

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL GINDER,

Claimant,

vs.

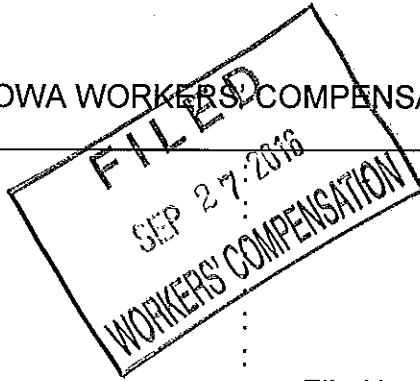
STUEVE CONSTRUCTION CO.,

Employer,

and

TRANSPORTATION INSURANCE  
COMPANY,

Insurance Carrier,  
Defendants.



File Nos. 5051846, 5051847, 5051848

ARBITRATION

DECISION

Head Note Nos.: 1100, 1403.30, 1804,  
2206, 2209

STATEMENT OF THE CASE

Claimant, Michael Ginder, filed three petitions in arbitration seeking workers' compensation benefits from Stueve Construction Company, employer, and Transportation Insurance Company, insurance carrier, both as defendants, as a result of alleged injuries sustained on May 14, 2013, July 2, 2013 and January 21, 2014. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on March 3, 2016, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 22, defendants' exhibits A through L, and the testimony of the claimant and Lewis Vierling. The parties submitted post-hearing briefs, the matter being fully submitted on March 21, 2016.

ISSUES

The parties submitted the following issues for determination:

In File No. 5051846 (Date of Injury: May 14, 2013)

1. Whether claimant sustained an injury on May 14, 2013 which arose out of and in the course of employment;
2. Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;

3. Whether the alleged injury is a cause of temporary disability;
4. Whether claimant is entitled to temporary disability benefits from February 2, 2015 through May 13, 2015;
5. Whether the alleged injury is a cause of permanent disability;
6. The extent of claimant's permanent disability, including whether limited to the scheduled member right arm or an industrial disability, and if an industrial disability, whether claimant is permanently and totally disabled;
7. The commencement date for permanent disability benefits;
8. Whether defendants are responsible for payment of claimed medical expenses;
9. Whether claimant is entitled to reimbursement for an independent medical evaluation under Iowa Code section 85.39;
10. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much; and
11. Specific taxation of costs.

In File No. 5051847 (Date of Injury: July 2, 2013)

1. Whether claimant sustained an injury on July 2, 2013 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability;
3. Whether claimant is entitled to temporary disability benefits from February 2, 2015 through May 13, 2015;
4. Whether the alleged injury is a cause of permanent disability;

5. The extent of claimant's permanent disability, including whether limited to the scheduled member right arm or an industrial disability, and if an industrial disability, whether claimant is permanently and totally disabled;
6. The commencement date for permanent disability benefits;
7. Whether defendants are responsible for payment of claimed medical expenses;
8. Whether claimant is entitled to reimbursement for an independent medical evaluation under Iowa Code section 85.39;
9. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much; and
10. Specific taxation of costs.

In File No. 5051848 (Date of Injury: January 21, 2014)

1. Whether claimant sustained an injury on January 21, 2014 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability;
3. Whether claimant is entitled to temporary disability benefits from February 2, 2015 through May 13, 2015;
4. Whether the alleged injury is a cause of permanent disability;
5. The extent of claimant's permanent disability, including whether limited to the scheduled member right arm or an industrial disability, and if an industrial disability, whether claimant is permanently and totally disabled;
6. The commencement date for permanent disability benefits;
7. Whether defendants are responsible for payment of claimed medical expenses;

8. Whether claimant is entitled to reimbursement for an independent medical evaluation under Iowa Code section 85.39;
9. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much; and
10. Specific taxation of costs.

### STIPULATIONS

In All Files:

The stipulations of the parties in the hearing report are incorporated by reference in this decision and are restated as follows:

1. The existence of an employer-employee relationship at the time of the alleged work injury.
2. Claimant sustained a cumulative injury resulting in an ulnar neuropathy condition.
3. Although claimant's entitlement to temporary disability benefits cannot be stipulated, claimant was off work during the claimed period.
4. At the time of the alleged injury, claimant's gross earnings were \$2,211.54 per week, claimant was married, and claimant was entitled to two exemptions.
5. With reference to the itemized list of disputed medical expenses: the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendants did not offer contrary evidence; and although causal connection of the expenses to the work injury could not be stipulated, the listed expenses are at least causally connected to the medical condition(s) upon which the claim of injury is based.

### FINDINGS OF FACT

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

Claimant's testimony was clear, direct, and consistent as compared to the evidentiary record and his deposition testimony. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 59 years of age at the time of hearing. He is married, with no children. Claimant was raised near Ottumwa, Iowa. He is right-hand dominant. Claimant graduated high school with a B-average in 1974. He thereafter attended the University of Northern Iowa from 1975 to 1978. While in college, claimant pursued general studies and courses in speech debate and teaching. Claimant did not earn a degree; he left the university after a cousin committed suicide. (Claimant's testimony; Exhibit 10, page 132) Claimant possesses limited computer skills. He is able to "hunt and peck" and utilized a computer to input timesheet information, as well as scan and email receipts. He denied any familiarity with the Microsoft suite of products. (Claimant's testimony)

In July 1978, claimant was hired as a laborer by defendant-employer. Defendant-employer builds large agricultural buildings and specializes in fertilizer storage. As a laborer, claimant was required to frequently lift 100 pounds, with an average daily lift of 80 pounds from floor to overhead. After 4 to 5 years of employment, claimant became a working foreman for defendant-employer. In this role, claimant ran a crew of 5 to 24 laborers, but continued to perform the same physical duties as other laborers. For a brief period, claimant worked as a supervisor, but ultimately returned to a foreman position after approximately 6 to 9 months. (Claimant's testimony; Ex. 10, p. 133; Ex. J, Depo Tr. pp. 13-17)

Since becoming a foreman, claimant has worked year-round for defendant-employer. During the course of his employment with defendant-employer, claimant earned certifications in concrete and operation of cranes, lifts, Bobcats, and forklifts. For 28 years, claimant and his wife lived in a camper and travelled to building locations in 45 states; for the most recent 10 years, claimant and his wife have resided in Algona, Iowa. Claimant worked an average of 60 to 65 hours per week and was paid based upon an annual salary of \$115,000.00 per year. (Claimant's testimony; Ex. 10, p. 133; Ex. J, Depo Tr. pp. 13-17) In the 5 years from 2010 through 2014, claimant's annual earnings ranged from \$93,000.00 to \$105,000.00. (Ex. 11, p. 134)

Claimant's relevant medical history includes evaluation of neck, bilateral shoulders, and left arm complaints. In February 2005, claimant presented to Kossuth Regional Health Center (Kossuth Regional) and was evaluated by Burt Bottjen, M.D. Claimant complained of intermittent paresthesias of his left side, from the arm to the toes. Dr. Bottjen noted no neurological deficit, as well as good strength and grip. An x-ray of cervical spine revealed marked disc degeneration and degenerative changes at C5-C7 levels. Dr. Bottjen read the x-ray as revealing evidence of nerve impingement about C4-C5. Dr. Bottjen assessed evidence of nerve impingement at C4-C5 and the possibility of a spinal cord injury. He recommended claimant rest and avoid strenuous physical activity. (Ex. A, pp. 1-2)

In 2007, claimant sought chiropractic care. In February 2007, claimant presented to Prairieland Chiropractic and indicated he injured his back the prior day while carrying a generator. Claimant described pain in the left lower lumbar region and disclosed experiencing low back pain on and off for years. He also reported development of

stress headaches, as well as pain of his neck and left shoulder. Claimant reported he had "bad" discs in his neck. The chiropractor opined claimant's examination findings supported a diagnosis of vertebral subluxation. (Ex. B, pp. 1-3) In November 2007, claimant sought care at Buffalo Center Chiropractic for complaints of sore shoulders and neck, on and off for 5 years. Claimant also reported occasional right hip discomfort, which had occurred on and off for 25 years. The chiropractor assessed cervical and thoracic segmental dysfunction, and thoracic facet joint swelling and myalgia. (Ex. C, pp. 2-3)

In February 2008, claimant returned to Dr. Bottjen for a complete physical examination. Claimant reported suffering some shortness of breath and chest discomfort, as well as occasional non-specific left arm and leg pain. (Ex. A, p. 2) Examination revealed some tenderness of the posterior neck; Dr. Bottjen noted prior x-rays showed cervical disc degeneration. Dr. Bottjen assessed degenerative arthritis and degenerative disc disease of the neck, with this being the likely source of claimant's arm pain. He ordered heart testing, with claimant to follow up with Dr. Beck for neck complaints thereafter. (Ex. A, p. 3)

Claimant returned to Dr. Bottjen for a physical examination in October 2011. At that time, Dr. Bottjen assessed chronic cigarette addiction and probable chronic obstructive pulmonary disease, as well as irritable bowel syndrome by history. Dr. Bottjen encouraged claimant to stop smoking. (Ex. A, pp. 4-5)

On April 8, 2013, claimant felt he pulled a muscle in his left leg while working. Claimant did not seek medical attention; however, he telephoned defendant-employer to report the occurrence to the safety officer. (Claimant's testimony) An accident report was created, which claimant subsequently signed. (Ex. G)

Claimant testified he labored under no permanent restrictions and did not utilize any prescription medication to treat pain or assist with sleep. (Claimant's testimony)

On May 14, 2013, claimant testified he was at work for defendant-employer carrying a bundle of shingles up a ladder. While he was climbing, the ladder slid, leading claimant to grab the edge of the roof and attempt to flip the bundle of shingles from his right shoulder onto the roof. When he did so, his head became trapped between the bundle and the roof. He immediately felt a sensation akin to a pulled muscle in his neck and right shoulder. Claimant continued working. Claimant testified his right arm also began to hurt and began to progressively worsen. (Claimant's testimony; Ex. J, Depo. Tr. pp. 22-23)

On June 4, 2013, claimant presented to Wood Chiropractic Clinic and was evaluated by Scott Wood, D.C. On a patient questionnaire, claimant reported a chief complaint of shoulder pain beginning one month prior. Claimant indicated he related his complaints to work, but had not notified his employer or filed a workers' compensation claim. (Ex. 1, p. 3) Dr. Wood noted claimant complained of neck pain at a level 6 on a 10-point scale, with the symptoms present since onset on April 17, 2013. Dr. Wood

described the symptoms as a "new incident," with claimant's neck being bothersome for some time, as well as right arm symptoms. He noted the symptoms had been ongoing for a few months, but claimant had been busy. Dr. Wood identified the issue as cervical subluxation. (Ex. 1, p. 1)

Claimant returned to Wood Chiropractic Clinic on July 1, 2013. Claimant reported continued symptoms of his right arm. Dr. Woods indicated claimant was uncertain as to the cause of his symptoms, but raised the possibility of being related to "shingle throwing." (Ex. 1, p. 4)

Defendant-employer referred claimant to Mark Davis, PAC at Kossuth Regional on July 2, 2013 in order to be cleared to operate a crane. Claimant informed Mr. Davis he had suffered from right-arm tingling for approximately six weeks. Mr. Davis noted claimant related an onset of symptoms "when he was hauling shingles up a ladder, throwing and pounding shingles." (Ex. 2, p. 5) Claimant denied significant pain, but complained of decreased grip strength in the right hand, as well as numbness and tingling. Mr. Davis noted claimant had a long history of neck pain. Claimant denied worsening of neck pain since the onset of right arm symptoms. Mr. Davis performed a physical examination and opined he was unable to clear claimant to operate a crane. He explained the significant weakness of claimant's right upper extremity and potential C7 or C8 radiculopathy required further evaluation for a cervical disc issue. (Ex. 2, pp. 5-6)

At the time of Mr. Davis' evaluation, claimant testified he was experiencing numbness and tingling of the bilateral arms, right greater than left. (Ex. J, Depo. Tr. p. 27) He testified he was also experiencing pain of the neck, shoulder and arm, as well as weakness of the right arm. He related each of these conditions to his work at defendant-employer. (Claimant's testimony)

Following Mr. Davis' evaluation, claimant testified he spoke with the president of defendant-employer, Dan Burns, and reported the May 14, 2013 work injury. Claimant testified he informed Mr. Burns that Mr. Davis would not recertify claimant to operate a crane until he had undergone further medical evaluation of the work injury. Claimant testified Mr. Burns advised him to follow through with the recommended testing and get his complaints addressed. Claimant further testified Mr. Burns indicated Molly Bartolo, from human resources, would take care of the situation. (Claimant's testimony; Ex. J, Depo. Tr. p. 50)

Claimant expressed uncertainty as to why no incident report was completed at that time. Claimant testified he had not informed defendant-employer of the May 14, 2013 injury sooner, as he believed the injury was not serious. In the past, claimant testified he had suffered with approximately six work-related injuries with defendant-employer. In each case, when he reported an injury, he was advised to seek medical treatment under his health insurance policy and if appropriate, defendant-employer would continue to pay his salary during the course of treatment. (Claimant's testimony)

On July 10, 2013, claimant returned to Mr. Davis. Mr. Davis noted claimant presented in follow up of significant neuropathy and weakness of the right upper extremity. He reiterated his prior examination findings of decreased grip strength and thenar wasting on the right, as well as his opinion claimant demonstrated a C7 or C8 radiculopathy. Claimant expressed belief his condition had worsened since he and his wife "dug" a foreign body out of his left forearm and inquired if any foreign body remained in his arm. Mr. Davis examined claimant and found no evidence of retained foreign body. Mr. Davis assessed right upper extremity neuropathy with thenar wasting and referred claimant to Sant Hayreh, M.D. for consultation. (Ex. 2, p. 7)

Claimant presented to Dr. Hayreh on July 23, 2013. Dr. Hayreh identified primary problems of weakness and numbness of the bilateral hands, right greater than left, for the preceding year or so. (Ex. 3, p. 19) Dr. Hayreh performed EMG/nerve conduction studies. He opined the studies revealed evidence of bilateral carpal tunnel syndrome and bilateral ulnar neuropathy at both the elbows and wrists. He also noted evidence of mild chronic denervation in the distal muscles. Dr. Hayreh opined the findings were compatible with multiple pressure neuropathy. (Ex. 3, p. 20)

Dr. Hayreh opined the exact etiology of claimant's symptoms was unclear. Given the multiple pressure neuropathy, Dr. Hayreh opined claimant likely had some underlying peripheral neuropathy, but also noted a need to rule out the possibility of underlying C7-C8 radiculopathy. Accordingly, he recommended and scheduled claimant for evaluation at the University of Iowa Hospitals & Clinics (UIHC). (Ex. 3, p. 21)

On July 30, 2013, claimant returned to Mr. Davis in follow up of his EMG testing. Mr. Davis opined the results potentially demonstrated an underlying polyneuropathy in the right upper extremity. However, he opined claimant's symptoms might also be cervical in nature. He assessed right upper extremity polyneuropathy and advised claimant to attend the appointment at UIHC arranged by Dr. Hayreh. Mr. Davis released claimant to continue working for so long as he was able to protect himself and others from any accidents which could be caused by right upper extremity weakness. (Ex. 2, p. 9)

Claimant testified during this period, he continued to suffer with progressively worsening right arm symptoms. Specifically, he complained of numbness and tingling, as well as loss of grip strength. He continued to work, but performed less strenuous duties. (Claimant's testimony) Claimant then returned to Mr. Davis in follow up on September 30, 2013. Mr. Davis noted claimant was scheduled for evaluation at UIHC on December 7, 2013, but indicated he desired to contact UIHC regarding the possibility of an earlier evaluation. (Ex. 2, p. 10)

On November 5, 2013, claimant presented for evaluation by Ludwig Gutmann, M.D., of the UIHC Neurology Department. Dr. Gutmann opined review of claimant's medical records showed an approximate one-year history of progressive weakness of the right hand, with neurogenic changes demonstrated on EMG. (Ex. 4,



p. 25) Dr. Gutmann assessed progressive muscle weakness with some fasciculations, primarily involving the bilateral hands, right more so than left. He ordered EMG and nerve conduction studies and a cervical MRI. (Ex. 4, p. 28)

Per Dr. Gutmann's orders, claimant underwent an MRI of the cervical spine and EMG/nerve conduction studies on November 14, 2013. (Ex. 4, pp. 30, 32-34) On December 5, 2013, claimant underwent an MRI of the right brachial plexus. (Ex. 4, pp. 29, 35)

Claimant returned to Dr. Gutmann on December 12, 2013. Dr. Gutmann reviewed the MRI and EMG results; he opined the cervical MRI revealed spinal stenosis and myelomalacia at C7-C8. Dr. Gutmann opined the likely etiology of claimant's complaints was a lower cervical myelopathy; however, a motor neuron disease remained a possibility. He opined claimant also appeared to have a right ulnar neuropathy. Dr. Gutmann referred claimant for evaluation by neurosurgeon, Chandan Reddy, M.D. (Ex. 4, p. 38)

At the referral of Dr. Gutmann, on December 23, 2013, claimant was evaluated by Dr. Reddy. Dr. Reddy noted claimant presented with a one-year history of progressive right hand weakness with wasting. Dr. Reddy opined claimant's cervical spine MRI revealed severe stenosis at C6-C7 with cord signal change. Following examination, Dr. Reddy assessed cervical spondylosis with myelopathy. He reviewed claimant's case with a colleague and reached a recommendation to proceed with a C6-C7 anterior cervical discectomy and fusion (ACDF). Dr. Reddy noted the goal of surgery would be to halt the progression of claimant's disease; any regaining of function would be a bonus. (Ex. 4, p. 39) Claimant consented to surgery, which was scheduled for January 21, 2014. (Ex. 4, p. 41)

Claimant continued to work for defendant-employer up through the week of January 19, 2014. He earned his typical weekly salary of \$2,211.54. (Ex. H; Ex. I, p. 1)

On January 21, 2014, claimant underwent C6-C7 ACDF, performed by Dr. Reddy. Dr. Reddy noted a diagnosis of cervical myelopathy. (Ex. 4, pp. 50-52, 59-60) Claimant was discharged from the hospital later that date with a prescription for oxycodone and under limitations to advance activity as tolerated, with no strenuous physical activities or lifting of over 10 pounds for 6 weeks, and no driving on narcotic medications. (Ex. 4, p. 53)

A First Report of Injury form was completed by defendant-employer, noting claimant alleged a cumulative neck injury with a date of injury of January 21, 2014. The form noted defendant-employer had knowledge of the injury on February 14, 2014. (Ex. F)

On March 10, 2014, claimant returned to Dr. Reddy in follow up of surgical ACDF. Claimant reported significant improvement in neck pain, but no improvement of hand strength. In fact, claimant reported a perhaps slight worsening of hand weakness.

Following examination, Dr. Reddy assessed lower trunk/medial cord distribution weakness. He diagnosed brachial plexopathy and indicated he would contact Dr. Gutmann to discuss the case. (Ex. 4, pp. 63, 64) Dr. Reddy released claimant to return to work without restrictions. (Ex. 4, p. 69)

Dr. Reddy subsequently authored a letter by which he opined:

[Claimant's] weakness in his right hand is likely due to cervical spondylosis which has been associated with heavy labor. I cannot further speculate on causation.

(Ex. 4, p. 70)

Claimant testified the ACDF did not reverse his symptoms; however, he believes it stopped the course of further progression. Claimant testified he was off work for a few weeks, but returned to work upon release by Dr. Reddy on March 10, 2014. He returned to a position working in the warehouse, which he described as less strenuous than the working foreman position, and he began occupational therapy. When he returned to work, claimant testified his symptoms remained at approximately the same level as they had been pre-surgery. (Claimant's testimony) During the period following surgery, defendant-employer continued to pay claimant his weekly salary of \$2,211.54 while he was off work. When claimant returned to work, he resumed earning \$2,211.54 per week. (Claimant's testimony; Ex. H; Ex. I, pp. 1-6)

On March 24, 2014, claimant returned to Dr. Gutmann and reported no change in right hand weakness. (Ex. 4, p. 66) Dr. Gutmann opined claimant demonstrated no progression, nor significant improvement, in hand weakness following surgery. He opined claimant's findings of right hand weakness and atrophy could be explained by the previous cervical lesion. Dr. Gutmann opined the evidence of motor neuron disease was equivocal. He advised claimant to return in follow up in six months. (Ex. 4, p. 68)

On June 9, 2014, claimant returned to Dr. Reddy for evaluation. Dr. Reddy opined claimant's examination findings had relatively stabilized since surgery. He assessed C6-C7 ACDF with cord signal changes and residual weakness, nonprogressive. Dr. Reddy noted both he and Dr. Gutmann related claimant's "residual disease" to cord signal change of the spinal cord. Dr. Reddy opined motor neuron disease remained a possible diagnosis, but was less likely. He recommended no further imaging for so long as the condition did not worsen. Dr. Reddy advised claimant to return for evaluation in one year. (Ex. 4, p. 72)

Claimant presented to Kossuth Regional on July 21, 2014 and was evaluated by Brent Owen, M.D. Claimant complained of right arm pain, as well as right hand numbness and weakness. Claimant indicated he had suffered from a prior injury and underwent a cervical ACDF for the arm pain and brachial plexus injuries. Dr. Owen assessed ulnar tunnel and bilateral carpal tunnel syndrome with hand numbness. He

recommended nighttime use of cock-up splints and continued observation. (Ex. 2, p. 11)

On August 26, 2014, claimant returned to Dr. Gutmann in follow up. On that date, claimant reported no progression of weakness. (Ex. 4, p. 75) Following evaluation, Dr. Gutmann opined he found no progression of neurological deficits and the existing deficits remained confined to the C7-C8 area. He expressed belief the neurological deficits were attributable to a cord lesion and found little support for a motor neuron disease. He advised claimant to follow up in six months. (Ex. 4, p. 77)

On September 22, 2014, defendants' third party administrator acknowledged receipt of claimant's workers' compensation claim, seeking payment for out-of-pocket medical expenses, as his conditions might be work related. The form notes a date of "event" of February 14, 2014, with claimant reporting the event on that date. (Ex. E)

Claimant returned to Mr. Davis on October 22, 2014 with complaints of increased right arm pain and weakness. Mr. Davis noted claimant suffered from "long-term polyneuropathies," with the right arm complaints being multifactorial in nature. (Ex. 2, p. 12) Mr. Davis assessed increased weakness and atrophy of the right upper extremity, long-term probable carpal tunnel syndrome with thenar wasting, and long-term ulnar neuritis. He opined claimant's condition had worsened dramatically over recent months and prescribed Norco. Mr. Davis requested an MRI of the cervical spine. (Ex. 2, p. 13)

Claimant underwent a cervical spine MRI on October 25, 2014. (Ex. 2, pp. 14-15) Following review of the MRI, on October 27, 2014, Mr. Davis scheduled claimant to be evaluated by David Beck, M.D. (Ex. 2, p. 16)

Claimant eventually returned to foreman work, tasked with building an expansion to a fertilizer plant. However, in October 2014, Mr. Burns advised claimant to take time off, get his right hand fixed, and defendant-employer would pay the medical bills. Claimant ceased working at this time. (Claimant's testimony; Ex. 10, p. 133; Ex. J, Depo. Tr. pp. 21-22) Thereafter, defendant-employer continued to pay claimant his weekly salary of \$2,211.54. (Ex. H; Ex. I, pp. 6-11)

At the referral of Mr. Davis, on November 5, 2014, claimant presented to Dr. Beck for evaluation. Dr. Beck noted that in June 2013, while undergoing a work physical, claimant noticed numbness down his right hand and wasting of the right hand. At the time of evaluation, claimant complained of right arm weakness and poor grip. He noted no improvement in right arm symptoms following ACDF; in fact, claimant believed his hands had further atrophied. Claimant rated the severity of his symptoms as a level 8 on a 10-point scale. (Ex. 5, pp. 84, 86, 88)

Dr. Beck reviewed claimant's MRI and x-rays; he opined they revealed a herniated disc at C7-T1 which was affecting the right uncinatate root. He also reviewed claimant's EMG, which he opined revealed ulnar nerve palsy with no conduction across

the bilateral elbows. On examination, Dr. Beck noted wasting of the bilateral intrinsic muscles, right greater than left, as well as a very weak right grip. (Ex. 5, p. 85) Dr. Beck assessed clinical demonstration of an uncinat radiculopathy and an ulnar neuropathy affecting claimant's right hand. Dr. Beck noted claimant complained his symptoms were progressively worsening. Dr. Beck recommended a C7-T1 discectomy on the right and a right ulnar nerve decompression. (Ex. 5, p. 85)

On November 13, 2014, claimant underwent surgery performed by Dr. Beck. In his operative note, Dr. Beck noted claimant had suffered from severe pain of the right arm and wasting of the right hand. He opined an MRI revealed a large herniation at right C7-T1 and EMG showed a total block in conduction across the ulnar nerve at the elbow. Dr. Beck performed two procedures, a C7-T1 laminectomy and discectomy on the right and a right ulnar nerve decompression at the elbow. Dr. Beck noted surgical findings of a right C7-T1 herniated disc and ulnar nerve entrapment at the elbow; he noted postoperative diagnoses of a C7-T1 herniated disc on the right and right ulnar nerve palsy. (Ex. 5, p. 89) Claimant was discharged from the hospital the following day with prescriptions for Percocet and Valium, as well as a light activity restriction. (Ex. 5, p. 93)

Following surgery, claimant followed up with Dr. Beck. On November 24, 2014, Dr. Beck noted claimant experienced slight improvement in his hand, but continued to demonstrate a very weak grip. (Ex. 5, p. 92)

On December 30, 2014, claimant returned to Mr. Davis with reports of continued weakness. Claimant requested pain medications and a release to return to work. Claimant informed Mr. Davis his claims had been denied by the workers' compensation insurance carrier and he had sought legal advice. Mr. Davis opined claimant's upper extremity and neck symptoms were multifactorial in nature; he further opined claimant's weakness was related to a long-term work related condition. He recommended physical therapy evaluation and treatment of claimant's arms; however, he cautioned the thenar wasting was already permanent. Mr. Davis indicated he was uncomfortable providing claimant a work release, as the release should come from Dr. Beck. He did refill a prescription for Norco. (Ex. 2, pp. 17-18)

While off work, defendant-employer continued to pay claimant's salary. (Claimant's testimony) However, on January 9, 2015, defendant-employer placed claimant on lay off. A letter from defendant-employer's human resources representative, Molly Bartolo, dated January 12, 2015 confirmed a prior discussion that claimant had been placed on temporary layoff as of January 9, 2015 for medical reasons. (Ex. 12, p. 135) By a separate letter of the same date, Ms. Bartolo requested claimant's physician answer questions regarding claimant's ability to perform his construction foreman position. (Ex. 12, pp. 136-137) A job description for the foreman position was attached, which outlined the duties of a foreman for defendant-employer. The listed duties included performance of extensive physical labor for concrete and heavy timber framing; lifting, pushing, pulling and carrying of 50 pounds; operation of

hand and power tools and motorized equipment; and loading and unloading of trucks. (Ex. 12, p. 138)

Following his lay off, claimant received payment for his accrued paid-time-off, which was paid through January 29, 2015. (Ex. 10, p. 133; Ex. 15, p. 141; Ex. H; Ex. I, pp. 11-12) Claimant subsequently filed for unemployment benefits; his claim was uncontested by defendant-employer. (Claimant's testimony)

On January 21, 2015, claimant returned to Dr. Beck in follow up. Dr. Beck noted improvement in claimant's grip, but continued weakness. Claimant inquired about returning to work. Dr. Beck expressed belief claimant could work on an as tolerated basis. Dr. Beck expressed difficulty assigning a specific pound-limit to the amount of weight claimant was capable of lifting, as the deficit was primarily due to claimant's weak grip. Therefore, Dr. Beck indicated he left that limitation to claimant's discretion. He issued a release allowing claimant to return to as many hours as tolerated and to lift as tolerated. (Ex. 5, pp. 97-98)

Dr. Beck subsequently provided answers to questions presumably posed by claimant's counsel. By the letter, Dr. Beck confirmed claimant's diagnosis of a C7-T1 herniated disc with right hand and arm issues, requiring a laminectomy and discectomy, as well as a right ulnar nerve decompression at the elbow. Following evaluation and records review, Dr. Beck agreed claimant's medical conditions were caused and/or materially and substantially aggravated by his work injuries at defendant-employer. Dr. Beck declined to issue an opinion on the extent of claimant's permanent impairment, but indicated claimant should be limited by permanent restrictions as set forth in a valid functional capacity evaluation (FCE). (Ex. 5, p. 99)

On February 5, 2015, defendant-insurance carrier's workers' compensation policy expired; another insurance provider promptly began coverage. (Ex. K, pp. 1-5)

On February 17, 2015, claimant returned to Dr. Gutmann. Claimant reported no progression, but continued weakness of his hands. He also reported a constant, slight numbness in the right fifth digit and muscular pain with physical exertion. (Ex. 4, p. 78) Dr. Gutmann expressed belief claimant's complaints originated from the cervical spine. He opined he found little clinical evidence of motor neuron disease, despite EMG findings of chronic and widespread neurogenic changes. He advised claimant to return to clinic in six months. (Ex. 4, p. 80)

Claimant testified the surgeries performed by Dr. Beck did not cure his existing symptoms; however, the progression of his problems seemed to stop. (Claimant's testimony) Claimant testified he spoke with Ms. Bartolo regarding returning to work. Ms. Bartolo indicated an FCE would be arranged by defendant-employer to determine claimant's functional abilities. (Ex. J, Depo. Tr. pp. 10-12)

On March 5, 2015, claimant participated in the FCE arranged by defendant-employer. The provider opined claimant demonstrated valid and consistent effort and

results. The provider opined claimant was recommended for jobs with physical requirements up to and including the medium physical demand level. (Ex. 6, p. 100) Claimant was found capable of carrying or lifting from floor to overhead of 50 pounds occasionally, 30 pounds frequently, and 15 pounds continually. He was found capable of pushing and pulling at waist height of 50 pounds occasionally, 30 pounds frequently, and 10 pounds continuously. Nonmaterial handling abilities were noted as an occasional bend/stoop, squat, or bend/twist; frequent walk, ladder climb, and reach above shoulder level; and continual crawl, climb steps, and kneel. (Ex. 6, p. 101) Testing of claimant's hands revealed an average right grip strength of 26 pounds, with a noted "normal" range of 74 to 128 pounds. Right lateral key pinch grip was found to average 2 pounds, with a normal range being 20 to 28 pounds. Two-point pinch was found to average 2.2 pounds on the right, with a normal range being 13 to 20 pounds. (Ex. 6, p. 102)

Upon receipt of the FCE report, claimant testified he telephoned Ms. Bartolo and emailed Mr. Burns and stated he had undergone the FCE and was ready to return to work. Defendant-employer never offered claimant employment. (Claimant's testimony; Ex. J, Depo. p. 12) In May 2015, claimant began looking for alternative employment. His search focused primarily upon construction work, as this was the field in which claimant had experience. (Claimant's testimony)

At the arranging of claimant's attorney, on June 18, 2015, claimant presented to board-certified occupational and environmental medicine physician, John Kuhnlein, D.O., for an independent medical evaluation (IME). Dr. Kuhnlein issued a report of his findings and opinions dated July 20, 2015. At the time of evaluation, claimant complained of pain and stiffness of his neck, constant numbness and tingling in the ulnar right hand, numbness and tingling of the ulnar forearm with use, weakness with gripping or grasping, and pain with range of motion of his neck. Dr. Kuhnlein noted claimant utilized hydrocodone once per day a total of three to four times per week, as well as occasional Advil or Aleve. Claimant also reported performing exercises and utilizing an analgesic cream, heat, and ice, as needed. (Ex. 7, p. 109)

Claimant reported on May 14, 2013 he was carrying a bundle of shingles on his right shoulder while climbing a ladder. When the ladder began to slide, claimant indicated he attempted to throw the bundle of shingles onto the roof, but his head became trapped between the bundle and the roof. Claimant reported immediately feeling a "pulled muscle" sensation on the right side of his neck. (Ex. 7, p. 104) He did not immediately recall seeking chiropractic care following the injury. Thereafter, on July 2, 2013, claimant presented for a work physical. Dr. Kuhnlein indicated the provider noted claimant complained of significant right upper extremity complaints for approximately six weeks and recounted "the same mechanism of injury described to me." (Ex. 7, p. 105)

Claimant reported he had suffered from intermittent neck symptoms over time, but denied suffering from neck pain at the time of the May 14, 2013 work injury. He further reported working without restrictions at the time of the injury. Dr. Kuhnlein

reviewed claimant's pre-injury medical records. Dr. Kuhnlein summarized claimant's medical treatment and reviewed the records with claimant. (Ex. 7, pp. 104-108) He noted an FCE placed claimant in the medium physical demand category. (Ex. 7, p. 109) Claimant described his job duties at defendant employer from 1978 to 2014. (Ex. 7, pp. 103-104) Dr. Kuhnlein performed a physical examination. (Ex. 7, pp. 110-111)

Dr. Kuhnlein also noted claimant was involved in a motor vehicle accident on April 26, 2015, following which claimant sought evaluation with Mr. Davis. Claimant reported Mr. Davis indicated the accident caused no new damage to his neck. Claimant similarly described the accident as minor and indicated he suffered no change in his symptoms following the accident. (Ex. 7, p. 110)

Following records review, interview, and examination, Dr. Kuhnlein issued the following diagnoses: cervical myelopathy with a C6-C7 ACDF and ongoing C7-C8 myelopathy; C7-T1 disc herniation and radiculopathy with C7-T1 laminectomy and discectomy; right cubital tunnel syndrome with cubital tunnel release; and EMG/nerve conduction study evidence of polyneuropathy unrelated to motoneuron disease and, more likely than not, related to his cervical spine disease. (Ex. 7, p. 112)

With respect to causation, Dr. Kuhnlein noted claimant worked construction for defendant-employer for 37 years, involving heavy to very heavy labor. He indicated claimant suffered with a sudden incident on May 14, 2013, resulting in the immediate onset of right-sided neck and right upper extremity symptoms. Given claimant's work history, the bilateral nature of claimant's symptoms and "the length of time that it would have taken for the current findings to develop," Dr. Kuhnlein opined claimant's work activities were a substantial factor in claimant's cumulative development of significant cervical spine disease, including myelopathy. While acknowledging claimant's work duties were not the only factor in development of his condition, Dr. Kuhnlein specifically opined the duties were a substantial factor. Dr. Kuhnlein further opined the May 14, 2013 work injury lit up and clinically aggravated this preexisting disease and rendered the myelopathic findings clinically apparent, resulting in a C6-C7 ACDF. (Ex. 7, p. 11)

Dr. Kuhnlein further opined the subsequent C7-T1 herniation with radiation represented an "adjacent segment issue" and was related to claimant's work at defendant-employer as a sequela to the ACDF. Dr. Kuhnlein explained adjacent segment disease can be seen at the levels above or below fusions, as the fused segment becomes stronger and the segments above and below are relatively weaker. In claimant's case, Dr. Kuhnlein opined claimant already suffered from significant cervical and thoracic disease and when the ACDF produced a strengthened segment, the relative weakness of the lower level resulted in a herniation at C7-T1. Therefore, Dr. Kuhnlein opined the C7-T1 disc herniation and radiculopathy were related to claimant's work for defendant-employer and the original injury as a sequela injury. (Ex. 7, p. 112)

Dr. Kuhnlein opined claimant's cubital tunnel syndrome also developed on a cumulative basis, culminating in the surgical release on November 13, 2014. He opined

claimant's cubital tunnel syndrome represented both a peripheral entrapment and pathology resulting from central cervical spine disease. Dr. Kuhnlein therefore viewed claimant's polyneuropathy as a combination of local entrapment and central cervical myelopathy. Dr. Kuhnlein opined claimant's symptoms did not change following surgery because the nerve had already suffered significant damage, as he found was evidenced by muscle wasting and a lack of conduction viewed on EMG/nerve conduction studies. (Ex. 7, pp. 112-113)

Dr. Kuhnlein opined claimant achieved MMI as of May 13, 2014, as claimant described no change in his symptoms, and neurologic and motor deficits had remained stable. With respect to further care, Dr. Kuhnlein recommended claimant continue to follow up with Dr. Gutmann as scheduled. He advised claimant would need to modify his activities relative to any changes caused by the disease. Dr. Kuhnlein recommended claimant wean from narcotic medications, if possible, and therefore raised the possibility of pain management evaluation. He also advised claimant to cease smoking and reduce his alcohol intake. (Ex. 7, p. 113)

Dr. Kuhnlein opined claimant sustained permanent impairment as measured by the AMA Guides to the Evaluation of Permanent Impairment. Dr. Kuhnlein opined claimant's motor and neurologic deficits were primarily central in nature and therefore, the most appropriate methodology would be to rate claimant's cervical spine condition. He opined the cervical and upper extremity problems could be adequately rated in this manner, as the cervical spine was the source of many of claimant's peripheral findings. He opined claimant demonstrated significant cervical spine disease with myelomalacia and significant peripheral pathology caused by the central pathology. Therefore, as a result of the fusion and severe multilevel neurogenic dysfunction, Dr. Kuhnlein found claimant fell within DRE Cervical Category V, warranting a permanent impairment rating of 38 percent whole person. Dr. Kuhnlein added an additional 1 percent whole person impairment as a result of the ulnar nerve entrapment at the right elbow. In total, Dr. Kuhnlein opined claimant sustained a combined 39 percent whole person impairment as a result of his work related conditions. (Ex. 7, pp. 113-114)

Dr. Kuhnlein rejected the FCE placement of claimant in the medium physical demand category. Dr. Kuhnlein explained he did not believe claimant could safely work at that level on a sustained basis. He expressed belief claimant might present a hazard to himself or others while attempting to control the weights allowed under the FCE. Dr. Kuhnlein opined it was "imperative" claimant work with lighter amounts of weight than those outlined in the FCE as a matter of safety for himself and any coworkers. Accordingly, Dr. Kuhnlein recommended permanent restrictions of: lifting 20 pounds occasionally from floor to waist or over shoulder level; lifting 40 pounds occasionally waist to shoulder with the weight located near his body; lifting 20 pounds occasionally if lifting at a distance more than an elbow's length from his body; sitting, standing, and walking as needed, with the ability to change positions for comfort; avoidance of working at or above shoulder height, but the ability to occasionally work at this level; occasionally stoop, squat, bend, crawl, or kneel; no working above ground level due to an inability to maintain a 3-point safety stance; occasional use of vibratory or power



tools below shoulder height, and no use of such tools above shoulder height for safety reasons. (Ex. 7, p. 114)

In September 2015, claimant testified he sought assistance from the Iowa Division of Vocational Rehabilitation. (Claimant's testimony) Claimant participated in an intake interview on September 4, 2015. A status update call on September 17, 2015 alerted claimant he had been placed on a waiting list for services. (Ex. 18, pp. 181-182)

At the referral of claimant's attorney, on December 7, 2015, claimant was evaluated by vocational expert Lewis Vierling. Mr. Vierling issued a report of his findings and opinions dated January 18, 2016. As elements of his vocational evaluation, Mr. Vierling performed an interview, medical records review, and job description review. (Ex. 15, pp. 148, 150-152) Mr. Vierling reviewed claimant's IME, FCE, physician-imposed restrictions, and ongoing symptoms; he thereafter opined claimant was capable of functioning in the light physical demand category. (Ex. 15, pp. 165, 169)

Mr. Vierling created pre- and post-injury occupational profiles of claimant. Claimant's pre-injury occupational profile allowed for work up to and including heavy labor. The pre-injury profile included 52 specific occupational categories, representing 255 to 260 similar occupations that matched all search factors. (Ex. 15, pp. 145, 162-163, 169) The post-injury profile included only 2 remaining specific occupational categories from the pre-injury occupational profile which matched all the search factors. These categories represented 5 to 10 similar occupations. However, Mr. Vierling noted claimant lacked experience in either of these two categories and opined he did not believe claimant was placeable in the types of occupations represented. (Ex. 15, pp. 145, 167)

Following this evaluation, Mr. Vierling opined claimant has been disqualified from and had lost access to 96 percent of the specific occupational categories he was qualified for and which were a part of his pre-injury occupational profile. (Ex. 14, pp. 145-146, 170) Based on this finding, Mr. Vierling opined claimant presented with a severely diminished work capacity as a result of the work injuries sustained on May 14, 2013. After considering employability and placeability issues, Mr. Vierling opined claimant had sustained a total loss of earning capacity. (Ex. 15, pp. 145-147, 171, 176)

On January 20, 2016, at the referral of defendants, claimant presented for an IME with neurosurgeon, David Boarini, M.D. Dr. Boarini issued his findings and opinions via a two-page report dated February 2, 2016. At the time of evaluation, claimant complained of arm pain, primarily right-sided, and weakness of the right arm and hand. Claimant reported his main difficulty was weakness of the right hand. Claimant dated his complaints to an event in May 2013 when he threw shingles onto a roof and the shingles slid and struck his head. (Ex. D, p. 1)

Dr. Boarini noted claimant had undergone a spinal fusion, cervical laminectomy and foraminotomy, and ulnar transposition. He also noted claimant remained on a

medication regimen and was not working. Dr. Boarini reviewed claimant's radiographic scans and EMGs; he expressed agreement with the corresponding written radiology reports. On examination, Dr. Boarini noted definite atrophy of the right intrinsic muscles, ulnar hypesthesia of the right hand, symmetric reflexes, and good range of motion of the neck and shoulders. (Ex. D, p. 1)

Dr. Boarini ultimately assessed chronic spinal cord compression, cervical radicular symptoms, and ulnar neuropathy. On the question of causation of claimant's conditions, Dr. Boarini opined claimant demonstrated a many-year history of neck symptoms and degenerative disease predating the May 2013 injury. He described the alleged work injury in May 2013 as quite minor, while the radiographic changes were chronic and degenerative in nature. (Ex. D, p. 1) Dr. Boarini opined the demonstrated changes were age-related and aggravated by smoking. He opined these changes had "little or nothing to do with work" and further, that there was "no scientific evidence" that the type of labor performed by claimant "caused" cervical spondylosis. (Ex. D, pp. 1-2)

With respect to the ulnar neuropathy, Dr. Boarini opined it reflected a chronic nerve condition that can be caused by activity. He therefore opined the ulnar neuropathy should be considered work related. However, he indicated the shingle incident was not of any significance regarding claimant's condition or need for surgery. He also found no evidence claimant sustained a contributing injury event in July 2013. Dr. Boarini opined claimant developed weakness and sought medical attention, thus showing claimant was aware of his medical problem. However, Dr. Boarini opined claimant "could not have reasonably been expected to understand" whether his conditions were related. (Ex. D, p. 2)

Dr. Boarini opined claimant sustained permanent impairment as a result of his conditions. Based upon the right arm weakness and having undergone a cervical fusion, Dr. Boarini estimated a total permanent impairment of 20 percent whole person. He attributed 75 percent of this impairment to spinal cord compression, which he opined was degenerative in nature and not "directly" related to work. Dr. Boarini therefore attributed 5 percent of the 20 percent rating to the work related ulnar neuropathy. While acknowledging claimant suffered from a permanent condition, Dr. Boarini opined a majority of the conditions were "not related specifically to work." (Ex. D, p. 2)

Dr. Boarini opined claimant's primary limitations were brought about by right hand weakness. He opined claimant was capable of working and adopted the FCE results as a guideline in claimant's employment. He opined placement of claimant in the medium physical demand category was reasonable. Dr. Boarini offered no specific treatment recommendations for further medical care. (Ex. D, p. 2)

On February 29, 2016, defendants issued claimant a check for 50 weeks of permanent partial disability benefits, a total sum of \$63,693.00. (Ex. L) As of the date of evidentiary hearing on March 3, 2016, claimant had not yet received this check.

Claimant's counsel provided Dr. Boarini's IME report to Dr. Kuhnlein for review. By a letter dated March 1, 2016, Dr. Kuhnlein briefly summarized Dr. Boarini's opinions and identified disagreement with Dr. Boarini on some topics. Dr. Kuhnlein reiterated his opinion that claimant's work duties in heavy to very heavy labor were a substantial factor in the cumulative development of his cervical spine disease. Dr. Kuhnlein indicated medical literature existed which supported the conclusion that work in heavy to very heavy labor might contribute to development of such conditions. He opined the work injury of May 14, 2013 lit up and clinically aggravated the preexisting disease, making the myopathic findings apparent and leading to the ACDF. Dr. Kuhnlein agreed with Dr. Boarini that claimant's ulnar nerve condition was work related. Dr. Kuhnlein also opined Dr. Boarini "vaguely" addressed the extent of claimant's permanent impairment and appeared to "guess" without reference to the AMA Guides. (Ex. 7, p. 121)

Dr. Kuhnlein also addressed a typographical error in his report regarding the date claimant achieved MMI. He noted claimant underwent surgery on November 13, 2014, thus rendering the proper MMI date May 13, 2015, as opposed to the May 13, 2014 date noted in his report. (Ex. 7, pp. 121-122)

At the time of evidentiary hearing, claimant testified he continues to suffer with symptomatology and limitations of his right arm and neck. Claimant testified he suffers pain in his neck if he looks upward. With respect to the right arm, claimant described continual numbness from the fingers up through his hand, which worsens with exertion; decreased strength; and pain with overhead activity or overexertion. Claimant testified he is unable to carry a can of gas weighing 40 pounds in his right hand; he explained he is unable to retain his grip. (Claimant's testimony)

Claimant continues to perform the home exercise program created in physical therapy. He also walks rapidly on a treadmill three to four times per week and performs abdominal crunches. He remains on prescription medications for pain and to assist with sleep. Claimant also described some limitation in his activities of daily living. For example, on occasion, his wife buttons his shirt; he also has difficulty using scissors and attempting to grasp and turn lids. To compensate, claimant attempts to utilize his left arm and hand more in daily activities; he has also changed the manner in which he holds a pen or turns car keys due to lack of grip. His sleep is interrupted by pain and stress related to his workers' compensation claim and the potential financial ramifications. (Claimant's testimony)

Claimant remained unemployed at the time of evidentiary hearing; however, he continues to search for employment. Claimant engaged in a notable job search and has been interviewed by three or four potential employers. He has not been offered employment. Claimant testified he informed each prospective employer of his physical limitations. The month prior to hearing, claimant interviewed for a position at Ag Property Solutions; he had not heard back from this potential employer at the time of evidentiary hearing. (Claimant's testimony; Ex. 22)

Claimant testified his State of Iowa vocational counselor, Trish, believes the best employment position for claimant would be as a dispatcher. Claimant asked a friend to search online for such positions, but was unable to locate a position in his area. Claimant testified Trish is also assisting him in improving his computer skills, and the two have arranged a meeting regarding potentially taking courses at a community college. (Claimant's testimony)

In addition to providing a written vocational evaluation, Mr. Vierling testified at evidentiary hearing. Mr. Vierling has 30 years of experience as a vocational rehabilitation counselor and consultant. At hearing, he reiterated the opinions contained in his report. Specifically, Mr. Vierling found claimant lost access to 96 percent of jobs in his pre-injury profile. Mr. Vierling testified he researched the labor market surrounding Algona, Iowa, and after doing so, he believes claimant is not employable and placeable at this time. He further opined claimant's prospects for reemployment were not positive and claimant was not likely employable into the future. (Mr. Vierling's testimony)

Mr. Vierling's testimony was professional, clear, and consistent with the evidentiary record. His demeanor gave the undersigned no reason to doubt his veracity. Mr. Vierling is found credible.

#### CONCLUSIONS OF LAW

In File No. 5051846 (Date of Injury: May 14, 2013)

The first issue for determination is whether claimant sustained an injury on May 14, 2013 which arose out of and in the course of employment.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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

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

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include

missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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

Claimant alleges he sustained a traumatic injury while attempting to lift a bundle of shingles onto a roof. Claimant offered credible and entirely consistent testimony on the occurrence of the alleged injury at hearing and deposition.

When claimant presented for chiropractic care the following month, he related his symptomatology to work and described an onset a month prior. The chiropractor noted claimant had suffered with ongoing symptoms of his neck and arm for some time, but suffered a "new incident." When claimant returned to the chiropractor the next month, claimant expressed doubt regarding the cause of his symptoms, but raised the possibility of the symptoms being related to shingle throwing. When defendant-employer referred claimant for a physical examination in July 2, 2013, claimant relayed suffering with right arm symptoms for approximately six weeks and tied the onset of these symptoms to "hauling shingles up a ladder, throwing and pounding shingles."

Claimant's statements regarding the occurrence of a work injury on May 14, 2013 are consistent and support a determination claimant suffered a traumatic injury on that date. Furthermore, claimant's statements acknowledge a history of symptoms predating the work injury, but which had not been symptomatic to a degree which interfered with his ability to work or required extensive medical treatment. Following the alleged May 14, 2013 work injury, claimant sought chiropractic care on two occasions prior to failing to pass a physical ordered by defendant-employer.

From this point onward, claimant began a course of extensive medical care. This medical treatment encompassed both neck and right upper extremity complaints, generally in an intertwined fashion. Treating physicians Drs. Reddy and Gutmann each related claimant's right arm symptoms to a cervical condition. When claimant's right arm symptoms continued to worsen following ACDF, claimant was referred to Dr. Beck. Dr. Beck assessed a new herniation at C7-T1 and right ulnar nerve palsy; he surgically treated both conditions. Mr. Davis opined claimant's upper extremity and neck

symptoms were multifactorial in nature and opined claimant's weakness was attributable to a long-standing work-related condition. Dr. Beck opined claimant's neck and right upper extremity conditions were caused and/or materially and substantially aggravated by claimant's work injuries at defendant-employer.

Evaluating physicians Dr. Kuhnlein and Dr. Boarini also viewed claimant's right upper extremity and neck conditions in an intertwined fashion. Each physician noted a history of longstanding cervical problems and a consistent report of an alleged traumatic injury on May 14, 2013. Drs. Kuhnlein and Boarini each opined claimant suffered from both cervical and ulnar nerve conditions, and each related the right arm symptoms at least in part to the cervical spine. In fact, both physicians rated the extent of claimant's permanent impairment on the basis of the cervical spine with some peripheral neuropathy.

Dr. Kuhnlein opined claimant's work duties were a substantial factor in claimant's cumulative development of cervical spine disease. He further opined the May 14, 2013 injury lit up and clinically aggravated this preexisting disease and rendered the myelopathic findings clinically apparent. Dr. Kuhnlein opined claimant's cubital tunnel syndrome also developed on a cumulative basis and represented a combination of a peripheral entrapment and results of the cervical spine disease.

Dr. Boarini opined claimant's cervical disease preexisted the alleged work injury of May 14, 2013, which he described as minor. He opined these changes had little or no relationship to work and that no scientific evidence supported a finding that the type of labor performed by claimant "caused" cervical spondylosis. However, Dr. Boarini opined claimant's ulnar neuropathy should be considered work related as a cumulative process; he opined the alleged May 14, 2013 injury was not of any significance in the ulnar neuropathy condition.

Following review of the entirety of the evidentiary record and after giving significant consideration to the medical opinions in evidence, it is determined claimant sustained a traumatic injury arising out of and in the course of his employment with defendant-employer on May 14, 2013. This traumatic injury appeared to be relatively minor at the time; however, it proved to be the onset of notable symptoms of claimant's right arm and neck. These symptoms ultimately required significant medical treatment.

Claimant undoubtedly suffered from preexisting conditions prior to May 14, 2013, particularly a degenerative condition of the cervical spine. Dr. Kuhnlein opined claimant's work duties for defendant-employer were a substantial contributing factor in claimant's development of cervical spine disease; he further opined the work injury of May 13, 2014 lit up the cervical condition, making the condition symptomatic and leading to multiple surgeries. Dr. Boarini opined claimant's neck condition was degenerative in nature and there was no scientific evidence the type of labor performed by claimant "caused" cervical spondylosis.

I find the opinions of Dr. Kuhnlein entitled to the greatest weight. Dr. Kuhnlein authored a detailed, exhaustive, and well-explained report containing his records review, interview and examination findings, and ultimate opinions. Dr. Boarini's report consisted of two pages which did not identify the depth of his knowledge regarding claimant's work duties or medical history and did not explain his findings and ultimate opinions in any depth. Dr. Kuhnlein utilized the correct standard in his discussion of causation, namely that claimant's work duties were a substantial factor in his development of cervical spine disease. Dr. Kuhnlein's opinion that the work injury of May 14, 2013 lit up and clinically aggravated claimant's cervical spine condition is consistent with the medical records in evidence and claimant's testimony, namely that claimant's conditions did not cause a need for medical treatment or impact claimant's ability to work immediately prior to May 14, 2013.

All of the medical opinions in evidence relate claimant's ulnar nerve condition to his work duties at defendant-employer on a cumulative basis. Review of the medical records reveals that while claimant may have suffered with some symptomatology prior to May 14, 2013, these symptoms did not impact claimant's ability to work or require ongoing medical treatment. Contemporaneous with the May 14, 2013 work injury, claimant began to suffer with noticeable symptoms in his right upper extremity and by July 2, 2013, claimant's right upper extremity condition caused claimant to fail a work physical. The right upper extremity symptoms are multifactorial in nature, with medical providers all agreeing some portion of the symptoms is attributable to a cervical condition in addition to the ulnar neuropathy itself. The cervical and upper extremity symptoms were treated in conjunction with one another. Accordingly, I find no valid reason to artificially attempt to separate the ulnar neuropathy condition from the cervical spine disease.

I therefore find that claimant suffered cumulative injuries in the form of cervical spine disease and ulnar neuropathy as a result of his work duties with defendant-employer. I further determine claimant sustained a work related injury on May 14, 2013 which materially aggravated, worsened and lighted up these conditions, resulting in extensive medical care including an ACDF, subsequent C7-T1 laminectomy and discectomy due to adjacent segment weakness, and ulnar nerve release.

The next issue for determination is whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it



may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Defendants argue claimant's claim arising from the May 14, 2013 injury is barred for failure to give timely notice pursuant to Iowa Code section 85.23. Claimant credibly testified he did not immediately report the May 14, 2013 injury, as he did not believe the injury was serious in nature. Claimant's symptoms then worsened and resulted in his failure to recertify as a crane operator on July 2, 2013. On that date, Mr. Davis recommended further medical evaluation for a potential cervical disc issue.

Mr. Davis was a medical provider chosen by defendant-employer to evaluate claimant for clearance to operate a crane in connection with his work duties. It is highly likely defendant-employer would have contemporaneously received Mr. Davis's medical note indicating the possibility of a physical condition which was significant enough to interfere with claimant's ability to work. Further, claimant credibly testified he contacted Mr. Burns almost immediately following the July 2, 2013 evaluation to advise that claimant had not been cleared to operate the crane. Claimant testified he advised Mr. Burns of the May 14, 2013 injury at that time and indicated Mr. Davis would not clear claimant until he had undergone further evaluation stemming from the work injury. Notice on or about July 2, 2013 is well within the 90-day period prescribed in section 85.23.

Claimant's credible testimony on providing notice to Mr. Burns contemporaneous with the July 2, 2013 evaluation is un rebutted. Mr. Burns did not provide a written affidavit or testimony to rebut or call claimant's testimony into doubt. The fact that defendant-employer did not create a written report of injury for this specific report when it had done so for similar reports in the past is not a sufficient inference to counteract claimant's credible testimony on notice. Claimant testified he was advised to seek medical treatment through his health insurance, and he continued to receive his weekly salary when he was required to miss work as a result of treatment for these conditions. Claimant testified this procedure was consistent with how defendant-employer handled prior work-related injuries claimant had sustained. It is therefore determined defendants have failed to prove the affirmative defense of lack of timely notice pursuant to Iowa Code section 85.23.

The next issue for determination is whether the alleged injury is a cause of temporary disability. The next issue for determination is whether claimant is entitled to temporary disability benefits from February 2, 2015 through May 13, 2015. These issues will be considered together.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits.

Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

By this decision *supra*, the undersigned determined the May 14, 2013 traumatic work injury materially aggravated, worsened and lighted up claimant's cervical spine disease and ulnar neuropathy conditions. As a result of each of these conditions, claimant has been required to undergo extensive treatment, including multiple surgeries with incident time off work. It is therefore determined claimant has proven by a preponderance of the evidence that the May 14, 2013 work injury is a cause of temporary disability.

Claimant has missed work during multiple periods as a result of his medical treatment. During each of these periods, defendant-employer continued to pay claimant's weekly salary. Therefore, claimant does not claim entitlement to temporary disability benefits during those times. Rather, claimant requests temporary disability benefits from February 2, 2015 through May 13, 2015, the period following claimant's layoff by defendant-employer while he continued to heal after C7-T1 laminectomy and discectomy and right ulnar nerve release.

On January 21, 2015, Dr. Beck released claimant to return to work; however, he did so on an "as tolerated" basis. Defendant-employer did not offer claimant any work at this time and rather, arranged an FCE. Defendant-employer rejected the terms of Dr. Beck's release. Dr. Beck subsequently deferred to an FCE which was not undertaken until March 5, 2015. Following the FCE, defendant-employer again refused to offer claimant work. Therefore, the best evidence as to the termination point of claimant's healing period is an assigned MMI date. The only physician to specifically opine as to a date claimant achieved MMI is Dr. Kuhnlein, who assigned a date of May 13, 2015. It is therefore determined that claimant is entitled to healing period benefits pursuant to Iowa Code section 85.34(1) from February 2, 2015 through May 13, 2015, unless superseded by an award of permanent total disability benefits.

The next issue for determination is whether the alleged injury is a cause of permanent disability.

By this decision *supra*, the undersigned determined the May 14, 2013 traumatic work injury materially aggravated, worsened and lighted up claimant's cervical spine disease and ulnar neuropathy conditions. As a result of each of these conditions, claimant has been required to undergo extensive treatment, including multiple

surgeries. Both opining physicians, Dr. Kuhnlein and Dr. Boarini, opined claimant demonstrated permanent impairment as a result of these conditions. A valid FCE found permanent limitations on claimant's activities and Dr. Kuhnlein recommended specific permanent restrictions as a result of these work-related conditions. It is therefore determined claimant sustained permanent disability as a result of the work injury of May 14, 2013.

The next issue for determination is the nature and extent of claimant's permanent disability, including whether claimant is permanently and totally disabled. The next issue for determination is the commencement date for permanent disability benefits. These issues will be considered together.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). By this decision *supra*, the undersigned determined the May 14, 2013 traumatic work injury materially aggravated, worsened and lighted up claimant's cervical spine disease and ulnar neuropathy conditions. As claimant has sustained injuries to both his right upper extremity and cervical spine, claimant's permanent disability is considered industrially.

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

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

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

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

At the time of evidentiary hearing, claimant was 59 years old and resided in Algona, Iowa. Claimant obtained a high school diploma and subsequently pursued approximately three years of college coursework. He did not earn a degree, as he dropped out due to personal, familial reasons and instead, began his employment with defendant-employer. The majority of his employment for defendant-employer was as a foreman, during which time he ran a crew and also procured a number of work-related certifications. Claimant is an intelligent individual who is capable of learning requisite knowledge and skills to be utilized in a work place.

As a result of the work injury of May 14, 2013, claimant sustained a permanent worsening of conditions of his cervical spine and right ulnar nerve. Claimant required extensive treatment of these conditions, including a C6-C7 ACDF, C7-T1 laminectomy and discectomy, and right cubital tunnel release. The surgeries have seemingly halted the progression of the disease processes; however, claimant has been left with residual symptomatology and limitations in his right arm and neck. Claimant feels pain in both regions, as well as numbness of his right hand and significantly decreased grip strength.

Only two physicians have offered opinions on the extent of claimant's permanent impairment as a result of these conditions, Dr. Boarini and Dr. Kuhnlein. Dr. Boarini opined claimant sustained a 20 percent whole person impairment as a result of the cervical fusion and right arm weakness. However, Dr. Boarini's report does not identify his methodology for reaching this percentage and did not include his examination measurements. Rather, Dr. Boarini's report indicates his rating was an estimate of claimant's permanent impairment. Dr. Kuhnlein, on the other hand, detailed his examination findings and rating methodology in his report. He explained how he arrived at his rating of 39 percent whole person in consultation with the AMA Guides. For these reasons, I find Dr. Kuhnlein's quantification of claimant's permanent impairment entitled to greater weight.

As a result of his work injury, claimant's activities are now limited in accordance with permanent restrictions which were not in existence prior to the work injury of May 14, 2013. At the arranging of defendant-employer, claimant underwent a functional capacity evaluation. Dr. Beck agreed to this methodology for determining claimant's permanent restrictions, but did not actually review and adopt the FCE findings. Dr. Boarini reviewed and opined claimant should utilize the FCE results in his employment activity and specifically opined assignment of claimant to the medium physical demand category was reasonable.

Dr. Kuhnlein rejected the FCE results and recommended specific permanent restrictions of: lifting 20 pounds occasionally from floor to waist or over shoulder level;

lifting 40 pounds occasionally waist to shoulder with the weight located near his body; lifting 20 pounds occasionally if lifting at a distance more than an elbow's length from his body; sitting, standing, and walking as needed, with the ability to change positions for comfort; avoidance of working at or above shoulder height, but the ability to occasionally at this level; occasionally stoop, squat, bend, crawl, or kneel; no working above ground level due to an inability to maintain a 3-point safety stance; occasional use of vibratory or power tools below shoulder height, and no use of such tools above shoulder height for safety reasons. Dr. Kuhnlein opined it was imperative for claimant to work with lighter weights, as he believed claimant would pose a safety risk to himself and others if expected to work up to the FCE weight limits on a sustained basis.

Having reviewed the FCE results in detail, I adopt the specific restrictions set forth by Dr. Kuhnlein with respect to claimant's ability to engage in the labor market. I view the FCE assignment of claimant to the medium physical demand category with skepticism due to the documented deficits in claimant's right hand strength which is contained in the FCE itself. Claimant's right hand grip was documented as approximately 1/4 to 1/3 of normal; his right lateral key pinch grip was, at most, 1/10 of normal; and his right two-point pinch was 1/6 to 1/9 of normal levels. While claimant may well be physically strong enough to lift 50 pounds, I find it worrisome to assume that a man with significantly decreased grip strength would be able to maintain safe control over that amount of weight, especially over extended periods. I further believe this was the conundrum referenced by Dr. Beck when he expressed difficulty in assigning a weight limit to claimant's activities. The permanent restrictions recommended by Dr. Kuhnlein are therefore adopted by the undersigned as a relevant reflection of claimant's physical abilities.

Claimant began his work for defendant-employer in 1978 and remained in the employ of defendant-employer until ultimately laid off for medical reasons found causally related to his work injury. Claimant's sole employer throughout his working life has been defendant-employer. During all but six months of this nearly 37 years, claimant has worked heavy to very heavy manual physical labor for defendant. The whole of claimant's employment has been in construction labor for defendant-employer. His work restrictions preclude claimant from returning to such work, as evidenced by defendant-employer's choice not to offer claimant continued employment after receipt of his permanent restrictions.

Due to his physical limitations and defendant-employer's decision not to offer claimant work, even in an accommodated fashion, claimant became unemployed in January 2015. To claimant's credit, he has performed an admirable work search and sought vocational rehabilitation assistance. However, he has not been successful in securing employment. Vocational expert Mr. Vierling opined claimant lost access to 96 percent of his pre-injury occupational profile and further opined claimant lacked experience in the positions which remain a part of his occupational profile post-injury. Following a labor market review of the Algona area and given all other relevant factors, Mr. Vierling opined claimant sustained a total loss of earning capacity. Defendants offered no contrary evidence. Furthermore, even if claimant were to obtain

employment, such employment will almost certainly carry earnings nowhere near claimant's annual salary of \$115,000.00 from defendant-employer.

Having considered the above and all other relevant factors of industrial disability, it is determined that claimant is currently permanently and totally disabled as a result of the injury of May 14, 2013. Such an award entitles claimant to permanent total disability benefits, commencing May 15, 2013, the day after claimant sustained the work-related injury, and continuing during the period claimant remains permanently and totally disabled. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were \$2,211.54, and claimant was married and entitled to two exemptions. The proper rate of compensation is therefore, \$1,304.94. As the work injury of May 14, 2013 is found to have resulted in permanent total disability, claimant is not entitled to overlapping healing period benefits. Defendants are entitled to credit for benefits paid.

The next issue for determination is whether defendants are responsible for payment of claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants denied claimant's claims for benefits and did not offer claimant medical treatment nor seek to play any role in procuring claimant medical treatment of his conditions. By this decision, the undersigned found claimant's cervical spine and ulnar neuropathy were compensable claims. There is no evidence any of the medical treatment received by claimant was not causally related to these compensable conditions or that the care received was not reasonable and necessary. Claimant received benefit from the medical treatment, as the care has appeared to halt the rapid progression of his disabling conditions. Defendants are therefore found responsible for the medical bills referenced in Exhibit 20; defendants shall hold claimant harmless for any such bills incurred by claimant in procuring medical treatment on these compensable claims.

Claimant also seeks payment for medical mileage expenses for a total of 6,396 miles. The claimed mileage was travelled in connection with medical care at UIHC or with Dr. Beck, as well as incident to IMEs with Dr. Kuhnlein and Dr. Boarini. Claimant has broken down the claim by date and applied the applicable mileage rate. (Ex. 13, p. 139) Defendants shall therefore reimburse claimant for medical mileage expenses in the amount of \$3,608.18.

The next issue for determination is whether claimant is entitled to reimbursement for an independent medical evaluation under Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Defendants directed no medical care or treatment prior to Dr. Kuhnlein's IME on June 18, 2015, therefore there were no opinions by employer-retained physicians which triggered claimant's right to a section 85.39 IME. Defendants subsequently retained Dr. Boarini to offer opinions on the extent of claimant's permanent disability; however, this election does not retroactively grant claimant a reimbursable IME. The statute is clear in requiring an evaluation by an employer-retained physician who offered opinions on the extent of permanent disability prior to claimant seeking an IME. Accordingly, claimant is not entitled to reimbursement of Dr. Kuhnlein's IME under section 85.39.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

Iowa Code 86.13, as amended effective July 1, 2009, states:

4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount



unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

By this decision, the undersigned found claimant was entitled to permanent total disability benefits commencing May 15, 2013. Defendants paid no benefits until February 29, 2016, three days prior to evidentiary hearing and approximately 21 months following the applicable commencement date. These benefits had not yet been received by claimant at the time of evidentiary hearing. Therefore, claimant has established a delay in payment of benefits.

As claimant established a delay in payment of benefits, the burden therefore shifts to defendants to establish a reasonable or probable cause or excuse for the delay. In order to meet this burden, defendants must prove the delay was preceded by a reasonable investigation. In this case, claimant's continued employment for defendant-employer and receipt of wages even during periods he was off work is a complicating factor. I am unwilling to penalize defendants for delay in payment of benefits when defendant-employer continued to pay claimant his salaried wages. During this period, claimant continued to seek treatment and defendant-employer continued to cooperate by paying claimant's wages while the conditions were investigated and evaluated.

However, defendant-employer ultimately laid claimant off, leaving claimant without any income from wages or workers' compensation benefits from February 2015 onward. The record contains no written documentation which was provided to claimant explaining the basis of the denial. The record contains no medical opinions denying causation prior to this date. The mere assertion a claim was fairly debatable is insufficient to avoid a penalty award; defendants must fulfill the requirements of section 86.13(4)(c). Defendants have not demonstrated compliance with this statutory section and therefore, a penalty award is mandatory.

Claimant last received income from defendant-employer, reflecting wages or lost time replacement, as of the claimed date of February 2, 2015. Defendants paid no permanent disability benefits until February 29, 2016, over one year later. The period of February 2, 2015 through February 29, 2016, stretches 56.143 weeks. Claimant's weekly compensation rate is \$1,304.94, leaving accrued benefits of \$73,263.81. A maximum penalty award would therefore be \$36,631.91 (50 percent x \$73,263.81 = \$36,631.91). I was unable to locate any other cases where defendant-employer was penalized regarding the manner in which a claim was handled. I find a penalty award of \$20,000.00 is warranted.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of written report preparation associated with the IME of Dr. Kuhnlein and the vocational evaluation of Mr. Vierling.

Iowa Code section 86.40 states:

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

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

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

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

Dr. Kuhnlein charged \$2,200.00 for his IME and associated fees. (Ex. 9, p. 129) Claimant is not permitted to receive reimbursement for the full cost of Dr. Kuhnlein's IME as a practitioner's report under rule 4.33. Rather, the Iowa Supreme Court has ruled only the portion of the IME expense incurred in preparation of the written report can be taxed. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). Dr. Kuhnlein's bill itemization fails to specifically identify what portion of

the IME fee is attributable solely to report preparation. Claimant requests taxation of one-third of the total expense fee, relying upon LaGrange v. Nash Finch Co., File No. 5043316 (Appeal July 1, 2015). Claimant's request is reasonable and well-founded. Defendants are accordingly taxed with \$733.33 of Dr. Kuhnlein's IME fee ( $1/3 \times \$2,200.00 = \$733.33$ ).

Similarly, claimant requests taxation of the portion of Mr. Vierling's fee attributable to written report preparation. Pursuant to LaGrange, taxation of the written report associated with a vocational expert opinion is taxable. Mr. Vierling charged a total of \$2,985.00 for the vocational evaluation. His invoice contains an itemization of how this figure was reached. (Ex. 17, p. 179) Claimant requests taxation of \$870.00 reflecting Mr. Vierling's report preparation fees. Claimant's request is reasonable and well-founded. Defendants are accordingly taxed with \$870.00 of Mr. Vierling's vocational evaluation fee.

No further consideration is warranted of the issues presented for determination in File No. 5051847 (Date of Injury: July 2, 2013) or File No. 5051848 (Date of Injury: January 21, 2014), as each file sought identical benefits claimed as a result of the cumulative cervical and ulnar nerve conditions which I determined to have been materially aggravated by the May 14, 2013 traumatic injury.

#### ORDER

#### THEREFORE, IT IS ORDERED:

In File No. 5051846 (Date of Injury: May 14, 2013):

Defendants shall pay unto claimant permanent total disability benefits at the weekly rate of one thousand three-hundred four and 94/100 dollars (\$1,304.94), commencing May 15, 2013 and continuing during the period claimant remains permanently and totally disabled.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall receive credit for benefits paid.

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

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall pay penalty benefits in the amount of twenty thousand and 00/100 dollars (\$20,000.00).

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools, 757 N.W.2d 330, 339 (Iowa 2008).

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 in the amount of one thousand six-hundred six and 33/100 dollars (\$1,606.33).

In File No. 5051847 (Date of Injury: July 2, 2013):

Claimant shall take nothing from these proceedings.

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

Costs are taxed to claimant pursuant to 876 IAC 4.33.

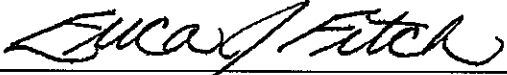
In File No. 5051848 (Date of Injury: January 21, 2014):

Claimant shall take nothing from these proceedings.

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

Costs are taxed to claimant pursuant to 876 IAC 4.33.

Signed and filed this 27<sup>th</sup> day of September, 2016.

  
ERICA J. FITCH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

Copies to:

Corey J. L. Walker  
Attorney at Law  
208 N. 2<sup>nd</sup> Ave. West  
Newton, IA 50208  
[corey@walklaw.com](mailto:corey@walklaw.com)

Tyler L. Laflin  
Garrett Lutovsky  
Attorneys at Law  
1350 Woodmen Tower  
Omaha, NE 68102  
[tlafin@ekoklaw.com](mailto:tlafin@ekoklaw.com)  
[glutovsky@ekoklaw.com](mailto:glutovsky@ekoklaw.com)

EJF/sam

**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.