BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOE PETERSON,

Claimant,

vs.

AKIN BUILDING CENTER,

Employer,

and

UNION INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5057582

ARBITRATION

DECISION

Head Note Nos.: 1108, 1801, 1801.1

STATEMENT OF THE CASE

Claimant, Joe Peterson, filed a petition in arbitration seeking workers' compensation benefits from Akin Building Center, employer, and Union Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on October 1, 2015. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch. The record in this case consists of joint exhibits 1 through 51, claimant's exhibits 1 through 19, defendants' exhibits A through N, and the testimony of the claimant, Tim Weinreich, Richard "Dick" Auffert and Tom Karrow.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant is entitled to temporary total disability benefits from October 13, 2015 through March 9, 2016;

2. Whether claimant is entitled to temporary partial disability benefits from March 10, 2016 onward;

3. Whether the stipulated injury is a cause of permanent disability;

4. The extent of any industrial disability;

5. The commencement date for permanent disability benefits;

6. Whether defendants are responsible for claimed medical expenses;

7. The extent, if any, credit due to defendants for overpayment of temporary total disability benefits;

8. Whether claimant is entitled to an award of penalty benefits under Iowa Code section 86.13 and, if so, how much;

9. Whether defendants are responsible for payment of interest on indemnity benefits;

10. Whether defendants are entitled to a credit for payment of an examination and report by claimant's expert, Dr. Manshadi; and

11. Specific taxation of costs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

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

Claimant was 62 years of age at the time of hearing. He resides in Bedford, Iowa. Claimant graduated high school in 1973 and subsequently earned an auto mechanics certification in 1975. He briefly worked in the field using this certification. Claimant's computer usage is limited to hunt-and-peck typing and internet browsing. (Claimant's testimony) In 1977, claimant began work for Westland Engineering, an asphalt paving company. Claimant held the position of paver operator for well over 20 years. He then worked as a working foreman on the paving crew for 4 years. Claimant was laid off in 2009 due to downsizing, after 32 years of employment. He described the work as seasonal in nature; during the season, he frequently worked 12 to 14 hours per day, up to 6 or 7 days per week. He averaged 80 hours per week. At the time of his layoff, claimant earned $16.00 per hour and grossed over $40,000.00 per year. (Claimant's testimony)

On December 12, 2011, claimant began work at defendant-employer, a lumberyard and design center business. Claimant was hired as a delivery truck driver, tasked with delivering building materials such as doors, windows, concrete, shingles, cabinets, and sheetrock. Unloading was performed by hand, unless the customer possessed a forklift. Claimant possesses a class A CDL license. He is permitted to drive intrastate, but has never undergone a Department of Transportation physical to drive interstate. He has never driven commercially outside of Iowa. Claimant also worked in the lumberyard, unloading trucks and operating a forklift. Claimant earned his forklift certification at defendant-employer. (Claimant's testimony) The job description for the position of outside yard associate at defendant-employer includes the following lifting demands: up to 10 pounds consistently, 25 pounds frequently, and up to 70 pounds maximum. (DEG, p. 1) Claimant initially earned $11.25 per hour and worked 45 hours per week. By the time of his work injury, claimant earned $14.00 per hour. (Claimant's testimony)

Claimant's medical history is relevant to consideration of the instant matter. Claimant treated with personal physician, Bethel Kopp, M.D., for back pain with radiculopathy. Per Dr. Kopp's referral, on November 29, 2012, Jeremy Baum, M.D. performed a lumbar spine injection. (JE1, p. 1)

Claimant was diagnosed with a right rotator cuff tear with severe retraction, impingement, and acromioclavicular (AC) joint arthrosis. On December 12, 2012, claimant underwent right shoulder arthroscopy with acromioplasty, distal clavicle resection, and rotator cuff repair, performed by board certified orthopedic surgeon, Michael Morrison, M.D. (JE5, pp. 1-2; DEB, p. 4) Claimant engaged in 31 sessions of occupational therapy post-right rotator cuff repair. (JE3, p. 1) During one of these sessions, claimant testified he developed right-sided neck pain on performance of a stretch. (Claimant's testimony)

Claimant returned to Dr. Kopp on February 26, 2013. Dr. Kopp assessed probable herniated disc disease of the cervical spine, right-sided. She ordered a cervical spine MRI. (JE10, p. 1) On February 27, 2013, claimant underwent a cervical spine MRI due to complaints of neck pain. Dr. Baum read claimant's results as revealing: C3-4 mild broad-based disc bulge; C4-5 mild broad-based disc bulge and small central to left paracentral disc protrusion; C5-6 board-based disc osteophyte complex formation with superimposed right foraminal disc protrusion; and C6-7 broad-based disc bulging with superimposed left paracentral disc protrusion. (JE2, pp. 1-2)

On March 5, 2013, claimant presented to Shirley Harris, M.D. with complaints of neck pain. Claimant reported a three-week duration of symptoms, which began as a stabbing pain in the right neck and radiated to the forearm, with distal fingertip tingling. (JE21, p. 1) Claimant reported developing neck pain while performing physical therapy post-rotator cuff repair. Dr. Harris reviewed claimant's MRI and restated the reported results. Dr. Harris assessed right cervical radiculopathy secondary to foraminal and spinal stenosis. She recommended a cervical epidural steroid injection (ESI) and surgical consultation. (JE21, p. 3)

Per Dr. Harris' recommendation, on March 11, 2013, claimant presented for neurosurgical evaluation with Wendy Spangler, M.D. Claimant complained of right-sided neck pain travelling to his shoulder and arm, with numbness and tingling of the first three digits. (JE24, p. 1) Dr. Spangler reviewed claimant's cervical MRI and assessed neck pain with right upper extremity radiculopathy and multilevel cervical spondylosis and disc protrusions. She noted a right-sided paracentral disc protrusion at C5-6, with canal stenosis bilaterally which may account for some radicular symptoms. However, Dr. Spangler described claimant's shoulder pain and limited movement as consistent with shoulder pathology. Dr. Spangler also noted changes at left C6-7, but no left-sided symptoms. Dr. Spangler recommended proceeding with cervical ESI, but in the event of no improvement, she opined it would be reasonable for claimant to undergo C5-6 anterior cervical discectomy and fusion. (JE24, p. 2)

Claimant underwent cervical ESI at C7-T1 on March 12, 2013, performed by Kyle Payne, M.D. (JE22, pp. 1-2)

On March 19, 2013, claimant returned to Dr. Morrison for further evaluation. Dr. Morrison noted claimant had developed some neck symptomatology along the right side of his neck, radiating to the right arm with tingling and numbness. Dr. Morrison ordered physical therapy for cervical traction; he also recommended use of over-the-counter medication and a cervical pillow. (JE6, p. 1)

Claimant returned to Dr. Payne on April 2, 2013. He reported much improvement following the first ESI, with improved sleep and some pain-free days. Claimant reported some continued occasional neck pain and stiffness. Dr. Payne performed a second cervical ESI at C7-T1. (JE23, pp. 1-3)

Claimant testified following the ESIs and physical therapy, his neck pain resolved and he returned to normal levels of functioning. He resumed work at defendant-employer as a delivery driver. (Claimant's testimony)

At follow up on April 30, 2013, Dr. Morrison described claimant as doing well with respect to the rotator cuff repair, with no pain complaints and good strength. He noted claimant was able to use his shoulder at work without difficulty. Dr. Morrison recommended claimant continue his home exercise program and return as needed. (JE7, p. 1)

A September 27, 2013 left shoulder MRI revealed a full-thickness supraspinatus tear. (JE4, p. 1) Dr. Morrison diagnosed left shoulder rotator cuff tear, impingement, and AC joint arthritis. Claimant underwent surgery with Dr. Morrison on November 15, 2013, consisting of left shoulder arthroscopy with subacromial decompression, distal clavicle resection, and rotator cuff repair. (JE8, pp. 1-2) Claimant followed up with Dr. Morrison on January 21, 2014 and expressed pleasure at the results of surgery. Dr. Morrison released claimant to return to work without restrictions in one weeks' time and to return to clinic as needed. (JE9, p. 1) Claimant testified he returned to work as a delivery driver at defendant-employer. (Claimant's testimony)

On May 7, 2015, claimant presented to his treating cardiologist, Michael Del Core, M.D. Dr. Del Core noted claimant suffered with coronary artery disease, status post bypass in 1997 and hospitalization in October 2014 for myocardial infarction. Dr. Del Core noted claimant also suffered with hypertension and hyperlipidemia. Dr. Del Core opined claimant had done well from a cardiac standpoint and was capable of doing all usual activities without significant symptoms or limitations. Claimant did complain of low back pain and expressed a desire to undergo a low back injection. (JE29, p. 1)

Claimant's supervisor, Richard "Dick" Auffert, testified at evidentiary hearing. Mr. Auffert has been an employee of defendant-employer for 32 years and a manager nearly the entirety of that period. Mr. Auffert hired claimant as a driver. He explained drivers are responsible for loading trucks by hand or with a forklift, driving to a customer location, and unloading product. Mr. Auffert testified he is aware of the strengths and weaknesses of all employees he supervises. He described claimant as having health issues and indicated claimant was often off work during the winter months for bilateral shoulder surgeries and heart issues. He testified he observed claimant experience some difficulty with overhead work. Given his knowledge of claimant's health, Mr. Auffert testified that on heavy loads, he would send a stronger driver or send another worker to assist claimant. He did so even prior to claimant's stipulated work injury in this matter and as a result, testified claimant did not complete 100 percent of all driver duties during his employment. (Mr. Auffert's testimony)

Mr. Auffert's testimony was clear and direct. His demeanor at the time of evidentiary hearing was excellent and provided the undersigned with no reason to doubt his veracity. Mr. Auffert is found credible.

Claimant suffered a stipulated work-related injury on October 1, 2015. Claimant testified he was unloading sheetrock with a coworker, Tim Weinreich, when the wind caught the piece of sheetrock in their hands. Claimant testified he reached up to catch the sheetrock and felt a significant pain in his left shoulder region and arm which led him to yell out. The two men finished the unloading process and returned to defendant-employer. (Claimant's testimony)

Tim Weinreich testified at evidentiary hearing. He testified he did not hear claimant yell out in pain at the time of the injury. He testified the two men continued working and he did not personally observe any signs of pain in claimant. He did not dispute whether claimant suffered with pain; he simply did not observe outward signs of pain. (Mr. Weinreich's testimony) Mr. Weinreich's testimony was clear and direct. His demeanor gave the undersigned no reason to doubt his veracity. Mr. Weinreich is found credible.

Claimant testified he initially believed he simply suffered a strain. He continued to work, but did not perform any lifting with his left arm. A few days after the event, claimant decided to seek medical evaluation. He testified he informed defendant-employer of his intention to see his primary care provider. (Claimant's testimony)

On October 8, 2015, claimant presented to personal provider, Allison Wetzel, PA, with complaints of neck pain with radiation to the left shoulder and arm since October 1, 2015. Claimant reported experiencing a stabbing and shooting pain in his left neck and upper arm with movement of his neck, particularly upward movement. She noted the symptom "started becoming more problematic" when claimant moved sheetrock at work. Ms. Wetzel noted claimant expressed belief he may have moved his neck incorrectly while lifting. (JE12, p. 1) Ms. Wetzel prescribed hydrocodone for use with either cervical or lumbar pain. Claimant reported his work was flexible, so he believed he could adjust his duties as needed. Ms. Wetzel advised claimant to follow up with an orthopedist when ready. (JE12, p. 2)

Claimant returned to Ms. Wetzel on October 13, 2015 with continued neck pain with radiation to his left shoulder. Claimant expressed belief his work was becoming problematic and exacerbating his pain. Ms. Wetzel issued an orthopedic referral and imposed restrictions requiring modification of work duties. (JE13, pp. 1-2)

Per Ms. Wetzel's referral, on October 14, 2015, claimant presented to Thomas Atteberry, M.D. with complaints of neck pain, radiating around the upper back and left shoulder, and down into the left arm. Claimant reported feeling a sudden, sharp pain when lifting sheetrock. Dr. Atteberry opined a cervical spine MRI from 2013 revealed multilevel degenerative changes with varying degrees of central and neural foraminal stenosis at C4-5, C5-6, and C6-7. Dr. Atteberry assessed neck and left upper extremity pain, cervical spondylosis, and multilevel central and neural foraminal stenosis. He expressed belief claimant's symptoms likely arose from his neck, but ordered an updated cervical spine MRI. (JE30, p. 1)

On October 16, 2015, Ms. Wetzel removed claimant from work pending resolution of neck pain. (JE14, p. 1)

On October 22, 2015, a representative of defendants' third party administrator interviewed claimant. The interview notes indicate claimant reported he carried sheetrock into a basement and felt pain of his left shoulder and down his left arm when he sat down the sheetrock. He was noted to have performed this task six times, for six different sheets of sheetrock. It was noted claimant felt immediate soreness in those regions, which gradually increased. (CE18, p. 1)

On October 28, 2015, claimant underwent cervical MRI. Neil Sergel, M.D. read the MRI as revealing: moderate AP canal stenosis at C5-6 with greater lateral recess narrowing on the left; and significant bilateral C6 foraminal stenosis, greater on the right. He opined the changes were similar to those demonstrated in the July 2013 MRI. Dr. Sergel also noted lesser disc bulges at C3-4, C4-5, and C6-7, which he described as stable to improved. (JE31, pp. 3-4) Following the MRI, claimant returned to Dr. Atteberry that same date. Dr. Atteberry opined claimant's MRI revealed: multilevel degenerative disease, most notable at C5-6 and to a lesser degree at C4-5; some central stenosis at C5-6, slightly more to the left side; and bilateral neural foraminal stenosis at C5-6. He assessed neck and left shoulder pain, and central and neural

foraminal stenosis of the cervical spine. Dr. Atteberry prescribed a Medrol Dosepak and opined claimant would benefit from cervical ESI. He removed claimant from work. (JE31, p. 1)

In response to inquiries from defendant-insurance carrier, Dr. Atteberry authored a letter dated November 10, 2015. Thereby, Dr. Atteberry diagnosed central and neural foraminal stenosis, and cervical spondylosis. Dr. Atteberry opined the condition appeared to be preexisting and underlying. However, he opined claimant suffered a work-related aggravation of the condition, leading to claimant's existing symptomatology. He noted claimant stated his symptoms began after lifting drywall and further, he assumed claimant was an honest person and reliable historian. (JE32, p. 1)

Claimant returned to Dr. Atteberry on November 18, 2015. Claimant reported continued pain and minimal relief with use of oxycodone. Dr. Atteberry left claimant off work and noted he was awaiting workers' compensation approval for a cervical ESI. (JE33, p. 1)

Claimant underwent the recommended cervical ESI on December 4, 2015. (JE44, pp. 1-2) On December 8, 2015, Dr. Atteberry authored a medical note restating claimant's off-work status. (JE34, p. 1)

On December 16, 2015, claimant returned to Dr. Atteberry. He reported quite a bit of initial relief with cervical ESI, but the return of symptoms after only a few days. Dr. Atteberry left claimant off work, prescribed pain medication, and requested approval for a repeat cervical ESI. (JE35, p. 1)

Claimant returned to Ms. Wetzel on January 20, 2016 in follow up of recently elevated blood pressure as noted prior to cervical ESI. Ms. Wetzel increased claimant's relevant medication. (JE15, pp. 1-2) She described claimant as quite "stressed out" and ready to resume work. (JE15, p. 1)

On February 8, 2016, claimant returned to Ms. Wetzel for recheck of his blood pressure levels. Claimant reported continued cervical pain, but relief following ESI. He reported an intention to undergo a repeat injection. (JE16, p. 1) The second ESI took place on February 10, 2016. (JE46, pp. 1-2)

On February 17, 2016, claimant presented to Dr. Atteberry with continued neck discomfort. Claimant denied any significant relief following the most recent injection. Dr. Atteberry recommended proceeding with a third ESI. In the event claimant received relief, physical therapy would be ordered. If claimant failed to experience significant relief, Dr. Atteberry indicated he would refer claimant to colleague and spine specialist, Huy Trinh, M.D. Claimant was again excused from work. (JE36, p. 1)

Claimant did not experience immediate relief with the second ESI, but eventually did obtain some benefit. (Claimant's testimony) A third ESI was delayed. However,

claimant's assigned nurse case manager recommended proceeding with Dr. Trinh's evaluation as scheduled in order to avoid further delay. (CE6, p. 4)

Per Dr. Atteberry's referral, claimant presented to Dr. Trinh on March 8, 2016. Dr. Trinh noted a history of injury at work in October 2015, when claimant caught a tipping piece of sheetrock. At the time, claimant reported feeling a sharp onset of neck pain with radiation toward the left shoulder and down the left arm, as well as numbness. Claimant reported lessened numbness and pain of the left arm, but continued pain primarily along the left side of his neck. Claimant reported he underwent two cervical ESIs and had a third scheduled for the following day. (JE37, p. 1) Dr. Trinh compared claimant's recent and 2013 cervical MRIs. He opined both showed evidence of moderately advanced disc arthrosis at C5-6 with posterior marginal osteophyte and some component of disc protrusion, slightly more toward the left side. (JE37, p. 2)

Following examination, Dr. Trinh assessed: preexisting disc arthrosis and protrusion at C5-6, aggravated by an injury at work; and improving left cervical radiculopathy. He expressed agreement with the scheduled third ESI. Dr. Trinh referred claimant for physical therapy and issued a prescription for tramadol, to take the place of oxycodone. Dr. Trinh released claimant to return to work on March 10, 2016 under restrictions of no overhead work and no lifting, carrying, pushing, or pulling over 20 pounds. (JE37, p. 2)

Claimant underwent the third ESI, as scheduled, on March 9, 2016. (JE47, pp. 1-2) Claimant testified this third injection provided relief of symptoms. He estimated his pain level as 2 or 3 on a 10-point scale following the series of three ESIs. (Claimant's testimony)

The parties stipulated claimant returned to work on March 10, 2016. Claimant returned to work light duty at defendant-employer in the role of customer service. Claimant testified he would assist customers and load items as needed. He described the work as less physically demanding than delivery driver work, as he was not required to perform heavy lifting while unloading trucks. (Claimant's testimony)

Claimant presented to Dr. Trinh on March 22, 2016. At that time, claimant remained in physical therapy. Claimant rated his pain as a level 3 to 4, at most, for which he treated with ibuprofen once or twice daily. Claimant denied radicular pain toward the arm and denied experiencing numbness. Dr. Trinh assessed degenerative disc disease with protrusion at C5-6, aggravated by work; and resolving left cervical radiculopathy. Dr. Trinh recommended completion of that week's physical therapy and continued performance of a home exercise program. He imposed restrictions of a 20-pound lift and no overhead work. (JE38, p. 1) Claimant's physical therapy concluded on March 23, 2016. (JE48, pp. 1-2; JE49, pp. 1-2)

Defendants paid temporary total disability for the period of September 30, 2015 through March 30, 2016. (DEJ, p. 1)

On April 19, 2016, claimant returned for evaluation by Dr. Trinh. Dr. Trinh noted a primary complaint of stiffness and occasional soreness of the neck, as well as continued, very mild and rare numbness of the left hand, but no arm pain. Dr. Trinh assessed degenerative disc disease with protrusion at C5-6, aggravated by work, and resolved left cervical radiculopathy. Dr. Trinh recommended continued performance of home exercises and released claimant to resume full-duty work. (JE39, p. 1)

Claimant testified he continued to perform customer service, as defendant-employer had hired another driver into claimant's former position. However, he also performed some lighter natured deliveries on an as-needed basis. Claimant testified he was limited to 40 hours per week. (Claimant's testimony; DEI, p. 13)

Mr. Auffert testified he limited claimant to lighter driving based upon his knowledge of claimant's health history. He monitored claimant's loads even more closely post-injury and limited him to lighter items. Mr. Auffert testified claimant was not relied upon to drive as often, as he had hired another driver. (Mr. Auffert's testimony)

Claimant returned to Dr. Trinh in follow up on May 31, 2016. Dr. Trinh described claimant as doing relatively well. Claimant reported he was performing regular work, but attempted to avoid overhead activities as much as possible. Claimant reported experiencing occasional discomfort of the left scapular area with notable lifting, for which he sporadically used ibuprofen. On examination, Dr. Trinh noted mild neck stiffness, mostly in right-sided rotation. Dr. Trinh assessed degenerative disc disease with protrusion of C5-6, aggravated by work; and resolved left cervical radiculopathy. Dr. Trinh opined claimant had achieved maximum medical improvement (MMI), was capable of full-duty work, and had sustained ratable permanent impairment. (JE40, p. 1)

On June 13, 2016, defendant-insurance carrier posed a number of questions to Dr. Trinh. Dr. Trinh issued his responses on July 5, 2016. Dr. Trinh thereby opined that as of his most recent examination on May 31, 2016, claimant's condition had improved, with occasional left scapular pain and mild neck stiffness. He opined claimant achieved MMI as of May 31, 2016 and confirmed claimant's release from care, to return as needed. He also confirmed he released claimant to light duty effective March 10, 2016 and full duty effective April 19, 2016. Dr. Trinh opined claimant fell within DRE Cervical Category II and suffered ratable permanent impairment of 6 percent whole person under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE41, p. 1)

On August 15, 2016, Jolyn Ybarra of defendant's third party administrator, authored correspondence to claimant's counsel. Thereby, Ms. Ybarra noted receipt of Dr. Trinh's impairment rating of 6 percent whole person. She set forth calculations identifying the impairment rating as corresponding with 30 weeks of permanent partial disability benefits at the weekly rate of $435.56. After subtraction of $1,910.22 in purported overpayment, Ms. Ybarra computed the total due to claimant of $11,156.58. Ms. Ybarra requested confirmation by claimant's counsel of the calculation and represented benefits would be issued upon receipt of agreement. (CE10, p. 1)

Claimant's counsel authored responsive correspondence dated August 17, 2016, whereby counsel requested a copy of Dr. Trinh's impairment rating opinions and records detailing indemnity benefits to date. (CE10, p. 1)

Claimant's counsel authored further correspondence to Ms. Ybarra on September 3, 2016. Thereby, counsel expressed agreement with Ms. Ybarra's computation and a credit of $1,910.22 for overpaid temporary total disability benefits being applied to permanent partial disability benefits. Counsel requested payment of permanent partial disability benefits in accordance with the computation. He also expressed belief Dr. Trinh's impairment rating was low and requested an independent medical examination (IME). (DEE, p. 1)

At the referral of claimant's counsel, on September 16, 2016, claimant presented to Neal Wachholtz, PT, for a functional capacity evaluation (FCE). Mr. Wachholtz opined the results of the FCE were valid. He found claimant demonstrated the ability to lift and carry 50 pounds occasionally and 20 pounds frequently, when performed near waist level or below. Mr. Wachholtz opined claimant was capable of: lifting 35 pounds occasionally and 15 pounds frequently to shoulder level; and lifting 15 pounds maximum overhead, on an occasional basis. He opined claimant should not perform prolonged or repetitive overhead work to limit aggravation of neck pain. Mr. Wachholtz opined claimant's physical abilities fell within the medium physical demand category. (CE1, p. 1)

Claimant continued to perform deliveries for defendant-employer until he received these recommended work restrictions. Claimant testified he provided a copy of the FCE results to Mr. Auffert. At that time, claimant was removed from deliveries and assigned to inside work. (Claimant's testimony; DEI, p. 13) His inside duties included cashiering, customer service, stocking shelves, running a forklift, and loading items weighing less than 50 pounds for customers. He continued to earn $14.00 per hour. (DEI, pp. 15-16)

Mr. Auffert testified claimant brought in a copy of his FCE report and the two discussed the results. Mr. Auffert testified he told claimant not to work beyond his restrictions and to ask for help if needed. He confirmed claimant no longer worked as a driver after this time. Absent the FCE report, claimant would have been permitted to continue driving. Claimant continued to work the same hours, at the same rate of pay. Mr. Auffert testified he observed claimant's physical abilities as approximately the same as they had been preinjury. However, upon being assigned to inside work, Mr. Auffert expressed belief claimant's effort was slightly lacking. He explained claimant struggled with inside tasks involving the computer and SKU numbers. Mr. Auffert testified there were times when claimant did not cooperate with other employees. He testified claimant also began calling in more frequently, estimated as one-quarter to one-third of his shifts. (Mr. Auffert's testimony)

On September 23, 2016, claimant's counsel authored correspondence to defendants' counsel, requesting payment of permanent partial disability benefits.

Counsel requested payment of the 6 percent impairment rating issued by Dr. Trinh, with such benefits commencing on July 5, 2016. Counsel again agreed to a credit against these permanent benefits in the amount of $1,910.22 for overpaid temporary total disability benefits. (DEE, p. 2)

Defendants' counsel responded to claimant's counsel via correspondence dated September 27, 2016. Thereby, defendants represented industrial disability benefits were not appropriate, given a full-duty work release and claimant's continued employment at defendant-employer, earning at least the same as on the date of his injury. Counsel represented defendants considered the $1,910.22 credit to represent payment of approximately 4.3857 weeks of permanent partial disability benefits and no other voluntary permanency benefits would be issued. (DEE, pp. 3-4)

At the referral of claimant's counsel, on December 6, 2016, claimant presented to board certified orthopedic surgeon Geoffrey McCullen, M.D. for an IME. (CE13, p. 2) Claimant reported he sustained an injury on October 1, 2015, when the wind caught the edge of a piece of sheetrock and claimant reached up with his left arm to hold the sheetrock. At the time, he reported experiencing immediate pain in his left neck, scapula, and arm. Claimant also reported a prior history of a pop in the right side of his neck while performing a "superman stretch." (CE2, p. 1) Dr. McCullen reviewed and summarized supplied medical records, including treatment records from October 8, 2015 through May 31, 2016, Dr. Trinh's responses to inquiries in June 2016, and the FCE report. (CE2, p. 2) Dr. McCullen reviewed claimant's February 2013 and October 2015 cervical MRIs. He opined he observed an interval change, with the development of the left paracentral disc protrusion and worsening of the left neural foraminal stenosis at C5-6. Dr. McCullen also performed a physical examination. (CE2, p. 3)

Following records review, interview, and examination, Dr. McCullen issued a work-related diagnosis of aggravation of a preexisting condition, with left C6 radicular complaint. He further opined the mechanism of extending and rotating the neck while holding sheetrock produced an aggravation of a preexisting condition and a left paracentral disc protrusion, causing a left C6 radicular complaint. Dr. McCullen opined claimant's preexisting condition was significant cervical spondylosis at multiple levels, C5-6 in particular. Dr. McCullen opined the work injury aggravated and worsened this condition, leading to a left C6 radicular pattern of pain. He described claimant's treatment-to-date as reasonable, but opined claimant had not achieved MMI due to additional treatment recommendations. Specifically, Dr. McCullen recommended upper extremity electrodiagnostic studies. Depending on the results thereof and upon the condition of cessation of smoking, Dr. McCullen opined claimant might be a candidate for C5-6 anterior cervical discectomy and fusion (ACDF). (CE2, p. 4) Dr. McCullen adopted the restrictions set forth in claimant's FCE. He also opined claimant fell within DRE Cervical Category II, which carried permanent impairment ratings from 5 to 8 percent. He opined Dr. Trinh's rating of 6 percent whole person was reasonable. In the event claimant underwent ACDF, Dr. McCullen opined claimant would fall in DRE Cervical Category IV, warranting a permanent impairment rating of 25 percent whole person. (CE2, p. 5)

On January 11, 2017, defendants' counsel authored correspondence to claimant's counsel. Thereby, counsel represented a check would be issued in the amount of $1,924.20 to cover the costs of Dr. McCullen's IME and associated mileage. Counsel also represented defendants would not authorize Dr. McCullen's treatment recommendations, as defendants stood by the opinion of Dr. Trinh. (CE11, p. 1) The referenced check was issued January 12, 2017. (DEM, p. 1)

Claimant returned to Dr. Spangler for evaluation on February 6, 2017. Claimant complained of left-sided neck, shoulder and upper extremity pain, numbness, and tingling. He reported a new onset of symptoms following the October 1, 2015 injury. Dr. Spangler described the injury as occurring when a sheet of sheetrock he was lifting was caught in the wind, jarring claimant. Claimant denied significant improvement following three ESIs. Claimant reported a history of right rotator cuff repair, after which tingling of his right thumb failed to resolve. (JE25, p. 1) Dr. Spangler reviewed claimant's October 28, 2015 MRI and opined it revealed: mild diffuse bulging of C4-5; moderate diffuse bulging of C5-6; and left-sided broad-based paracentral bulging of C6-7. (JE25, p. 2) Dr. Spangler performed a physical examination. (JE25, pp. 1-2) Dr. Spangler assessed left-sided neck pain and upper extremity radiculopathy and paresthesias. She located the cervical changes to primarily C5-6, but also C6-7. Dr. Spangler opined an updated MRI and x-rays were required prior to issuance of treatment recommendations. (JE25, p. 2)

Claimant underwent the recommended cervical x-rays on February 6, 2017. (JE25, p. 3) An updated cervical MRI followed on February 8, 2017. Radiologist, David Rupiper, identified an impression of C5-6 degenerative disc disease with moderate central stenosis and moderate right foraminal stenosis. (JE26, p. 1) Kimberly Nelson, PAC, contacted claimant with the imaging results. She noted progressive changes at C5-6 with cord compression and foraminal narrowing; and changes at C6-7, minimal overall. Ms. Nelson conveyed Dr. Spangler recommended C5-6 ACDF; claimant indicated he would consider the procedure. (JE27, p. 1)

In February 2017, claimant testified his hours were cut to 32 hours per week by defendant-employer. (Claimant's testimony) Mr. Auffert confirmed claimant's hours were cut to 32 per week. He testified other employees were more efficient and requested additional hours, while claimant regularly called in sick. (Mr. Auffert's testimony)

On April 11, 2017, claimant presented to Todd Troll, M.D., for EMG/NCS. Dr. Troll opined the studies did not reveal any abnormalities. (JE51, p. 1)

On April 12, 2017, claimant presented to Ms. Nelson to discuss EMG results. Despite not ordering the study, Dr. Spangler reviewed the results and opined the EMG was normal. Ms. Nelson noted Dr. Spangler previously offered C5-6 ACDF, but claimant wished to hold off on the procedure. (JE28, p. 1)

Following review of additional medical records, Dr. Trinh authored a narrative report dated April 17, 2017. The report contained a summary of claimant's treatment. Dr. Trinh opined claimant's 2015 MRI revealed no indication of acute injury, such as edema or swelling. (JE42, p. 1) Following Dr. Trinh's release of claimant from care, he noted claimant had undergone both an FCE and IME. Dr. Trinh opined there was no medical indication for an FCE; he expressed skepticism of FCEs completed solely based upon attorney referrals, as he believed they were completed for legal, not medical reasons. Dr. Trinh critiqued the FCE for measuring non-work related deficits related to prior right shoulder symptomatology that did not resolve following surgery. He critiqued the FCE as including restrictions attributable to ongoing right shoulder difficulties and preexisting neck conditions. (JE42, p. 2)

Dr. Trinh also reviewed and addressed Dr. McCullen's IME report. Dr. Trinh noted Dr. McCullen believed interval change was present between the 2013 and 2015 cervical MRIs, with development of a left paracentral disc protrusion and worsening of left neural foraminal stenosis at C5-6. Dr. Trinh indicated he reviewed medical records which were unavailable to Dr. McCullen, including: Dr. Harris' March 5, 2013 record; Dr. Spangler's records of March 11, 2013 and February 6, 2017; and the February 2017 MRI. After doing so, Dr. Trinh expressed disagreement with Dr. McCullen's opinion of interval change and further opined any changes between the 2013 and 2015 MRIs were not significant. Dr. Trinh opined both MRIs revealed evidence of the same amount of moderately advanced disc arthrosis at C5-6. He opined the only slight difference was present at C6-7, with a slight left paracentral disc protrusion, but no evidence of significant central canal stenosis or disc herniation. Based upon minimal changes, lack of radiculopathy in 2016, history of referral for the same surgery in 2013, and claimant's return to normal work duties, Dr. Trinh expressed belief the viewed changes were not significant. As a result, and specifically noting resolution of left arm radiculopathy in 2016, Dr. Trinh opined any ongoing medical care was attributable to the preexisting neck condition which dated to 2013. (JE42, p. 2)

Claimant's counsel authored correspondence to Dr. McCullen dated June 13, 2017. Thereby, counsel provided Dr. McCullen with additional medical records, including those cited by Dr. Trinh but which claimant did not possess at the time of Dr. McCullen's original IME, as well as care records undertaken following the IME. Counsel requested Dr. McCullen review these records and respond. (CE19, pp. 1-2)

Claimant returned to Dr. McCullen on June 27, 2017. Claimant reported continued pain of the left posterior neck, radiating to the left scapula and arm. Claimant reported his pain level was responsive to activity, with overhead activities and lifting over 50 pounds increasing the frequency of pain. Dr. McCullen reviewed additional medical records, including claimant's February 2017 MRI. Dr. McCullen opined he viewed a subtle radiographic change between the MRIs of February 2013 and October 2015; he viewed no significant interval change between the October 2015 and February 2017 MRIs. Dr. McCullen opined claimant was not currently an ideal candidate for ACDF, primarily due to claimant's smoking. Dr. McCullen also noted a sizable portion

of claimant's symptoms consisted of left neck pain, a symptom which could not reliably be reduced by ACDF. (CE3, p. 1)

Dr. McCullen expressed agreement with Dr. Trinh's previously rendered opinions that claimant suffered with a preexisting degenerative condition at C5-6, the injury caused new left arm symptoms, and resulted in a ratable impairment. (CE3, p. 2) Dr. McCullen opined the work injury of October 1, 2015 aggravated a preexisting cervical spondylitic condition at C5-6 and caused a new pain down claimant's left arm. (CE3, p. 1) Dr. McCullen noted he and Dr. Trinh disagreed with respect to permanent restrictions. He opined claimant's FCE was a valid representation of claimant's abilities and further opined the noted restrictions were related to claimant's October 1, 2015 injury. (CE3, pp. 1-2) Dr. McCullen reasoned claimant lacked any left arm symptoms prior to the injury, but since the injury, had experienced intermittent left neck, scapula, and arm symptoms. He described these symptoms as limiting of claimant's activity. Dr. McCullen further opined the limitations followed as a result of claimant's work injury, regardless of whether or not there was a subtle interval change between the 2013 and 2015 imaging. He reasoned claimant's symptoms post-injury were very different, as the radiation post-injury was left-sided, as opposed to right-sided in 2013. (CE3, p. 2)

Claimant retained vocational consultant, Ted Stricklett, to author an opinion. (CE12, p. 1) Mr. Stricklett interviewed claimant via telephone on August 29, 2017. Mr. Stricklett reviewed various records, including wage records, Dr. Trinh's opinions, Dr. McCullen's IME report, and the FCE report. Following interview, records review, and analysis, a vocational report was issued on September 22, 2017. (CE15, p. 1)

Mr. Stricklett denoted claimant's work history as including over 30 years as a paver operator and working foreman, earning $15.75 per hour, and his employment at defendant-employer. Mr. Stricklett noted claimant began work at defendant-employer and held responsibilities as a delivery driver, forklift operator, tractor trailer truck driver, and material handler. Mr. Stricklett noted claimant's gross average weekly wage of $707.75 on the date of his injury. He noted claimant currently worked for defendant-employer in roles of cashier and hardware sales, 32 hours per week at an hourly wage of $14.00 per hour. (CE15, pp. 2-3) Mr. Stricklett identified the physical demands and skill levels associated with claimant's employment history. He classified the fields as follows: hardware sales as light, semi-skilled work; material handler as heavy to very heavy, skilled work; cashier as light, semi-skilled work; tractor trailer truck/delivery driver as medium, semi-skilled work; forklift driver as medium, semi-skilled work; and paver operator as medium, semi-skilled work. (CE15, pp. 3-4)

Mr. Stricklett assessed claimant's employability in the open labor market, utilizing the restrictions identified in the FCE and adopted by Dr. McCullen. He utilized the Bedford/Shenandoah/Clarinda/Maryville, Missouri labor market area in his analysis. As an initial matter, Mr. Stricklett opined claimant had suffered a 37 percent wage loss, comparing his gross average weekly wage with his current 32 hours per week at $14.00 per hour. Mr. Stricklett opined the recommended restrictions precluded a return to material handler and delivery driver positions as they are typically performed. He

identified examples of jobs available in the labor market within the recommended restrictions: security guard, driver (certain settings), cashier, and retail sales. He identified associated wages in the range of $290.00 to $460.00 per week. As compared to claimant's gross average weekly wage, these wages would result in wage losses of 35 to 59 percent. (CE15, p. 7) Mr. Stricklett ultimately concluded that utilizing the recommended restrictions, claimant had sustained an approximate loss of earning capacity of 45 percent. In the event claimant was forced to leave defendant-employer and his accommodated role, Mr. Stricklett opined claimant's loss of earning capacity would increase. (CE15, p. 8)

Defendants' counsel requested board certified musculoskeletal radiologist, Derek Burdeny, M.D., review and compare claimant's February 2013 and October 2015 cervical spine MRIs. (DEA, pp. 1, 5) Dr. Burdeny did so and issued a report containing his opinions dated October 9, 2017. In comparing the two studies, Dr. Burdeny viewed no significant change at C4-5, C5-6, or C6-7. (DEA, p. 2) Dr. Burdeny opined he observed no interval change or interval worsening. Dr. Burdeny disagreed with Dr. McCullen's opinion that claimant experienced interval change. Dr. Burdeny opined the broad-based left paracentral disc protrusion with osteophytic ridge and compression of the left C6 nerve root was unchanged, as were findings of severe canal stenosis and severe bilateral foraminal stenosis. In his analysis, Dr. Burdeny noted the radiologist reading the October 2015 MRI, Dr. Sergel, opined the changes were similar to those previously present. Dr. Burdeny opined claimant's findings represented a natural progression of a preexisting medical condition and claimant's neck and shoulder pain reflected the natural progression of the preexisting condition. Dr. Burdeny opined the work injury did not cause any structural damage to the cervical spine and there were no post-traumatic findings related to the October 1, 2015 work injury. He opined the work injury reflected, at most, a temporary exacerbation of this preexisting condition. (DEA, p. 3)

Defendants also requested a medical records review from Dr. Morrison. In his report of October 27, 2017, Dr. Morrison noted claimant's pre-injury history of neck pain with right arm radiation in February 2013. Dr. Morrison opined the February 2013 cervical MRI revealed disc protrusion primarily at C5-6 with central canal stenosis and foraminal stenosis. He noted claimant received a neurosurgery evaluation with Dr. Spangler, cervical ESIs with Dr. Payne, and physical therapy and medication at Dr. Morrison's direction. Dr. Morrison noted at the time of his April 2, 2013 evaluation of claimant, claimant reported considerable relief with these measures. (DEB, pp. 1-2)

Dr. Morrison summarized claimant's care post work injury and noted complaints of left-sided neck pain, extending into the left upper extremity. (DEB, pp. 1-2) Dr. Morrison expressed agreement with Drs. Trinh and Burdeny, as he appreciated no change between the February 2013 and October 2015 MRIs. As a result, Dr. Morrison opined that any symptoms developed on October 1, 2015 would represent temporary irritation to a preexisting symptomatic condition. Dr. Morrison further opined any surgical intervention would have no correlation to the October 1, 2015 work injury. Dr. Morrison opined claimant had achieved MMI as outlined by Dr. Trinh on May 31, 2016

and as the injury represented only a temporary irritation, no permanent impairment had been sustained. Dr. Morrison also opined claimant did not require permanent restrictions as a result of the temporary irritation and did not require an FCE. (DEB, p. 3)

Dr. Trinh was forwarded copies of the October 2017 reports of Drs. Burdeny and Morrison for review. On November 27, 2017, he expressed agreement with the opinions expressed by these physicians in their reports. (JE43, p. 1)

Defendants retained vocational evaluator, Tom Karrow, to render a vocational opinion. (DEC, pp. 1, 10) Mr. Karrow performed a records review, including wage and medical records, claimant's deposition transcript, and Mr. Stricklett's vocational report. (DEC, p. 2) He noted multiple providers had offered opinions regarding appropriate work restrictions, with Drs. Morrison and Trinh recommending no restrictions, while the FCE adopted by Dr. McCullen found claimant was capable of medium physical demand work. Following review of claimant's deposition transcript, Mr. Karrow expressed belief claimant was performing activities at least in the medium physical demand level. (DEC, p. 3)

Mr. Karrow performed a labor market analysis, utilizing the Clarinda/Shenandoah/Red Oak/Creston/Maryville labor market. (DEC, p. 1) Mr. Karrow noted claimant's work history, corresponding physical demands and skill levels. He classified claimant's experience as follows: supervisor, asphalt paving as light, skilled work; hardware sales representative as light, skilled work; material handler as heavy, semi-skilled work; paving operator as medium, skilled work; forklift operator as medium, semi-skilled work; cashier as light, semi-skilled work; and truck driver as medium, semi-skilled work. (DEC, p. 4) Mr. Karrow noted claimant continued to work as a cashier and in hardware sales, 32 hours per week at an hourly rate of $14.00. He also noted claimant's pre-injury gross average weekly wage of $707.75. Mr. Karrow found no indication claimant was searching for work or had registered with Iowa Workforce Development. (DEC, p. 3) Mr. Karrow located the following available sedentary to medium physical demand level positions: local and over-the-road tractor trailer truck driver hauling only drop-and-hook, no touch loads; hardware sales; material handler; cashier; forklift operator; paver, supervisor asphalt paving; and related positions. (DEC, p. 8)

Assuming no permanent restrictions as opined by Drs. Morrison and Trinh, Mr. Karrow found claimant capable of performing any job in his work history and accordingly, had suffered no loss of earning capacity. If one were to adopt the FCE restrictions accepted by Dr. McCullen, Mr. Karrow opined there were higher paying jobs available within the recommended restrictions than that held by claimant. He identified eight employers with openings for local or over-the-road drivers in a drop-and-hook, no touch capacity. He represented these positions brought average annual wages of $53,500.00. (DEC, p. 8) Assuming adoption of the medium physical demand restrictions, Mr. Karrow opined claimant could perform truck driving, operate a forklift, or perform asphalt paving. In his analysis, Mr. Karrow twice referred to claimant's job on

the date of his work injury as in asphalt paving. Mr. Karrow acknowledged forklift operation carried lower annual earnings of $33,000.00, representing a 10 percent wage loss. (DEC, p. 9) Mr. Karrow critiqued Mr. Stricklett's opinion of a 43 percent loss of earning capacity on the basis claimant's CDL licensure was not mentioned, nor were suitable driving positions. Mr. Karrow noted claimant still maintained his CDL licensure and opined this licensure greatly impacted claimant's earning capacity. (DEC, pp. 3, 7)

In December 2017, defendant-employer reduced claimant's hours from 32 to 24 hours per week. (DEH, p. 5) Claimant testified none of his coworkers were cut to 24 hours. As a result of this decline in hours, claimant testified he lost employer-provided benefits such as health insurance. He procured health insurance through the open marketplace. (Claimant's testimony)

Mr. Auffert confirmed claimant's hours were cut to 24 hours per week. During the slow season, employees are limited to 40 hours per week maximum. He admitted no other employees have had their hours cut to 24 hours per week. He explained that the other employees do not have attendance issues and he is able to rely upon them to present to work. (Mr. Auffert's testimony)

As a result of the decline in hours, claimant filed for unemployment benefits. (DEH, p. 5) His claim was filed December 10, 2017. (DEK, p. 1) On December 21, 2017, Dick Auffert authored correspondence to Iowa Workforce Development, protesting claimant's claim. Mr. Auffert admitted defendant-employer reduced claimant's hours from 32 to 24 per week effective November 29, 2017. Mr. Auffert represented all employee hours had been reduced due to entering a slow business season. Mr. Auffert represented claimant was unable to perform the truck driver/yard person job claimant was hired for due to weight restrictions. Mr. Auffert also represented claimant was frequently absent for various health reasons and had become less productive. (CE9, p. 1) A decision was issued on January 5, 2018, whereby it was determined claimant was not eligible for unemployment benefits as he was not properly considered partially unemployed. (DEK, p. 1) Claimant indicated he later withdrew his claim for unemployment benefits, as he learned receipt of benefits would have disproportionately increased the cost of his insurance payment. (DEH, p. 5)

On January 16, 2018, Mr. Stricklett authored an updated vocational report given claimant's reduction to 24 hours per week. In comparing claimant's gross average weekly wage with his current hours and hourly rate, Mr. Stricklett found an approximate 53 percent wage loss. After consideration of claimant's recommended restrictions, wage, and decreased hours, Mr. Stricklett opined claimant had sustained an approximate 60 percent loss of earning capacity. (CE16, p. 1)

Defendants provided Mr. Stricklett's updated vocational opinion to Mr. Karrow for review. Mr. Karrow opined his previously expressed opinions remained unchanged. He found no indication claimant's decreased hours were attributable to a medical condition and further highlighted lack of consideration of over-the-road drop-and-hook driving as an option available to claimant. (DED, p. 1)

Mr. Karrow testified at evidentiary hearing. At that time, Mr. Karrow expressed belief claimant suffered no loss of access or earning capacity if no permanent restrictions are imposed. If the FCE restrictions were adopted, he opined the work injury did not impact claimant's ability to work or obtain a position in medium physical demand or less strenuous positions. He identified potential positions as a truck driver, customer service, cashier, retail, or clerk, which were available within claimant's geographical area. The majority of these positions fell within the sedentary to light demand categories and carried wages of $9.50 to $11.50 per hour. He testified trucking companies pay higher wages than claimant earned at defendant-employer and drop-and-hook loads fall within the light physical demand category. Mr. Karrow admitted he had not spoken with claimant and was unaware of claimant's desire to remain employed at defendant-employer, his interest in over-the-road, interstate trucking, or whether claimant had passed a Department of Transportation physical which would allow claimant to drive interstate. (Mr. Karrow's testimony)

Mr. Karrow's testimony at the time of hearing consisted primarily of recitation of items within his written report. On cross examination, Mr. Karrow was not persuasively able to respond to inaccuracies or inconsistencies identified regarding his opinions. While Mr. Karrow's demeanor was acceptable and I found no indication of an attempt to mislead, Mr. Karrow's testimony provided little probative assistance. Mr. Karrow is, however, found to be a credible witness.

Defendants obtained surveillance video of claimant on January 20, 2018, which was entered into evidence. Review of the approximately 40-minute video includes recordings of claimant removing a relatively small amount of snow and ice from a driveway. He primarily pushes the material with a tool or shovel, with minimal amounts of lifting performed. Claimant's pace is slow, and breaks in activity are observed. (DEN)

Claimant continues to treat periodically with Ms. Wetzel. She routinely prescribes oxycodone and ibuprofen 800 milligrams. Claimant estimated taking ibuprofen once daily and oxycodone every three days, often to help with sleep. (Claimant's testimony)

Claimant continues to work customer service for defendant-employer. Claimant testified he enjoys his job and would like to remain so employed. He believes he is capable of working 40 hours per week in this role. In the event his hours do not increase, claimant may seek alternative employment. He has not yet sought alternative employment or registered with Iowa Workforce Development. Claimant testified he has no experience and is not interested in over-the-road truck driving. (Claimant's testimony) Review of claimant's W-2s from defendant-employer reveals the following earnings: $21,144.00 in 2012 (DEL, p. 1); $15,885.00 in 2013 (DEL, p. 2); $25,192.00 in 2014 (CE7, p. 4); $25,623.00 in 2015 (CE7, p. 3); $22,111.00 in 2016 (CE7, p. 2); and $18,904.00 in 2017 (CE7, p. 1). In addition to his employment at defendant-employer, claimant receives income from an Aflac insurance policy and Social Security Survivor benefits. (Claimant's testimony)

Mr. Auffert testified claimant is currently limited to 24 hours per week, but often does not work as many hours as he is scheduled. Claimant continues to call in sick frequently and Mr. Auffert testified he is unable to rely on claimant to be present. Mr. Auffert testified claimant will have a job for so long as he continues to present to work. He testified it is possible that claimant's hours will increase, but testified he first desires to see improvement from claimant, particularly with respect to attendance. (Mr. Auffert's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant is entitled to temporary total disability benefits from October 13, 2015 through March 9, 2016.

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).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Ms. Wetzel imposed work restrictions as of October 13, 2015. Both Ms. Wetzel and Dr. Atteberry subsequently removed claimant from work entirely. Dr. Trinh ultimately released claimant to return to work with restrictions effective March 10, 2016. The parties stipulated claimant was off work from October 13, 2015 through March 9, 2016. The parties agree claimant returned to light duty on March 10, 2016.

As claimant was off work from October 13, 2015 through March 9, 2016, claimant is entitled to temporary total disability benefits for this period. Claimant's entitlement to temporary total disability benefits ceased upon his return to work on March 10, 2016. The parties stipulated claimant's gross average weekly wage at the time of the work injury was $707.75 and he was single and entitled to one exemption. The proper rate of compensation is therefore, $435.56.

The next issue for determination is whether claimant is entitled to temporary partial disability benefits from March 10, 2016 onward.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the

employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Claimant returned to work on March 10, 2016 under work restrictions. While on light duty, claimant testified his hours were limited and his earnings decreased. As claimant's earnings were lower while on light duty, he is entitled to temporary partial disability benefits. Accordingly, the end date for the claimant's period of entitlement to temporary partial disability benefits must be determined. Dr. Trinh placed claimant at MMI on May 31, 2016. Therefore, claimant is entitled to temporary partial disability benefits from his return to work on March 10, 2016 through May 31, 2016.

At achievement of MMI, claimant is no longer entitled to any temporary disability benefits. Therefore, it must be determined if claimant achieved MMI on May 31, 2016, as opined by Dr. Trinh. Claimant argues he did not achieve MMI on May 31, 2016. Instead, claimant argues he should remain entitled to temporary partial disability benefits until June 27, 2017, the date Dr. McCullen opined claimant was not a surgical candidate.

During this interim period, claimant underwent an FCE on September 16, 2016 and an IME with Dr. McCullen on December 6, 2016. At that point, Dr. McCullen opined claimant's care to date had been reasonable, but claimant had not achieved MMI, as he recommended further evaluation of claimant's surgical candidacy. After such care was denied by defendants, claimant sought evaluation by Dr. Spangler and diagnostic testing per Drs. Spangler and McCullen. Dr. Spangler subsequently raised the possibility of C5-6 ACDF, but Dr. McCullen opined claimant was not currently a surgical candidate.

Following Dr. Trinh's assignment of MMI on May 31, 2016, claimant did not receive more extensive, active treatment of his complaints. The further evaluation and diagnostic testing did not lead to treatment nor result in change in claimant's physical condition. As the further evaluation and testing did not lead to any additional treatment or change in physical condition, it is determined Dr. Trinh's assigned date of May 31, 2016 accurately reflects the date claimant achieved MMI. Having determined claimant achieved MMI on May 31, 2016, claimant is not entitled to temporary partial disability benefits after this date.

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

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).

Claimant argues the work injury of October 1, 2015 resulted in permanent disability. Defendants admit the occurrence of a work-related injury on October 1, 2015, but argue the injury was temporary in nature and resolved without permanent disability.

The record is undisputed that claimant suffered with a preexisting cervical condition; this condition resulted in a surgical recommendation for C5-6 ACDF in 2013. At the time of this recommendation, however, claimant had been suffering with right-sided symptoms and was ultimately able to return to full-duty work. Claimant, therefore, argues for distinguishing his post-work injury left-sided symptoms from the preexisting symptomatology.

With respect to injuries involving preexisting conditions, medical evidence and opinions are crucial to determination of issues of causation. In this case, claimant complained of neck and left upper extremity symptoms. He underwent three cervical ESIs and physical therapy. On March 22, 2016, Dr. Trinh assessed resolving left cervical radiculopathy and noted claimant denied radicular arm pain or numbness. On April 19, 2016, Dr. Trinh assessed resolved left cervical radiculopathy and noted only occasional stiffness and soreness of the neck, as well as very mild, rare left hand numbness. At his final contemporaneous evaluation of claimant on May 31, 2016, Dr. Trinh again assessed resolved left cervical radiculopathy. Claimant reported occasional left scapular discomfort and his general avoidance of overhead activities. On examination, Dr. Trinh noted only mild neck stiffness. At the time of this evaluation, Dr. Trinh released claimant to full duty work and opined claimant had sustained permanent impairment. He later quantified the impairment as 6 percent whole person.

Claimant returned to work at defendant-employer in somewhat of a hybrid customer service and driver position. Mr. Auffert testified he was more cautious in assigning claimant driving loads than he had been pre-injury, but no formal restrictions were imposed. Claimant continued functioning in this role until he elected to undergo an FCE which found claimant capable of functioning in the medium physical demand category. Claimant then reviewed these results with Mr. Auffert and thereafter, claimant was not permitted to work as a driver.

Therefore, claimant returned to work with a full-duty work release after a brief course of treatment. He worked in customer service and driving roles, based upon Mr. Auffert's assignment of work with knowledge of claimant's medical history. The FCE subsequently found claimant possessed limitations. However, claimant has a history of bilateral shoulder, neck, and heart conditions. It is true claimant obtained a full-duty work release for these pre-injury conditions from his treating physicians, but claimant also obtained a full-duty work release from Dr. Trinh post-injury. Based upon Mr. Auffert's testimony, claimant did not work the full range of full duty as a driver pre- or post-injury. Mr. Auffert appears to have informally assumed and accommodated claimant's health concerns over the course of his employment. Therefore, claimant's work activities may not accurately reflect the full extent of claimant's functional abilities before or after the work injury. Unfortunately, the evidentiary record lacks any preinjury FCE for comparison purposes. Such concerns about the accuracy of the FCE results were identified by Dr. Trinh, who stood by his full-duty work release. Given the lack of ability to objectively compare claimant's pre- and post-injury physical abilities, the FCE report provides little probative assistance.

Dr. Trinh subsequently performed a records review. Following review of claimant's medical records, he opined any ongoing medical care would be attributable to claimant's preexisting neck condition. In his report, Dr. Trinh opined claimant's 2015 MRI showed no signs of acute injury and no interval change was present between 2013 and 2015 MRIs. Dr. Trinh also relied upon claimant's resolution of radicular complaints in 2016, history of surgical referral, and return to work in normal work activities. Dr. Trinh served as claimant's treating physician with the ability to evaluate claimant contemporaneously on multiple occasions. His opinions are therefore entitled to significant weight.

Dr. Morrison subsequently expressed agreement with Dr. Trinh's full-duty work release. Dr. Morrison, who treated claimant contemporaneously with the 2013 neck condition, opined claimant's October 1, 2015 injury represented a temporary irritation to claimant's preexisting symptomatic condition. Like Dr. Trinh, Dr. Morrison opined any surgical intervention would have no correlation to the October 1, 2015 work injury. Given the lack of interval change on MRI, Dr. Morrison opined the work injury resulted in a temporary irritation only which resulted in no permanent disability. Dr. Morrison is in the unique position as the only opining physician who treated claimant contemporaneously with his 2013 neck complaints. It is Dr. Morrison who, therefore, is in the superior position to opine as to claimant's preexisting neck condition.

Dr. Burdeny also performed a records review. Dr. Burdeny, like Drs. Trinh and Morrison, found no interval change between the 2013 and 2015 MRIs. Dr. Burdeny opined the work injury of October 1, 2015 did not cause structural damage and he observed no post-traumatic findings on claimant's contemporaneous MRI. Following review, Dr. Burdeny opined the work injury resulted in, at most, a temporary exacerbation of claimant's preexisting condition. Further, he opined claimant's neck and shoulder pain reflected the natural progression of claimant's preexisting cervical

disease. Dr. Burdeny is a board certified radiologist and as such, he possesses notable expertise and training in reviewing MRIs.

Following review, Dr. Trinh expressed agreement with the opinions of Drs. Morrison and Burdeny. As a result, Drs. Trinh, Morrison, and Burdeny shared the opinion that claimant's work injury of October 1, 2015 represented only a temporary exacerbation of a preexisting condition. While it is true Dr. Trinh initially opined claimant sustained permanent impairment, upon review of further medical records, he altered his opinion. Dr. Trinh's opinions are easily reconciled with the opinions of Drs. Morrison and Burdeny.

Claimant relies upon the opinions of Dr. McCullen to counter the opinions of Drs. Trinh, Morrison, and Burdeny. Dr. McCullen opined he viewed subtle changes between claimant's 2013 and 2015 MRIs. Dr. McCullen also opined that even without interval changes, claimant's symptomatology changed to left-sided complaints post-injury and this change supports a finding of permanent disability.

After consideration of the entirety of the evidentiary record, I find claimant has not carried his burden of proving the work injury of October 1, 2015 is a cause of permanent disability and further failed to prove his ongoing symptoms are causally related to the October 1, 2015 work injury. Claimant's claim of permanent disability is plausible; however, plausibility is not sufficient to meet claimant's burden. The greater weight of the medical evidence supports the conclusion the October 1, 2015 work injury reflected a temporary exacerbation only. Dr. McCullen's IME opinions are simply not compelling enough to counter the opinions of Drs. Trinh, Morrison, and Burdeny.

Dr. McCullen's opinions are based in large part upon claimant's development and continued experience of left-sided symptoms post-injury. However, contemporaneous medical records reveal resolved left-sided complaints approximately six months' post-injury. At most, only minor left-sided symptoms persisted at the end of Dr. Trinh's treatment. The post-injury FCE is of limited value in support of Dr. McCullen's opinion, given a lack of objective pre-injury comparison. Claimant's lay testimony is also insufficient to buttress Dr. McCullen's opinions, given issues of preexisting informal accommodations and post-injury effort questions.

Upon review of the entirety of the record and given the greater weight of the medical evidence, it is determined claimant has failed to meet his burden of proving the work injury is a cause of permanent disability. Having determined claimant failed to meet his burden of proving the work injury resulted in permanent disability, consideration of the issues of extent of industrial disability and commencement date for permanent partial disability benefits is unnecessary, as moot.

The next issue for determination is whether defendants are responsible for 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).

When dealing with unauthorized care, to be entitled to payment, claimant must establish the care was rendered on a compensable claim. That being established, claimant must establish that the care provided on the compensable claim was both reasonable and the outcome more beneficial than the care offered by the defendants. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

Claimant seeks an order finding defendants responsible for medical evaluation and treatment as recommended by Dr. McCullen in his IME report. As set forth *supra*, claimant failed to carry his burden of proving he suffered more than a temporary aggravation of his preexisting cervical condition as a result of the work injury of October 1, 2015. Given that claimant failed to prove the work injury resulted in permanent disability and failed to prove causal connection between his ongoing complaints and the work injury, claimant has failed to prove the medical evaluation received, and for which reimbursement is sought, was rendered on a compensable condition. As causal connection to the work injury of October 1, 2015 has not been established, defendants are not properly held responsible for the requested expenses.

Even assuming the expenses were incurred on a compensable condition, the care obtained was not authorized by defendants. In cases of unauthorized care, claimant must establish the care received was more beneficial than that offered by defendants. Claimant has failed to establish the care received and requested was beneficial, as the care consisted only of further workup for surgical candidacy. The care resulted in no active treatment or improvement in claimant's condition. As such, defendants are not properly held responsible for the requested expenses.

The next issue for determination is the extent, if any, of credit due to defendants for overpayment of temporary total disability benefits under Iowa Code section 85.34(4).

Iowa Code section 85.34(4) states:

> 4. *Credits for excess payments.* If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or

the employer's representative has acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.

The parties stipulated defendants are entitled to a credit for overpaid temporary total disability benefits against an award of permanent partial disability benefits. No permanent partial disability benefits were found owing in this claim. However, the extent of credit due to defendants may be relevant in the event claimant suffers subsequent injuries with this employer. By this decision, claimant was found entitled to temporary total disability benefits from October 13, 2015 through March 9, 2016, a period of 22.714 weeks. At the weekly rate of $435.56, claimant is entitled to $9,893.31 in temporary total disability benefits. The record establishes claimant was paid temporary total disability benefits in the amount of $11,023.25. (DEJ, p. 1) The credit to defendants for overpaid temporary total disability benefits is therefore, $1,129.94.

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

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.

Claimant sought an award of penalty benefits for defendants' nonpayment of permanent partial disability benefits; he made no request with respect to temporary disability benefits. No permanent partial disability benefits were found owing by this decision, as claimant failed to carry his burden of proving he suffered more than a temporary exacerbation of a preexisting condition. As no owed benefits were delayed, no penalty benefits are warranted.

The next issue for determination is whether defendants are responsible for payment of interest on indemnity benefits.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

The next issue for determination is whether defendants are entitled to a credit for payment of an examination and report by claimant's expert, Dr. Manshadi.

Defendants argue claimant chose his own providers and these providers were not retained by defendants for purposes of triggering claimant's right to a reimbursable IME under section 86.13. As defendants did reimburse claimant for Dr. Manshadi's IME, defendants seek a dollar-for-dollar credit to offset any award of costs in this matter. Defendants, however, cited no authority for the credit requested. As defendant offers no authority for this credit, defendants' request for credit must fail.

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: filing fee ($100.00); deposition transcription fees ($93.99); one-third of the FCE cost ($229.33); IME supplemental report ($700.00); vocational report ($865.00); and supplemental vocational report ($165.00).

Iowa Code section 86.40 states:

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

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

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code

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

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

Claimant prevailed on his claims for temporary disability benefits and as such, an award of costs is appropriate. The costs of filing fee ($100.00) and transcription fees ($93.99) are allowable costs and are taxed to defendants. The costs of obtaining two practitioners' reports may also be taxed. I find the FCE and supplemental IME reports are appropriate for taxation; I decline to award any portion of vocational expenses. Claimant is not permitted to receive reimbursement for the full cost of the FCE ($688.00) or Dr. McCullen's supplemental IME ($700.00) 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). Both invoices fail to itemize and identify what portion of the imposed fees are attributable solely to report preparation. Therefore, consistent with the decision of LaGrange v. Nash Finch Co., File No. 5043316 (Appeal July 1, 2015), defendants are taxed with one-third of each of the total report fees. Defendants are taxed with $229.33 of the FCE expense (33 1/3 percent x $688.00 = $229.33) and $233.33 of Dr. McCullen's IME fee (33 1/3 percent x $700.00 = $233.33).

Defendants are taxed with costs in the amount of $656.65 ($100.00 + $93.99 + $229.33 + $233.33 = $656.65).

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant temporary total disability benefits at the weekly rate of four hundred thirty-five and 56/100 dollars ($435.56) for the period of October 13, 2015 through March 9, 2016.

Defendants shall pay unto claimant temporary partial disability benefits for the period of March 10, 2016 through May 31, 2016.

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 accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

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 as set forth in the decision.

Signed and filed this 29th day of March, 2019.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.