BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES LAFON, JR.,	FILED	
Claimant,	OCT 19 2017	
vs.	WORKERS COMPENSATION	
HAWKEYE ON-SITE VEHICLE SERVICES,		File Nos. 5055058, 5057153
Employer,		ARBITRATION DECISION
and		
FARMERS INSURANCE EXCHANGE,		
Insurance Carrier, Defendants.		Head Note Nos.: 1108, 1801, 1803.1 2209, 2501, 2502

STATEMENT OF THE CASE

James LaFon, Jr., claimant, filed a petition in arbitration seeking workers' compensation benefits against Hawkeye On-Site Vehicle Services, employer, and Farmers Insurance Exchange, insurer, for alleged work injuries to his right wrist and hand (File No. 5055058) and to his neck and shoulder (File No. 5057153).

This case was heard on April 20, 2017, in Des Moines, Iowa. The case was considered fully submitted on May 22, 2017 upon the simultaneous filing briefs.

The record consists of Exhibits 1-41, Defendants' Exhibits A-J, and testimony of the claimant and of Stephen Geiss, owner of defendant employer.

ISSUES

File No. 5055058

Whether claimant sustained an injury which arose out of and in the course of employment;

Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;

Whether claimant's claim is untimely under Iowa Code section 85.26;

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so,;

The appropriate commencement date of permanent disability benefits;

The extent of claimant's scheduled member disability;

Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

Whether claimant is entitled to reimbursement of the independent medical evaluation (IME) report of Sunil Bansal, M.D., pursuant to Iowa Code section 85.39;

File No. 5057153

Whether claimant sustained an injury which arose out of and in the course of employment;

Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;

Whether claimant's claim is untimely under Iowa Code section 85.26;

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so,;

The appropriate commencement date of permanent disability benefits;

The extent of claimant's alleged industrial disability;

Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;

Whether claimant is entitled to reimbursement of the IME report of Dr. Bansal pursuant to Iowa Code section 85.39;

STIPULATED FACTS

The parties stipulate that claimant was an employee of the defendant employer at all relevant times. Further, at all relevant times, claimant was married and entitled to two exemptions.

The parties further stipulate that claimant's gross earnings at the time of the alleged injury to the wrist and hand was $761.25. Based on the claimant's marital status and exemptions, the weekly benefit rate for a wrist/hand injury in this case is $497.12.

At the time of the alleged injury to his shoulder and neck, claimant's gross earnings were $769.41. Based on the claimant's marital status and exemptions, the weekly benefit rate for a wrist/hand injury in this case is $501.70.

Prior to the hearing, defendants paid $519.81 in medical expenses and seek a credit of that amount against any award in File No. 5055058.

FINDINGS OF FACTS

Claimant was a 55-year-old person at the time of the hearing. He graduated from high school in 1980 and earned an associate of applied science degree in automotive technology from Des Moines Area Community College. Claimant is a certified Automotive Service Excellence with master technician status. At the time of his alleged injuries, claimant was employed with the defendant employer as an automotive technician.

Prior to his injury, claimant worked as a warehouse clerk and/or dockworker for Loffredo Fresh Produce but his primary source of employment for the majority of his adult life has been working as an auto technician.

At the time of the injury, claimant's gross earnings were $21.00 per hour. His duties for the defendant employer included oil changes, brake work, transmission work, tire rotations, and other types of maintenance. He testified that he would lift in excess of 50 pounds. His supervisor, Mr. Stephen Geiss, disagreed. Mr. Geiss maintained that the heaviest work involved would be tire rotation.

Mr. Geiss testified at hearing that Hawkeye Onsite is a mobile fleet truck repair service. At the time of the hearing, Mr. Geiss employed two part-time employees working as mechanics. He said that there was a policy to report injuries. First, the employee may report it verbally. Mr. Geiss cited an example of when a worker cut their finger. In fact, claimant suffered an injury in 2014 to his finger, ripping out a nail. He reported it to Mr. Geiss. Claimant received medical treatment at Mercy South family practice and urgent care on January 6, 2014. (Exhibit 5:18) It is unclear whether this claim was paid for by workers' compensation or from claimant's health insurance.

Claimant used tools on a daily basis, working overhead with tools such as air impact wrenches, weighing approximately 5 to 20 pounds. After an argument between claimant and Mr. Geiss over medical care for claimant's alleged work injury, claimant left work after June 16, 2015, and did not return. He was officially terminated on June 22, 2015.

Claimant's past medical history includes in October 1998, treatment for pain in his joints. Claimant reported stated that he had a family history of arthritis. He reported pain in his left knee, bilateral hips, upper back and in the neck and arm, greater on the right. (Ex 1:5) Later, while working under a car, claimant felt a pull or pop in the right shoulder area. Robert Major, M.D., concluded claimant had early osteoarthritis in the

hips and left knee along with a right shoulder strain. Claimant was given medication and encouraged to follow-up. (Ex. 1:5)

The next medical record regarding claimant's back pain took place in 2012. (Ex. 2:7) The claimant was climbing a ladder when he felt a pull in his mid-back. Subsequently, he had right arm paresthesias and was unable to work. (Ex. 2:7) He was prescribed home physical therapy, medication, and placed on light duty. (Ex. 2:8)

In June 2013, claimant suffered an acute inferior myocardial infarction. (Ex. 3:12) His coronary angiogram revealed non-obstructive coronary disease. Claimant was provided medication and encouraged to quit smoking. (Ex. 3:14)

In December 2013, claimant was seen at Mercy Clinic for a right ear issue. There is a notation that he had some anger and/or stress management issues at the time. (Ex. 4:17)

Claimant asserts that he began experiencing numbness in his right hand, primarily in the thumb, index and middle fingers, around November 2013. Claimant testified that he reported this injury to Mr. Geiss, but that Mr. Geiss did nothing in response. Mr. Geiss refutes this. Claimant further testified that he repeatedly complained of numbness in his hand and that he needed to see a doctor, but that Mr. Geiss remained non responsive. Mr. Geiss, again, refutes this. Claimant's brief refers to Exhibit 35 as additional support of claimant's testimony, but Exhibit 35 is deposition testimony taken on June 30, 2016, rather than phone records or some other non-testimonial evidence.

Mr. Geiss did, however, deny that carpal tunnel syndrome (CTS) was an actual injury. He believed an injury could only be traumatic in nature.

In August or September of 2014, claimant requested that he be sent to a doctor. Mr. Geiss refused on the basis that he did not believe the CTS was work related. Claimant did not seek any medical attention on his own.

In October 2014, claimant was working under a pick-up when a wooden block broke. The motor fell and claimant jerked his head, neck and arms out of the way to avoid being struck by the motor. The following day he had trouble lifting an air impact gun with his right arm. He noticed pain, weakness, and loss of range of motion on the right as well as neck and right shoulder pain. Mr. Geiss argues that this injury is a fabrication, disputing that the claimant would be using Porto-Power to jack up the vehicle and that even if he did, the Porto-Power would not be placed on a wood block, as the Porto-Power remained at the defendants' shop. Further, the remote site did not have its own Porto-Power.[1]

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[1] Claimant was not able to identify the exact date of this incident.

Mr. Geiss acknowledges that in November of 2014, claimant reported CTS and following that report, Mr. Geiss informed his insurer. The insurance company then went forward and set up a medical visit for the claimant. The medical visit took place on December 16, 2014.

The contradictory testimony of whether claimant reported carpal tunnel problems prior to the fall of 2014 is resolved in favor of Mr. Geiss. When claimant reported injury in November of 2014, Mr. Geiss reported this to his insurance carrier and medical treatment commenced. When claimant had a previous work injury while employed with the defendants, he sought out and received care.

The behavior of the parties suggests that when claimant reports an injury to his employer, the employer notifies the insurance carrier.

In the intervening time, on or about December 10, 2014, claimant had jaw pain and palpitations similar to the acute myocardial infarction that occurred in 2013. (Ex. 8:26) He sought treatment and testing was completed which resulted in abnormal findings in keeping with known inferior wall myocardial infarction. (Ex. 9:33) It was noted that the claimant had been noncompliant with his medications and he was still smoking at least a pack a day. (Ex. 8:27)

Claimant was seen by Scott Shumway, M.D., on December 16, 2014 for severe right hand symptoms. (Ex. 11:39) According to Dr. Shumway, claimant reported intermittent tingling and numbness in the fingers of the right hand, dating back to 2001. Over the last year, his symptoms had become markedly worse. (Ex. 11:39) Dr. Shumway concluded the claimant was suffering from carpal tunnel syndrome on the right. Although claimant had no obvious swelling, he was able to flex and extend the fingers of the right hand without difficulty. He had full range of motion of his wrist and no evidence of any atrophy. (Ex. 11:41) Dr. Shumway recommended an EMG. The EMG was not approved until 2015.

Claimant was not seen or treated for any shoulder or neck complaints. Claimant maintained that he was not given enough time to fill out the paperwork, but did mention a right shoulder/neck injury to the physician. There is no mention of shoulder or neck complaints in the medical records.

On or about March 16, 2015, claimant was seen for a left ankle inversion injury. He was diagnosed with an ankle sprain and given prescription medication. (Ex. 15:59)

On June 9, 2015, claimant was written up for losing his temper with the owner over an issue regarding claimant's workers' compensation case. (Ex F:1) On June 16, 2015, claimant was written up for using profanity and a loud voice when questioning the owner over workers' compensation care. (Ex. F:2) On June 17, 2015, claimant was written up for failure to report to work at 9:00 a.m. (Ex F:3) He was written up for the same thing on June 18, 2015. (Ex F:4) Claimant was written up for being 15 minutes late on June 19, 2015. (Ex. F:5) Claimant had no disciplinary procedures or letters prior to his work injury.

On July 22, 2015, claimant underwent an EMG study which showed moderately severe right carpal tunnel syndrome and axonal loss to the right C5 and C6 enervated muscles. An MRI of the C-spine was recommended. (Ex. 17:63) He was then seen in follow-up at Iowa Orthopedic by Dr. Shumway who recommended claimant undergo a right carpal tunnel release. (Ex. 18:65) On November 6, 2015, Dr. Shumway recommended restrictions of no repetitive grasping or lifting. (Ex. 18:66)

Claimant underwent carpal tunnel release with Dr. Shumway on March 24, 2016. (Ex. 20:73)

On or about March 8, 2016, claimant sought out treatment with Robert Major, M.D., for right shoulder pain. (Ex. 19:67) This was the first medical record visit regarding claimant's neck and shoulder injury. (Ex. 19:67) Dr. Major documented that claimant had definite muscle wasting that was worse on the right than the left. His grip strength was less on the right as well. He had reduced range of motion in the upper extremity. (Ex. 19:68)

On or about March 23, 2016, claimant lost his temper with Dr. Major's office, screaming profanities that it was ridiculous that he had to wait a month see his doctor. (Ex. 19:71)

On April 6, 2016, claimant returned to Dr. Shumway for follow-up after the surgery to his right carpal tunnel release. He reported that symptoms were mild and have improved. (Ex. 21:76) Claimant was released from Dr. Shumway's care on June 8, 2016. (Ex 21:79)

On July 28, 2016, an MRI of the cervical spine was finally conducted. The MRI showed multilevel spondylosis leading to multilevel central canal narrowing, with the greatest areas of concern at C5 – C7. (Ex. 22:81) A mass was seen in the pyriform left sinus and subsequently removed for fear it was cancerous.

On August 24, 2016, claimant presented to Einar Bogason, M.D., for problems with his right arm and shoulder. (Ex. 24:87) An EMG study was ordered, the results of which were normal. (Ex. 24:90) An MRI of the right brachial plexus was performed on November 9, 2016. This MRI was negative. (Ex. 24:93) Claimant was then referred to Iowa Orthopaedic where he was seen by Timothy Vinyard, M.D. Dr. Vinyard did not believe that the symptoms were coming from the claimant's shoulder, but instead his neck. (Ex. 25:92) Claimant was referred to Todd J. Harbach, M.D. (Ex. 25:101) In the history, Dr. Harbach records that the claimant first felt immediate pain with weakness after the October 2014 incident. (Ex. 25:98) However, the first medical notation of neck and right shoulder pain was in early 2016 and not in 2014 when claimant was seen by Dr. Shumway. An EMG study in 2015 by Dr. Bahls revealed axonal loss in the right C5 and C6 region, but there was no follow up on that issue by Dr. Shumway.

After another EMG which showed chronic right C6 radiculopathy, Dr. Harbach recommended claimant undergo two cervical epidural steroid injections to determine whether surgery would be helpful. (Ex. 25:110)

> The patient returns after his EMC/nerve conduction velocity test to review it today and it shows that he has radiculopathy. There does not appear to be any ongoing nerve injury and no recovery. This makes sense since his symptoms began in 2014, at least 2-1/2 to 3 years ago. He does have foraminal stenosis on the RIGHT at C5-C6 and bilateral foraminal stenosis at C6-C7 and some early instabilit6y at C4-C5 without significant neural encroachment. I told him that, objectively, I have nothing to base doing surgery on that would indicate he would have a good result. To make sure that I am not incorrect, I am going to send him for 2 cervical epidural steroid injections to see if that helps him recover any strength over the next month or so. If he feels like his arm feels better and there is some strength improvement then I think it [*sic*] be worthwhile trying surgery. If not, that will be the flipping point and we will have to discuss that further upon his return. I will see him back in about a month after he has had the injections and we will go from there.

(Ex. 25:110) Claimant underwent one injection on March 28, 2017. (Ex. 25:111) There was no improvement and therefore Dr. Harbach released claimant. (Ex. 41:275) Dr. Harbach had no further care he could provide claimant.

On June 10, 2015, Dr. Shumway was asked to provide an opinion as to whether the conditions for which he treated claimant beginning on December 16, 2014, were related to his work. Dr. Shumway opined the following:

> **Answer:** Based on my evaluation of Mr. Lafon on December 16, 2014, he is required as an auto mechanic to use the hand for heavy gripping, pushing and pulling that is highly repetitive. Based on his work description, I do feel that his work activities are a significant exacerbating factor for his work-related carpal tunnel syndrome.

(Ex. 30:135)

On August 10, 2015, claimant was seen for an independent medical evaluation (IME) by Teri S. Formanek, M.D. (Ex. A:4) Claimant's examination resulted in non-normal findings:

> There is slight atrophy of the left thenar eminence. Circulation to both hands is normal in appearance. There is no swelling in the right upper extremity. There is marked atrophy of the biceps and deltoid muscle, as well as the supraspinatus and infraspinatus muscles on the scapula. The patient has substantial weakness in wrist extension, elbow flexion, and range of motion of the shoulder with marked weakness of the rotator cuff. The patient's neck range of motion is severely limited in lateral bending and extension.

(Ex. A:2) An EMG nerve conduction test of July 22, 2015, showed evidence of C5-6 radiculopathy and mild slowing of the median nerve in the carpal tunnel with

prolongation of the peak latency in the sensory nerve conduction values and a prolonged latency in the motor conduction values. (Ex. A:2) Dr. Formanek concluded that the claimant suffered from mild to moderate carpal tunnel syndrome and that the onset could date back as far as 2001. He agreed that the underlying condition was "at least aggravated by the type of employment that he did over the past seven and a half years." (Ex. A:3)

Dr. Formanek did not believe that the C5 and C6 radiculopathy was related to work activities but more likely the result of a personal health condition. He attributed claimant's ongoing paresthesias in the thumb, index, and long fingers to the cervical spine condition. (Ex. A:3) Dr. Formanek further concluded the following:

> The patient relates a history of intermittent numbness and tingling in November 2013, and over a long period of time, he had some intermittent symptoms. This would not be uncommon for the development of carpal tunnel syndrome, gradually over a period of time until it becomes clinically symptomatic to the point where the patient seeks treatment. I would state that his date of injury for the carpal tunnel condition was probably in November 2013. With this in mind, I think that his escalation of symptoms is a result of his neck condition which has caused atrophy of the muscles and weakness in the right upper extremity, primarily in the proximal aspect of the extremity, and I believe it is responsible for the permanent numbness and tingling in his thumb, index, and long fingers primarily. I say this because the nerve conduction testing is not at a severity level that would normally be associated with constant numbness and tingling in the hand from median nerve compression at the wrist.

(Ex. A:3)

On October 12, 2015, claimant underwent an independent medical examination with Sunil Bansal, M.D. (Ex. 26:112) Claimant mentioned to Dr. Bansal that he was not able to mark on the paperwork that he had an injury to his neck and right shoulder, but mentioned it to the physician. (Ex. 26:112) Claimant reported numbness of the thumb, index, and middle fingers of the right hand along with constant pain in the right wrist. He had neck discomfort and difficulty with range of motion of his right arm. He asserted he was not able to raise his right arm away from his body and had pain that radiated from the center of his neck down into his upper back and shoulder blade. He complained of significant weakness of his right arm and a loss of muscle mass. (Ex. 26:115)

Claimant told Dr. Bansal that his work duties required him to use his hand pushing and pulling repetitively throughout the day. He also worked with power tools which caused vibrations. (Ex. 26:116) On examination, he had tenderness over the cervical paraspinal musculature, greater on the right with guarding. He had reduced flexion, extension, lateral flexion on both sides. He had full range of motion in his right shoulder and tenderness to palpation over the trapezius. He also had mild tenderness to palpation on the volar aspect of the wrist, a positive Tinel's sign, a positive Phalen's

sign, no thenar atrophy, more weakness with thumb abduction, full range of motion of the wrist, a loss of two point sensory discrimination over the thumb, index, and long finger. (Ex. 26:116) He had reduced right-handed grip strength and a slight reduction of loss in the biceps on the right. (Ex. 26:117) There was no measurement of muscle mass comparing the left to the right.

Dr. Bansal concluded that as a result of the claimant's work, which entailed twisting and turning of his hands with pushing and pulling on hand and power tools, claimant sustained right carpal tunnel syndrome. (Ex. 26:118) Dr. Bansal wrote that while the claimant had remote symptoms dating back to 2001, the fact that he continued a job that required extensive use of his right hand for many years after that made it "medically implausible that he was having clinically significant carpal tunnel syndrome when he started" work for the defendant. (Ex. 26:118)

Dr. Bansal set claimant's maximum medical improvement date as December 16, 2014. (Ex. 26:118) Because adequate treatment had not yet been performed, he felt the rating was premature; however, assessed a five percent upper extremity impairment. (Ex. 26:118) He placed a restriction of no lifting greater than ten pounds occasionally with the right hand along with no frequent squeezing, pinching, grasping with the right hand. (Ex. 26:118)

Dr. Bansal also concluded the claimant sustained a work injury to his cervical spine. "In my medical opinion, the mechanism of a violent jerk is consistent with his radiculopathic cervical spine condition." (Ex. 26:120) Dr. Bansal went on to conclude that the claimant's constellation of right shoulder, neck and shoulder blade pain was related to the cervical discogenic problem, primarily due to inflammation and/or an increase in sensitivity in the somatosensory system. (Ex. 26:112) Again, he felt the treatment was incomplete but assigned a 7 percent whole person impairment. (Ex. 26:122) He also recommended restrictions of no lifting greater than 10 pounds with the right arm or 25 pounds total along with no over the shoulder work. He was also to avoid work or activities that required repeated neck motion or that would place his neck in a posturally flexed position for any appreciable duration of time greater than 15 minutes. (Ex. 26:123)

Dr. Bansal provided a follow-up opinion on August 19, 2016. (Ex. 27) During this visit, the claimant continued to complain of numbness in his right hand, involving the first, second and third fingers. Claimant no longer had as much pain in the hand, but did have pain in the wrist radiating up to the mid-forearm. He continued to report weak grip strength on the right and did not believe that he had any improvement following the surgery. (Ex. 28:127)

He reported that his neck pain was in the posterior aspect of the right side radiating into his right shoulder and shoulder blade. His main complaint was weakness of his right arm and lack of range of motion of his right arm. He had no radiating pain other than the wrist pain. (Ex. 28:127) Claimant further reported that his right arm was weak and had to use accessory muscles to raise his arm. He could raise his arm a scant few inches away from his body before needing the assistance of his left hand

braced under his right elbow to elevate the arm further. (Ex. 28:127) Physical examination showed reduced range of motion of his neck along with tenderness to palpation. (Ex. 28:128) He also had tenderness to palpation over the trapezius but full range of motion. (Ex. 28:120)

As for his right wrist and hand, he had mild tenderness to palpation over the solar aspect of the wrist, a positive Phalen's test, a negative Finkel's test, no thenar atrophy noted, no weakness of the thumb with adduction, full range of motion of the wrist, and a loss of two point sensory discrimination over the thumb, index, and long fingers. (Ex. 28:128) He also had reduced strength of the right hand.

Due to the medical care provided, Dr. Bansal change the maximum medical improvement date to June 8, 2016 when claimant was released from care by Dr. Shumway. (Ex. 28:129) As a result of the sensory deficits, Dr. Bansal assessed a four percent upper extremity impairment. (Ex. 28:130) Restrictions included no lifting greater than ten pounds occasionally or five pounds frequently along with no frequent squeezing, pinching or grasping of the right hand. (Ex. 28:130) No further treatment was necessary in the opinion of Dr. Bansal.

As it related to claimant's work injury of October 2014, Dr. Bansal modified his opinion to an aggravation of cervical spondylosis with right lateralization at C-5 through C7. (Ex. 28:130) Dr. Bansal did not believe the claimant had adequate treatment for the cervical injury and recommended a course of physical therapy medications and/or epidural injections. (Ex. 28:130) Dr. Bansal assigned a 7 percent whole person impairment and recommended claimant avoid lifting more than 5 pounds overhead and no frequent overhead lifting. He also needed to avoid work or activities that required repeated neck motion, or that would place his neck in a posturally flexed position for any appreciable duration of time greater than 15 minutes. (Ex. 28:131)

On October 4, 2016, Dr. Formanek opined that the claimant had no residual impairment as a result of the right wrist carpal tunnel condition. (Ex A:5) He reiterated that the claimant's medical condition involving the cervical spine and the residual effects were the result of a cervical spine problem which Dr. Formanek believed was not related to any work injury. (Ex. A:5)

On February 17, 2017, Lewis Vierling, M.S., issued a vocational rehabilitation evaluation. (Ex. 31) Mr. Vierling found that claimant had sustained a 100 percent loss of access between the pre-injury and post-injury occupational profiles due to his significant health issues. (Ex. 31:140) Much of claimant's loss of employability appears to be premised on Mr. Vierling's presumption of claimant's chronic, debilitating pain. (Ex. 31:139-40) Mr. Vierling documented claimant's pain as "severe" on a daily basis with the need for pain medication. (Ex. 31:140)

On April 13, 2017, Ted Stricklett, MS, issued an industrial disability assessment of the claimant. (Ex. C:1) Based on the opinions of Dr. Formanek, claimant's loss of earning capacity would be 0 percent. Based on the restrictions and opinions of Dr. Bansal, claimant's loss of earning capacity would be approximately 55 percent.

(Ex. C:6) Under Dr. Bansal's restrictions, claimant would be precluded from returning to his past work as an automotive technician and material handler. Instead, claimant would have to look for jobs such as a service writer, parts clerk, automobile detailer, office cleaner, security guard, shuttle driver. He would earn wages of approximately $9.00 to $14.50 per hour compared to his previous earnings at the time of his injury of $21.00 per hour. (Ex. C:6)

Mr. Stricklett's report also took issue with the findings of Lewis Vierling's February 2017 report. First, Mr. Vierling used an incorrect wage base citing claimant's earnings at the time of the injury at $24.00 per hour instead of $21.00 per hour. (Ex. C:8; Ex. 31:140) Second, Mr. Vierling ignored past light duty experience of claimant. Claimant previously worked as a customer service representative, which falls within the light duty category. (See Ex. 31:148) Third, Mr. Vierling listed automotive service advisor as a position claimant could work under Dr. Bansal's restrictions but still identified claimant as having a 100 percent loss of access to the labor market. (Ex C:9) Further claimant obtained work at Shearer Performance Specialty after his termination at a pay rate of $20.00 per hour. (Ex C:8)

In a supplemental report dated April 19, 2017, Dr. Harbach signed off on an opinion letter authored by the claimant's attorney indicating that Dr. Harbach treated claimant from January 30, 2017 to April 17, 2017, and that the October 2014 workplace injury materially aggravated the claimant's underlying cervical spine condition which necessitated Dr. Harbach's treatment. (Ex. 41:274-75) Dr. Harbach recommended claimant undergo a functional capacity evaluation (FCE) in order to fully calculate claimant's impairment. Dr. Harbach did not have the full medical picture that Dr. Bansal or Dr. Formanek had. Dr. Harbach's opinions were based on his examination of claimant and claimant's verbal history of an injury occurring in 2014 which substantially aggravated claimant's pre-existing condition.

Claimant maintains that he informed his medical providers about his shoulder and neck problems repeatedly but that those conditions were ignored. Dr. Shumway was the physician that claimant saw between 2014 and 2015 and the physician that claimant maintains ignored his repeated complaints. Mr. Geiss and claimant have contradictory testimony. The medical records of Dr. Shumway are silent on the issue of neck and shoulder injuries. There is another medical record, however, that can provide some illumination. In the medical records taken in December of 2014 when claimant was seen for a potential cardiac incident, there is also no mention of any shoulder or neck pain. This is significant because in a previous heart incident, claimant reported chest and left arm pain. (Ex. 9:34) While there is one early error in Dr. Shumway's report, there is little indication that he would outright ignore a pain complaint of the claimant. The medical records of Dr. Shumway are detailed, noting claimant had had a previous cardiac event and that the claimant had been evaluated for CTS in 2001. Further, if claimant had debilitating neck and shoulder pain, as he testified, he could have sought care by himself as he ultimately did in 2015. Therefore, it is found that claimant did not report the neck and shoulder injury until sometime in 2015.

In a supplemental report dated May 9, 2017, Dr. Formanek reaffirmed his original position that the claimant needed no restrictions regarding his carpal tunnel condition. (Ex. J:1) Dr. Formanek also opined claimant did not sustain a neck and shoulder injury arising out of a 2014 injury. "Such an injury would cause the need for immediate treatment within the first several weeks after the injury if there was an infinite injury that occurred from that event at work. In other words, the event at work does not happen in 2014 and the need for treatment for the injury becomes apparent in 2016. I believe that it is his degenerative condition in his cervical spine that is the cause for his symptoms and that he did not have a substantial injury at work that was the cause for the need to address the cervical spine and shoulder complaints." (Ex J:1)

CONCLUSIONS OF LAW

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

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The

expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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

File No. 5055058

(Right carpal tunnel)

There is no dispute that claimant's right carpal tunnel syndrome arose out of and in the course of his employment. Even Dr. Formanek agreed that claimant's work aggravated his condition. Claimant's work of twisting and turning his hands while pushing and pulling, along with the regular use of vibratory tools gave rise to a carpal tunnel injury.

The defendants assert two timeliness defenses. First, they claim the CTS is time barred for failure to give timely notice under Iowa Code section 85.23 and/or time barred for failing to timely file under Iowa Code section 85.26. Claimant's CTS is a cumulative injury.

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

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

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." Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 829 (Iowa 1992) (quoting Peoria Cty. Belwood Nursing Home v. Indus. Comm'n, 115 Ill.2d 524, 106 Ill. Dec. 235, 505 N.E.2d 1026, 1029 (1987)).

The Supreme Court of Iowa concluded the limitations period does not commence "until the employee ... knows that the physical condition is serious enough to have a permanent adverse impact on the claimant's employment or employability." Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001). In Larson, the Supreme Court further elucidated that "permanent adverse impact" provides an abbreviated or alternative characterization of the three elements of the discovery rule test: nature, seriousness, and probable compensable character of the injury. Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 854-55 (Iowa 2009).

Under the guidance of the Iowa Supreme Court, the nature, seriousness, and probable compensable character of the injury was not known to the claimant until his visit to Dr. Shumway on December 16, 2014. While claimant had pains and difficulties, he still worked his regular job duties and believed he could continue with his regular tasks up until his visit with Dr. Shumway. Thus, by December 16, 2014, defendants had actual notice of the injury, having been informed of it sometime in November 2014.

Claimant's petition dated October 5, 2015, was within the two year statute of limitations. Therefore, it is found that claimant's right wrist/hand injury claim was filed timely and that proper notice was timely provided.

Because the right hand and wrist injury is deemed work related, the medical bills associated with claimant's CTS are the responsibility of the defendants.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

Therefore, the charges reflected in the Iowa Department of Human Services lien shall be paid by the defendants subject to any medical bills previously paid. (Ex 39:254-56)

The next issue is whether the alleged injury is a cause of temporary disability and, if so, the extent.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant agrees he is not entitled to healing period benefits after he began performing work for a subsequent employer in January 2016. Further, claimant concedes that the majority of the symptoms and limitations that prevented the claimant from working were due to his right shoulder and neck injury. The claimant is seeking healing period benefits only from November 6, 2015, the day on which Dr. Shumway first imposed restrictions due to claimant's inability to repetitively grasp and left with his right hand until December 31, 2015. (Ex. 18:66, Claimant's Brief, p. 25)

Claimant was not working between November 6, 2015 and December 31, 2015. He returned to substantially similar work on January 1, 2016. Therefore claimant is entitled to temporary total benefits from November 6, 2015 through December 31, 2015.

We next turn to the issue of whether the carpal tunnel syndrome on the right was the cause of permanent disability. Defendants argue, primarily based on the expert opinion of Dr. Formanek, the claimant has sustained no permanent injury as a result of his carpal tunnel syndrome. Dr. Formanek opines that the problems with the claimant's right hand and wrist stem from his neck condition. However Dr. Shumway recommended work restrictions as a result of the carpal tunnel syndrome and those restrictions have not been lifted. The opinions of Dr. Shumway, the treating physician, are more compelling as it relates to the right hand and wrist given the length of time Dr. Shumway treated the claimant, in addition to the surgery he performed as well as subsequent care.

It is found that the claimant sustained a permanent disability arising out of the right carpal tunnel syndrome which has previously been found to arise out of and in the course of claimant's employment with the defendants.

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. The extent of scheduled member

disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Because this is an injury to the right hand and wrist, the claimant is entitled to a finding of functional impairment. Dr. Shumway recommended restrictions of no repetitive lifting or grasping. Dr. Bansal assigned a four percent upper extremity impairment. Based on the foregoing, it is determined that claimant has sustained a four percent upper extremity impairment.

Claimant seeks reimbursement of the independent medical examination of Dr. Bansal. On August 10, 2015, defendants obtained an opinion from Dr. Formanek which essentially found that claimant's right hand and wrist problems were not related to the work injury. This adverse opinion triggered the claimant's right to an examination under Iowa code section 85.39. Under Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015), only the examination is reimbursable. The case of City of Davenport v. Newcomb is not binding precedent in light of the 2015 Young ruling. The bill submitted by the claimant is not broken down. The claimant is awarded two-thirds of the initial IME bill of $2,975.00 fee charged, which is $1,983.33. (Claimant's Statement Of Costs; Ex. 40:266-67) Claimant is not entitled to more than one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 861 (Iowa 2009).

Claimant further seeks recovery of the evaluation by Lewis Vierling. Reports are covered in rule 876 IAC 4.33 wherein the claimant can request that costs be taxed by the deputy to a prevailing party.

Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested.

Rule IAC 876 4.33. Under Des Moines Area Regional Transit Authority v. Young, 4.33 reports are allowed in lieu of testimony. Evaluations of a party are not appropriate because evaluations are similar to examinations and neither are a report in lieu of testimony. According to Exhibit 40, Mr. Vierling spent 3-1/2 hours preparing the report. (Ex. 40:272) The report fee of $630.00 is permitted.

File No. 5057153

(Neck/Shoulder)

Claimant relies on the opinions of Dr. Bansal and Dr. Harbach as to the issue of whether the neck and shoulder injury is related to a work incident occurring on or about October 2014. Claimant had a serious degenerative condition in his cervical spine. He alleges that this condition was aggravated by a workplace incident where he was forced to jerk out of the way to avoid a falling engine.

Dr. Formanek opined the neck and shoulder injuries were unrelated to claimant's work. Dr. Harbach did not have access to all the medical records and did not appear to be aware that claimant did not report any neck or shoulder injuries to any medical providers until the fall of 2015, nearly a year after the alleged traumatic incident. Dr. Bansal's findings are conclusory without any significant reasoning supporting his opinions. Dr. Formanek's opinions are detailed and appeared to consider all possible causes of claimant's pain.

Therefore, relying on Dr. Formanek's opinions, it is determined claimant did not sustain a work related injury which resulted in a neck and shoulder trauma.

As a result of this conclusion, the remainder of the issues for File No. 5057153 are moot. Claimant shall take nothing.

ORDER

THEREFORE, it is ordered:

File No. 5055058

That defendants are to pay unto claimant ten (10) weeks of permanent partial disability benefits at the rate of four hundred ninety-seven and 12/100 dollars ($497.12) per week from June 8, 2016.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants shall pay medical expenses and liens associated with the care and treatment of claimant's right CTS and provide further care for claimant's right CTS pursuant to Iowa Code section 85.27 subject to any medical bills previously paid.

That defendants are to be given credit for benefits previously paid.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including the filing fee, the court reporter costs of claimant's deposition, the court reporter costs of Stephen Geiss's deposition, and six hundred thirty and 00/100 dollars ($630.00) charged by Lewis Vierling.

That defendants shall pay one thousand nine hundred eighty-three and 33/100 dollars ($1,983.33) of the fees of Dr. Bansal pursuant to Iowa Code section 85.39.

File No. 5055058

Claimant shall take nothing.

That each party shall pay their own costs.

Signed and filed this 19th day of October, 2017.

JENNIFER S. GERRISH-LAMPE
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.