malual sustained a permanent impairment to his cervical spine using Table 15-5 of the AMA Guides. Dr. Shumaker assigned a twenty-five percent impairment to the body as a whole, and Dr. Bansal assigned a twenty-eight percent impairment to the body as a whole. (Ex. 5, p. 146, 165; 11, p. 239)

Malual attended a functional capacity evaluation, which was invalid. After receiving the results, Dr. Shumaker imposed restrictions of lifting fifty pounds occasionally, one to thirty-three percent of the time, twenty-five pounds frequently, thirty-four to sixty-six percent of the time, and ten pounds constantly, sixty-seven to 100 percent of the time. (Ex. 5, p. 145) He later modified the restrictions to a fifty pound

restriction. (Ex. 5, p. 161) Dr. Bansal recommended a ten pound lifting restriction with no lifting above shoulder level, and "to avoid work or activities that require repeated neck motion, or that place his neck in a posturally flexed or extended position for any appreciable duration of time (greater than 15 minutes)." (Ex. 11, p. 239) I find Dr. Shumaker's opinion more persuasive than Dr. Bansal's opinion. Dr. Shumaker is a neurosurgeon who treated Malual over the course of several months. Dr. Bansal is an occupational medicine physician who conducted an independent medical evaluation of Malual; he did not provide any treatment to Malual.

Malual is fifty-six. He has completed a GED, and certified nurse's aide coursework at a community college. Malual has worked for packing plants processing meat, and for casinos counting change, figuring tax, and parking cars. Malual alleges he cannot return to work in a casino because of his vision. Malual's alleged vision problem is not a sequela of the October 13, 2014, work injury.

The parties did not submit vocational expert reports or other evidence of the labor market Malual resides in. There was no evidence presented at hearing that Malual has applied for work since his work injury. I do not find Malual has demonstrated he is motivated to work. Considering his functional disability, age, education, qualifications, experience, and ability to engage in similar employment, I conclude Malual has sustained a fifty percent industrial disability. Malual has not established he is permanently and totally disabled due to his work injury under the statute, or under the odd-lot doctrine.

III. Commencement of Permanent Partial Disability

Under Iowa Code section 85.34 (2013), compensation for permanent partial disability shall begin at the end of the healing period, which occurs when "the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Thus, under the statute, the achievement of maximum medical improvement is one possible date for the commencement of permanency. Iowa Code § 85.34. The parties have stipulated that the date Malual reached maximum medical improvement, is the commencement date for permanent partial disability benefits, but disagree when Malual reached maximum medical improvement. Farmland and Safety aver Malual reached maximum medical improvement on September 10, 2015, and Malual contends he reached maximum medical improvement on April 12, 2016. The Iowa Legislature has defined maximum medical improvement as the point in the convalescence from which "it is medically indicated that further significant improvement from the injury is not anticipated." Id.; see also Waldinger Corp. v. Mettler, 817 N.W.2d 1, 9 (Iowa 2012).

Dr. Shumaker treated Malual following his work injury for a C3-C4 disc herniation, including a cervical discectomy. Dr. Shumaker ordered a functional capacity evaluation. On September 20, 2015, Dr. Shumaker noted the functional capacity evaluation was invalid and he imposed permanent restrictions of lifting fifty pounds

occasionally, one to thirty-three percent of the time, twenty-five pounds frequently, thirty-four to sixty-six percent of the time, and ten pounds constantly, sixty-seven to 100 percent of the time. (Ex. 5, p. 145) Using the AMA Guides, Dr. Shumaker found Malual "has a 25% permanent partial impairment of the Body As A Whole using table 15-5, DRE IV." (Ex. 5, p. 146) Dr. Shumaker released Malual from care. In his December 2015 report, Dr. Bansal placed Malual at maximum medical improvement on September 10, 2015, the date of his last appointment with Dr. Shumaker. (Ex. 11, p. 238)

Malual returned to Dr. Shumaker on February 4, 2016, complaining of severe left base neck pain and diffuse numbness in his left arm with an inability to move the left arm. (Ex. 5, p. 151) Dr. Shumaker recommended magnetic resonance imaging and a nerve conduction study/electromyography of the left arm. (Ex. 5, p. 151)

Malual attended a follow-up appointment with Dr. Shumaker on April 12, 2016. (Ex. 5, p. 161) Dr. Shumaker noted the nerve conduction study/electromyography of the left arm dated March 8, 2016, showed mild to moderate left carpal tunnel syndrome with no evidence of radiculopathy. (Ex. 5, p. 161) Dr. Shumaker opined "[u]nfortunately the patient at this point appears to have a non-physiologic pain syndrome without evidence of a complex regional pain syndrome." (Ex. 5, p. 161) Dr. Shumaker opined there are no further surgical options for Malual and he failed a functional capacity evaluation on validity criteria. (Ex. 5, p. 161) Dr. Shumaker opined Malual was at maximum medical improvement and released him to full-time work with a fifty pound lifting restriction. (Ex. 5, p. 161)

On May 2, 2016, Dr. Shumaker issued a note opining Malual had reached maximum medical improvement and assigning a twenty-five percent permanent impairment under the AMA Guides. (Ex. 5, p. 165) In his note, Dr. Shumaker did not opine Malual reached maximum medical improvement before April 12, 2016. In August 2016, Dr. Bansal received additional medical records and issued a supplement report. (Ex. 11, pp. 241-57) Dr. Bansal opined he agreed with Dr. Shumaker that Malual reached maximum medical improvement on April 12, 2016. (Ex. 11, p. 254) No contrary opinion was obtained from Dr. Shumaker. The evidence supports Malual reached maximum medical improvement on April 12, 2016.

IV. Medical Care

A. Medical Care and Bills

Malual seeks to recover the cost of emergency room and/or ambulance services for care he received at Crawford County Memorial Hospital on December 17, 2014, May 5, 2015, May 11, 2015, and June 9, 2015, and for care he received on August 27, 2015 at Alegent Health Community Memorial Hospital, and care he received from Drs. Luft, Zawaideh, Long, Dumba, and Archers, and Aschinger, LISW, and Krause-Reinert, LISW. Malual seeks to recover medical bills totaling $1,107.09 set forth in Exhibit 24.

Malual did not contact Farmland or Safety before seeking the care he received on December 17, 2014, May 5, 2015, May 11, 2015, June 9, 2015, and August 27,

2015. Malual avers he should be able to recover the cost of the care because Farmland and Safety abandoned his medical care when Dr. Shumaker, his treating neurosurgeon failed to personally see him from March 25, 2015, the date of his discharge from surgery, until February 6, 2016. Farmland and Safety dispute they abandoned Malual's medical care, and contend the care was unauthorized.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefore, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability").

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). Farmland and Safety accepted liability for Malual's C3-C4 disc herniation, and resulting discectomy and selected Dr. Shumaker as the treating neurosurgeon. While Malual may have been dissatisfied with the care he received, Malual has not established Farmland and Safety abandoned his care.

During his many trips to the emergency room Malual was instructed to follow up with his treating physicians. (Exs. 1, pp. 1-2; 3, pp. 42-43, 45, 51, 56) Throughout this period, Malual continued to receive treatment Drs. Woollen, Wampler and Shumaker. Malual contends Dr. Shumaker provided ineffective treatment and abandoned his care because he did not personally observe and treat him after surgery. The record shows that following surgery, Malual was in regular contact with CNOS, where Dr. Shumaker works, he regularly spoke with Dr. Shumaker's nurses, and he was examined by advanced registered nurse practitioners working in the practice with Dr. Shumaker. (Ex. 5) Malual had a scheduled appointment with CNOS on May 5, 2015, before noon. (Ex. 5, p. 113) Before his appointment that morning he sought emergency medical treatment.

Malual also seeks payment for additional unauthorized care with Drs. Luft, Zawaideh, Long, Dumba, and Archers, and Aschinger, LISW, and Krause-Reinert, LISW, after September 14, 2015. Malual has not established Farmland and Safety abandoned his care. Malual filed an application for alternate medical care on August 25, 2015, and on December 15, 2015. Both applications were dismissed prior to the

alternate care hearings. If Malual was dissatisfied with the care he was receiving he could have sought alternate care.

The Iowa Supreme Court has held an employer may be responsible for unauthorized care "upon proof by a preponderance of the evidence that such care was reasonable and beneficial," meaning "it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Gwinn, 779 N.W.2d at 206. Malual has not established the care he received from any of the unauthorized providers provided a more favorable medical outcome than would have been achieved by the care authorized by Farmland and Safety.

Malual is entitled to recover the cost of prescriptions he obtained from his treating physicians. Exhibit 24 documents Malual paid $46.99 for hydrocodone prescribed by Dr. Shumaker, and $238.98 for hydrocodone prescribed by Dr. Massey, both of whom were chosen by Farmland and Safety to treat Malual. Malual is awarded the $311.96 cost of the hydrocodone prescribed by Drs. Shumaker and Massey.

B. Medical Mileage

Malual seeks to recover medical mileage in the amount of $1,712.59, set forth in Exhibit 25. Farmland and Safety contend Malual is not entitled to medical mileage for unauthorized care.

Iowa Code section 85.27, expressly allows for the recovery of "reasonably necessary transportation services." Rule 876 Iowa Administrative Code 8.1(2) provides "transportation expense" includes "[a]ll mileage incident to the use of a private auto" at the rate allowed by the Internal Revenue Service for the business standard mileage rate in effect on July 1 of each year. Exhibit 25 includes requests for medical mileage for visits to the physical therapist, Dr. Wampler, Siouxland Surgery Center, and CNOS. Exhibit 25 also requests medical mileage for unauthorized treatment Malual received. Malual is entitled to recover medial mileage for the treatment he received from the authorized treating physicians. Malual is awarded $618.49 in medical mileage for his visits to the physical therapist, Dr. Wampler, Siouxland Surgery Center, and CNOS.

C. Ongoing Medical Care

Malual seeks ongoing medical care as recommended by Drs. Dumba, Archer, and Bansal, and ongoing mental health counseling with New Directions Mental Health Center. As discussed above, Malual has not met his burden of proof that he sustained a mental health sequela. I also found that Dr. Shumaker's opinion is more persuasive than Dr. Bansal's opinion. Farmland and Safety have not abandoned Malual's care. Farmland and Safety are responsible for any ongoing care for Malual's work injury.

V. Penalty

Malual seeks an award of penalty benefits for late temporary total disability and permanent partial disability payments he received from August 26, 2015 through

September 30, 2015, and June 16, 2016 through July 13, 2016, totaling $4,534.29. Farmland and Safety aver no penalty should be awarded because for the first period Malual was offered and refused suitable work and there was confusion of the nature of the benefits, and for the second period, benefits stopped due to a computer issue and were resumed when the issue was brought to the Farmland's attention, and even if a penalty is appropriate, Malual cannot cite to a prior penalty award against Farmland in the last eight years, so any penalty should be nominal.

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

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

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by

Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Farmland and Safety stopped paying Malual for the period of August 26, 2015 through September 30, 2016. Farmland and Safety did not convey the reason for the delay or denial of benefits to Malual in writing. When the issue was brought to the attention of Farmland's counsel on September 29, 2015, Farmland and Safety remedied the matter. With respect to the second period, June 16, 2016 through July 13, 2016, Farmland and Safety discontinued benefits due to a computer issue, and when the issue was brought to Farmland's attention, the benefits were paid. Malual presented no evidence of prior penalties issued against Farmland. Imposition of a penalty is warranted. A $500.00 penalty is issued against Farmland and Safety.

VI. Recovery of Second Independent Medical Examination

Malual seeks to recover the $1,946.00 cost of a second independent medical examination conducted by Dr. Bansal on July 14, 2016. Farmland and Safety allege Malual is only entitled to recover the cost of one independent medical examination under Iowa Code section 85.39. Malual contends he is entitled to recover the cost of a second independent medical examination because Dr. Shumaker issued two impairment ratings on October 2, 2015 and May 2, 2016.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon 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 choosing." Id.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

> [w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further,

> even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015).

The statute allows for payment of a "subsequent examination" when an "evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low." Iowa Code § 85.39. The statute discusses a single, subsequent evaluation; it does not expressly afford for the recovery of a second independent medical examination. Id. Malual is not entitled to recover the cost of a second evaluation.

Even if Malual could recover the cost of a second independent medical examination, Dr. Bansal's bill, which is attached to the hearing report, is not itemized and lists a charge of $1,946.00 for the examination and report. Under Young, Malual is not entitled to recover the $1,946.00 examination because the bill is not itemized. 867 N.W.2d at 846-47.

VII. Costs

Malual seeks to recover the $100.00 filing fee, $614.10 for the deposition transcripts of Mabor, Gatwech, and Wal, $50.00 for Aschinger's report, and $1,946.00 for Dr. Bansal's July 14, 2016 report. Farmland and Safety agree Malual is entitled to recover the $100.00 filing fee, $614.10 for the deposition transcripts, and $50.00 for Aschinger's report, but contend Malual is not entitled to recover the $1,946.00 cost of Dr. Bansal's report because the bill is not itemized. Rule 876 IAC 4.33(6), provides

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

The rule allows for the recovery of the filing fee, deposition costs, and report fee, totaling $764.10. As discussed above, Dr. Bansal's invoice, dated August 16, 2016, does not provide a separate itemization of the cost of the examination and the report. Under Young, Malual is not entitled to recover the cost of the examination and report. 867 N.W.2d at 846-47.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of four hundred ninety-five and 93/100 dollars ($495.93), commencing on April 12, 2016.

Defendant shall pay accrued benefits in a lump sum with interest on all received weekly benefits pursuant to Iowa Code section 85.30.

Defendants are entitled to a credit for benefits previously paid.

Defendants shall reimburse the claimant for all causally related medical bills totaling three hundred eleven and 96/100 dollars ($311.96), and medical mileage totaling six hundred eighteen and 49/100 dollars ($618.49).

Defendants shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee, six hundred fourteen and 10/100 dollars ($614.10) for the deposition transcripts, and fifty and 00/100 dollars ($50.00) for Aschinger's report.

Defendants shall pay the claimant five hundred and 00/100 dollars ($500.00) in penalty benefits.

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

Signed and filed this 13th day of April, 2017.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.