BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM HAVEN STARK, Claimant, vs. KELLY DEMOLITION, LLC, Employer, and GREAT DIVIDE INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED MAR 22 2017 WORKERS COMPENSATION	File No. 5053932 ARBITRATION DECISION Head Note Nos.: 1108, 1402.30, 1402.60 1801.1, 2501, 2907

Claimant William Haven Stark filed a petition on February 15, 2016, alleging he sustained an injury to his body as a whole while working for the defendant, Kelly Demolition, LLC ("Kelly Demolition"), on June 16, 2014. Kelly Demolition, and its insurer, Great Divide Insurance Company ("Great Divide") filed an answer on February 29, 2016, denying Stark had sustained a work injury, and raising affirmative defenses, including comparative negligence, the injury was caused by a third party, the injury was a natural progression of pre-existing disease, and the claimant's injury was the result of intoxication.

An arbitration hearing was scheduled for 11:00 a.m. on February 9, 2017, in Cedar Rapids, Iowa. At the time of the hearing attorney Daniel Anderson appeared with his client, Stark. No one appeared on behalf of Kelly Demolition and Great Divide. I placed a telephone call to the defendants' counsel of record, Rubina Khaleel, a partner with Hennessy and Roach, P.C., in Omaha. She informed me the hearing had been continued and immediately transferred the call to Patrick Mack, an associate with her firm. Mack informed me he had discussed a continuance with Anderson, but he could not explain why a motion to continue had not been filed. Anderson made a professional statement that he did not agree to a continuance. Mack reported he did not believe he was the lead attorney in the case. Mack had not filed an appearance in this case.

The parties discussed settlement for nearly one hour, but were unable to resolve the case. Khaleel orally moved to continue the hearing. Anderson did not formally resist the motion out of professional courtesy. The parties agreed the hearing could be held on March 6, 2017, at 1:00 p.m. in Des Moines, Iowa. On February 10, 2017, I

issued an order, ordering the defendants to file their exhibits with the deputy commissioner, and to serve a copy on Stark ten days before the March 6, 2017 hearing. The order was served on Anderson and Khaleel.

An arbitration hearing was held on March 6, 2017, in Des Moines, Iowa. Attorney Anderson appeared with his client, Stark. Stark testified. Attorney Mack appeared on behalf of Kelly Demolition and Great Divide. Mack had not filed an appearance on behalf of the defendants before the hearing. Claimant's Exhibits 1 through 9 were admitted into the record. Defendants also moved to admit exhibits. Anderson reported he received the defendants' exhibits ten minutes before the start of the hearing and he requested sanctions be imposed. Mack reported he had not seen the February 10, 2016 order prior to the hearing. The order was sent to the defendants' attorney of record, Khaleel. Mack reported the order was not in the file. I granted the request for sanctions. Defendants' Exhibits A through G were not admitted. Defendants requested the opportunity to submit post-hearing briefs, which the claimant resisted. The record was closed at the end of the hearing.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Kelly Demolition and Great Divide waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Stark and Kelly Demolition at the time of the alleged injury.

2. If Stark has sustained a permanent disability, the disability is an industrial disability.

3. If Stark has sustained a permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is October 16, 2014.

4. At the time of the alleged injury, Stark's gross earnings were $910.00 per week, he was single and entitled to one exemption, and the parties believe the weekly rate is $543.32.

5. With respect to the disputed medical expenses, the fees or prices charged by providers are fair and reasonable, the treatment was reasonable and necessary, and although disputed, the medical providers would testify as to the reasonableness of their fees and/or expenses set forth in the listed expenses and the defendants are not offering contrary evidence.

6. Stark was paid $399.20 in temporary total disability benefits from June 21, 2014 through July 4, 2014.

ISSUES

1. Did Stark sustain an injury on June 16, 2014, which arose out of and in the course of his employment with Kelly Demolition?

2. Did the alleged injury cause a temporary disability during a period of recovery?

3. Is Stark entitled to healing period benefits from June 21, 2014 through October 15, 2014?

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

5. If the alleged injury caused a permanent disability, what is the extent of disability?

6. Is Stark entitled to payment of medical expenses, including medical mileage?

7. Should penalty benefits be awarded to Stark?

8. Is Stark entitled to recover the cost of the independent medical examination?

9. Should costs be assessed against either party?

FINDINGS OF FACT

Stark is single and lives in Cedar Rapids with his girlfriend. Stark graduated from high school in 1972. (Exhibit 3, page 2) At the time of the hearing Stark was sixty-two. Stark is left-hand dominant.

After high school, Stark worked for his father, William H. Stark, from 1972 through 2006, until his father closed his business. (Ex. 3, p. 3) Stark earned $45,000.00 per year. (Ex. 3, p. 3) Stark operated heavy equipment, prepared bids, maintained the equipment, and hauled the equipment for his father's earth moving business. (Ex. 3, p. 3) Stark also performed some shoveling and raking for the business.

In 2006 JPM Enterprises hired Stark and paid him $45,000.00 per year. (Ex. 3, p. 3) Stark operated heavy equipment, drove a dump truck, and performed manual labor and material lifting. (Ex. 3, p. 3) Stark also performed side jobs for John Morris during his employment with JPM Enterprises. (Ex. 3, p. 3) Stark became involved in a disagreement with the owner of JPM Enterprises and left his employment in 2012. (Ex. 3, p. 3)

Rod Kelly, the owner of Kelly Demolition, hired Stark in 2012 and paid him $20.00 per hour. (Ex. 3, p. 3) Stark ran heavy equipment, drove a truck, and performed

maintenance duties on the equipment. (Ex. 3, p. 3) Stark testified he graded parking lots for Kelly Demolition where he ran the heavy equipment and checked the grading.

Before he started working for Kelly Demolition Stark was injured and he received medical treatment. In 2005 Stark was in a car accident when he was driving a farm tractor from one project to another on Highway 30. The tractor Stark was driving had flashing warning lights. A vehicle rear-ended the tractor Stark was driving. Stark was taken by ambulance to St. Luke's Hospital. Stark was diagnosed with whiplash, a neck injury, and he sustained cuts on his hands. Stark received three cervical epidural injections following the incident. Stark testified that if his medical records indicate his symptoms extended from his neck to his left shoulder and arm he would have no reason to dispute the records. Stark recalled he experienced radiating pain from his neck. Stark denied he received treatment for his left shoulder.

In 2007 Stark was involved in a second car accident. He was on his way to work and it was icy. A woman crossed over the road in front of him while he was driving. Stark tried to swerve, but he clipped her vehicle, and he became airborne in his pickup truck. Stark was again diagnosed with whiplash and he had problems with his trapezius muscle following the accident. Stark testified he received treatment for his neck but he did not receive treatment for his shoulder. Stark continued to work after the accident.

Stark testified that between 2007 and 2014, he performed typical construction work and he was able to perform his duties. Stark did not relay he experienced any unusual strain or stress on his shoulders during that period of time.

Stark reported on June 16, 2014, Rod Kelly asked him to pick up equipment in Mount Vernon and haul it to Cedar Rapids with a low boy trailer attached to a semi. (Ex. 3, p. 4) Stark went to pick up the equipment, a track hoe. The low boy trailer had two five foot steel ramps attached to the end that flipped up and down. Stark lowered the ramps to move the track hoe onto the trailer. Stark described the ramps as spring loaded and very heavy.

After Stark drove the track hoe onto the trailer he attempted to raise the ramps onto the beaver tail of the trailer. When the springs operated properly, Stark was required to lift between thirty-five and forty pounds to raise the ramps onto the trailer. Stark testified the springs were not operating properly and he had to lift more than a hundred pounds to raise the ramps onto the trailer. Stark testified the springs on the ramps had not been operating correctly for a period of time and he had previously informed Rod Kelly they were not operating properly.

Stark reported that when he went to raise the ramps on June 16, 2014, he heard and felt a pop in his arm and he thought he had broken his arm. Stark dropped the ramp and he experienced instant pain that felt like he was being stabbed with a knife. Stark testified he sat on the trailer for about fifteen minutes and cried in pain. Stark was by himself and he did not have anyone to help him. Stark relayed he was immobilized from the pain.

After approximately fifteen minutes, Stark got up and tried to secure the load. Stark used the track hoe bucket to flip the ramps onto the trailer. Stark reported he struggled to get the track hoe chained down. Stark then went back to his employer and spoke with Rod Kelly.

Stark told Rod Kelly he had been injured using the low boy trailer. Stark reported Rod Kelly told him to take the truck to the airport and switch trucks with Cory, another employee of the business. Stark testified Rod Kelly told him he wanted him to continue working. Stark worked a couple of hours until it started raining. He then left for the day.

The day after the injury Stark sought medical treatment with his family practice physician, Dmitriy Acherkan, M.D. Stark received upper extremity magnetic resonance imaging on June 17, 2014. (Ex. 2, p. 1) The reviewing radiologist listed the following impression:

> 1. Full-thickness anterior peripheral supraspinatus rotator cuff tear, 2.2 cm anteroposterior and 17 mm mediolateral.
>
> 2. Infraspinatus tendinesis and undersurface irregularity/fibrillation. There is edema within the infraspinatus muscle.
>
> 3. Peripheral subcapularis tear in the superior aspect of the junction with the supraspinatus tendon. There is atrophy of the superior aspect of the subcapularis muscle.
>
> 4. Disruption of the long biceps tendon from the labral anchor. It is not distinctly visualized in the bicipital groove, compatible with retraction.

(Ex. 2, p. 2)

Stark acknowledged that before the incident he had received injections into his left shoulder in October 2013 and April 2014. Stark reported that after he received each injection his shoulder felt better. Stark testified he did not have any problems performing his work duties before the incident on June 16, 2014. He reported he did not receive any additional medical treatment between April 2014 and his work injury. Stark testified he was not placed on any restrictions from a doctor for his left shoulder before June 16, 2014. Stark relayed after the work injury he could hardly move his arm.

On June 23, 2014, Stark attended an appointment with Daniel Fabiano, M.D., an orthopedic surgeon. (Ex. 2, p. 3) Stark relayed he was experiencing left shoulder pain, he felt a pop on the date of the injury, and he could not raise his arm. (Ex. 2, p. 3) Dr. Fabiano examined Stark and reviewed the magnetic resonance imaging of his left shoulder. (Ex. 2, pp. 3-4) Dr. Fabiano assessed Stark with a complete tear of the left rotator cuff tendon, and a rupture of the bicipital tendon of the left arm. (Ex. 2, p. 5) Dr. Fabiano recommended a left shoulder arthroscopy with rotator cuff repair, and imposed restrictions of no use of the left arm. (Ex. 2, pp. 5-6) Stark testified Kelly Demolition and Great Divide did not authorize surgery on his left shoulder and, instead,

scheduled an appointment with another physician, Jeffrey Westpheling, M.D., an occupational medicine physician.

Stark attended an appointment with Dr. Westpheling on July 2, 2014, for a second opinion on causation with respect to his left shoulder condition. (Ex. 2, p. 7) Dr. Westpheling examined Stark, and reviewed his medical records, but he did not provide any treatment to Stark. (Ex. 2, p. 7) Dr. Westpheling documented:

> Mr. Stark reports that he was at work moving heavy equipment with a semi and this required lifting ramps on a trailer. It was while he was lifting a ramp that he heard a "snap" in the anterior aspect of the left shoulder and subsequent onset of severe pain. The pain was so severe that he thought he had broken a bone in his shoulder. He had to stop all activity for approximately 15 minutes; however, upon resuming activity noted increasing pain in the anterior left shoulder. He got to the point where he had to lift his left arm with his right arm to perform any type of task.
>
> In regard to any prior history with his left shoulder, he reports having had "soreness" in his left shoulder over the last year. He underwent a cortisone injection of the left shoulder last year as well as again in April of this year. He reports having had no prior left shoulder MRIs or left shoulder surgery other than that previously detailed.

(Ex. 2, p. 7) Dr. Westpheling noted Stark was taking pain medication. (Ex. 2, p. 7) Dr. Westpheling assessed Stark with a left shoulder supraspinatus tear, and a left shoulder proximal biceps tendon tear. (Ex. 2, p. 8) Dr. Westpheling documented, "[i]t is my opinion with a reasonable degree of medical probability that his current left shoulder condition requiring surgical intervention is related to the work incident of mid June 2014," and noted Stark should follow up with Dr. Fabiano. (Ex. 2, p. 8) Kelly Demolition and Great Divide did not authorize surgery for Stark's left shoulder after they received Dr. Westpheling's opinion.

Stark testified Kelly Demolition and Great Divide brought a woman from Texas to Iowa who gave him a test. Stark met the woman at a local chiropractor's office. Stark does not know if the woman is trained in medicine or what her qualifications are. Stark recalled an individual named Frank Tomecek, M.D. issued a report. Stark does not recall ever meeting Dr. Tomecek or being examined by him. According to Dr. Sassman's report, Dr. Tomecek opined the major cause of Stark's left shoulder injury was not due to a single event which occurred at work on June 16, 2014, but rather a chronic, ongoing condition was more likely the major cause. (Ex. 1, p. 4) Dr. Tomecek did not testify at hearing. No information was provided concerning his qualifications or training.

After the testing, on July 21, 2014, the defendants' underwriting company sent Stark a letter informing him his claim was being denied because his shoulder condition was pre-existing. (Ex. 4, p. 2) On July 24, 2014, Dr. Fabiano performed a "[l]eft

shoulder arthroscopy, extensive debridement, biceps tenotomy, [and] open rotator cuff repair with decompression" on Stark. (Ex. 2, p. 9)

On September 9, 2014, Dr. Acherkan prepared a note documenting Stark has a history of chronic left shoulder pain, and opining "[t]his condition was aggravated by hard physical labor done at his job on June 16, 2014. We saw him in the clinic on June 17, 2014 and an MRI done that day showed a full-thickness rotator cuff tear." (Ex. 2, p. 11)

Stark attended a follow-up appointment with Dr. Fabiano on September 30, 2014. (Ex. 2, p. 13) Dr. Fabiano assessed Stark with a "[c]omplete tear of rotator cuff tendon – post op concern that [*sic*] is not healed." (Ex. 2, p. 13) Dr. Fabiano ordered upper extremity magnetic resonance imaging of Stark. (Ex. 2, p. 14) The reviewing radiologist listed an impression of:

> 1. Postsurgical changes of previous rotator cuff repair with extensive associated susceptibility artifact. Suspected anterior subacromial decompression, with susceptibility artifact as well.
>
> 2. No evident retracted tears of the rotator cuff. There is thinning and signal heterogeneity throughout the distal supraspinatus and infraspinatus which may be a sequela of surgery or partial tear/scarring. Correlate with MR arthrogram if there is further concern for a full-thickness component of recurrent tearing.
>
> 3. No acute or stress fracture.
>
> 4. Glenohumeral joint effusion and large amount of subacromial/subdeltoid bursal fluid.
>
> 5. Extensive signal heterogeneity in the superior, inferior, and posterior labrum; a nondisplaced labral tears are not excluded on the study. The labrum is poorly evaluated due to motion artifact.
>
> 6. The intra-articular portion of the long head biceps tendon is not visualized. Severe partial interstitial tearing is seen within the proximal vertical portion.

(Ex. 2, p. 15)

Stark attended a follow-up examination with Dr. Fabiano on October 14, 2014. (Ex. 2, p. 16) Dr. Fabiano noted that Stark's left shoulder was weak, but improving, and ordered a consult with physical therapy. (Ex. 2, pp. 16-17) Stark testified he attended twenty-six physical therapy appointments between July 2014 and November 2014.

Stark testified he was off work between June 21, 2014 and October 14, 2014. Stark reported that during this period he was required to take testing ordered by Kelly Demolition and Great Divide, which delayed his surgery. Stark reported he could barely

complete the testing and he could not work, even though Kelly Demolition wanted him to work.

Stark testified that in June 2014, Dr. Fabiano restricted him from using his left arm. Stark reported that following his surgery he continued to have problems with his left shoulder, which prevented him from returning to work.

On November 18, 2014, Dr. Fabiano issued Stark a permanent lifting restriction of twenty-five pounds. (Ex. 2, pp. 18-19)

During an appointment with Dr. Fabiano on November 25, 2014, Stark reported he had two episodes where he felt his shoulder pop while lifting and using a twenty-five pound spade. (Ex. 2, p. 20) Dr. Fabiano ordered repeat magnetic resonance imaging of the left shoulder. (Ex. 2, p. 21)

On December 13, 2014, Stark received left shoulder magnetic resonance imaging. (Ex. 2, p. 22) The reviewing radiologist listed an impression of:

> 1. Postsurgical changes of previous rotator cuff repair and acromioplasty. A recurrent focal perforation tear cannot be absolutely excluded though this may represent postoperative change. Correlate with MR arthrogram if there is further concern. I do not see definite rotator cuff retraction. Moderate supraspinatus and infraspinatus atrophy.
>
> 2. Tendinosis and mild atrophy of the subscapularis tendon and muscle belly.
>
> 3. Signal heterogeneity within the labrum as above; I cannot exclude nondisplaced tears of the posterior or inferior labrum. Evaluation is again limited by artifact, despite repeat imaging.
>
> 4. No acute or stress fracture. Mild AC joint hypertrophy.
>
> 5. Large amount of subacromial/subdeltoid bursal fluid. Mild glenohumeral effusion.
>
> 6. Suspicion for tenodesis of the proximal biceps tendon with resection of the intra-articular portion and persistent interstitial tear or tendinosis of the distal portion. Correlate with surgical history.

(Ex. 2, p. 23)

Stark attended a follow-up appointment with Dr. Fabiano on December 19, 2014. (Ex. 2, p. 24) Dr. Fabiano noted, "[h]e is doing failry [*sic*] well and I do not see that any further RTC surgery would be of benefit." (Ex. 2, p. 26)

Stark's employment with Kelly Demolition was seasonal. He was laid off in the winter and recalled in the spring each year. When he was laid off, Stark would apply for unemployment insurance benefits. Stark was laid off in the fall of 2014.

In the spring of 2015 Stark returned to work. Stark built a pond for Kelly Demolition. Stark testified he just ran the heavy equipment for the project. Stark reported he experienced difficulty with the project and the grading due to his pain medication. Stark's employment with Kelly Demolition ended in 2015 after he had a disagreement with Rod Kelly. (Ex. 3, p. 3)

Stark testified that when he received surgery Rod Kelly told him to apply for unemployment insurance benefits. Stark reported he applied for and received unemployment insurance benefits.

In 2015, Stark was hired by Aaron's Lawn Care & Landscaping, his present employer. (Ex. 3, p. 3) Stark is paid $22.00 per hour. (Ex. 3, p. 3) Stark runs heavy equipment and drives a dump truck. (Ex. 3, p. 3) Stark operates the equipment only. He engages in no manual labor. Stark is assigned a laborer to complete manual labor tasks.

Stark's attorney sent a letter to Dr. Fabiano on February 12, 2016, asking for his opinion regarding Stark's work injury, and providing some of his medical records. (Ex. 2, pp. 27-30) Dr. Fabiano responded on February 16, 2016, by e-mail, as follows:

> [t]he review of William Starks [*sic*] records demonstrates that his need for rotator cuff surgery was due to his work injury 6/16/14 with a significant degree of medical probability. These were acutely noted on his MRI 6/17/14. The subsequent findings 11/25/14 is a result of the cuff inability to heal and further degeneration and is a sequel of 6/16/14 injury. A substantial number of rotator cuff tears will not heal completely or well despite repair.

(Ex. 2, p. 31) Stark reported Dr. Fabiano has informed him he may need shoulder replacement surgery in the future. At this time Dr. Fabiano has not recommended any additional surgery.

Stark retained Robin Sassman, M.D., an occupational medicine physician, to conduct an independent medical examination on September 14, 2016. (Ex. 1, p. 1) Dr. Sassman issued her report on November 29, 2016. Dr. Sassman diagnosed Stark with a "[l]eft shoulder rotator cuff tear status post left shoulder arthroscopy, extensive debridement, biceps tenotomy and open rotator cuff repair on July 24, 2014, by Danial Fabiano, M.D. with a persistent tear." (Ex. 1, p. 1) Dr. Sassman opined:

> the incident that occurred on or about June 16, 2014, is directly and causally related to the left shoulder rotator cuff tear, the need for surgery, and his persistent symptoms. It was on this date that Mr. Stark was picking up a 120-pound ramp on a trailer. When he lifted the ramp, he felt

> a pop and severe pain in the left shoulder. It is true that Mr. Stark had a previous history of left shoulder pain and received injections in the left shoulder as well as acupuncture. However, he notes that even with these symptoms, he was able to do his job with very little pain. He states that his left shoulder symptoms were not limiting until the date of the injury in question in June of 2014. Unfortunately, Mr. Stark had another injury in [*sic*] on November 25, 2014 when he noted a "popping" sensation while using a spade. The subsequent arthrogram showed a complete rotator cuff tear. I would consider this injury to be a sequela of the original injury on June 16, 2014.
>
> Of note, regarding the "Electrodiagnostic Functional Assessment Report" produced by Dr. Tomecek, I would agree with Dr. Fabiano that this document adds no information of any use in this case.

(Ex. 1, p. 7)

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

> [f]or the left shoulder, the impairment due to range of motion of the left shoulder was calculated based on Figures 16-40, 16-43 and 16-46 on page 476-479. These are as follows: He can be assigned 4% upper extremity impairment for loss of flexion, 1% upper extremity impairment for loss of extension, 3% upper extremity impairment for loss of abduction, and 2% upper extremity impairment for loss of internal rotation. I am instructed to add these values together for a total of 10% upper extremity impairment. Using Table 16-3 on page 439, this is converted to 6% whole person impairment.

(Ex. 1, p. 8) Dr. Sassman recommended restrictions of no lifting, pushing, pulling, or carrying over twenty pounds occasionally from floor to waist and waist to shoulder, rarely lifting, pushing, pulling, or carrying above shoulder height over ten pounds, and rarely use vibratory or power tools. (Ex. 1, p. 8)

Stark reported when he worked for his father he performed manual labor, including raking, shoveling, chain saw work, and some material handling. Stark also performed some manual labor when he worked for JPM Enterprises. After grading, Stark would use a shovel or rake to feather the area around the foundation. Stark testified that he would not be able to return to his former employment because Dr. Fabiano told him he cannot engage manual labor, due to his work injury.

Stark runs heavy equipment for Aaron's Lawn Care & Landscaping. Stark excavates areas using a track hoe and a mini hoe, and he operates a skid loader. Stark does not perform manual work. A laborer is assigned to perform any manual labor work with projects he works on. Stark reported that his first year of employment with Aaron's Lawn Care & Landscaping he earned approximately $17,000.00, and he believes he

earned $30,000.00 the second year. Stark's employment with Aaron's Lawn Care & Landscaping is also seasonal, and he receives unemployment insurance benefits in the winter each year.

Stark believes he earned a total of $30,000.00 during the period of time he worked for Kelly Demolition, and he earned $7,000.00 in 2014.

Stark has held a commercial driver's license for most of his adult life. Stark reported he attends a yearly physical for his commercial driver's license where his vision, blood pressure, and reflexes are checked. Stark reported the exam does not include a physical component with any lifting requirements.

Stark testified his whole life has changed since his work injury. He is left-hand dominant and reported his left arm has no strength. Stark relayed he has to watch what he picks up and he experiences discomfort all of the time in his shoulder. Stark described the pain as an aching pain in the front of his shoulder and reported the pain is worse when he is working.

Stark testified his work injury has interfered with his activities of daily living, including going to the bathroom because he cannot reach with his arm. Stark used to mow his own yard and shovel his own snow. Now he has to pay someone to mow his yard and he cannot shovel snow. Stark enjoyed riding a motorcycle. Since his injury he struggles when he attempts to ride his motorcycle.

Stark enjoyed target shooting and hunting pheasant and rabbit before his work injury. Since his work injury he cannot pull back the trigger on his gun. Stark is able to care for his dogs and fold towels for his girlfriend.

During the hearing I did not observe Stark engage in any furtive or suspicious movements. His memory was clear, he maintained appropriate eye contact, and his rate of speech was normal. Based upon my observations, I found Stark to be a credible witness.

CONCLUSIONS OF LAW

I. NATURE AND EXTENT OF THE INJURY

A. Nature of the Injury

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

Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

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

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

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).

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

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

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

The record reflects Stark had received treatment to his left shoulder, including injections, prior to the work injury on June 16, 2014. Dr. Westpheling, an occupational medicine physician, was retained to provide a second opinion regarding causation and he examined Stark on July 2, 2014. (Ex. 2) Following the examination, Dr. Westpheling concluded, "[i]t is my opinion with a reasonable degree of medical probability that his current left shoulder condition requiring surgical intervention is related to the work incident of mid June 2014," and noted Stark should follow up with Dr. Fabiano. (Ex. 2, p. 8) Dr. Fabiano, the orthopedic surgeon who treated Stark, has also opined Stark's "need for rotator cuff surgery was due to his work injury 6/16/14 with a significant degree of medical probability. These were acutely noted on his MRI 6/17/14. The subsequent findings 11/25/14 is a result of the cuff inability to heal and further degeneration and is a sequel [*sic*] of 6/16/14 injury." (Ex. 2, p. 31) Dr. Sassman, the occupational medicine physician retained to perform an independent medical examination of Stark, opined the incident on June 16, 2014 "is directly and causally related to the left shoulder rotator cuff tear, the need for surgery and his persistent symptoms." (Ex. 1, p. 7) Dr. Sassman also agreed with Dr. Fabiano that Stark experienced a second injury on November 25, 2014 while working when he noted a "popping" sensation while using a spade and the subsequent arthrogram showed a complete rotator cuff tear, which she considers to be a sequela of the original June 2014 injury. (Ex. 1, p. 7)

Apparently the only physician who may have found no causation is Dr. Tomecek. (Ex. 1, p. 4) I do not find his opinion persuasive. Dr. Tomecek did not testify at hearing. I have not received any information regarding Dr. Tomecek's training and experience. He did not examine Stark, and he never met with Stark. Dr. Sassman opined, "I would agree with Dr. Fabiano that [Dr. Tomecek's report] adds no information of any use in this case." (Ex. 1, p. 7)

Using the AMA Guides, Dr. Sassman opined Stark has sustained a six percent whole person impairment to his left shoulder. Dr. Sassman recommended restrictions of no lifting, pushing, pulling, and carrying over twenty pounds occasionally from floor to waist and waist to shoulder, rarely lifting, pushing, pulling, and carrying above shoulder height over ten pounds, and rarely use vibratory or power tools. (Ex. 1, p. 8)

I conclude Stark has established he sustained a permanent impairment arising out of and in the course of his employment with Kelly Demolition. Based on the

opinions of Drs. Fabiano and Sassman, I further conclude his need for medical care and treatment for his left shoulder condition is causally connected to his work injury. Stark has met his burden of proving he sustained a permanent impairment as a result of his work injury.

B. Extent of Disability

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

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

At the time of the hearing Stark was sixty-two. Stark is a high school graduate and he holds a valid commercial driver's license. Stark has worked his entire adult life operating heavy earth moving machinery, and engaging in some manual labor and material handling. Stark's employment has been and remains seasonal. He has received and continues to receive unemployment insurance benefits during the winter months when he is laid off.

Following his work injury Stark was able to secure employment consistent with his restrictions through Aaron's Lawn Care & Landscaping. The owner of the business is Stark's friend. They first worked together when Stark worked for JPM Enterprises.

No wage records were produced from Stark's employment with Kelly Demolition. Aaron's Lawn Care & Landscaping pays Stark $22.00 per hour. (Ex. 3, p. 3) Stark operates heavy equipment and drives a dump truck. (Ex. 3, p. 3) Stark performed similar duties for Kelly Demolition and he was paid $20.00 per hour. (Ex. 3, p. 3) Stark no longer performs any manual labor like he performed when he worked for Kelly Demolition.

Dr. Sassman has recommended permanent restrictions of no lifting, pushing, pulling, or carrying over twenty pounds occasionally from floor to waist and waist to shoulder, rarely lifting, pushing, pulling, or carrying above shoulder height over ten pounds, and rarely use vibratory or power tools. (Ex. 1, p. 8) Stark credibly testified he is no longer able to engage in manual labor, target shoot, hunt, and he has difficulty

using his arm to go to the bathroom. Considering the industrial disability factors, I find Stark has sustained a twenty percent permanent partial impairment, commencing on October 16, 2014.

II. HEALING PERIOD BENEFITS

Stark seeks healing period benefits from June 21, 2014 through October 15, 2014. 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. Stark has sustained a permanent impairment, so any temporary benefits he is entitled to are healing period benefits.

Stark returned to work on the date of his injury. He sought medical treatment through Dr. Acherkan the next day. During his appointment with Dr. Fabiano on June 23, 2014, Dr. Fabiano recommended a left shoulder arthroscopy with rotator cuff repair, and imposed restrictions of no use of the left arm. (Ex. 2, pp. 5-6) Stark was scheduled for surgery shortly thereafter, but the surgery was delayed while Kelly Demolition and Great Divide sought a second opinion. Stark credibly testified he was off work through October 14, 2014. No witnesses appeared on behalf of Kelly Demolition or Great Divide showing suitable work was offered to Stark during this period of time. No evidence was presented that Stark was capable of returning to work during this time. Stark is awarded healing period benefits from June 21, 2014 through October 15, 2014.

III. MEDICAL BILLS AND MEDICAL MILEAGE

Stark seeks to recover $342.04 for treatment he received from Physicians' Clinic of Iowa between July 22, 2014 through December 19, 2014, $2,853.00 for magnetic resonance imaging conducted at St. Luke's Hospital on June 17, 2014, $1,783.06 in charges from St. Luke's Hospital from July 24, 2014, $585.61 for additional magnetic resonance imaging conducted at St. Luke's Hospital, $130.74 in charges from Radiology Consultants from June 17, 2014, $50.00 in charges from Iowa Physicians Clinic, from June 17, 2014 and July 23, 2014, and $76.78 in pharmacy charges from June 17, 2014, through August 16, 2014. (Ex. 8) The medical bills total $5,821.23. Stark has itemized the bills and highlighted the bills. He has not requested reimbursement for medical expenses unrelated to his work condition.

Under Iowa Code section 85.27, "[t]he employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and

hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services." Stark is entitled to recover the medical bills for treatment he received related to his work injury, as set forth in Exhibit 8.

Stark seeks to recover mileage from June, 17, 2014 through November 29, 2015, related to his work injury, totaling $145.98. (Ex. 7, p. 1) The statute expressly allows for the recovery of medical mileage. Rule 876 Iowa Administrative Code 8.1(2) further provides "transportation expense" includes "[a]ll mileage incident to the use of a private auto" at the rate allowed by the Internal Revenue Service for the business standard mileage rate in effect on July 1 of each year. Kelly Demolition and Great Divide are responsible for all causally connected past and future medical expenses, including medical mileage.

IV. PENALTY

Stark received one check for temporary total disability benefits from Kelly Demolition and Great Divide totaling $399.20 from June 21, 2014 through July 4, 2014. (Ex. 6, p. 1) Kelly Demolition and Great Divide paid no additional temporary or permanent benefits to Stark. Stark seeks an award of penalty benefits.

Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to 50 percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

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

the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

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

Kelly Demolition and Great Divide have not acted reasonably in this case. After receiving Dr. Westpheling's second opinion regarding causation on July 2, 2014, they denied liability for Stark's claim. Stark received one check for temporary total disability benefits from Kelly Demolition and Great Divide totaling $399.20 from June 21, 2014 through July 4, 2014. (Ex. 6, p. 1) Stark remained off work from June 21, 2014 through October 15, 2014. When he returned to work, Stark had restrictions, and ultimately he received permanent restrictions. After receiving Dr. Sassman's report, Kelly Demolition and Great Divide did not commence paying permanent partial disability benefits. Stark's claim was not fairly debatable. Kelly Demolition and Great Divide did not commence an appropriate investigation. Stark is entitled to the penalty benefits in this case to deter Kelly Demolition and Great Divide and other insurers and employers from acting unreasonably in the future. Stark is awarded $7,334.00 in penalty benefits.

IV. INDEPENDENT MEDICAL EXAMINATION AND REPORT

Stark seeks to recover the $1,392.50 cost of Dr. Sassman's examination, and the $1,692.50 cost of her report, set forth in Exhibit 9. Kelly Demolition and Great Divide denied Stark's claim on July 21, 2014. (Ex. 4, p. 2)

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

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

> We conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under

> administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). The record does not contain the opinion of a physician retained by the defendants providing a permanency evaluation. The opinion of Dr. Tomecek was not produced at hearing. Under the statute, Stark is not entitled to recover the $1,392.50 cost of Dr. Sassman's examination.

Under rule 876 IAC 4.33(6), the cost of two reports from doctors or practitioners can be taxed as costs. Stark is entitled to recover the $1,692.50 cost of Dr. Sassman's report.

V. COSTS

Stark seeks to recover the $100.00 filing fee, and the $13.47 service fee, set forth in Exhibit 9. Rule 876 IAC 4.33 outlines the costs that can be taxed, as follows,

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

The rule allows for the recovery of the filing fee and service fee totaling $113.47. Stark is awarded $113.47 in costs.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant healing period benefits from June 21, 2014 through October 15, 2014, at the rate of five hundred forty-three and 32/100 dollars ($543.32).

Defendants shall pay the claimant one hundred (100) weeks of permanent partial disability benefits at the rate of five hundred forty-three and 32/100 dollars ($543.32), commencing on October 16, 2014.

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

Defendants are entitled to a credit for benefits previously paid.

Defendants shall pay the claimant seven thousand three hundred thirty-four, and 00/100 dollars ($7,334.00) in penalty benefits.

Defendants are responsible for all causally related medical bills set forth in Exhibit 8, totaling five thousand eight hundred twenty-one and 23/100 dollars ($5,821.23), and medical mileage totaling one hundred forty-five and 98/100 dollars ($145.98), set forth in Exhibit 7.

Defendants shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee, thirteen and 34/100 dollars ($13.47) for service fee, and one thousand six hundred ninety-two and 50/100 dollars ($1,692.50) cost of Dr. Sassman's report.

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

Signed and filed this 22nd day of March, 2017.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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