BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GREG LOVETT, Claimant, vs. UNITED AIRLINES, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	FILED JAN 18 2017 WORKERS COMPENSATION	File Nos. 5052661 5052662 5055346 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.30, 1402.40, 1402.50, 1801.1, 2209, 2401, 2501, 2802, 3202

Claimant Greg Lovett ("Lovett") filed two petitions in arbitration on June 15, 2015. In File Number 5052661, Lovett alleged he sustained a cumulative injury to his left upper extremity while working for the defendant, United Airlines, Inc. ("United"), on September 4, 2013. In File Number 5052662, Lovett alleged he sustained a cumulative injury to his right upper extremity while working for United on September 18, 2013. United and the defendant, New Hampshire Insurance Company ("New Hampshire"), filed an answer to both petitions on August 24, 2015. Lovett filed a third petition in arbitration on December 7, 2015, File Number 5055346, alleging he sustained a cumulative injury to his left upper extremity while working for United on October 1, 2014, and alleging a claim against the Second Injury Fund of Iowa ("the Fund"). The Fund filed an answer on December 22, 2015. Lovett amended his petition for File Number 5055346. United and New Hampshire filed an answer on January 11, 2016.

An arbitration hearing was held on October 18, 2016, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Nicholas Platt represented Lovett. Lovett appeared and testified. Attorney Cory Abbas represented United and New Hampshire. Assistant Attorney General Julie Burger represented the Fund. Exhibits 1 through 9 and A through D were admitted into the record. The record was left open through

November 18, 2016, for the receipt of Exhibit 10, which was admitted into the record, and post-hearing briefs. At that time the record was closed.[1]

Before the hearing the parties prepared a hearing report for each case, listing the stipulations and issues to be decided.

FILE NUMBER 5052661

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. Lovett sustained an injury to his left upper extremity on September 4, 2013, which arose out of and in the course of employment.

3. If Lovett has sustained a disability, the disability is a scheduled member disability to the left upper extremity.

4. At the time of the alleged injury, Lovett's gross earnings were $1,059.66 per week, he was married and entitled to two exemptions, and his weekly rate is $667.09.[2]

5. Defendants have waived all affirmative defenses.

6. The costs listed in Exhibit 9 have been paid.

ISSUES

1. Is the alleged injury a cause of temporary disability during a period of recovery?

2. If the alleged injury is a cause of temporary disability, is Lovett entitled to temporary benefits from October 1, 2014 through October 29, 2014, and February 5, 2015 through April 29, 2016?

3. Is the alleged injury a cause of permanent disability?

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[1] Lovett filed two additional petitions in arbitration, File Numbers 5052663 and 5052664, involving alleged hearing loss and tinnitus injuries. The parties resolved the claims for these files following the hearing, prior to the date the cases were fully submitted.

[2] According to the rate book in effect at the time of Lovett's injury, from July 1, 2013 to June 30, 2014, the rate for a married person with two exemptions who earns $1,059.66 per week is $666.31. http://www.iowaworkcomp.gov/sites/Authoring.iowadivisionofworkcomp.gov/files/2013ratebook.pdf. This is the correct rate which must be used. See Davis-Eisenhart Mktg., Inc. v. Baysden, 539 N.W.2d 140, 142 (Iowa 1995) (noting the court cannot permit litigants to bind the court with stipulations as to the law).

4. If the alleged injury is a cause of permanent disability, what is the extent of the disability?

5. If the alleged injury is a cause of permanent disability, is the commencement date for permanent partial disability benefits April 29, 2016?

6. Is Lovett entitled to recover the cost of an independent medical examination?

7. Is Lovett entitled to alternate medical care?

8. Should costs be assessed against either party?

FILE NUMBER 5052662

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. Lovett is not seeking temporary disability benefits for his alleged right upper extremity injury at this time.

3. If Lovett has sustained a disability, the disability is a scheduled member disability to the right upper extremity.

4. At the time of the alleged injury, Lovett's gross earnings were $1,059.66 per week, he was married and entitled to two exemptions, and his weekly rate is $667.09.[3]

5. The costs listed in Exhibit 9 have been paid.

ISSUES

1. Did Lovett sustain an injury to his right upper extremity on September 18, 2013, which arose out of and in the course of employment?

2. Did Lovett provide timely notice under Iowa Code section 85.23?

3. If Lovett provided timely notice, is the alleged injury a cause of permanent disability?

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[3] According to the rate book in effect at the time of the claimant's injury, from July 1, 2013 to June 30, 2014, the rate for a married person with two exemptions who earns $1,059.66 per week is $666.31. http://www.iowaworkcomp.gov/sites/Authoring.iowadivisionofworkcomp.gov/files/2013ratebook.pdf. This is the correct rate which must be used. See Davis-Eisenhart Mktg., Inc. v. Baysden, 539 N.W.2d 140, 142 (Iowa 1995) (noting the court cannot permit litigants to bind the court with stipulations as to the law).

4. If Lovett provided timely notice and the alleged injury is a cause of permanent disability, what is the extent of the disability?

5. If Lovett provided timely notice and the alleged injury is a cause of permanent disability, is the commencement date for permanent partial disability benefits October 1, 2014?

6. Is Lovett entitled to recover the cost of an independent medical examination?

7. Is Lovett entitled to alternate medical care?

8. Should costs be assessed against either party?

FILE NUMBER 5055346

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.

2. If Lovett has sustained a disability to the left upper extremity, the disability is a scheduled member disability.

3. At the time of the alleged injury, Lovett's gross earnings were $1,059.66 per week, he was married and entitled to two exemptions, and his weekly rate is $667.09.

4. The costs listed in Exhibit 9 have been paid.

ISSUES

1. Did Lovett sustain an injury to his left upper extremity on October 1, 2014, which arose out of and in the course of employment?

2. Did Lovett experience a first injury to his right upper extremity on September 18, 2013?

3. Did Lovett provide timely notice under Iowa Code section 85.23?

4. If Lovett provided timely notice, is the alleged injury a cause of temporary disability?

5. If Lovett provided timely notice and the alleged injury is a cause of temporary disability, is Lovett entitled to temporary benefits from October 1, 2014, through October 29, 2014, and February 2, 2015, through April 29, 2016?

6. If Lovett provided timely notice, is the alleged injury a cause of permanent disability?

7. If Lovett provided timely notice and the alleged injury is a cause of permanent disability, what is the extent of the disability?

8. If Lovett provided timely notice and the alleged injury is a cause of permanent disability, is the commencement date for permanent partial disability benefits April 29, 2016?

9. Has Lovett proved qualifying injuries for purposes of his claim against the Fund?

10. Is Lovett entitled to payment of medical expenses?

11. Is Lovett entitled to recover the cost of an independent medical examination?

12. Is Lovett entitled to alternate medical care?

13. Should costs be assessed against either party?

FINDINGS OF FACT

Lovett is married and lives in Otley, Iowa. (Exhibits 5, page 2; 6, p. 2; Transcript, p. 13) At the time of the hearing he was fifty-seven. (Exs. 5, p. 2; 6, p. 2; Tr., p. 13) Lovett graduated from Prairie City High School in 1977 and he has not completed any additional post-secondary education. (Exs. 5, p. 2; 6, p. 2; Tr., pp. 13-14) Lovett earned C grades in high school. (Ex. 6, p. 3; Tr., p. 15) After high school Lovett enrolled in two courses at Des Moines Area Community College, but he dropped out before the end of the semester. (Ex. 6, p. 2; Tr., p. 14)

From 1977 through 1988, Lovett worked for Road Machinery and Supply Co. as a hydraulic mechanic, earning $16.00 per hour. (Exs. 5, pp. 3, 5-6; 6, pp. 3-4; Tr., p. 15) Lovett changed hydraulic hoses, and he worked on hydraulic cylinders and pumps, where he had to lift, push, and pull between ten and 100 pounds. (Ex. 6, p. 3; Tr., pp. 15-16)

Lovett left Road Machinery and Supply Co. to work for United in 1988. (Ex. 6, p. 4; Tr., p. 16) Lovett worked for United for twenty-six years, from 1988 through 2014, in ramp service, gate service, the baggage room, and the ticket counter. (Exs. 5, pp. 3, 5-6; 6, p. 4; Tr., p. 16) For the last five to ten years of his employment with United Lovett unloaded and loaded baggage from airplanes. (Ex. 6, p. 5; Tr., p. 16) Lovett generally worked with three other employees unloading bags from the airplanes. (Tr., p. 17) One worker worked at the bottom of the conveyor belt, one worked by the door of the airplane, and the other two workers worked in the pit, an area at the bottom of the airplane. (Tr., p. 17) The workers would rotate positions when each airplane arrived. (Tr., p. 18) Lovett worked on his hands and knees pushing, pulling, and lifting luggage. (Tr., p. 18) Lovett testified the work in the pit was the most physically demanding of the

positions, and he worked in the pit usually once per day. (Tr., p. 18) Individual pieces of luggage in the pit typically weighed between ten and fifty pounds, but could weigh as much as ninety-nine pounds. (Tr., pp. 18-19)

United decided to close the Des Moines station in 2014. (Tr., pp. 26, 56) United notified the employees six months before the closing and offered Lovett the opportunity to relocate or to accept a buyout when his employment ended. (Ex. 6, pp. 5, 16; Tr., pp. 27, 56) Lovett's last day of employment with United was on September 30, 2014. (Tr., pp. 27, 56) At that time Lovett earned $25.00 per hour. (Ex. 5, pp. 3, 5-6; Tr., p. 52) When Lovett worked for United he worked regular overtime, and he generally worked forty-five to fifty hours per week. (Tr., p. 52)

After his employment with United ended, Lovett received unemployment insurance benefits. (Ex. 6, p. 5) Approximately two months later, in late 2014, Lovett was hired as a seasonal worker for United Parcel Service ("UPS") unloading and unloading trucks, twenty-five hours per week, and he was paid $10.00 per hour. (Exs. 5, pp. 3, 6; 6, p. 5-6; Tr., p. 24) The largest package he would handle at UPS weighed 100 pounds. (Ex. 6, p. 6)

On February 16, 2015, Lovett was hired by Precision Pulley & Idler, Inc. ("Precision"), as a welder. (Exs. 5, p. 6; 6, p. 6; Tr., p. 35) Lovett passed a pre-employment physical for Precision. (Ex. 6, p. 16; Tr., pp. 53, 62-63) Lovett works full-time for Precision, forty to fifty hours per week and earns $18.65 per hour. (Exs. 5, p. 6; 6, p. 7; Tr., pp. 51, 63) Lovett reported his work for Precision is easier than his work for United because he can work at his own pace and he can limit the amount he lifts. (Tr., p. 35) Lovett handles items weighing one pound to fifteen or twenty pounds. (Ex. 6, p. 7) Lovett did not request any accommodations from Precision and he works normal duty.

Lovett has smoked for the past thirty years. (Ex. 1A, p. 5) He has a history of hypertension and cancer of the tongue. (Ex. 4, p. 6) Lovett also injured his back while working for United in 2011. (Ex. 4, p. 6)

On July 23, 2013, Lovett attended an appointment with Steven Aviles, M.D., an orthopedic surgeon, and Dr. Aviles documented he was complaining of "tingling and numbness that extends from the medial aspect of his [left] elbow to his ulnar two digits. He states that his whole hand goes numb as well and that it begins at resting and goes down his fingertips. He feels a little weak on his grip as well." (Ex. 1A, pp. 1-4) Dr. Aviles took x-rays, which revealed no fracture or dislocation, and noted Lovett "seems to demonstrate signs and symptoms of medial epicondylitis, cubital tunnel syndrome, as well as carpal tunnel syndrome." (Ex. 1A, p. 3)

Dr. Aviles referred Lovett to ZeHui Han, M.D., an orthopedic hand and upper extremity surgeon, for an appointment on July 31, 2013. (Ex. 1A, pp. 5-7) Lovett complained of left elbow pain, aggravated by pushing, weight bearing with extension,

and pulling, which was relieved by bracing/splinting, and ice, with associated numbness and tingling in the arms. (Ex 1A, p. 5) Dr. Han assessed Lovett with epicondylitis – lateral (tennis elbow), carpal tunnel syndrome, and an ulnar nerve lesion. (Ex. 1A, p. 7) Dr. Han advised Lovett to take non-prescription anti-inflammatory medication, to begin a strengthening program after one week, to apply ice fifteen minutes every hour for the first two days, and to wear a brace. (Ex. 1A, p. 7) Dr. Han scheduled an electromyography ("EMG") exam. (Ex. 1A, p. 8)

Anthony Stark, D.O., performed an electrodiagnostic evaluation of Lovett's bilateral extremities on August 5, 2013. (Ex. 1A, p. 9) Dr. Stark found "[t]here IS electrodiagnostic evidence of a right and left sensory/motor median neuropathy at the wrist that is axonal in nature and consistent with carpal tunnel syndrome. There is NO electrodiagnostic evidence of a right or left sensory/motor ulnar neuropathy at or about the elbow." (Ex. 1A, p. 10)

During Lovett's next appointment with Dr. Han on August 14, 2013, Lovett complained of persistent numbness and tingling in his left arm, and bilateral elbow pain with the left worse than the right. (Ex. 1A, p. 11) Dr. Han noted "[t]he symptoms began 7 years ago" and occur daily. (Ex. 1A, p. 11) During his physical exam Dr. Han noted Lovett was tender on the lateral epicondyle on both sides, "[h]e has positive Tinel sign of bilateral wrists," and is able to make a composite fist with full extension. (Ex. 1A, p. 12) Dr. Han assessed Lovett with carpal tunnel syndrome, "epicondylitis – lat (tennis elbow)." (Ex. 1A, p. 12) Lovett opted to undergo a surgical release for his left carpal tunnel syndrome and to receive an injection for his epicondylitis. (Ex. 1A, p. 12)

On August 29, 2013, Dr. Han sent a letter to the claim manager for United and New Hampshire, in response to an e-mail, stating,

> [b]ased on our conversation, this patient has been working in United Airline's customer service for twenty-five years, and per patient's statement, his daily activities include handling of heavy suitcases from passengers, and within reasonable medical certainty, I contribute his left upper extremity problems including carpal tunnel syndrome, cubital tunnel syndrome and medial epicondylitis to his work activities.

(Ex. 1A, p. 13)

Dr. Han performed a left carpal tunnel release and bilateral lateral epicondyle injections on Lovett on September 4, 2013. (Ex. 1B, p. 1) Following surgery, Dr. Han imposed restrictions of no use of the left hand for two weeks. (Ex. 1A, p. 14)

During his appointment on September 18, 2013, Dr. Han noted Lovett's left hand wound was healing well, he had good range of motion in his wrist and he had minimal tenderness on the left lateral epicondyle. (Ex. 1A, p. 15) Dr. Han continued with the restriction of no use of the left upper extremity at work, ordered Lovett to begin range of

motion and strengthening exercises with his left upper extremity, and reported that in four weeks he would perform a right carpal tunnel release. (Ex. 1A, p. 15)

Lovett returned to Dr. Han on October 16, 2013, following his left carpal tunnel release and injections. (Ex. 1A, p. 17) Dr. Han documented Lovett had residual symptoms, but he was much better, and he had "minimal residual symptoms on RIGHT hand." (Ex. 1A, p. 17) Dr. Han assessed Lovett with carpal tunnel syndrome, found Lovett could begin regular work activities without restrictions, and noted given Lovett had minimal symptoms on his right side, he would continue with conservative treatment, but Lovett may need a right carpal tunnel release in the future if he becomes symptomatic. (Ex. 1A, p. 17) Dr. Han ordered Lovett to perform strengthening exercises. (Ex. 1A, p. 17)

During Lovett's next appointment on November 13, 2013, Dr. Han noted Lovett was continuing to improve, his pain was occasional, he was full weight bearing, and he was not taking any medication. (Ex. 1A, p. 19) Dr. Han ordered Lovett to continue range of motion and strengthening exercises, ordered no restrictions, and determined Lovett was at maximum medical improvement. (Ex. 1A, p. 20)

On January 8, 2014, Lovett attended an appointment with Dr. Han, complaining of moderate to severe pain in his right elbow that was constant and worsening, and that was aggravated by daily use and gripping. (Ex. 1A, p. 21) Lovett also reported weakness. (Ex. 1A, p. 21) Dr. Han assessed Lovett with lateral epicondylitis (tennis elbow), performed an injection, and instructed Lovett to follow up if his symptoms persist. (Ex. 1A, p. 22)

Lovett returned to Dr. Han on April 23, 2014, complaining of left elbow pain aggravated by lifting, movement, and pushing, with associated joint instability and tenderness, and numbness and tingling in both arms. (Ex. 1A, p. 24) Dr. Han ordered magnetic resonance imaging, and found Lovett could continue with his regular work duties. (Ex. 1A, pp. 24-25)

On October 1, 2014, Lovett attended an appointment with Dr. Han complaining of left elbow pain aggravated by pushing and pulling, with associated symptoms of popping and tingling in his arms. (Ex. 1A, p. 27) Dr. Han reviewed the magnetic resonance imaging and found Lovett had "about a 50 percent tear of common extensor to the lateral epicondyle" and discussed surgical fixation with Lovett. (Ex. 1A, p. 28) Dr. Han imposed a ten pound lifting restriction, and noted Lovett should avoid pushing, pulling, twisting, and bending. (Ex. 1A, p. 28)

Lovett attended a follow-up appointment with Dr. Han on October 29, 2014, complaining of left elbow pain. (Ex. 1A, p. 29) Dr. Han administered an injection and found Lovett could return to his regular work activities without restrictions. (Ex. A1, p. 30)

On February 4, 2015, Lovett attended a follow-up appointment with Dr. Han complaining of aching and sharp pain in his left elbow aggravated by overuse, pressure, and daily activity. (Ex. 1A, p. 32) Dr. Han noted the pain was relieved by an injection and rest, but Lovett had reported the pain had recurred. (Ex. 1A, p. 32) Dr. Han reviewed Lovett's imaging and noted that he had "a 50 percent tear of common extensors attachment" and he had decided to explore surgical debridement of the lateral epicondylitis. (Ex. A1, p. 33) Dr. Han imposed a five pound lifting restriction. (Ex. A1, p. 33)

Lovett returned to Dr. Han complaining of left elbow pain and a trauma that occurred at work on January 27, 2016. (Ex. A1, p. 34) Dr. Han ordered additional magnetic resonance imaging. (Ex. A1, p. 35) Dr. Han noted that the imaging "demonstrates 75% tearing of the common extensor tendon" and discussed conservative treatment and a lateral epicondylitis debridement. (Ex. A1, p. 37) Dr. Han imposed no restrictions. (Ex. A1, p. 37)

Dr. Han issued an opinion for United and New Hampshire on March 26, 2016. (Ex. A, p. 1) With respect to causation, Dr. Han opined,

> I evaluated this patient on February 4, 2016 and also January 27, 2016 for similar problems of bilateral elbow pain. I treated the patient conservatively regarding this condition. I understand this patient ended his job at United Airlines on September 30, 2015, and the patient is currently working at UPS doing delivery, loading, and unloading of trucks. Even though this patient's bilateral elbow pain can be considered as the continuation of his problems started in 2013 as you are aware from my prior medical record including the MRI on the bilateral elbows, we did close that case on November 13, 2013. The problem for this patient now is the aggravation by the work activities at UPS caused from the prior existing condition.
>
> Thank you very much for providing the work information at UPS. Certainly, the patient stopped working at United Airlines on September 30, 2014, and he is now working in the UPS handling the loading and unloading of trucks and also delivering. Within a reasonable medical certainty, I believe this UPS work activity materially aggravated that pre-existing condition, but not the work activity from United Airlines.

(Ex. A, p. 1) Dr. Han reported he continued to believe Lovett reached maximum medical improvement on November 13, 2013. (Ex. A, p. 1) Dr. Han noted Lovett could engage in normal work activity without restrictions and found no functional impairment, concluding Lovett's present condition was a material aggravation of current symptoms from his work at UPS. (Ex. A, p. 2)

On April 29, 2016, Lovett attended an appointment with his personal physician, Mitchell Blom, D.O., at Pella Regional Health Center, complaining of left shoulder and elbow pain. (Ex. B1, pp. 2-4) Dr. Blom documented Lovett believed his shoulder pain was related to his elbow pain. (Ex. B1, p. 3) Dr. Blom listed an impression of left elbow common extensor tendon tear, left shoulder tendinitis, and tobacco dependency. (Ex. B1, p. 3) Dr. Blom administered an injection into Lovett's shoulder, and recommended he obtain a second opinion regarding his elbow. (Ex. B1, p. 4)

In response to a request from Lovett's counsel, on July 19, 2016, Dr. Blom sent a letter, opining, "[i]t is fairly clear that his carpal tunnel, as well as left and right elbow pain due to epicondylitis was at least partially and/or wholly caused by his work at United Airlines, which required repetitive gripping and lifting." (Ex. B1, p. 5)

Robin Sassman, M.D., performed an independent medical examination of Lovett on August 2, 2016, and issued her report on September 8, 2016. (Ex. 4, p. 1) Dr. Sassman reviewed Lovett's medical records and examined him. (Ex. 4, p. 1) Dr. Sassman diagnosed Lovett with left lateral and medial epicondylitis, symptoms of left ulnar neuropathy at the elbow, left carpal tunnel syndrome status post left carpal tunnel release on September 4, 2013, right lateral and medial epicondylitis, symptoms of right ulnar neuropathy at the elbow, and symptoms of right radial tunnel syndrome. (Ex. 4, p. 8)

Dr. Sassman opined Lovett's work at United was a substantial contributing factor in the development of his diagnoses because that after 2011, Lovett almost exclusively loaded and unloaded airplanes. (Ex. 4, p. 8) Dr. Sassman noted,

> [i]t has been asserted in the records by Dr. Han that his work at UPS materially aggravated his pre-existing condition and his current complaints were not due to the work activity from United Airlines. Dr. Han pointed out that the United Airlines case was closed on November 13, 2013, and Mr. Lovett was at MMI at that point for the United Airlines case. However, the currently available record shows that Mr. Lovett continued to seek care with Dr. Han through 2014 and early 2015 receiving injections and an MRI of the left elbow during that time. Additionally, Dr. Han was recommending surgery to Mr. Lovett in October of 2014, which would have been before he even began his work at UPS in November of 2014. This indicates that Mr. Lovett continued to have significant symptoms (and treatment) after the date of MMI for the United Airlines case and before he began to work at UPS in November of 2014.
>
> On further questioning of Mr. Lovett regarding of his work at UPS, Dr. Han's letter (written on March 24, 2016) asserts that Mr. Lovett was working at UPS at the time he authored his letter. After speaking with Mr. Lovett, this is incorrect. Mr. Lovett worked at UPS from November 24, 2014—to January 15, 2015. This was a seasonal job. Mr. Lovett worked

> 3-4 hours per day during the week just through this time frame. He noted no change in his symptoms during that time; and, based on my understanding of what he did at UPS (loaded a truck for the first part of his short employment term to delivering packages on a route for 3-4 hours per day), the UPS activities do not equate to the significant lifting that was required for his job at United Airlines, which I believe is the cause of his ongoing symptoms as noted above.
>
> Therefore, based on the above information, I respectfully disagree with Dr. Han's assertion that Mr. Lovett's ongoing symptoms were due to his work at UPS and not to his work at United Airlines.

(Ex. 4, p. 8) Dr. Sassman recommended a repeat EMG to assess for ulnar neuropathy at the elbow based on her findings of paresthesias and loss of sensation in the forearms on examination, magnetic resonance imaging of the right elbow, and a second opinion from an upper extremity orthopedic surgeon to determine what treatment options Lovett may have. (Ex. 4, p. 9)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Sassman assigned the following impairment rating:

> For the range of motion of the left elbow, using Figures 16-40, on page 476, and 16-37, on page 474, he can be assigned 1% upper extremity impairment for loss of pronation. For the left ulnar neuropathy symptoms using Table 16-10 on page 482, Mr. Lovett is determined to be in a Grade 2 with 80% sensory deficit. I am instructed to multiply this by the maximum percent upper extremity impairment for sensory deficit of the ulnar nerve from Table 16-15 on page 492, which is 7%. Therefore, 7% x 80% is equal to 5.56%. This is then rounded up to 6% upper extremity impairment. 6% upper extremity impairment is combined with 1% upper extremity impairment for a total of 7% upper extremity impairment for the left elbow.
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> For the range of motion of the right elbow, using Figures 16-40, on page 476, and 16-37, on page 474, he can be assigned 1% upper extremity impairment for loss of pronation. Using Table 16-10 on page 482, Mr. Lovett is determined to be in a Grade 2 with 80% sensory deficit. I am instructed to multiply this by the maximum percent upper extremity impairment for sensory deficit of the ulnar nerve from Table 16-15 on page 492, which is 7%. Therefore, 7%x80% is equal to 5.56%. This is then rounded up to 6% upper extremity impairment. 6% upper extremity impairment is combined with 1% upper extremity impairment for a total of 7% upper extremity impairment for the right elbow.

> With respect to the carpal tunnel syndrome, and based on the instructions on page 495, Mr. Lovett falls into the third first category because he had normal sensibility and normal nerve conduction study. Therefore, there is no objective basis for an impairment rating.
>
> With regard to the epicondylitis, I do not believe the above impairment rating accurately reflects the impact the pain from the lateral and medial epicondylitis has on Mr. Lovett's activities of daily living. Therefore, using Chapter 18, I will add 3% upper extremity impairment for pain for the right upper extremity and 3% upper extremity impairment for pain with regard to the left upper extremity.
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> For the right upper extremity, using the Combined Values Chart on page 604, 7% upper extremity impairment is combined with 3% upper extremity impairment for a total of 10% upper extremity impairment. Using Table 16-3 on page 439, this is converted to 6% whole person impairment. This is relative to the September 18, 2013 injury date.
>
> For the left upper extremity, using the Combined Values Chart on page 604, 7% upper extremity impairment is combined with 3% upper extremity impairment for a total of 10% upper extremity impairment. Using Table 16-3 on page 439, this is converted to 6% whole person impairment. This is relative to the September 4, 2013, injury date.

(Ex. 4, pp. 9-10) Dr. Sassman recommended Lovett limit forceful gripping and grasping with both hands to an occasional basis and to limit the use of vibratory and power tools to a rare basis. (Ex. 4, p. 10)

Lovett testified he has not had surgery for his left elbow tendon tear because he needed to work and did not want to be "laid up for six months." (Tr., p. 39) Lovett reported that he cannot lift with his left arm, and he has a difficult time putting on a coat and shirt. (Tr., p. 39) Lovett would like to have surgery at some point on his left elbow. (Tr., p. 69) Lovett also believes he will need surgery for right carpal tunnel syndrome in the future. (Tr., p. 69)

Lovett testified he cannot tolerate mowing and weeding his yard, and his wife performs these duties. (Tr., p. 50) Lovett continues to hunt pheasant and deer. (Tr., p. 65) Lovett used to enjoy bow hunting, but he can no longer bow hunt. (Tr., p. 50) Lovett also had to alter his golf swing. (Tr., p. 51)

CONCLUSIONS OF LAW

I. Notice to the Employer

Lovett alleges he sustained three cumulative injuries, a left upper extremity impairment, which manifested on September 4, 2013, a right upper extremity

impairment, which manifested on September 18, 2013, and a left upper extremity impairment, which manifested on October 1, 2014. United and New Hampshire contend Lovett failed to provide timely notice to United within ninety days of his September 18, 2013 and October 1, 2014 injuries.

Iowa Code section 85.23, provides:

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the alleged occurrence of the injury, no compensation shall be allowed.

The purpose of the notice provision is to afford the employer the opportunity to investigate the circumstances of the injury when the information is fresh. Johnson v. Int'l Paper Co., 530 N.W.2d 475, 477 (Iowa Ct. App. 1995). "Actual knowledge must include information that the injury might be work related." Id. The employer bears the burden of proving the affirmative defense. DeLong v. Iowa State Highway Comm'n, 299 Iowa 700, 703, 295 N.W.2d 91, 92 (1940).

United and New Hampshire aver Lovett reported talking to his employer about his left and right arm issues before he saw Dr. Han in 2013, but he did not report any new injuries to United after September 18, 2013. During the hearing Lovett testified his employer was aware of his conditions as follows:

> Q. After doing the initial report of having issues with your right arm to United, after your left arm surgery, did you talk with anyone at United about your right arm symptoms worsening or needing medical treatment at that time?
>
> A. No. I just – I had given them an injury report.
>
> Q. And then the next thing that happened was you were talking with Dr. Han about needing further – needing treatment for the right arm.
>
> A. Yes.
>
> Q. After giving that initial report of an issue with your right arm in 2013 up through the end of your employment in September of 2014, did you talk to anyone about – any supervisors or managers at United about continuing to have right arm issues and needing treatment for your right arm?

A. I can't recall, but I talked to my supervisor and he knew. He knew it was bad also.

Q. And when you say you talked to your supervisor, after filling out the right arm injury report, when did you talk with your supervisor again about having issues with your right arm?

A. When I came back from carpal tunnel on my left, Dr. Han told me I needed carpal tunnel surgery on my right, and that's when I told my supervisor I'm going to have an operation on that.

Q. Now, after your left arm carpal tunnel surgery, there was a period of time you were off work completely after surgery; correct?

A. Yes, sir.

(Tr., pp. 58-59)

Dr. Han performed a left carpal tunnel release and bilateral lateral epicondyle injections on September 4, 2013. (Ex. 1B, p. 1) United and New Hampshire paid the cost of the treatment. Dr. Han, the treating physician, continued to provide treatment to Lovett for several complaints, including left elbow pain and right carpal tunnel syndrome, and diagnosed Lovett with lateral epicondylitis and eventually a fifty percent tear of the common extensor to the lateral epicondyle on October 1, 2014, the day after his employment ended with United. (Ex. 1A, pp. 22, 28; Tr., pp. 27, 56) The evidence supports United had actual knowledge of Lovett's injuries. United and New Hampshire have not proven the affirmative defense.

II. Causation

United and New Hampshire contend Lovett has failed to establish the injuries to his right and left upper extremities and current need for medical care are causally related to his work for United. Lovett counters he developed three cumulative injuries while working for United.

Under Iowa Code section 85.3(1),

> Every employer, not specifically excepted by the provisions of this chapter, shall provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of an in the course of

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

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

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

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist; a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

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

Lovett avers he sustained three cumulative injuries to his left and right upper extremities. Cumulative injuries are occupational diseases that develop over time. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015). A cumulative injury results from repetitive trauma in the workplace. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). "A cumulative injury is deemed to have occurred when it manifests – and 'manifestation' is that point in time when 'both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person.'" Baker, 872 N.W.2d at 681. The parties stipulated Lovett's September 4, 2013 injury to his left upper extremity arose out of and in the course of employment.

With respect to causation, Dr. Han opined,

> Even though this patient's bilateral elbow pain can be considered as the continuation of his problems started in 2013 as you are aware from my prior medical record including the MRI on the bilateral elbows, we did close that case on November 13, 2013. The problem for this patient now is the aggravation by the work activities at UPS caused from the prior existing problem.

(Ex. A, p. 1) Dr. Han further opined, "[w]ithin a reasonable medical certainty, I believe this UPS work activity materially aggravated that pre-existing condition, but not the work activity from United Airlines." (Ex. A, p. 1) Dr. Han did not recommend any work restrictions and found no functional impairment. (Ex. A, p. 2)

Dr. Sassman diagnosed Lovett with left lateral and medial epicondylitis, symptoms of left ulnar neuropathy at the elbow, left carpal tunnel syndrome status post left carpal tunnel release on September 4, 2013, right lateral and medial epicondylitis, symptoms of right ulnar neuropathy at the elbow, and symptoms of right radial tunnel syndrome. (Ex. 4, p. 8) Dr. Sassman opined Lovett's work at United was a substantial contributing factor the development of his diagnoses. (Ex. 4, p. 8) Dr. Sassman noted,

> [i]t has been asserted in the records by Dr. Han that his work at UPS materially aggravated his pre-existing condition and his current complaints were not due to the work activity from United Airlines. Dr. Han pointed out that the United Airlines case was closed on November 13, 2013, and Mr. Lovett was at MMI at that point for the United Airlines case. However, the currently available record shows that Mr. Lovett continued to seek care with Dr. Han through 2014 and early 2015 receiving injections and an MRI of the left elbow during that time. Additionally, Dr. Han was recommending surgery to Mr. Lovett in October of 2014, which would have been before he even began his work at UPS in November of 2014. This indicates that Mr. Lovett continued to have significant symptoms (and

> treatment) after the date of MMI for the United Airlines case and before he began to work at UPS in November of 2014.
>
> On further questioning of Mr. Lovett regarding of his work at UPS, Dr. Han's letter (written on March 24, 2016) asserts that Mr. Lovett was working at UPS at the time he authored his letter. After speaking with Mr. Lovett, this is incorrect. Mr. Lovett worked at UPS from November 24, 2014—to January 15, 2015. This was a seasonal job. Mr. Lovett worked 3-4 hours per day during the week just through this time frame. He noted no change in his symptoms during that time; and, based on my understanding of what he did at UPS (loaded a truck for the first part of his short employment term to delivering packages on a route for 3-4 hours per day), the UPS activities do not equate to the significant lifting that was required for his job at United Airlines, which I believe is the cause of his ongoing symptoms as noted above.
>
> Therefore, based on the above information, I respectfully disagree with Dr. Han's assertion that Mr. Lovett's ongoing symptoms were due to his work at UPS and not to his work at United Airlines.

(Ex. 4, p. 8)

I find Dr. Sassman's opinion more persuasive than Dr. Han's opinion. Dr. Han's opinion is based on incorrect information. Dr. Han placed Lovett at maximum medical improvement on November 13, 2013, but he continued to provide care and treatment to Lovett from 2014 through 2015, including injections and magnetic resonance imaging. The record supports Lovett continued to have symptoms after the date Dr. Han found he was at maximum medical improvement and before he commenced his seasonal employment with UPS.

Lovett does not contend he sustained a traumatic injury causing the tear to the common extensor of the lateral epicondyle. Dr. Sassman did not opine Lovett sustained a separate cumulative injury to his left upper extremity on October 1, 2014. Lovett has not proven he sustained a separate cumulative injury that manifested on October 1, 2014. The evidence supports Lovett's September 4, 2013 and September 18, 2013 work injuries to his left and right upper extremities are causally related to his employment with United.

III. Extent of Disability and Commencement Date for Permanency

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a

scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

Carpal tunnel syndrome is a scheduled injury. Iowa Code § 85.34(2)(l); Stephenson v. Furnas Elec. Co., 552 N.W.2d 828, 832 (Iowa 1994). The schedule provides a maximum award of 190 weeks of compensation for the loss of a hand. Iowa Code § 85.34(2)(l). Lovett's alleged bilateral upper extremity impairments involving his elbows are also scheduled injuries. Iowa Code § 85.34(2)(m); Evenson v. Winnebago Indust., Inc., 881 N.W.2d 360, 370 (Iowa 2016). The schedule provides a maximum award of 250 weeks of compensation for such an injury. Iowa Code § 85.34(2)(m).[4]

Dr. Han did not assign an impairment rating to Lovett. (Ex. A) As discussed above, I do not find his opinion persuasive.

Using the AMA Guides, Dr. Sassman assigned no impairment rating for Lovett's carpal tunnel syndrome. (Ex. 4, p. 9) Dr. Sassman assigned an impairment rating of seven percent for the left upper extremity for the elbow, and seven percent for the right upper extremity for the elbow. (Ex. 4, p. 9) Dr. Sassman found that with respect to the epicondylitis, she did not believe the impairment rating for the upper extremities accurately reflects the impact the pain from the lateral and medial epicondylitis has on Lovett's activities of daily living, and she assigned an additional three percent left upper extremity impairment for pain, and a three percent right upper extremity impairment for pain. (Ex. 4, p. 10) Using the Combined Values Chart on page 604 of the AMA Guides, Dr. Sassman assigned a total ten percent upper extremity impairment for each upper extremity.

Based on Dr. Sassman's opinion, and also considering the lay testimony presented at hearing I find Lovett is entitled to twenty-five weeks of permanent partial disability benefits for his left upper extremity impairment, and twenty-five weeks of permanent partial disability benefits for his right upper extremity impairment.

Dr. Han performed a left carpal tunnel release and bilateral lateral epicondyle injection on September 4, 2013. (Ex. 1B, p. 1) Following surgery, Dr. Han imposed restrictions of no use of the left hand. (Ex. 1A, p. 14) On October 16, 2013 Dr. Han found Lovett could begin regular work activities without restrictions, and noted since Lovett had minimal symptoms on his right side, he would continue with conservative

[4] Thus, the schedule provides a maximum of 250 weeks of permanent partial disability benefits for each upper extremity. If a simultaneous injury had occurred, the total would be 500 weeks. Iowa Code § 85.34(2)(s).

treatment, but Lovett may need a right carpal tunnel release in the future if he is symptomatic. (Ex. 1A, p. 17) Lovett was released to return to work and returned to work without restrictions following his appointment with Dr. Han. The correct commencement date for permanency is October 17, 2013. Evenson v. Winnebago Indus., Inc., 881 N.W.2d, 360, 372-74 (Iowa 2016) (noting the statute provides the healing period lasts until the claimant has returned to work, the claimant has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first" and finding the claimant returned to work first, and permanent partial disability benefits commenced on his first return to work).

IV. Healing Period Benefits

Dr. Han released Lovett to return to work without restrictions on October 16, 2013. Lovett returned to work and he performed his normal duties at United until his termination on September 30, 2014. The day after his termination, Lovett received additional restrictions Dr. Han. (Ex. 1A, pp. 27-29) During his appointment on October 1, 2014, Lovett complained of left elbow pain aggravated by pushing and pulling, with associated symptoms of popping and tingling in the arms. (Ex. 1A, p. 27) Dr. Han reviewed the magnetic resonance imaging and found Lovett had "about a 50 percent tear of common extensor to the lateral epicondyle" and discussed surgical fixation with Lovett. (Ex. 1A, p. 28) Dr. Han imposed a ten pound lifting restriction, and noted Lovett should avoid pushing, pulling, twisting, and bending. (Ex. 1A, p. 28) Lovett attended a follow-up appointment with Dr. Han on October 29, 2014, complaining of left elbow pain. (Ex. 1A, p. 29) Dr. Han administered an injection and found Lovett could return to his regular work activities without restrictions. (Ex. A1, p. 30)

Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012). As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for loss of earnings" during a period of recovery from the condition. Id. An award of healing period benefits or total temporary disability benefits is not dependent on a finding of permanent impairment. Dunlap, 824 N.W.2d at 556. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Id. As analyzed above, Lovett has established he sustained permanent disabilities to his left and right upper extremities. If Lovett is entitled to reimbursement for an additional loss of earnings during a period of recovery from a condition, then he is entitled to healing period benefits.

Under Iowa Code section 85.34(1),

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Due to the termination of his employment on September 30, 2014, Lovett was not employed on October 1, 2014, when he attended his appointment with Dr. Han. While Lovett requested Dr. Han not impose any restrictions, Dr. Han imposed restrictions. (Tr., p. 60) At that time United offered Lovett no additional work consistent with the restrictions imposed by Dr. Han. United has not provided any evidence Lovett was medically capable of returning to employment substantially similar to the employment in which he was engaged at the time of injury on October 1, 2014. Lovett is entitled to healing period benefits from October 1, 2014 through October 29, 2014.

Lovett seeks additional healing period benefits from February 5, 2015 through April 29, 2016. Precision hired Lovett as a welder on February 16, 2015. (Exs. 5, p. 6; 6, p. 6; Tr., p. 35) When Precision hired Lovett he passed a pre-employment physical. (Ex. 6, p. 16; Tr., pp. 53, 62-63) Lovett works full-time for Precision, forty to fifty hours per week. (Exs. 5, p. 6; 6, p. 7; Tr., pp. 51, 63) When he was hired Lovett did not request any accommodations from Precision and he works normal duty.

Dr. Han released Lovett to regular duty without restrictions on October 29, 2014. Lovett did not request accommodations from United or Precision when he was hired. He passed a pre-employment physical with Precision. Lovett has not received any additional surgery or treatment supporting he entered a new healing period after October 29, 2014, through the date of hearing. Therefore, he not entitled to any additional healing benefits after October 29, 2014. Id.

V. The Fund

Lovett seeks benefits through the Fund. The Fund alleges there is no evidence supporting the alleged injury that occurred on October 1, 2014, was a new injury. Under Iowa Code section 85.64,

> [i]f an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of

> another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by his division and the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Thus, "an injury qualifies as a second injury for Fund purposes if it (1) follows a previous disability to an enumerated member and (2) results in 'the loss of or loss of use of another such member.'" Second Injury Fund of Iowa v. Kratzer, 778 N.W.2d 42, 45 (Iowa 2010).

As analyzed above, the record does not support Lovett sustained a third injury on October 1, 2014. In his Post-Hearing Brief, Lovett alleges his first qualifying injury was to the left upper extremity on September 4, 2013, and the second qualifying injury occurred on September 18, 2013, to his right upper extremity. This was not what was asserted at hearing in the Hearing Report, which identifies the parties' stipulations and issues to be decided. Lovett, United, and New Hampshire prepared the Hearing Report for File Number 5055346, which alleges a disputed first injury date of September 18, 2013, to the right upper extremity, and a disputed second injury date of October 1, 2014, to the left upper extremity.

The hearing report must be prepared prior to the commencement of the hearing and must be signed by the parties and the presiding deputy. James R. Lawyer, Iowa Practice Series – Workers' Compensation § 21.24, at 275-76. The parties can stipulate to or dispute issues, including, but not limited to the claimant's entitlement to permanency benefits. Id. at 276. When completing the hearing report in this case, the parties stipulated to a number of issues, and identified the issues to be determined by the deputy commissioner. Lovett's attorney signed the Hearing Report, asserting a first injury date of September 18, 2013, to the right upper extremity, and a second injury date of October 1, 2014, to the left upper extremity. Lovett did not name the Fund as a party to the other two cases, File Numbers 5052661 and 5052662, involving the alleged injuries occurring on September 4, 2013, and September 18, 2013.

This agency relies on hearing reports to determine the issues to be decided by the presiding deputy commissioners. Lovett waived his argument by signing the Hearing Report and by failing to raise the issue with the deputy commissioner at the start of the hearing. Cf. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 186-87 (Iowa 1980) (concluding claimant's attorney failed to preserve error on foundation objection by failing to object when the deposition was offered into evidence before the deputy, and by failing to afford "his adversary [with the opportunity] to remedy the alleged defect"); Hawkeye Wood Shavings v. Parrish, No. 08-1708, 2009 WL 3337613,

at *4 (Iowa Ct. App. 2009) (concluding the defendants waived the issue of whether they were entitled to a credit for benefits already paid for the September 2000 injury because on the hearing report signed by the defendants, the defendants stipulated "0 weeks" of credit); Burtnett v. Webster City Custom Meats, Inc., No. 05-1265, 2007 WL 254722, at *3-4 (Iowa Ct. App. Jan. 31, 2007) (concluding the deputy commissioner did not commit an abuse of discretion by refusing the claimant's request to change dates in the joint hearing report, and noting the agency's approach requiring claimants to list dates prior to hearing in a hearing report "is more than reasonable").

As found above, Lovett has not established he sustained a third injury on October 1, 2014, he failed to name the Fund as a party in File Numbers 5052661 and 5052662, and he failed to raise the earlier first injury dates on the Hearing Report. Lovett has not established a claim against the Fund.

VI. Alternate Medical Care

Lovett seeks reimbursement for his medical bills and alternate care. United and New Hampshire aver they are not responsible for Lovett's medical bills and alternate care because the care requested is not causally related to any work injuries he sustained while working for United.

"An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law." Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id.; Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997).

Lovett reports United and New Hampshire paid for his treatment for his left and right upper extremities with Dr. Han until March 24, 2016. After that date, United and New Hampshire denied causation. As analyzed above, Lovett's injuries to his left and right upper extremities are causally related to his employment with United. Exhibit 10 contains bills for a shoulder lesion. Dr. Sassman did not opine any shoulder condition Lovett has sustained is causally related to his left and right upper extremity impairments. No expert witness in this case has offered such an opinion. Lovett is not entitled to recover the medical bills set forth in Exhibit 10. United and New Hampshire are responsible for all future medical care for Lovett's work injuries, including any additional surgery required to treat his work-related conditions, and are directed to provide the care.

VII. Independent Medical Examination

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an

evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id.

Dr. Han declined to give an impairment rating to Lovett, and opined Lovett's left and right upper extremity injuries were not causally related to his employment with United. Lovett disagreed with Dr. Han's opinion, and sought an independent medical examination with Dr. Sassman.

Dr. Sassman separately billed Lovett for the cost of the examination, $1,250.00, and for the cost of the report, $1,547.50. United and New Hampshire have not asserted Dr. Sassman's bill is unreasonable. Lovett is entitled to recover is entitled to recover the $1,250.00 cost of the examination, and the separate $1,547.50 cost of the report. Id.; Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846-47 (Iowa 2015); 876 IAC 4.33(6). Dr. Sassman's bill also provides a $225.00 charge for a median left neurometry exam. Lovett has provided no explanation of the charge. Lovett is not entitled to recover the separate $225.00 fee.

VIII. Costs

Lovett requests the costs set forth in Exhibit 9 be taxed to United and New Hampshire. Exhibit 9 contains a copy of the check for the $100.00 filing fee for File Number 5052661, the $100.00 filing fee for File Number 5055346, a $156.95 fee for his deposition, and $561.00 for Richard Tyler, Ph.D.'s audiologist report. Rule 876 IAC 4.33 outlines the costs that can be taxed, as follows,

> 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.

The rule expressly allows for the recovery of the filing fee and the deposition transcript. Lovett was not successful in proving his claim in File Number 5055346. United and New Hampshire are not assessed the $100.00 filing fee for File Number 5055346. Given Lovett settled the hearing loss and tinnitus claims before final submission of the

cases, United and New Hampshire are not assessed for Dr. Tyler's report. United and New Hampshire are assessed $256.95 in costs.

ORDER

IT IS THEREFORE ORDERED, that:

Lovett shall take nothing with respect to File Number 5055346.

With respect to File Number 5052661, United and New Hampshire shall pay Lovett twenty-five (25) weeks of permanent partial disability benefits, commencing on October 17, 2013, at the rate of six hundred sixty-six and 31/100 dollars ($666.31).

With respect to File Number 5052661, United and New Hampshire shall pay Lovett healing period benefits commencing on October 1, 2014 through October 29, 2014, at the rate of six hundred sixty-six and 31/100 dollars ($666.31) per week.

With respect to File Number 5052662, United and New Hampshire shall pay Lovett twenty-five (25) weeks of permanent partial disability benefits, commencing on October 17, 2013, at the rate of six hundred sixty-six and 31/100 dollars ($666.31).

United and New Hampshire shall pay accrued benefits in a lump sum, with interest.

United and New Hampshire are entitled to a credit for benefits previously paid.

Lovett is entitled to ongoing care for treatment of his work injuries.

United and New Hampshire shall reimburse Lovett one hundred and 00/100 dollars ($100.00) for the filing fee for File Number 5052661, one hundred fifty-six and 95/100 dollars ($156.95) for Lovett's deposition transcript, one thousand two hundred fifty and 00/100 dollars ($1,250.00) for Dr. Sassman's examination, and one thousand five hundred forty-seven and 50/100 dollars ($1,547.50) for Dr. Sassman's report.

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

Signed and filed this 18th day of January, 2017.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/srs

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