BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JERAMIE EDWARDS,	:	
Claimant,	:	File No. 21700093.01
vs.	:	ARBITRATION DECISION
JOHN DEERE DAVENPORT WORKS,	:	
Employer,	:	
Self-Insured,	:	Head Notes: 1108.50, 1402.20, 1802,
Defendant.	:	2907, 4000

STATEMENT OF THE CASE

Claimant, Jeramie Edwards, filed a petition in arbitration seeking workers' compensation benefits against John Deere Davenport Works ("John Deere"), a self-insured employer. In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on November 16, 2021, via CourtCall.

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

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 6, and Defendant's Exhibits A through BB. Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed their post-hearing briefs on January 3, 2022, at which time the case was deemed fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained injuries arising out of and in the course of employment on or about October 25, 2019;

2. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability benefits, if any;

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, if any;

4. Whether claimant is entitled to an award of medical expenses;

5. Whether claimant is entitled to alternate medical care;

6. Whether claimant is entitled to penalty benefits;

7. Whether claimant is entitled to reimbursement of his independent medical examination fees under Iowa Code section 85.39; and

8. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

Jeramie Edwards was a 40-year-old individual living in Moline, Illinois at the time of the evidentiary hearing. (Hearing Transcript, page 10; Exhibit T, Deposition page 9). Edwards received his High School Equivalency Certificate in approximately 2000. (Ex. T, Depo. pp. 10-11). Prior to working for defendant, Edwards worked as a garage door installer, a material cutter, and a warehouse employee. (Hr. Tr., pp. 10-11)

Edwards began working for John Deere Davenport Works on March 5, 2018. (Hr. Tr., p. 11). He was first assigned to work as an assembler on the small loader line. (Hr. Tr., pp. 11-12) He worked in this position for approximately six months before transitioning into a plasma operator position. (Hr. Tr., p. 12). A few months later, claimant was "reduced out" of the plasma operator position and started working as a utility worker on the forestry line. (Id.; Ex. T, Depo. p. 17) As a utility worker, Edwards was tasked with knowing how to perform nine (9) different job stations. (Ex. T, Depo. p. 32) As I understand it, a utility worker essentially fills in for John Deere employees that are absent from work. (Ex. T, Depo. p. 33) Edwards was operating as a utility worker on the alleged date of injury. (Ex. T, Depo. p. 18).

Before analyzing the evidentiary record, an important distinction needs to be made regarding the alleged date(s) of injury in this case. According to the original notice and petition, Edwards is asserting a cumulative injury with a manifestation date of October 25, 2019. That being said, Edwards testified at both his deposition and at the evidentiary hearing to his belief that the alleged bilateral shoulder condition stems from a specific, traumatic injury. To this end, there is no evidence that claimant sustained an acute or traumatic injury on October 25, 2019; instead, October 25, 2019, is the date claimant first sought medical attention for his alleged injury/condition. If Edwards sustained an acute injury, the evidentiary record suggests such an injury occurred on or about October 21, 2019.

Edwards asserts he sustained a traumatic injury to his bilateral shoulders while attempting to secure a drive shaft to a skidder tractor on or about Monday, October 21, 2019. To complete this task, Edwards utilized a rolling mat, or "creeper" to more easily

access the underside of the skidder. Edwards explained that the drive shaft – the part that needed to be secured to the tractor – was located on the ground to his right when he rolled under the tractor. In order to install the drive shaft to the tractor, he needed to lift the drive shaft, pull it across his body, and press it up to the skidder. (Ex. T, Depo. pp. 34-35) According to Edwards, the injury occurred when he initially lifted the drive shaft off the ground. (See Ex. T, Depo. pp. 34-35; Hr. Tr., p. 17) Edwards testified that he felt a "pop" in his right shoulder, followed by right greater than left shoulder pain. (Hr. Tr., p. 56; Ex. T, Depo. p. 41) Despite the pain, Edwards testified he was able to secure the drive shaft to the skidder tractor and complete the rest of his shift. (Ex. T, Depo. p. 39)

Edwards did not report the injury to his supervisor or seek medical attention on the date of injury. (Ex. T, Depo. p. 41; Hr. Tr., p. 18)

Edwards asserts his bilateral shoulder pain worsened throughout the week while performing his normal work activities. He asserts his left shoulder pain increased the more he used it to compensate for his right shoulder between October 21, 2019, and October 25, 2019. (See Ex. 1, p. 5; Hr. Tr., p. 19)

On Friday, October 25, 2019, Edwards presented to work and performed three of a possible nine jobs. (See JE1, pp. 19-21) Edwards started out working the skidder valve sub workstation. (JE1, p. 20) While performing his job duties at the skidder valve sub workstation, Edwards informed his supervisor that he was having shoulder problems. (See JE1, pp. 19-21) The second job claimant performed was "Drive Shaft installation." (Id.) According to the evidentiary record, Edwards was only able to complete one installation on October 25, 2019. (Id.) Thereafter, Edwards worked the valve sub workstation for the buncher tractor. (Id.) After completing his third job for the day, Edwards asked to present to the on-site occupational health clinic for his bilateral shoulder pain. (See JE1, p. 21; JE1, p. 27)

Edwards presented to the on-site occupational health clinic at John Deere, and described bilateral shoulder pain that had worsened over the past week. (Joint Exhibit 1, page 27) Edwards described the injurious event to Michelle Shepherd, R.N. (Id.) Edwards reported that on the date of said injurious event, he was attempting to secure a drive shaft to a skidder tractor. Consistent with his testimony, Edwards described using the rolling mat, or "creeper" to more easily access the underside of the skidder tractor. According to the October 25, 2019, medical record, Edwards sustained an injury "holding and balancing the drive shaft while attempting to bolt the drive shaft to the yoke[.]" (JE1, p. 27) Edwards disputes that he told Ms. Shepherd his injury occurred while holding and balancing the drive shaft. (Hr. Tr., pp. 18-19)

Following the appointment, Ms. Shepherd completed an incident report. According to the incident report, Edwards sustained an injury to his bilateral shoulders at approximately 10:00 AM on Monday, October 21, 2019. (JE1, p. 39) The incident report describes the injury as follows: "EE lying on back, moving driveshaft into frame – holding & balancing driveshaft while putting in bolts to bolt to the yoke." (JE1, p. 39)

Edwards returned to the on-site occupational health clinic on Monday, October 28, 2019, for an evaluation with Christine Deignan, M.D. (JE1, p. 24) Edwards complained of bilateral shoulder pain that was both "burning" and "tearing." (Id.) He also described numbness in the scapular region. (Id.) Despite the detailed reports of Ms. Shepherd, and the information provided in the incident report, Dr. Deignan's initial medical record is void of any reference to a traumatic event occurring on or about October 21, 2019. In documenting claimant's injury history, Dr. Deignan provided:

> Giving [*sic*] his history he says the injury occurred over time but it was not one thing. The specific activity was placing an axel which he was only able to do once before he told his supervisor he needed to come up to the nurse.

(JE1, p. 24) Dr. Deignan assessed Edwards with minor musculoskeletal pain and imposed preventative restrictions of no lifting, pushing, or pulling anything weighing more than 15 pounds, and no work above shoulder height. (JE1, pp. 24-25)

Edwards continued to report left greater than right shoulder pain at his October 30, 2019, follow-up appointment with Dr. Deignan. Dr. Deignan assessed Edwards with bilateral shoulder pain complaints that were consistent with a pectoralis and right biceps strain. (JE1, p. 23) At the end of his examination, Edwards requested an MRI be taken of his shoulders. Dr. Deignan denied claimant's request, noting that conservative care was appropriate as they were just 5 days out from the date of injury. (Id.) Edwards was discouraged by the lack of a definitive diagnosis and expressed his frustration with Dr. Deignan's handling of his work injury. (JE1, pp. 22-23)

Edwards returned to Dr. Deignan on November 6, 2019, reporting no changes in his condition. (Id.) He described his pain as "agonizing" and remarked that he experienced the same pain from morning to night. (Id.) On examination, claimant was tender along both clavicles, at the right biceps tendon, and in the right rhomboid. Additionally, claimant described pain with Hawkins' testing. (Id.) Despite claimant's pain complaints and Dr. Deignan's findings during examination, Dr. Deignan continued to assess claimant with bilateral pectoralis muscle pain. (Id.)

Dr. Deignan eventually referred Edwards to see an orthopedic specialist. The decision was made, in part, because Edwards was going to be laid off and would not be presenting to the on-site clinic. (See JE1, pp. 23-24; JE2, p. 46) Dr. Deignan's referral noted that no diagnostic imaging had been taken. (JE1, p. 22)

On November 8, 2019, Edwards was evaluated by Tuvi Mendel, M.D., an orthopedic surgeon with Orthopaedic Specialists, P.C. (JE2, p. 48) Consistent with the medical records of Ms. Shepherd, Dr. Mendel's "History of Present Illness" section notes that Edwards' bilateral shoulder pain began on October 21, 2019, and progressed to the point where he decided to seek treatment at the on-site occupational health clinic. (Id.) Dr. Mendel noted that no diagnostic tests or therapy had been recommended or performed. (Id.) On examination, Dr. Mendel observed tenderness over the rotator cuff

and AC joint in both shoulders. (JE2, p. 49) Dr. Mendel subsequently administered four different rotator cuff tests. All four tests returned positive in both shoulders. (Id.)

Dr. Mendel assessed Edwards with bilateral shoulder pain with impingement and AC joint irritability, as well as rotator cuff irritability, left worse than right. (JE2, p. 50) To address Edwards' conditions, Dr. Mendel recommended diagnostic/therapeutic injections and physical therapy. (Id.) Dr. Mendel opined injections were Edwards' best option; however, Edwards declined the treatment option, noting he was extremely afraid of needles. (Id.) He would later tell both Dr. Mendel and Dr. Deignan that he did not want injections because he did not want a "band-aid" solution. (See JE2, p. 51)

Edwards returned to Dr. Deignan for a follow-up appointment on November 11, 2019. (JE1, p. 21) Dr. Deignan reviewed Dr. Mendel's notes with Edwards and conducted a physical examination. (Id.) Dr. Deignan assessed claimant with bilateral shoulder pain with pectoralis pain, impingement symptoms, and biceps tendon pain. (Id.) Pursuant to Dr. Mendel's report, Dr. Deignan prescribed meloxicam and physical therapy. (Id.)

Immediately following the November 11, 2019, appointment, Dr. Deignan conducted a Job Site Assessment. (See JE1, pp. 19-20) The usefulness of the assessment is limited by the fact it only documents the three job duties Edwards performed on October 25, 2019, the date Edwards presented for treatment, not October 21, 2019, the date claimant's symptoms began. (See JE1, p. 20) Again, Dr. Deignan's assessment fails to distinguish between the date of injury and the date Edwards first presented for treatment. Nevertheless, Dr. Deignan concluded her Job Site Assessment by providing:

> The activities required on this job are consistent with the injury reported. The forces and positions of work could reasonably have caused the complaints Mr. Edwards reported.

(JE1, p. 21) At the time, the "complaints Mr. Edwards reported" consisted of bilateral shoulder pain, with "burning" and "tearing." (JE1, p. 24)

Notably, the reporting of claimant's injury is complicated by the fact Edwards experienced pain while installing a drive shaft on two separate occasions. On or about October 21, 2019, Edwards sustained a traumatic injury while installing a drive shaft. He has consistently testified that he did not report this injury or request medical treatment for the same on the date of injury. On October 25, 2019, Edwards performed three different jobs. The second of the three jobs involved installing drive shafts. Edwards told Dr. Deignan that he was only able to install one drive shaft on October 25, 2019, due to the pain in his bilateral shoulders. Unlike with the October 21, 2019, occurrence, Edwards reported his bilateral shoulder pain and requested medical treatment for the same on October 25, 2019. Dr. Deignan's reporting, including her jobsite analysis, squarely focuses on the October 25, 2019, occurrence. (JE1, pp. 20-21, 24)

Pursuant to Dr. Mendel's recommendation, physical therapy was initiated on November 12, 2019. (JE1, p. 18) Michelle Whiteside, P.T. recorded that Edwards was "doing something at work and could feel soreness in his shoulders" on or about October 21, 2019. (Id.) Edwards told Ms. Whiteside that he initially believed the pain would go away with time; however, his pain worsened throughout the week, and he decided to seek medical attention after experiencing "some sharp stabbing pain on Friday of that week[.]" (Id.) Like Dr. Mendel, Ms. Whiteside assessed Edwards with bilateral shoulder pain and signs and symptoms of mild right impingement and moderate left impingement. (JE1, p. 19)

In a November 18, 2019, note, Dr. Deignan again reviewed the job duties of the valve sub position. (JE1, p. 14) Dr. Deignan opined, "Overall the job has some problematic activities, but the clinical presentation is not one consistent with rotator cuff tear or labrum tear." (JE1, p. 15) In other words, Dr. Deignan acknowledged that individuals working in the valve sub position are subject to activities that could cause a rotator cuff tear or labrum tear; however, claimant's specific complaints did not align with a diagnosis of a rotator cuff tear or labrum tear.

Edwards continued to report no improvement when he presented to Dr. Deignan on November 27, 2019, at the on-site occupational health clinic at the John Deere Seeding Plant in Moline, Illinois. (JE1, p. 10) In addition to his ongoing complaints of pain, Edwards reported numbness in both of his arms and hands. (Id.) Interestingly, Dr. Deignan concluded that the numbness in Edwards' hands stemmed from "laying in bed with his elbows against the bed." (Id.) She assessed bilateral shoulder strain with symptoms of impingement and continued physical therapy. (JE1, pp. 10-11) Following the examination, Edwards again expressed his frustrations with Dr. Deignan's treatment plan. (JE1, p. 11)

At his December 18, 2019, follow-up appointment with Dr. Mendel, Edwards reported numbness and tingling from his shoulder down to his 4th and 5th digits. (JE2, p. 51) He reported seeing improvements in his mobility, but not in his strength. (Id.) Given claimant's lack of improvement, Dr. Mendel ordered an MR arthrogram of the right shoulder. (JE2, p. 52) According to the medical records, claimant chose to have the MR arthrogram done on his right shoulder first because it is his dominant side, and the right shoulder was bothering him more at the time of the December 18, 2019, appointment. (See JE1, p. 1)

Dr. Deignan approved the request for an MR arthrogram on December 20, 2019. (JE2, p. 53; see JE1, p. 2) It is unclear why Dr. Deignan needed to approve the recommendation of Dr. Mendel considering Dr. Mendel was an authorized treating physician.

The December 31, 2019, MR arthrogram revealed moderate rotator cuff tendinopathy with partial undersurface tears of the supraspinatus and infraspinatus tendons, a small SLAP tear, and mild acromioclavicular joint degenerative changes. (JE3, pp. 82-83; see JE2, p. 54) After reviewing the diagnostic imaging, Dr. Mendel recommended surgical intervention consisting of a right shoulder arthroscopy with

decompression, possible biceps tenodesis, rotator cuff repair, and AC joint resection. (JE2, p. 55) Dr. Mendel faxed an authorization letter for the same to Dr. Deignan on January 6, 2020. (JE2, p. 57)

Following Dr. Mendel's recommendation for surgery, Dr. Deignan drafted a causation opinion. (JE1, pp. 30-31) Despite previously providing the forces and positions of work could reasonably have caused the complaints Mr. Edwards reported, Dr. Deignan opined that the pathology demonstrated on the December 31, 2019, MRI was not caused, exacerbated, or aggravated by the work claimant performed at John Deere Davenport Works. (JE1, p. 31) Additionally, the causation opinion provides, "In the week before reporting the injury, Mr. Edwards did not have any specific event that started his pain." (JE1, p. 31) Such an opinion is not supported by the employer's incident report or the contemporaneous medical records of Ms. Shepherd, Ms. Whiteside, or Dr. Mendel, which clearly note a specific event occurring in the days leading up to October 25, 2019. (JE1, pp. 18, 25; JE2, p. 48)

Dr. Deignan subsequently denied authorization for the recommended surgery on January 13, 2020, at approximately 7:09 a.m. (JE1, p. 30) Hours later, Dr. Deignan drafted an e-mail providing that Edwards reached maximum medical improvement (MMI) "for the muscle strain diagnosis" three weeks earlier on December 20, 2019. (JE1, pp. 29-30) Importantly, Dr. Deignan did not conduct a physical examination of Edwards on December 20, 2019 or January 13, 2020. (See JE1, pp. 2-3) ("O: Not re-examined") Moreover, the notes from the December 20, 2019, appointment do not indicate that Dr. Deignan felt claimant had reached MMI for any of his alleged conditions. (See JE1, pp. 2-3)

On the same day, defendant produced a denial letter to claimant. (See Ex. G) The letter outlined Dr. Deignan's causation opinion and relayed that defendant was denying the alleged bilateral shoulder injury as well as any corresponding request for workers' compensation benefits. (Ex. G, p. 23)

The denial letter misstates Dr. Deignan's November 18, 2019, opinion regarding the potential causal connection between the alleged work injury and claimant's job duties. The letter provides, "She concluded that the forces required to perform these activities are not consistent with a labrum tear or rotator cuff tear." In reality, Dr. Deignan concluded the work activities were problematic, but claimant's clinical presentation did not translate to a rotator cuff or labrum tear. (See JE1, p. 15) At the time, Dr. Deignan mistakenly believed claimant's complaints were located in his chest. (See JE1, pp. 22, 24-25)

The January 13, 2020, denial letter also notes that claimant's weekly temporary workers' compensation benefits would terminate thirty (30) days from the delivery of the letter, provided he was otherwise entitled to temporary workers' compensation benefits during said 30-day period. (Ex. G, p. 25) Edwards did not receive any additional temporary benefits following the January 13, 2020, letter. (See Ex. I, p. 30) Defendant asserts Edwards was not entitled to any additional temporary benefits because he reached MMI on December 20, 2019. (Ex. I, p. 30) However, the denial letter does not

reference or discuss Dr. Deignan's opinion regarding MMI. (See JE1, p. 2) I find defendant did not contemporaneously relay its reason for denying additional temporary benefits.

Despite the denial, Edwards ultimately decided to move forward with the recommended surgical intervention. Dr. Mendel performed the right shoulder arthroscopy with decompression, biceps tenodesis, rotator cuff repair, and AC joint resection on February 10, 2020. (JE2, pp. 54-55; JE4, pp. 86-88) Edwards testified the surgery was successful at alleviating the pain in his right shoulder. (Ex. T, Depo. p. 66)

Following a series of relatively uneventful post-op appointments, Dr. Mendel released Edwards to return to work without restrictions in June 2020. (JE2, p. 66) Shortly thereafter, Edwards was recalled to work at the John Deere Seeding plant in Moline, Illinois. Edwards returned to full-time work in "cradle assembly" in August 2020. (See JE1, p. 28; Ex. T, Depo. p. 61) Edwards was able to work in this position without issue until approximately September 21, 2020. (See JE1, p. 28; JE2, p. 68)

On September 21, 2020, Edwards presented to the on-site occupational health clinic at John Deere Seeding and reported bilateral shoulder pain. (JE1, p. 28) Dr. Deignan was at the Seeding plant on this date and was able to examine Edwards. Dr. Deignan opined, "the symptoms sound like the same claim that [was] reported at Davenport Works." (Id.) Dr. Deignan implemented preventative restrictions of no overhead lifting with either shoulder and asked the Safety Department to investigate. (Id.) Edwards reported he was able to perform most of his job duties despite the preventative restrictions. (See JE1, p. 32)

Due to his increased pain, Edwards scheduled a follow-up visit with Dr. Mendel's office on September 25, 2020. (JE2, p. 68) Edwards reported that his shoulder was doing well up until the last week of September, when he began feeling the same pain he experienced prior to his February 10, 2020, surgery. (Id.) He denied any specific injury. (Id.) Dr. Mendel referred Edwards back to physical therapy and recommended he ask occupational health to assess his workstation for appropriate modifications. (JE2, p. 69)

Despite failing to describe a work-related injury with any specificity when speaking with Dr. Deignan and Dr. Mendel, Edwards testified at his deposition that he aggravated his right shoulder pulling on a torque wrench on or about September 21, 2020. (Ex. T, Depo. p. 28)

In one of the more concerning medical records to come across my desk, an October 17, 2020, medical record from the on-site occupational health clinic provides that Dr. Deignan spoke with John Deere's Safety Director who "feels the work activities are not sufficient to cause the current injury. He advises to denie [*sic*] the case as work related." (JE1, p. 32) Without providing her own causation opinion or addressing the accuracy of the safety director's lay opinion, Dr. Deignan removed Edwards' restrictions and instructed him to follow up with Dr. Mendel, using his personal health insurance. (Id.) This medical record casts significant doubt on defendant's assertion that the medical staff at its on-site clinic is entirely independent from the employer.

John Deere Davenport Works subsequently recalled Edwards and he returned to work in his full-time utilities position on January 19, 2021. (Ex. T, p. 96) Edwards testified that he returned to his normal utility job duties; however, he required assistance when working on the "Bogie." (Ex. T, Depo. p. 63)

After a few weeks, Edwards returned to the on-site occupational health clinic and reported continued bilateral shoulder discomfort. (JE1, p. 37) He reported no specific injury or traumatic event; however, he did note that the repetitive nature of the job and the awkward angles used when torquing were causing him right shoulder pain. (JE1, pp. 37-38) At a follow-up appointment with Dr. Mendel, Edwards relayed his belief that he had reinjured his right shoulder at work. (JE2, p. 72) At deposition, Edwards attributed the then-current bilateral shoulder discomfort to using a torque wrench overtop a skidder. (See Ex. T, Depo. pp. 63, 73-74)

Following an updated MR arthrogram, Dr. Mendel diagnosed a recurrent versus evolving rotator cuff tear. (JE2, p. 75) As a result, Dr. Mendel recommended and performed a second surgery on Edwards' right shoulder. (See JE2, p. 75; JE4, p. 89) The surgery occurred on April 27, 2021, and consisted of a decompression, rotator cuff repair, and a platelet rich plasma injection. (JE4, p. 89; See JE2, p. 76) Despite undergoing surgery, Edwards continued to complain of ongoing pain with impingement through at least October 2021. (JE2, p. 80)

Edwards had not been released or placed at MMI by Dr. Mendel prior to the November 16, 2021, evidentiary hearing. The most recent medical record in evidence notes that Edwards' shoulder had been feeling "pretty good overall" but his strength was not where he wanted it to be. (JE6, p. 106) Edwards does not feel as though the second surgery was as successful as the first. (See Ex. 1, p. 5)

Defendant challenges Edwards' credibility. Defendant first calls attention to Edwards' criminal history. In 2004, Edwards pleaded guilty to possession of stolen merchandise, a felony. (Ex. A) Following his plea, Edwards paid his fines and completed approximately 18 months of probation. (Hr. Tr., p. 13) While theft is a crime of dishonesty, the crime was committed over fifteen years ago. There is no evidence that Edwards has committed any additional crimes of dishonesty. I decline defendant's invitation to summarily reject claimant's testimony solely based upon his 2004 conviction.

Defendant next highlights the fact claimant's petition and discovery responses assert a cumulative injury, while his testimony supports the occurrence of an acute injury. I do not find this argument to be persuasive. Defendant's assertion has no bearing on Edwards' propensity for truthfulness. Defendant's argument fails to see claimant for the layperson that he is. Edwards is not required to concern himself with the technical terms commonly used in the realm of workers' compensation law. Rather, Edwards and similarly situated injured workers are simply called upon to testify to their injuries and associated conditions. Any confusion surrounding the type of injury sustained is typically clarified through the discovery process.

Similarly, defendant asserts that Edwards' testimony regarding the left shoulder injury has been entirely inconsistent. Defendant highlights that the current matter largely focuses on the right shoulder, despite the contemporaneous medical records consistently noting left greater than right pain. Again, I do not find defendant's argument persuasive. Edwards testified that he sustained injuries to both shoulders when picking up the drive shaft. He further asserts that his right shoulder pain was more severe than the left shoulder pain on the date of the traumatic injury; however, he also asserts his left shoulder pain increased throughout the week as he overcompensated for his right shoulder. In this respect, it is entirely possible that Edwards' left shoulder pain was greater than his right shoulder pain when he initially presented for medical treatment.

Lastly, defendant points out that Edwards alleged a work injury after receiving notice that an indefinite layoff from John Deere Davenport Works was imminent. (Ex. E, p. 18) Defendant does not believe that the timing of Edwards' reporting was "mere coincidence." Such an argument is purely speculative and will not be entertained.

While I did not find the majority of defendant's credibility arguments to be persuasive, there are a number of inconsistencies and issues with claimant's testimony that do call his credibility into question.

From a general perspective, Edwards presented as a poor historian. Most notably, Edwards' testimony regarding the specifics of the alleged traumatic injury have not always matched up with the contemporaneous medical records. For instance, Edwards testified at both his deposition and at the evidentiary hearing that he felt a "pop" in his right shoulder when he lifted the drive shaft; however, such an assertion is not documented in any of the contemporaneous medical records. Additionally, claimant testified to acute aggravations occurring in September 2020 and February 2021; however, the contemporaneous medical records consistently note that Edwards did not report a specific injury to his providers. (See JE1, p. 37; JE2, p. 68)

Despite the above noted concerns regarding claimant's credibility, the contemporaneous medical evidence strongly suggests that claimant sustained some type of injury as a result of his work activities on October 21, 2019. Ultimately, compensability of this case will come down to medical causation.

The parties sought and obtained competing medical opinions as to whether claimant's bilateral shoulder condition and need for surgery arose out of and in the course of his employment with John Deere.

Dr. Deignan offered various reports and opinions as the on-site occupational physician for John Deere. Following the December 31, 2019, MR arthrogram, and Dr. Mendel's recommendation for surgery, Dr. Deignan was asked to address causation. (See JE1, pp. 30-31; JE2, p. 55; JE3, pp. 82-83) Dr. Deignan opined that the pathology demonstrated on the December 31, 2019, MR arthrogram was not caused, exacerbated, or aggravated by the work Edwards performed at John Deere. (JE1, p. 31)

I do not find Dr. Deignan's opinion persuasive for several reasons. First, it does not appear as though Dr. Deignan ever had a firm understanding of claimant's work injury and his reporting of the same.

In her January 8, 2020, causation opinion, Dr. Deignan provides, "In the week before reporting the injury, Mr. Edwards did not have any specific event that started his pain." (JE1, p. 31) Such an opinion is not supported by the employer's incident report or the contemporaneous medical records of Ms. Shepherd, Ms. Whiteside, or Dr. Mendel, which clearly note a specific event occurring in the days leading up to October 25, 2019. (JE1, pp. 18, 25; JE2, p. 48)

According to the incident report, Edwards sustained an injury to his bilateral shoulders at approximately 10:00 AM on Monday, October 21, 2019. (JE1, p. 39) The incident report was completed by Ms. Shepherd at Occupational Health Services on October 25, 2019, the date Edwards first reported the injury to his supervisor. (See Id.) The initial medical record expands upon the information noted in the October 25, 2019, incident report. The record provides:

> This employee, who works in department 783, reported that he had been laying on his back to put a drive shaft into a frame. EE noted that he was holding and balancing the drive shaft while attempting to bolt the drive shaft to the yoke when he began having bilateral shoulder pain. EE stated that he is feeling a "burning and tearing" sensation in both shoulders, however the left shoulder is worse than the right. EE stated that he cannot pin-point a day or time when the burning and tearing sensation began, but that it started around the beginning of this week and today it is at its worse [*sic*], prompting him to seek Medical assistance. . . . EE was accompanied to Medical by his Supervisor, T. O'Connell.

(JE1, p. 25)

Similarly, Edwards told Dr. Mendel that his bilateral shoulder pain began on October 21, 2019, and that his symptoms progressed. (JE2, p. 48) Edwards then told Ms. Whiteside that he first noticed bilateral shoulder pain on October 21, 2019, when he was doing something at work. (JE1, p. 18) He also described how the pain worsened throughout the week and he decided to seek treatment on October 25, 2019. (Id.)

From these records, I deduce that Edwards sustained an injury to his bilateral shoulders while installing a drive shaft on Monday, October 21, 2019. At some point in time thereafter, Edwards developed a burning and tearing sensation in his shoulders.[1] When his symptoms did not subside, he elected to seek medical treatment and reported the condition to his supervisor and Occupational Health Services on Friday, October 25, 2019.

[1] Unless the burning and tearing sensation presented at a later date, it would be difficult to reconcile Ms. Shepherd's note that Edwards could not pinpoint a day or time when the burning and tearing sensation began, with her incident report providing Edwards' injury occurred at 10:00 AM on October 21, 2019.

Dr. Deignan's medical records are void of any reference to a traumatic event occurring on or about October 21, 2019. Despite the detailed reports of Ms. Shepherd, and the information provided in the incident report, it is evident from Dr. Deignan's first medical report that she misunderstood the timeline of events and the details surrounding Edwards' alleged work injury. (JE1, p. 24) Her jobsite analysis similarly describes the day claimant first sought medical treatment as the date of injury. The report provides, "*On the date of injury* Mr. Edwards performed 3 different jobs." (JE1, p. 20) (emphasis added) She then provides Edwards told his supervisor he was having shoulder problems while performing his first job and ultimately requested medical assistance after performing the third job. (JE1, pp. 20-21) Dr. Deignan's understanding is also at odds with claimant's credible testimony that he did not seek medical treatment or report the injury to his supervisor on the day he first experienced shoulder pain. (Hr. Tr., pp. 55-56; Ex. T, Depo. p. 41) It is evident Dr. Deignan mistakenly believed that claimant sustained an injury on October 25, 2019.

Additionally, Dr. Deignan's causation opinion cites to some, but not all, of her prior diagnoses. In her causation opinion, Dr. Deignan provides that her initial diagnosis was "minor musculoskeletal pain mainly affecting the pectoral muscles in the anterior chest." At no point in her causation opinion does Dr. Deignan address the fact she also assessed claimant with bilateral shoulder pain consistent with a right biceps strain, or that she followed the recommendations and diagnoses of Dr. Mendel until surgery was recommended.

Lastly, Dr. Deignan's opinion does not adequately address the possibility that claimant sustained a cumulative injury. The only reference Dr. Deignan makes to a potential cumulative injury is a single paragraph that discusses quarterback injuries in the National Football League (NFL). The inclusion of this study is quite perplexing. A study concluding that the majority of quarterback shoulder injuries were caused by direct trauma, while less than 15 percent were due to overuse from throwing, has no applicability to the matter at hand. There is no evidence the cited study can be extrapolated to injuries sustained in the workplace, and, to the undersigned's knowledge, Edwards is not an NFL quarterback, nor did his injury occur while throwing a football or being tackled.

For these reasons, I assign no weight to Dr. Deignan's causation opinion.

Following the February 10, 2020 surgery, claimant's counsel sought a causation opinion from Dr. Mendel. (See JE2, p. 67) Dr. Mendel produced a report on August 13, 2020, opining Edwards' bilateral shoulder condition was aggravated or possibly caused by his work activities at John Deere. (JE2, p. 67)

Defendant subsequently scheduled a conference call with Dr. Mendel. (See Ex. L, p. 39) During the conference call, Dr. Mendel was made aware of Dr. Deignan's January 6, 2020, causation opinion. Dr. Mendel was also made aware of the fact Dr. Deignan performed a jobsite analysis prior to producing her causation opinion. (See Ex. L, p. 40) Following the conference call, defense counsel produced a letter to Dr. Mendel that alleged to have summarized their discussion. Defense counsel asked Dr.

Mendel to sign off on the letter if he felt the letter accurately reflected his opinions. Dr. Mendel signed the document on October 7, 2020. (Ex. L, p. 41)

According to the letter, Dr. Mendel confirmed he did not know of claimant's specific job duties at John Deere. (Ex. L, p. 40) Dr. Mendel agreed with the statement that the right shoulder condition depicted on the December 31, 2019, MRI was not caused by an acute or traumatic injury. (Ex. L, p. 40) Dr. Mendel also provided the speculative opinion that the fact Mr. Edwards is alleging a bilateral shoulder claim makes it less likely that the condition was caused by any work-related cumulative or repetitive trauma because, "a typical worker primarily uses his dominant arm and shoulder on the job and uses his non-dominant arm and shoulder less on the job." (Id.) Lastly, Dr. Mendel agreed that because Dr. Deignan is more familiar with claimant's job duties, he would defer to her as to whether claimant's work activities at John Deere caused, exacerbated, or aggravated claimant's bilateral shoulder condition. (Ex. L, pp. 40-41)

In response to the opinions of Drs. Deignan and Mendel, Edwards sought an independent medical examination with David Segal, M.D. (Ex. 1) The evaluation occurred on September 24, 2021. (Ex. 1, p. 1) Dr. Segal's report provides a detailed summary of the medical records in evidence. It appears Dr. Segal understood and detailed a medical history that includes all three incidents described by claimant as occurring in October 2019, September 2020, and February 2021. Following his review of the medical records and physical evaluation of Edwards, Dr. Segal agreed with the right shoulder diagnoses provided by Dr. Mendel. He also diagnosed claimant with signs and symptoms consistent with rotator cuff tendinopathy or tearing, and subacromial impingement in the left shoulder. (Ex. 1, p. 14) He also diagnosed claimant with ulnar neuropathy and possible carpal tunnel syndrome in the right upper extremity. (Id.) He placed claimant at MMI as of June 15, 2021. (Ex. 1, p. 30)

Dr. Segal opined all of claimant's diagnoses are directly and causally related to his alleged work injuries. (Ex. 1, p. 25) Dr. Segal opined that the forceful strain on the shoulder region caused downward, outward, and rotational stress that was transferred to claimant's labrum, shoulder joint, and shoulder girdle area. (Ex. 1, p. 15) He further opined that but for the October 2019 work injury, claimant would not have, or continue to have, increased symptoms and increased impairment. (Id.) Dr. Segal assessed 20 percent right upper extremity impairment as a result of the right shoulder injury, 2 percent left upper extremity impairment as a result of the left shoulder injury, and an additional 15 percent right upper extremity impairment as a result of the right ulnar neuropathy. (Ex. 1, pp. 32-33)

With respect to permanent restrictions, Dr. Segal limited claimant to lifting 30-35 pounds with his right arm and 35-40 pounds with his left. (Ex. 1, p. 37) Dr. Segal further recommended he rarely reach overhead with his right arm, rarely use vibratory tools/machinery and vehicles, and never engage in heavy torquing. (Id.) Dr. Segal opined that claimant's physical limitations would limit any meaningful participation in gainful employment in work that involves lifting or manual labor. (Id.)

Lastly, Dr. Segal provided a number of treatment recommendations intended to improve the condition of claimant's bilateral shoulders. (Ex. 1, pp. 38-39) In terms of "immediate recommendations" he recommended an EMG and subsequent evaluation with a neurosurgeon or hand surgeon for his ulnar neuropathy symptoms. He further recommended an MRI for the left shoulder as it is still causing claimant trouble and has not yet been addressed. (Ex. 1, p. 38) He also provided a list of treatments that may be necessary in the future, including, diagnostic imaging, physical therapy, injections, and additional surgeries. (Ex. 1, p. 39)

When comparing and weighing the competing medical opinions of Dr. Mendel and Dr. Segal, I note that Dr. Mendel had the advantage of evaluating and speaking to Edwards multiple times since November 2019. He has also inspected Edwards' shoulder during two surgical procedures. On the other hand, Dr. Mendel changed his causation opinion and deferred to Dr. Deignan, whose opinions I have expressly rejected.

In comparison, Dr. Segal evaluated claimant once for an independent medical evaluation, and the evaluation took place nearly two years after the original date of injury.

Defendant challenges the opinions of Dr. Segal and points out that the Iowa Board of Medicine filed a Statement of Charges against Dr. Segal in 2015. (See Exs. B, C, D) The charges certainly impact Dr. Segal's credentials and his overall credibility. On the other hand, with the exception of neurosurgery, the Board of Medicine has permitted Dr. Segal to continue the practice of medicine. While concerning, the charges brought against Dr. Segal were resolved via a settlement in 2016, the Board of Medicine approved relatively minor penalties in the disciplinary proceedings, and Dr. Segal was not asked to provide a neurosurgical opinion in this case. As such, I find Dr. Segal continues to be qualified to offer medical opinions and I will consider his opinions in this case.

Ultimately, I have a difficult time accepting the updated causation opinion of Dr. Mendel as it relies heavily on the accuracy of the information provided by defense counsel, and Dr. Mendel defers his causation opinion to Dr. Deignan, whose opinions I expressly rejected. He also readily admits that he is not familiar with Edwards' job duties.

Several issues exist within the October 5, 2020, letter from defense counsel to Dr. Mendel. First, the opening paragraph of the letter misstates the October 25, 2019, medical record and ignores the incident report. (JE1, p. 39) The letter inaccurately provides, "When Mr. Edwards reported his alleged bilateral shoulder injury to John Deere Davenport Work on October 25, 2019, he stated that he could not pin-point a day or time when the alleged injury occurred." (Ex. L, p. 39) In reality, the October 25, 2019, medical record provides that claimant could not pinpoint a day or time when the burning and tearing sensation began, not when the alleged injury occurred. (JE1, p. 25) Moreover, the incident report definitively denotes a specific date and time when the alleged injury occurred. (JE1, p. 39)

Lastly, Dr. Mendel's opinion regarding the likelihood of sustaining a bilateral shoulder injury as a result of cumulative or repetitive trauma is unhelpful as it does not account for the facts of the matter at hand. It is undisputed that Edwards had to frequently use both arms in the performance of his job. Moreover, Edwards credibly testified that he had to use his left shoulder more to compensate for his right following the October 21, 2019, work injury.

While Dr. Segal's IME report is not without fault, I find that Dr. Segal is the only physician in this case to possess and conduct a comprehensive review and analysis of all relevant medical records in this case. Although Dr. Segal did not perform a job site visit in this case, he provided a detailed summary of the job duties Edwards performed as a utility employee. He also effectively critiqued the opinions of Dr. Deignan and Dr. Mendel. Dr. Segal provided reasonable and convincing explanations for his findings, and his opinions are supported by the medical evidence in this case. Unlike Drs. Deignan and Mendel, Dr. Segal specifically addressed the potential cumulative nature of Edwards' injury. While I take issue with Dr. Segal's impairment ratings for the left shoulder and ulnar neuropathy, my concern does not detract from the strength of his opinions regarding causation.

Having considered all of the medical opinions, as well as the other evidence in this record, I find the medical opinions expressed by Dr. Segal to be most credible and consistent with the evidentiary record. I accept Dr. Segal's causation opinion. Therefore, I find the claimant in this case has proven by a preponderance of the evidence that he sustained an injury to his bilateral shoulders, which arose out of and in the course of his employment with John Deere Davenport Works, on October 21, 2019.

Claimant asserts he sustained a cumulative injury, with a manifestation date of October 25, 2019. The evidentiary record does not support such a conclusion. Instead, the evidentiary record supports a finding of an acute injury occurring on or about October 21, 2019. Claimant has consistently testified that his injuries stem from lifting a drive shaft on or about October 21, 2019. The incident report and the contemporaneous medical records generally corroborate claimant's testimony. As such, I find claimant sustained an acute injury on October 21, 2019. Such a finding does not prejudice defendant. As noted several times throughout its post-hearing brief, defendant was acutely aware of claimant's claims regarding a traumatic injury. Moreover, Dr. Deignan and Dr. Mendel both addressed causation for a traumatic injury.

The parties dispute whether claimant has reached MMI for his bilateral shoulder condition.

Dr. Segal placed Edwards at MMI as of June 15, 2021. (Ex. 1, p. 30) In discussing MMI, Dr. Segal's report inaccurately provides that Dr. Mendel released Edwards back to regular duty work without restrictions on June 15, 2021. Such an opinion is not supported by the evidentiary record. There is no evidence that Dr. Mendel released claimant to return to work without restrictions on June 15, 2021. At hearing, claimant confirmed Dr. Mendel had not released him back to work prior to the evidentiary hearing. (Hr. Tr., p. 61)

Edwards continues to treat with Dr. Mendel, he is still presenting for physical therapy treatments with respect to the right shoulder, and his left shoulder has not been fully addressed at this time. Moreover, as of the date of hearing, claimant had not returned to work for the defendant employer. For these reasons, I reject Dr. Segal's opinion in this respect, and find claimant has failed to prove he has reached MMI for his bilateral shoulder condition.

In reaching a finding that claimant has not yet achieved MMI, I must also find the issue of permanency is not ripe for determination at this time.

REASONING AND CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury which arose out of and in the course of his 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. 6.904(3).

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 refer to the cause or source of the injury. The words "in the course of refer to the time, place, and circumstances of the injury. 2800 Corp, v. Fernandez, 528 N.W.2d 124 (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.

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. 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).

Claimant's petition asserts he sustained a cumulative injury, with a manifestation date of October 25, 2019; however, the evidentiary record does not support such a

conclusion. Instead, the evidentiary record supports a finding of an acute injury occurring on October 21, 2019.

As such, it must first be decided whether claimant's bilateral shoulder claim should be denied due to the variance in the injury date as plead on the division's original notice and petition form and the actual date of injury as established through the evidentiary record.

The Iowa Supreme Court has premised its prior consideration of the sufficiency of pleading analysis with a recognition that our workers' compensation law is for the benefit of working men and women, "and should be, within reason, liberally construed." Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961); see Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 261 (Iowa 1980) (workers' compensation law should be liberally construed). "Its beneficent purpose should not be defeated by reading something into a section which is not there, or by a narrow or strained construction." Disbrow v. Peering Implement Co., 233 Iowa 380, 392, 9 N.W.2d 378, 384 (1943).

Defendants are entitled to only fair notice of the claim and such does not require a pleading of facts. Doerring v. Kramer, 556 N.W.2d 816 (Iowa App. 1996). Specific theories need not be pleaded. Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188 (Iowa App. 1984). Only a short and plain statement of the claim is necessary. Van Meter v. Van Meter, 328 N.W.2d 338 (Iowa 1983). This is especially true in an administrative agency such as this agency charged with administering a humanitarian compensation system. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 1177, 38 N.W.2d 161, 163 (1949). The key to pleading in an administrative process is nothing more nor less than opportunity to prepare and defend. Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 192 (1968).

Defendant in this case had the opportunity to conduct discovery to determine the specific basis for claimant's assertion as to the date of injury. It is clear the defendant ascertained the specifics of claimant's claim through discovery. Claimant has consistently testified that his injuries stem from lifting a drive shaft on or about October 21, 2019. The incident report and the contemporaneous medical records of Ms. Shepherd, Ms. Whiteside, and Dr. Mendel corroborate claimant's testimony.

The court has noted that a variance in an injury date from the pleading of approximately two weeks is "unimportant." Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 373-74, 112 N.W.2d 299, 301 (1961). The court explained:

> An application for arbitration is not a formal pleading and is not to be judged by the technical rules of pleading. Nor is the same conformity of proof to allegation necessary as in ordinary actions. Cross v. Hermanson Bros., 235 Iowa 739, 742-744, 16 N.W.2d 616, 617, 618 (1944) and citations; Ford v. Goode, 240 Iowa 1219, 1225, 38 N.W.2d 158, 161 (1949).

Due process requires that a party "be informed somehow of the issue involved in order to prevent surprise at the hearing and allow an opportunity to prepare . . . The

test is fundamental fairness, not whether the notice meets technical rules of common law pleading." Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992).

There is no surprise to defendant that claimant was asserting injuries to his bilateral shoulders. There is no surprise to defendant that claimant sustained an injury to his bilateral shoulders while installing a drive shaft. The essential cause of action as well as the supporting facts remain unchanged by the variance in the date of injury and the type of injury pled.

It is up to defendants to utilize the extensive discovery and evidence exchange procedures provided to them and the information they receive through their right to control the care to learn the details of any claim. The key to pleading in an administrative process is nothing more nor less than opportunity to prepare and defend. Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 192 (Iowa 1968).

Defendant had complete access to claimant's treatment records and were as knowledgeable of the mechanisms of injury as claimant. Defendant routinely references the same in their post-hearing brief. Aside from the medical reports of Dr. Deignan, the October 21, 2019, injury is well documented in the evidentiary record. Defendant was provided sufficient notice of the assertions of claimant and was fully able to investigate and prepare a vigorous defense of this claim despite claimant's error. Defendant seeks to have a well-documented injury and its effects thrown out due to a technicality that defendant recognized well before the date of the evidentiary hearing. Such a result would be undeniably harsh and detrimental to the very nature of the workers' compensation act.

Following review of the entirety of the evidentiary record and after giving significant consideration to the medical opinions in evidence, I determined claimant sustained an acute injury arising out of and in the course of his employment with defendant on October 21, 2019. I further find the September 2020 and February 2021 incidents were a continuation of claimant's October 21, 2019, traumatic work injury as opposed to new, distinct injuries. It is widely accepted that when a body part is rendered weakened by a work-related injury and is subsequently worsened through normal work activities, the employer is liable for the full disability. Oldham v. Schofield & Welch, 266 N.W. 480, 482 (Iowa 1936).

The next disputed issue to be decided is whether claimant is entitled to additional healing period benefits. Claimant first asserts entitlement to healing period benefits from November 18, 2019, through August 3, 2020. Defendant asserts claimant is not entitled to healing period benefits between November 18, 2019, through August 3, 2020, as claimant was off work during this time due to a pre-planned, company-wide layoff.

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 (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has

achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). An intervening event will not terminate healing period benefits if the claimant is otherwise entitled to receive them, even though another circumstance prevented working as well.

Review of the medical records in evidence reveals that at the time of the planned layoff, claimant remained under the work restrictions imposed by Dr. Deignan and Dr. Mendel. At the time of the layoff, claimant had returned to work in a light duty capacity. He had not, however, returned to substantially similar work prior to the date of the planned layoff. Claimant's limitations are attributable to the bilateral shoulder injury. Claimant has proven he remained under work restrictions which limited his activity between November 18, 2019, and August 3, 2020. Claimant is entitled to healing period benefits during the planned layoff.

Claimant next contends that he is entitled to healing period benefits from March 12, 2021, to June 15, 2021, while he was recovering from his second surgery. Aside from causation, defendant offers no argument with respect to claimant's claim for benefits between March 12, 2021, through June 15, 2021, while he was recovering from his second surgery.

I find claimant was off work, recovering from a surgical procedure causally related to the original work injury, between March 12, 2021, and June 15, 2021. As such, I find claimant is entitled to healing period benefits between March 12, 2021, through at least June 15, 2021.

The next disputed issue – whether claimant has sustained permanent disability as a result of the October 21, 2019, injury – requires a determination of whether claimant has achieved MMI or remains in a running healing period as of the date of the arbitration hearing.

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).

Edwards contends he reached MMI as of June 15, 2021, pursuant to the opinions of Dr. Segal. Defendant rejects this assertion and argues claimant has not yet reached MMI.

The Iowa Supreme Court has indicated that this agency cannot speculate as to the extent of permanent disability before MMI has been achieved. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010) Deciding the issue of permanency before it is ripe risks making a final decision that could be undermined or altered by later evidence. Id.

Claimant's surgeon, Dr. Mendel, removed claimant from work following the April 27, 2021, surgery. On May 4, 2021, Dr. Mendel anticipated claimant would be able to

return to regular duties without restriction in approximately 3-6 months. (JE2, p. 76) Claimant credibly testified at hearing that Dr. Mendel had not released him to return to work, and he had not returned to work for the defendant employer.

Temporary total disability and healing period benefits are compensated under different statutory sections but represent payment of benefits for the same purpose: lost time during a period of temporary disability. A determination of whether benefits paid or payable should be categorized as temporary disability benefits under Iowa Code section 85.33 or as healing period benefits under Iowa Code section 85.34(1) cannot be determined until it is known whether the injury causes permanent disability. Of course, a determination of whether an injury causes permanent disability is not ripe until the claimant achieves MMI. Bell Bros Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010).

While Dr. Segal opined that claimant had achieved MMI on June 15, 2021, his opinion was based, in part on the inaccurate belief that Dr. Mendel had already returned claimant to work without restrictions. Dr. Segal also recommended additional forms of treatment intended to improve the condition of claimant's bilateral shoulders. These recommendations belie a finding of MMI.

At the time of the evidentiary hearing, claimant had not returned to work since undergoing surgery on April 27, 2021. There is no indication that claimant was capable of returning to substantially similar employment on or before the date of the evidentiary hearing. Lastly, claimant's surgeon had not released him to return to work or placed him at MMI. For these reasons, I find claimant was not at MMI as of the date of the arbitration hearing.

Claimant is entitled to either temporary total disability benefits or healing period benefits from March 12, 2021, through the date of the arbitration hearing and continuing until the first condition of either Iowa Code section 85.33(1) or Iowa Code section 85.34(1) is met.

Claimant asserts a claim for permanent disability benefits. However, as noted above, a claim for permanent disability is not ripe and cannot be determined until the claimant achieves MMI. Bell Bros., 779 N.W.2d at 200. Having determined that claimant has not yet achieved MMI, I conclude that the claim for permanent disability is premature and cannot be determined at this time.

The next issue for determination is whether defendant is 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).

Claimant is seeking reimbursement for the medical expenses contained in Exhibit 4. While claimant did not include a summary of his medical expenses, the vast majority of the medical expenses appear to stem from treatment offered by Dr. Mendel. I find the medical expenses documented in Exhibit 4 are reasonable, necessary, and causally related to the treatment of claimant's bilateral shoulder condition. As such, I find claimant is entitled to reimbursement of all causally related medical expenses contained in Exhibit 4.

Mr. Edwards is also asserting a claim for alternate medical care. More accurately, claimant is requesting that defendant initiate and provide ongoing medical care for the bilateral shoulder condition. Having determined claimant sustained an acute injury arising out of and in the course of his employment with defendant on October 21, 2019, defendant shall furnish reasonable medical care for all causally related conditions pursuant to Iowa Code section 85.27.

Mr. Edwards is also seeking reimbursement of the independent medical evaluation charges from Dr. Segal pursuant to 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 Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Defendant asserts that Dr. Segal's evaluation was not in response to an evaluation of permanent disability made by a physician retained by John Deere Davenport Works.

The Court of Appeals recently addressed this issue in in Kern v. Fenchel, Doster & Buck. P.L.C., No. 20-1206, 2021 WL 3890603 (Iowa Ct. App. Sept. 1, 2021). In Kern, defendants' expert found there was no causation. Kern disagreed with the opinion and sought an IME at defendants' expense. The commissioner found Kern was not entitled to recover the cost of the IME. The Iowa Court of Appeals reversed, finding the "opinion on lack of causation was tantamount to a zero percent impairment rating," which is reimbursable under Iowa Code section 85.39.

In this case, Dr. Deignan and Dr. Mendel offered no causation opinions. Claimant disagreed with Dr. Deignan and Dr. Mendel's opinions and sought an IME with Dr. Segal, which was issued after Dr. Deignan and Dr. Mendel's opinions. Under Kern, claimant is entitled to recover the cost of Dr. Segal's IME.

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 section 86.13(4) provides:

> 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 in 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.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom Meats. Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim-the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland. Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant asserts a single argument as to why penalty benefits are appropriate in this case. Claimant asserts he is entitled to penalty benefits for defendant's failure to pay 30 days of benefits following the January 13, 2020, denial letter. Claimant received temporary total disability benefits from November 18, 2019, until January 12, 2020, when he was issued a letter from defendant notifying him that he would be receiving an additional 30 days of benefits "provided you are otherwise entitled to benefits."

Defendant asserts that claimant was not otherwise entitled to TTD benefits, "as Claimant's entitlement to temporary benefits actually ended on December 20, 2019 – before Deere even completed its investigation and before the January 13, 2020 denial letter was ever mailed to Claimant[.]" (Defendant's post-hearing brief, p. 53)

The problem with defendant's argument is that the explanation contemporaneously conveyed to claimant at the time of the denial, delay, or termination of benefits did not include a reference to Dr. Deignan's MMI opinion. Rather, defendant only relayed to claimant that his benefits were being terminated as a result of Dr. Deignan's causation opinion. Claimant was not made aware that his benefits were being terminated as a result of his MMI status until February 20, 2020, two days after his attorney inquired as to why claimant did not receive 30 days of benefits following the January 12, 2020, letter.

Moreover, the assertion that Dr. Deignan's MMI opinion could provide defendant with a reasonable basis to contest claimant's entitlement to additional benefits strains credulity. Notably, Dr. Deignan's MMI opinion was not included in the on-site medical records for the December 20, 2019, appointment; rather, her opinion is first noted in an e-mail Dr. Deignan sent to Debra Slater, a nurse at the on-site clinic, and Michael Perry, the safety analyst at John Deere, on January 13, 2020, the same day defendant produced its denial letter to claimant, and one week after her initial causation opinion. (Ex. Z, Depo. p. 28) Dr. Deignan did not physically examine claimant on December 20, 2019, or January 13, 2020. It is difficult to understand how Dr. Deignan determined claimant reached MMI on December 20, 2019, let alone how defendant could rely upon the same to deny claimant's entitlement to additional benefits.

Defendant failed to pay 30 days of temporary benefits to claimant. Defendant is liable for $2,283.24 in penalty benefits for failure to pay claimant 30 days of temporary benefits after serving the January 13, 2020, Auxier notice.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was successful in his claim and therefore exercise my discretion and assess costs against the defendant in this matter in the amount of $100.00 for the filing fee.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant healing period benefits from November 18, 2019 through August 3, 2020, and from March 12, 2021 through the date of the arbitration hearing and continuing into the future until claimant returns to work, is capable of performing substantially similar employment, or achieves maximum medical improvement, whichever shall occur first.

All benefits shall be payable at the weekly rate of five hundred seventy and 81/100 dollars ($570.81).

Defendant shall pay interest on unpaid weekly benefits awarded herein 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.

Defendant shall be given a credit for sick pay/disability benefits previously paid for the stipulated amount of seventeen thousand three hundred ninety-one and 00/100 dollars ($17,391.00).

Defendant shall provide future medical care to treat the bilateral shoulder injury of October 21, 2019, including any appliances, medications and referrals for further testing, imaging, therapy and other treatment by other providers.

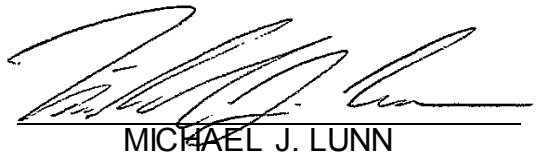
Defendant shall pay claimant a penalty of two thousand two hundred eighty-three and 24/100 dollars ($2,283.24) for failure to pay thirty (30) days of benefits following the January 13, 2020, Auxier notice.

Pursuant to Iowa Code section 85.39, defendant shall reimburse claimant in the amount of four thousand one hundred twenty-five and 00/100 dollars ($4,125.00) for the cost of Dr. Segal's IME.

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

Costs are taxed to defendant pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this ____16th____ day of June, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Robert Rosenstiel (via WCES)

Troy Howell (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.