BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TIMOTHY BURGER, Claimant, vs. MENARD, INC. Employer, and XL INSURANCE AMERICA INC., Insurance Carrier, Defendants.	File No. 5059150 ARBITRATION DECISION Head Notes: 1100, 1108, 1400, 1403, 1801.1, 1802, 2206, 2500, 2701, 3000, 3002, 4000, 4000.2

STATEMENT OF THE CASE

This is a petition in arbitration. The contested case was initiated when claimant, Timothy Burger, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on July 13, 2017. Claimant alleged he sustained a work-related injury on February 27, 2017 or March 1, 2017. Claimant alleged the work injury affected his left lower extremity, his back, and his body as a whole. (Original notice and petition)

For purposes of workers' compensation, Menard, Inc., is insured by XL Insurance America Inc. Defendants filed their answer on August 3, 2017. Defendants denied the claim in its entirety. A first report of injury was filed on August 14, 2017.

The hearing administrator scheduled the case for hearing on October 4, 2018. The hearing took place at Iowa Workforce Development at 150 Des Moines Street, Des Moines, Iowa. The undersigned appointed Ms. Chris A. Quinlin as the certified shorthand reporter. She is the official custodian of the records and notes. The original transcript was filed on October 19, 2018.

Claimant testified at hearing. Claimant also called the following lay people to testify: Mr. Rick Sloth, and Ms. Marcia Nelson. Claimant and defendants called Mr. Lance Gesell, Plant Manager at the Shelby, Iowa facility to testify. The parties offered joint exhibits 1 through 29. The exhibits were admitted as evidence in the case. The

attorneys are commended for offering all exhibits as joint ones. It was so much easier to follow the exhibits since they were offered jointly.

Post-hearing briefs were filed on November 5, 2018. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the injury;

2. Defendants have waived any affirmative defenses;

3. If the injury is found to be permanent in nature, it will be calculated by the industrial method;

4. At the time of the alleged work injury, claimant was married and entitled to two (2) exemptions;

5. Affirmative defenses that may have been available to defendants have been withdrawn;

6. Defendants agree to reimburse claimant $120.12 for mileage to travel for an independent medical examination; and

7. Claimant has paid certain costs and defendants do not dispute that those costs have been paid.

ISSUES

The issues presented are:

1. Whether claimant sustained a work-related injury on February 27, 2017 or March 1, 2017 which arose out of and in the course of his employment;

2. Whether the alleged injury is the cause of temporary and/or permanent disability;

3. Whether claimant is entitled to temporary partial, temporary total or healing period benefits;

4. Whether claimant is entitled to permanent total disability benefits, permanent partial disability benefits or whether claimant is an "odd lot" employee;

5. The parties are disputing the weekly benefit rate to which claimant may be owed. Claimant alleges the weekly benefit rate is $541.48. Defendants maintain the rate is $345.97;

6. Whether defendants are entitled to past due medical bills as well as future medical costs and care to treat claimant's back and left knee;

7. Whether defendants are liable for penalties pursuant to Iowa Code section 86.13; and

8. Whether claimant is entitled to interest.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant, the two lay witnesses and the testimony of Mr. Gesell, the plant manager, at hearing, after judging the credibility of the people who testified, and after reading the evidence, the transcript, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

Claimant is 61 years old. He is married and resides with his spouse in Harlan, Iowa. The town has a population slightly under 5,000 people. It is the county seat for Shelby County. Claimant has resided in Harlan for approximately forty years.

Claimant currently smokes tobacco products. He has smoked at least half a pack of cigarettes per day for 40 years. Various medical providers have explained to claimant the effects cigarette smoking has on his current conditions. (Tr., pp. 121-122) Claimant has found it too difficult to quit.

Claimant received his high school diploma from Shelby Tenet Community School in 1977. He has no other formal education. Claimant indicated he did not excel in academic subjects. He enjoyed more "hands on" type work. Claimant entered the construction business following his high school graduation. His father owned the business. Later, claimant and his brother operated the construction business for a number of years. Claimant also sold cars, worked in a manufacturing plant, and worked briefly as a telemarketer.

Claimant commenced his employment with Menard, Inc. on August 22, 2008. During the course of his first eight years of employment, claimant worked as a "sidelite" installer in the "custom shop". Claimant's assigned duties included standing all day at a workbench which was waist high. Then claimant would reach for tools to caulk and assemble windows and doors. Claimant was quite satisfied with the position. (Transcript, pages 31-32)

On October 26, 2016, members of management transferred claimant to the "cutout room". Claimant was not happy about the transfer. He testified he did not like the job at all. (Tr. pp. 85-86) He stated he had to strip steel from foam on different sizes

of doors. Claimant estimated he would handle from 300 to 800 doors per day. There were bending and twisting motions involved with each door. Some doors required stripping as much as eight pieces of metal per door.

Counsel for claimant asked her client to describe the process that occurred when claimant was working on a patio door in the "cutout" room. Claimant answered:

> A. I - - The very first day I could feel the pain. And I was really sore at the end of the day. And it just - - it progressively got worse every day. I mean, and I stayed down there for four months, and - - until I finally couldn't take it anymore and I told Lance that I can't do this anymore.
>
> Q. And what part of your body was it that progressively got more painful every day?
>
> A. The - - From my upper lower back down to my knee. Yeah. Down to my knee.
>
> Q. And you're gesturing for our record. You're taking your arm and you're running it down kind of your left leg to your left knee; correct?
>
> A. Yeah.
>
> Q. Had you ever had those symptoms before?
>
> A. Not that bad, no. Not - - No. I don't think I've had - - not all that at once at all, no.
>
> Q. Okay.
>
> A. I'd remember that.

(Tr. p. 89)

There was a five-minute video tape produced by the plant manager and shown during the arbitration hearing. The video depicted an employee of Menard, Inc. working in the cutout room. The video was taken approximately 1.5 hours after second shift had begun. The video demonstrated only two cutouts traveling down the conveyor belt in a five-minute period. Based on the video tape, coupled with the testimony of the plant manager, claimant would be required to strip 640-650 sheets of steel from foam per shift. Claimant disputed the video was an accurate depiction of his job duties.

There is no question; claimant had pre-existing osteoarthritis in his spine and his left knee, as well as in other parts of his body. On September 23, 2004, claimant underwent a left knee arthroscopy with medial meniscectomy. Mark E. Goebel, M.D. performed the surgery. (Joint Exhibit 5, page 1) Claimant also had work-related

bilateral carpal tunnel surgery. No permanent restrictions were warranted and claimant returned to work.

In May of 2014, claimant had a left total shoulder replacement. (Jt. Ex. 8, p. 1) Jonathan E. Buzzell, M.D. performed the surgery. (Jt. Ex. 8, p. 1) On October 29, 2014, Dr. Buzzell imposed the following permanent work restriction for the left shoulder:

> Light Heavy Work
>
> > Lifting 75 pounds max with frequent lifting and/or carrying objects weighing up to 40 pounds.
> >
> > Additional Comments:
> >
> > Limit overhead work to occasional and less than 10 pounds with left arm

(Jt. Ex. 8, p. 3)

No medical provider ever imposed permanent work restrictions for claimant's pre-existing osteoarthritis in his spine and left knee. Claimant did not report any work injury to his spine or left knee until after he had been working in the cutout room.

On November 17, 2016, claimant saw his personal physician, Scott A. Markham, D.O. This is the first time claimant reported the position in the cutout room was affecting his back. Claimant related to Dr. Markham:

> He was at work and he was in a certain area at Menard's where he was content and was enjoying his job. He called it more of in the custom area and he did not have to do a lot of heavy lifting. They have now changed his position and they have given him a 3-day suspension. He said he just cannot do this job. It is too much bending, stooping and pulling. He said it just wipes out his back. He has had previous back surgery and has had epidural steroids as well. He said this is just really hurting his back. I have recommended he go talk to the plant nurse or medical personnel and they can discuss what he would need to do.

(Jt. Ex. 6, p. 12)

William R. Palmer, M.D., a specialist in rheumatology, had been treating claimant for many years with a focus on claimant's osteoarthritis. Claimant visited Dr. Palmer on January 30, 2017. (Jt. Ex. 4, p. 27) Claimant reported he had been placed on a more strenuous job at work, and since that time, he felt his health had deteriorated. (Jt. Ex. 4, p. 27) Claimant indicated he felt he was barely able to perform his new job duties due to the physical pain he was experiencing. He rated his pain as an 8 on an analog scale of 0 to 10 with 0 equaling no pain and 10 equaling the worse pain imaginable. (Jt. Ex. 4, p. 27) Dr. Palmer opined claimant's condition had worsened and the deteriorated

condition was directly related to the strenuous job, claimant was performing in the cutout room. (Jt. Ex. 4, p. 29) Dr. Palmer suggested claimant be returned to his former position in the custom room. (Jt. Ex. 4, p. 29)

In his deposition, claimant described the day he reported his work injury to the manager, Mr. Gesell. He testified:

> Q. (By Ms. Kelsey J. Paumer) Do you remember what month this was?
>
> A. It was February 28th, I believe. That's the day I told Lance I couldn't do it anymore.
>
> Q. I'm going to get to that conversation in just a second.
>
> A. Oh, okay. I'm sorry.
>
> Q. That's okay. I just didn't want you to think I wasn't going to follow up.
>
> A. I probably - - - I thought we already did.
>
> Q. When you were experiencing your pain, did you immediately think that it was because you were in the cutout room?
>
> A. Oh, yes.
>
> Q. Now, you've talked about different ways you modified your work to help with your pain, including leaning on a wall.
>
> Did you modify your work in any other way?
>
> A. Once in a while, I made kind of a chair out of the foam and the pads that I had so I could sit down because I had to sit down; and after a few minutes, it felt better where - - so, I'd go over and start doing it again. I'd do this continuously.
>
> Q. How often would you have to sit down?
>
> A. Sit down? Maybe once an hour because I was pulling myself up - - they had a cement floor where I could pull myself up and take the pressure off, and that took, that helped, you know, because, then, I wouldn't have to go over and sit down, you know, and - - but it just continuously, it got bad.

(Jt. Ex. 29, p. 13)

...

> Q. So, you told him [Lance Gesell] on February 28th that you couldn't do it

anymore?

A. Uh-huh.

Q. Is that a "yes"?

A. Yes. I'm sorry.

Q. No, you're fine.

What is the - - what happened after you told him that?

A. He left and came back a few minutes later and told me just go home for the rest of the day and get some rest and come back.

So I did that, and I came back, and they had me scheduled, cleaning the break room and stuff, and - -

Q. Did they claim that that was a light-duty position?

A. Yeah, basically, I guess, but I guess the day before that, I did ask him [Gesell] that I wanted to see a doctor. He said:

"Oh, okay."

You know, and I never saw one, but I thought he would get, have me go see one; but the next day, I come back, I was working in there, and he finally came walking in, he used the restroom, probably around 8:30, and I went up and asked, you know, stopped him and asked him, I said:

"Lance, I told you yesterday that I wanted to see a doctor," and he said:

"You want to see our doctor?"

And I said:

"Yeah."

And he said:

"Okay, "he said, "let me go get Justin Barber and fill out a report and stuff."

And we did that, and that's when Justin took me down to the doctor in Council Bluffs.

(Jt. Ex. 29, p. 15)

On March 1, 2017, claimant visited the Occupational Health Clinic at Mercy Hospital in Council Bluffs, Iowa. (Jt. Ex. 9, p. 1) Claimant complained of sore knees, especially the left knee to the left hip, pain in the low back, stomach area, and numbness in the right arm. (Jt. Ex. 9, p. 1) George Smith, ARNP, examined claimant. The nurse practitioner diagnosed claimant with:

IMPRESSION:

1. Lumbar back pain with radicular symptoms left leg,
2. Bilateral hip pain.
3. Bilateral knee pain.
4. Bilateral hip pain.
5. Osteoarthritis of bilateral hands and bilateral knees per patient history.
6. Right arm pain.

(Jt. Ex. 9, p. 3)

Nurse Smith imposed some temporary restrictions with respect to repetitive movements. Claimant was told to sit, stand, and walk, but to vary the activities every one-half hour. With respect to force, claimant was to exert only 5 pounds of force continuously, and 15 pounds of force occasionally. Claimant was restricted from working in the cutout room. (Jt. Ex. 9, p. 5)

On March 8, 2017, claimant returned to the occupational clinic. James G. Kalar, M.D., FAAFP, examined claimant. X-rays were taken. The results showed: "diffuse lumbar spondylosis and facet arthropathy along with congenitally short pedicles which is suggestive of spinal stenosis. There is also a mild left lumbar scoliosis."

Dr. Kalar ordered magnetic resonance testing. The physician diagnosed claimant with:

IMPRESSION:

1. Acute low back pain superimposed on probable spinal stenosis with neurogenic claudication.

PLAN: He may continue to work restricted duty. Please refer to the discharge instructions for complete details. He will continue with his previous medications as before. I have requested an MRI of the lumbar spine. I do not feel that physical therapy would be beneficial at this time. I did ask him to obtain a CD with the MRI images before leaving the MRI facility. Follow-up will be scheduled

when MRI results are available. I would anticipate referral to a spine specialist. Recheck sooner if any new or worsening symptoms.

(Jt. Ex. 9, pp. 6-7)

On March 24, 2017, claimant returned to see Dr. Palmer. (Jt. Ex. 4, p. 31) Claimant rated his pain at an 8 out of 10. (Jt. Ex. 4, p. 31) Dr. Palmer injected the left knee with 80 MG of Kenalog. The rheumatologist opined claimant's left leg, lumbosacral back pain, and bilateral carpal tunnel syndrome were all work related. (Jt. Ex. 4, p. 33)

Five days later, claimant returned to Dr. Palmer. Claimant felt his health status had worsened. (Jt. Ex. 4, p. 34) Claimant rated his pain level at 9 out of 10. (Jt. Ex. 4, p. 34) There was swelling of the left knee but claimant's gait was normal. (Jt. Ex. 4, p. 35)

Claimant again returned to Dr. Palmer's office on April 8, 2017. Linda Belsky-Lohr, APRN, examined claimant and assessed claimant's situation as:

- The patient's illness has not improved
- Reviewed with him the results of the new left knee films
- Orthopedic referral is recommended. He would like to wait on this.
- Suggested an MRI of the left knee. He politely declined my suggestion.
- I requested that he return home and initiate: RICE. He has hydrocodone at home as well.

(Jt. Ex. 4, p. 36)

Defendants did not schedule magnetic resonance imaging (MRI) as prescribed by Dr. Kalar. Instead, an appointment with Dean K. Wampler, M.D., Medical Director of CompChoice Occupational Health Services, in Omaha, Nebraska was scheduled for claimant. Dr. Wampler examined claimant on April 28, 2017. The interview and examination commenced at 9:50 a.m. and concluded at 10:30 a.m. Dr. Wampler also reviewed some medical records from 2004 through 2013 from Dr. Palmer; records from 8/02/2011 through 11/15/2012 from Dr. Markham; an IME from Anil Agarwal, with the date of January 29, 2013; and operative reports from Methodist Hospital for March 29, 2013 and June 6, 2013.

In Dr. Wampler's report of April 28, 2017, the physician noted:

Mr. Burger arose from the waiting room chair by pushing off the arm rests and walked with a forward stooped gait to and from the exam room. He preferred to

> stand flexed forward at his hips, but could come upright upon request. His lumbar lordosis is flat or even slightly kyphotic.
>
> Cervical mobility was diminished but reportedly not painful. Lumbar mobility was markedly diminished with minimal ability to bend forward more than 40 degrees, and coming upright in itself was a challenge for him because of reported pain. There is some tenderness over the posterior spinous structures, and mild increased muscle tone in the paralumbar muscles expected from his posture.
>
> Screening neurologic exam in the lower extremities was normal. Deep tendon reflexes in the knees are 2+ and ankles 1+ and symmetric. There were no sensory deficits by light touch or scratch, and strength testing of major muscle groups in the lower extremities was also symmetrical.
>
> I had Mr. Burger squat as low as he could three time [sic] in succession. He struggled coming up the third time, complaining of bilateral knee pain and weakness in his left thigh.

(Jt. Ex. 14, p. 9)

Dr. Wampler acknowledged it was "possible", claimant's work injury exacerbated or aggravated claimant's underlying lumbar spinal stenosis condition. (Jt. Ex. 14, p. 10) Dr. Wampler did not know whether claimant's condition was a substantial or permanent change as a result of his work duties. (Jt. Ex. 14, p. 10) Dr. Wampler also indicated in his report:

> There is no doubt that Mr. Burger has progressive condition of life. His marked spinal deterioration is undoubtedly caused by his long term smoking history and genetic predisposition of short pedicles. There is opportunity that repetitive bending and stooping could produce temporary exacerbation or potential permanent aggravation to the condition. I have explained what needs to be reviewed to make that determination.

(Jt. Ex. 14, p.10)

Dr. Wampler opined temporary restrictions were in order. (Jt. Ex. 14, p. 11) Dr. Wampler agreed claimant should lift no more than 10 pounds; he should alternate sitting and standing each hour. (Jt. Ex. 14, p. 11) Dr. Wampler could not determine whether claimant had reached maximum medical improvement or whether he had sustained any permanent impairment. (Jt. Ex. 14, p. 11)

Dr. Palmer ordered MRI testing. The testing occurred on June 9, 2017 at Village Pointe Imaging. Robert Forbes, M.D., interpreted the findings as follows:

IMPRESSION:

1. Moderate degenerative rotary levoscoliosis of the lumbar spine, apex at L2.

2. L1-L2: Severe spinal stenosis. Severe right and moderate left neural foraminal stenosis. Modic type I degenerative endplate changes.

3. L2-L3: Severe spinal stenosis. Severe right neural foraminal stenosis.

4. L3-L4: Severe spinal stenosis. Severe bilateral neural foraminal stenosis.

5. L4-L5: Severe spinal stenosis. Severe bilateral neural foraminal stenosis. Moderate bilateral lateral recess stenosis at the level of the superior endplate of L5.

6. L5-S1: Moderate spinal stenosis. Severe bilateral neural foraminal stenosis.

(Jt. Ex. 4, p.40)

Dr. Palmer reviewed the MRI results. Claimant returned to Dr. Palmer on June 27, 2017. The rheumatologist expressed his medical opinions in his clinical notes for the same date. Dr. Palmer opined:

> Impression: No improvement and aggravated by previous job IMO Has been assigned to light duty. He should never return to previous job (stripping steel from foam).
>
> Current Plans
>
> - The patient's illness has not improved-severe OA left knee
> - I am making no medication changes today
> - Follow up in three months.
>
> Spinal stenosis of lumbar region with neurogenic claudication
>
> Impression: He has been assigned to light duty. OA pain is better. Has not yet sought out the assistance from Dr. Belatti for epidurals. His work physician wants him to have a repeat MRI of the L/S spine. This has not yet been scheduled, but will be scheduled soon.
>
> Current Plans
>
> - The patient's illness has worsened, aggravated by his prior work activity.

- I suggest we have another epidural and or Spine consult. He'll discuss with his attorney and PCP

(Jt. Ex. 4, p. 43)

On June 30, 2017, Dr. Wampler issued another report regarding claimant's condition. Dr. Wampler reviewed two MRI reports. One was from October 16, 2013. The other report was the one issued in June of 2017. Dr. Wampler also reviewed some records from Dr. Palmer. Dr. Wampler did not examine claimant. Dr. Wampler opined claimant only sustained a temporary exacerbation of pain when he engaged in more strenuous work in the cutout room. Dr. Wampler indicated there were no traumatic changes to claimant's lumbar spine per the results of the June 2017 MRI. (Jt. Ex. 14, p. 14) Additionally, Dr. Wampler opined it was not necessary to calculate a permanent impairment rating since there was no change to claimant's spine function. (Jt. Ex. 14, p. 15) Finally, Dr. Wampler discussed claimant's work abilities. He wrote:

Work Abilities

Mr. Burger is physically debilitated because of his pre-existing condition. His lack of ability to stand and walk more than 10 minutes is due to the spine disease rather than any injury event or short-term change of work.

(Jt. Ex. 14, p. 15)

Because of Dr. Wampler's two reports, defendants determined they were denying liability for claimant's claim. A denial letter was sent to claimant on July 11, 2017. The basis for the denial was listed in the letter to claimant. (Jt. Ex. 18, p. 1)

Dr. Palmer referred claimant to an orthopedic specialist, Samuel P. Phillips, M.D. Dr. Phillips examined claimant on July 18, 2017. (Jt. Ex. 10, p. 1) Dr. Phillips determined claimant would need staged bilateral knee replacements. (Jt. Ex. 10, pp. 3-4) Dr. Phillips imposed work restrictions of "No kneeling, squatting, crawling, limit standing, walking according to symptoms, Limit pivoting/twisting on knee." (Jt. Ex. 10, p. 5)

Claimant's personal care physician, Dr. Markham, referred claimant to George Greene, M.D., an orthopedic surgeon at Ortho Nebraska. Dr. Greene examined claimant on August 22, 2017. Dr. Greene reviewed the June 9, 2017 MRI test results. Dr. Greene noted:

There is moderately severe stenosis at L1-2, L2-3, L3-4, and L4-5 secondary to congenital stenosis, hypertrophy of the facets and ligamentum flavum, and epidural lipomatosis.

(Jt. Ex. 11, p. 1)

Dr. Greene assessed claimant's situation and discussed the various treatment options with claimant. (Jt. Ex. 11, p. 3) Dr. Greene discussed L1, L2, L3, L4, and L5 laminectomies, medial facetectomies and root foraminotomies. Dr. Greene discussed the proposed operative procedures and potential risks. Claimant elected to proceed with the surgical procedures. Dr. Greene elected to schedule the surgery in the future. (Jt. 11, p. 3) However, claimant testified in his deposition, Dr. Greene would not schedule the surgery until the workers' compensation insurance carrier would agree to cover the cost of the surgical procedure. (Jt. Ex. 29, pp. 19-20)

Counsel for defendants contacted Dr. Greene and questioned him on the issue of causation. Defense counsel posed the following question:

> 4. Of the diagnoses stated in request #1, which of these, if any, are causally related to his alleged work accident? Did the alleged accident cause a tempory [sic] or permanent injury? Please state how the objective findings support your response.

Dr. Greene provided the following response in his letter of August 28, 2018:

> **Answer:** The first report of injury or illness is dated March 2, 2017. The occupational health evaluation by George Smith, ARNP on March 1, 2017 details a four-month history of worsening pain involving the hips, bilateral knees and both legs, more on the left than the right. In addition, low back and radicular left leg pain was reported. These complaints were attributed to a work activity involving heavy physical work. The report of worsening low back pain most likely represented an acute lumbar strain related to the advanced degenerative changes identified in the lumbar spine. I consider this a temporary exacerbation of a preexisting condition. The radicular leg symptoms are related to the multilevel lumbar stenosis. The multilevel lumbar stenosis was not caused by the work activity and was documented on the MRI of the lumbar spine from 2013. The occurrence of bilateral leg pain with activity is the typical symptom of neurogenic claudication. The work activities caused the leg symptoms but not the underlying disease process. The symptom of radicular leg pain occurs in these patients, both with the activities of daily living and with multiple work activities. I do not consider these symptomsas [sic] a cause of a temporary or permanent injury.
>
> I am not able to provide an answer regarding the relationship of the advanced degenerative changes in the knee to the alleged work accident as this is beyond my scope of practice.

(Jt. Ex. 11, pp. 7-8)

Members of management terminated claimant on November 2, 2017. Claimant applied for unemployment insurance benefits. He was initially denied benefits on January 3, 2018. However, claimant appealed to the Employment Appeal Board. The Employment Appeal Board reversed the decision of the administrative law judge. The Board determined claimant was discharged for no qualifying reason. As a result, claimant was eligible for unemployment insurance benefits. (Jt. Ex. 26)

On January 18, 2018, claimant saw Dr. Markham. (Jt. Ex. 6, p. 15) Claimant reported he was seeking disability, as he could not lift any heavy objects or perform manual labor. (Jt. Ex. 6, p. 15)

Claimant saw Dr. Palmer on May 4, 2018. (Jt. Ex. 4, p. 46) Claimant explained he had not experienced any improvement in his back and left leg. Dr. Palmer opined claimant should never return to his previous job where he was stripping steel from foam. (Jt. Ex. 4, p. 46) Dr. Palmer injected claimant's knees with 80 MG of Kenalog. (Jt. Ex. 4, p. 46)

Dr. Palmer referred claimant to Midwest Neurosurgery & Spine Center for a consultation. (Jt. Ex. 12, p. 1) Claimant presented to Keith M. De Fini, PA-C and Keith R. Lodhia, M.D. (Jt. Ex. 12) An assessment was performed. The assessment showed:

1. Spondylolisthesis lumbar region.

2. Spinal stenosis.

3. Lumbar spondylosis.

4. Lumbar back pain.

(Jt. Ex. 12, p. 2)

No neurologic deficits were noted. (Jt. Ex. 12, p. 2) The physician's assistant explained to claimant and his spouse the following:

> ...that with the multilevel degenerative changes noted on MRI that certainly a multilevel laminectomy as suggested by Dr. Greene would provide him some benefit. However, if he has some instability identified as L3 does show some evidence of posterior spondylolisthesis on L4 then he may need a fusion. With the multilevel degenerative changes, this most likely would be a multilevel fusion. I explained to him that I would like to hold off and discuss this with Dr. Lodhia regarding treatment options after obtaining a new MRI and see how well he does with the injections.

(Jt. Ex. 12, p. 2)

On July 19, 2018, claimant visited his personal care physician, Dr. Markham. Claimant reported he was unable to perform much work because of the pain in his back, hips and most especially in the knees. (Jt. Ex. 6, p. 18) Dr. Markham changed claimant's prescription from diclofenac to 750 MG of nabumeton twice per day. (Jt. Ex. 6, p. 19)

Dr. Wampler issued a third independent medical examination on July 27, 2018. (Jt. Ex. 14, p. 19) The evaluator did not examine claimant again. Dr. Wampler did review additional medical reports, including the independent medical examination written by Dr. Sassman, and the physician reviewed certain diagnostic tests. Dr. Wampler opined claimant's two MRI tests did not show any traumatic abnormalities such as disk herniation, annular tear, or inflammatory tissue responses. (Jt. Ex. 14, p. 21) Dr. Wampler continued to hold the opinion that claimant's conditions were not work-related.

Counsel for claimant, referred her client to David H. Segal, M.D., a neurosurgeon in Cedar Rapids, Iowa, for another independent medical examination. The examination occurred on July 21, 2018. Dr. Segal authored an opinion with the date of August 23, 2018. (Jt. Ex. 17) Dr. Segal reviewed multiple medical records, job descriptions, a videotape, and a denial letter from defendants. In his overall summary, Dr. Segal opined:

> Mr. Burger injured his low back performing work duties at Menards [sic], which was reported on February 27, 2017, in relation to increased exertional duties that he had to do at work starting October 19, 2016. The specific work that he did during the time he was in the cutout department was not typical type of work, in my opinion, and caused him significant low back pain and caused a permanent aggravation of a preexisting, minimally symptomatic condition. His low back condition prior to this work duty was only occasionally symptomatic, had been treatable, and did not cause him permanent impairment. The work duties that he did between October 19, 2016, and March 1, 2017, caused him permanent exacerbation of the preexisting injury, which causes the current symptoms and impairment, and this is with a high degree of medical certainty.

(Jt. Ex. 17, p. 19)

Dr. Segal took exception to Dr. Wampler's opinion regarding temporary aggravation of a preexisting condition. (Jt. Ex. 17, p. 20) Dr. Segal clearly wrote in his report of August 23, 2018:

> ...The work-related injury and exacerbation from the cutout room continues. There is nothing in the records to support a temporary exacerbation, and medical evidence of traumatic change in pathology is

> not relevant to permanent aggravation of a preexisting condition. Furthermore, when Dr. Wampler writes that "any exacerbation of symptoms would have resolved when Mr. Burger was placed on light duty," that statement is not relevant to Mr. Burger's case, as his symptoms did not resolve. It is speculative and also not based on actual fact to say that happened. No one can say that Mr. Burger's symptoms would have resolved, as the medical records show they did not resolve. There is no doctor treating Mr. Burger that thinks that his symptoms resolved. The surgery that was proposed was not proposed for resolved symptoms. The treatments that Mr. Burger underwent were for continued symptoms. Therefore, to say that the symptoms had resolved-they frankly did not. That is not the case here, and there is no basis to say that the symptoms would have resolved. The only grounds for that appear to be what Dr. Wampler feels things should have been. However, medicine and the human body do not respond the way an individual doctor thinks they should respond. Medical care is based on history, physical, and diagnostic studies, and not what should be the case. Therefore, to say there was only temporary impairment is factually wrong. There was permanent aggravation of preexisting condition, and at this point it is not expected to resolve without surgery. By Dr. Wampler's logic, an aggravation of a preexisting condition can never be permanent because he claims that all symptoms must always resolve once the injured worker ceases performing the injurious work. However, this is not valid logic, as many symptoms last beyond the time of injury and may be permanent.
>
> Please note: In addition to the aggravation of Mr. Burger's low back pain, there has also been both primary aggravation and secondary aggravation of both knees, left worse than right.

(Jt. Ex. 17, p. 20)

Dr. Segal explained how he reached his opinion on causation. He wrote in his August 23, 2018 report:

> As discussed, Dr. Wampler's opinions do not appear to be based on Mr. Burger's history. They appear to be based on what Dr. Wampler feels should be the case based on a hypothetical scenario that does not exist. There was not a temporary aggravation- there was a **permanent** aggravation that is well documented in the records. And that permanent aggravation was not a continuation of the prior symptoms, as the symptoms prior to the work in the cutout room were much less, they were less severe, and they were less impairing. And there was improvement of the symptoms in 2015, as Mr. Burger was able to work through that up to the point of the cutout room and up to the point where he had to stop

working March 1, 2017.

(Jt. Ex. 17, p. 22)

Dr. Segal also diagnosed claimant with bilateral knee issues. (Jt. Ex. 17, pp. 22-23) With respect to the left knee, Dr. Segal opined:

Left Knee Diagnoses:

1) Left knee degenerative osteoarthritis, status post partial medial meniscectomy on 9/23/04 with advanced chondromalacia. This was permanently aggravated by the work duties at Menards [sic] in the cutout room.

(Jt. Ex. 17, p. 22)

Right Knee Diagnoses:

1)Right Knee chondromalacia and medical [sic] meniscal tear. Dr. Phillips's diagnosis was severe osteoarthritis with complete loss of medial joint space. This was permanently aggravated by the work duties at Menards [sic] in the cutout room. The right knee was permanently aggravated as sequelae of the left knee diagnosis because Mr. Burger was favoring the left knee after the left knee was permanently aggravated from the duties in the cutout room.

(Jt. Ex. 17, p. 23)

Dr. Segal made all types of recommendations for future medical treatment. (Jt. Ex. 17, pp. 23-25) The neurosurgeon opined claimant had not reached maximum medical improvement. (Jt. Ex. 17, p. 25)

Per a request from defendants, William R. Boulden, M.D., conducted an independent medical examination of claimant on August 6, 2018. Dr. Boulden observed claimant walking with "a slight stooped gait". Claimant exhibited a limited range of motion in his back. Claimant had no reflexes at the knees and ankles. (Jt. Ex. 16, p. 6)

When Dr. Boulden performed his IME, he did not have Dr. Sassman's IME, nor did he have the actual IME performed by Dr. Wampler. Dr. Boulden reviewed two job descriptions that were supplied to him. One description was for the "light installer" the other description was for the "cut out" room. Dr. Boulden opined the position in the "cut out" room was less physical than the job as a "light installer". The one problem is: claimant testified, he performed the position of "light preparation" not the job of "light installer."

Dr. Boulden diagnosed claimant with chronic back pain, spinal stenosis, and severe endstage arthritis of the left knee. (Jt. Ex. 16, p. 7) Dr. Boulden discussed causation with respect to claimant's conditions. The evaluating physician opined:

> With reference to question number two, the patient did have pre-existing medical conditions in both his low back and left knee, and there is documentation of this in the medical records and on MRI. It has now been identified that the MRI of his lumbar spine has shown increasing degenerative changes. In my medical opinion, there are several reasons for this, but they do not include his job. This is based on the fact that once you have degenerative disc disease, it will continue to progress on its own. Also, the patient is a chronic smoker and it is well documented that chronic smokers have increased degeneration of the spine and discs, so that is a major condition that also increases degenerative disc disease. It has been shown that he does have significantly increased degenerative disc disease and stenosis that he has.
>
> With reference to question number three, smoking is one of the major reasons for developing degenerative disc disease and spinal problems. The other one that is not mentioned much is congenital in nature and this patient does have, by report, short pedicles, which lead to increased stress and development of arthritic changes of the facet joints.
>
> With reference to question number four, I do not feel that any of these activities are related to his alleged change in jobs. His symptoms may have changed, but that is based on the fact of the progression of the degenerative disc disease and the increase in spinal stenosis that he has in the lumbar spine. I would state that his job had nothing to do with this. The increased symptoms would not be based on his job because of the pathology. Likewise, his knee has been a problem for a long period of time and, once again, is not related to change in occupation.

(Jt. Ex. 16, p.8)

On August 30, 2018, Dr. Markham provided a causation opinion in response to a letter sent to him by claimant's counsel on August 27, 2018. Dr. Markham opined in relevant portion:

> Mr. Burger began complaining of low back pain and radiation to the left thigh in October, 2013. He had epidural steroid shots and his symptoms improved. In May 2014, his low back pain had markedly improved and his primary complaint was left shoulder pain and he ultimately had a total shoulder arthroplasty. He was able to return to work and had no complaints of back pain with ambulation or gait disturbance.

> In May 2015, he did report return of leg radiculopathy and back pain, but was able to work a full day without disabling pain. However, in November of 2016, patient had worsening pain in his back and development of neurogenic claudication. His symptoms improved when placed on light duty but returned if he went back to "cut out" at Menards [sic]. His left knee pain worsened as well.
>
> To summarize, Mr. Burger had known spinal stenosis with intermittent low back pain and left leg radiculopathy that responded well to conservative therapy. His more profound disability evolved and became disabling after being transferred to the "cut out" at Menards. Referral to spine surgeon wasn't considered till after the development of the disabling symptoms that were evident after taxing his back in the "cut out".
>
> It is obvious that his duties in the "cut out" at Menards exacerbated his previous disease and likely accelerated progression of that disease leading to present disability. He can now, no longer walk upright without pain and any ambulation results in increased pain. His knee disability has also progressed, and the physical demands of the "cut out" may well have contributed to that as well.
>
> Even with surgery, which I believe will improved [sic] his pain, Mr. Burger will not be able to return to a physically demanding job. And with his mental health issues and ADHD, he will not be able to learn second skills that will allow him to be at light duty.
>
> I did recommend to Mr. Burger that he apply for Social Security Disability and continue to support that application.

(Jt. Ex. 6, pp. 23, 24)

CONCLUSIONS OF LAW AND RATIONALE

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6) (2016).

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT AND CAUSAL CONNECTION

The first issue for resolution is whether claimant's back and bilateral knee conditions arose out of and in the course of his employment on or about February 27, 2017. 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 Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

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.

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).

Claimant has suffered from osteoarthritis for many years. Dr. Palmer, the rheumatologist, has been claimant's treating physician for the osteoarthritis. No one disputes claimant's preexisting condition. In Iowa, an employer takes an employee "as is". An employee comes to the work place with any active or dormant health conditions. See: Honeywell v. Allen Drilling Co., 506 N.W,2d 434 (Iowa 1993).

If the employment of a claimant resulted in a personal injury that aggravated the person's already impaired physical condition, the injured worker is entitled to compensation to the extent of that injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (February 1961).

There is no question; claimant had to bend, twist, stand on concrete, and reach with his arms, once he was transferred from the custom room to the cutout room. From day one of the transfer, claimant experienced pain in his back, down his buttocks, and to his knees. He developed an antalgic gait as a result of the pain he was undergoing.

At the hearing, there was a dispute between claimant and the plant manager as to the number of doors per hour claimant had to manipulate. Although a precise number of doors could not be agreed upon, claimant did engage in repetitive activities. Counsel for claimant, devoted nearly five pages of her post-hearing brief to presenting various calculations of doors traveling down the conveyor belt in the cutout room with the number of bends and twists a worker would have to perform in a given hour or shift. Defense counsel presented a five-minute video recording of the operation in the cutout room. There was a disagreement whether the video was an accurate depiction of the work claimant actually performed. According to the defense, the video was taken at approximately 5:30 p.m. and one and one-half hours into the second shift.

This deputy workers' compensation commissioner is unable to determine the precise number of doors claimant had to manipulate during each shift he worked in the cutout room. However, this deputy is convinced claimant engaged in repetitive bending, twisting and standing on concrete. Likewise, this deputy is convinced, these same repetitive activities aggravated claimant's preexisting osteoarthritis.

There are numerous medical opinions regarding whether claimant's preexisting medical condition was aggravated, accelerated or lighted up by his employment activity. Then there is the secondary issue: if the condition was aggravated, accelerated, or lighted up by claimant's employment, the undersigned is charged with determining whether the aggravation was temporary or permanent in nature.

Dr. Palmer, the treating rheumatologist, had the most contacts with claimant over the course of many years. He has a very impressive Curriculum Vitae. He is a Fellow in the American College of Rheumatology. He is a Diplomat in the American Board of Internal Medicine, and a Diplomat in the American Board of Internal Medicine-Rheumatology Division. Dr. Palmer has participated in a variety of research studies; he has published numerous articles; and given many presentations during the course of his practice.

Dr. Palmer treated claimant both before February 27, 2017 and after February 27, 2017. Dr. Palmer was treating claimant when he reported his job duties in the cutout room were adversely impacting his back and knees. Dr. Palmer was adamant. In his opinion, claimant's work duties aggravated his underlying preexisting

osteoarthritis. (Jt. Ex. 4, pp. 31, 33, and 35) Dr. Palmer surpassed all other physicians with the knowledge and familiarity he had with claimant's conditions. His opinions carried the most weight with the undersigned.

Dr. Markham, claimant's personal care physician, also evaluated, examined and treated claimant both before and after the work injury. Dr. Markham opined:

> His [claimant's] more profound disability evolved and became disabling after being transferred to the "cut out" at Menards. Referral to a spine surgeon wasn't considered till after the development of the disabling symptoms that were evident after taxing his back in the "cut out".

(Jt. Ex. 6, p. 23)

Claimant was sent to Dr. Kalar at the Occupational Health Clinic at Council Bluffs Mercy Hospital. Dr. Kalar ordered MRI testing. Rather than schedule the MRI test for diagnostic purposes, defendants retained the services of Dr. Wampler who was contacted in order to provide a second opinion.

Dr. Wampler conducted a forty-minute examination of claimant. The evaluator reviewed some medical records for claimant for the years from 2004 through December 30, 2013. Dr. Wampler issued two subsequent reports. While he did review some additional medical records, he did not examine claimant again. This deputy did not find Dr. Wampler's opinions to be particularly compelling. His reports have been offered as expert opinions on numerous occasions in other workers' compensation cases in Iowa. This deputy does not recall even one occasion when Dr. Wampler provided an opinion that was favorable to a claimant.

Dr. Segal's report of August 23, 2018 was reasoned, clear and logical. He examined claimant. The evaluator listed all of the records he reviewed, both medical and non-medical. His summary described why he held certain opinions with respect to causation. (Jt. Ex. 17, p. 19) This deputy gave considerable weight to the opinions held by Dr. Segal.

Additionally, Dr. Segal, in his independent medical report of August 23, 2018, pointed out many of the glaring errors Dr. Wampler made in determining claimant had a temporary aggravation of a preexisting condition that resolved when claimant was placed on light duty. (Jt. Ex. 17, p. 20)

With respect to Dr. Sassman, it is known in the workers' compensation community, she generally writes opinions which are favorable to claimants. However, the undersigned has never found Dr. Sassman to base her opinions on faulty logic, as was the situation in the present case with Dr. Wampler. Dr. Sassman's opinion is not accorded as much weight as the opinions held by Dr. Palmer, Dr. Markham, and Dr. Segal.

Dr. Boulden issued an independent medical report after examining claimant on August 6, 2018. His opinions are accorded very little weight because he did not have Dr. Sassman's IME or the actual IME performed by Dr. Wampler. Dr. Boulden also reviewed two job descriptions at Menard, Inc. However, one of the jobs reviewed, was a job claimant never performed. No weight was given to the opinions of Dr. Boulden. Insufficient and inaccurate information was supplied to him.

Both Dr. Palmer and Dr. Segal impressed the undersigned. They convinced this deputy; claimant's duties in the cutout room aggravated, exacerbated or lit up claimant's preexisting condition. Claimant sustained an injury on February 27, 2017 that arose out of and in the course of his employment. The date of March 1, 2017 is not an injury date. It is just an alternative date that was presented. No benefits are owed under the workers' compensation laws for March 1, 2017.

HEALING PERIOD BENEFITS

It is clear to this deputy; claimant has not reached maximum medical improvement. Claimant is in need of surgery for his spine, probably also for his left leg and possibly for his right knee. Dr. Greene recommended the following surgical procedures for claimant on August 22, 2017:

> The patient wishes to proceed with L1, L2, L3, L4, and L5, laminectomies, medial facectectomies, and root foraminotomies. This will be scheduled for him in the near future at his convenience.

(Jt. Ex. 11, p. 3) Dr. Greene would not perform the surgery, as defendants had denied liability for the injury. Dr. Greene also opined claimant would reach maximum medical improvement approximately six (6) months following his spinal surgery. (Jt. Ex. 11, p. 9)

Management members at Menard, Inc. terminated claimant on November 2, 2017. As discussed earlier in the decision, claimant was ultimately awarded his unemployment insurance benefits. The Employment Appeals Board determined claimant was discharged for no qualifying reason. Claimant has sought work but has been unsuccessful in obtaining even part-time employment.

At the arbitration hearing, Mr. Gesell testified claimant was terminated because old computer paper with torn perforated edges would become stuck in the printer after claimant had torn off the perforated edges. Claimant had performed the job from March of 2017 until the day he was terminated. It was a sedentary position. The paper tearing job did not have a formal written job description. (Tr. p. 41) Once claimant was terminated from the position, Menard, Inc. did not advertise for a person to replace claimant as a "paper tearer". Pursuant to questions posed by claimant's counsel, Mr. Gesell answered questions about claimant's sedentary position as follows:

Q. (By Ms. R. Saffin Parrish-Sams) And that paper tearing job is just basically a made-up job for injured workers to accommodate their restrictions; correct?

A. It was work that needed to be done. And it also fit his restrictions, so that's the task I gave him.

Q. And once the boxes of paper were all torn, you wouldn't buy new boxes of old computer paper and have someone continue to tear them, would you?

A. No.

Q. So that was something that just needed to be done in the interim until those boxes were gone; correct?

A. Correct.

Q. Now, Menards [sic] wrote Tim up whenever the copy machine would jam because the edges of those papers weren't smoothly; correct?

A. Not whenever. When it became excessive.

Q. So Menards [sic] wrote him up a number of times for printer jams; correct?

A. Yes.

Q. And when Tim was fired, he filed for unemployment; correct?

A. Yes.

Q. Menards [sic] tried to claim at that unemployment hearing that those paper jams constituted misconduct that disqualified him for unemployment; is that correct?

MS. PAUMER: Objection.

Relevance.

THE COURT: Overruled.

You may continue.

Q. Is that correct?

A. Yes.

(Tr., p. 42)

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

In 2017 the Iowa Legislature added provisions to Iowa Code section 85.33 with respect to suitable work offered by the employer to the injured employee. Iowa Code section 85.33(3)(a) provides:

> 3.a. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work and the employee's disability the employee shall accept the suitable work and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of refusal. Work offered at the employer's principal place of business or established place of operation where the employee has previously worked is presumed to be geographically suitable for an employee whose duties involve travel away from the employer's principal place of business or established place of operation more than fifty percent of the time. If suitable work is not offered the employer for whom the employee was working at the time of the injury and the employee who is temporarily, partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.
>
> b. The employee shall communicate an offer of temporary work to the employee in writing, including details of lodging, meals, and transportation, and shall communicate to the employee that if the employee refuses the offer of temporary work, the employee shall communicate the refusal and the reason for the refusal to the employer in writing and that during the period of the refusal the employee will not be compensated with temporary partial, temporary total, or healing period benefits, unless the work refused is not suitable. If the employee refuses the offer of temporary work on the grounds that the work is not suitable, the employee shall communicate the refusal along with the reason for the refusal, to the employer in writing at the time the offer of work is refused. Failure to

communicate the reason for refusal in the manner precludes the employee from raising suitability of the work as the reason for the refusal until such time as the reason for the refusal is communicated in writing to the employer.

(Iowa Code section 85.33(3) (a-b)

Claimant is requesting temporary partial disability (TPD), benefits from March 1, 2017, the date claimant was off work, through November 2, 2017, the date claimant was terminated. Counsel for claimant did detail what weeks required the payment of TPD and the amount of hours in every week where TPD was warranted. The grand total of TPD owed equals 164.14 hours.

Restrictions in Force During Pay Period Resulting in Reduced Earnings	Work Week	Hrs Worked	Hours
3/1/17 ATP ARNP Smith; JE9, p.5	02/26/17-03/04/17	38.62	1.38
3/8/17 ATP Dr. Kalar; JE9, p.9	03/05/17-03/11/17	35.20	4.8
Prior restrictions still in effect/not lifted	03/12/17-03/18/17	36.78	3.22
Prior restrictions still in effect/not lifted	03/19/17-03/25/17	35.92	4.08
Prior restrictions still in effect/not lifted	03/26/17-04/01/17	28.98	11.02
Prior restrictions still in effect/not lifted	04/02/17-04/08/17	38.20	1.8
Prior restrictions still in effect/not lifted	04/09/17-04/15/17	38.78	1.22
4/28/17 Dr. Wampler: JE14, p.11	04/16/17-04/22/17	36.90	3.1
Prior restrictions still in effect/not lifted	04/23/17-04/29/17	36.13	3.87

			Total = 25.09

Restrictions in Force During Pay Period Resulting in Reduced Earnings	Work Week	Hrs Worked	Hours
Prior restrictions still in effect/not lifted	04/30/17-05/06/17	30.15	9.85
Prior restrictions still in effect/not lifted	05/07/17-05/13/17	39.22	.78
Prior restrictions still in effect/not lifted	05/14/17-05/20/17	36.73	3.27
Prior restrictions still in effect/not lifted	05/21/17-05/27/17	0	40.00
Prior restrictions still in effect/not lifted	05/28/17-06/03/17	15.42	24.00
Prior restrictions still in effect/not lifted	06/04/17-06/10/17	32.00	8.00
Prior restrictions still in effect/not lifted	06/11/12-06/17/17	25.85	14.15
Prior restrictions still in effect/not lifted	06/18/17-06/24/17	22.90	17.10
6/27/17 Dr. Palmer: JE4, p.56	06/25/17-07/01/17	35.23	4.77
Prior restrictions still in effect/not lifted	07/02/17-07/08/17	23.45	16.55
			Total = 139.05
			Grand Total TPD = 164.14

As a result, claimant has met his burden of proof with respect to the payment of TPD benefits.

Claimant is entitled to healing period benefits in the form of a running award from November 2, 2017 until such time as claimant has reached maximum medical improvement. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15, report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

The next issue for resolution is the issue of the weekly benefit rate. Iowa Code section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by diving by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6).

At hearing, it was stipulated, claimant was married and entitled to two exemptions. Claimant and defendants submitted their respective wage calculations in joint exhibits 20 and 21. The parties argued their positions in their respective briefs. Each side pointed out miscalculations on the part of the other side. After reviewing joint exhibits 20 and 21, as well as the arguments of the parties, it is the determination of the undersigned; the adjusted weekly benefit rate proposed by defendants seems to best reflect claimant's gross weekly wage. For ease of understanding, defendants' explanation in their brief is duplicated below:

> Defendants submitted their average weekly wage calculation (hereinafter "AWW") in Joint Exhibit 21. Prior to hearing, Defendants calculated Claimant's AWW as $345.97, while Claimant calculated his AWW to be $541.48. Defendants concede some miscalculations. For example, Defendants failed to include Claimant's shift differentials in the weeks of February 25, 2017, December 3, 2016, and November 19, 2016. Defendants have adjusted their calculations to include a "Total Wage/Wk" of $683.14, $771.68, and $763.61 respectively. **Additionally, Defendants have included Claimant's Profit Sharing and Holiday**

bonuses. Thus Defendants now allege an AWW of $419.99. (Emphasis added.)

With regard to Claimant's calculations, the first error made by Claimant can be found in the week of February 25, 2017. (JE20, pg. 1) Claimant improperly calculated his hourly rate as "$15.25/$17.75". However, Claimant was actually receiving an hourly rate of $15.15 with an additional $2.50 shift differential for weekend hours. (JE9, pg. 2)

Claimant excludes the weeks of February 18, 2017, February 11, 2017, February 4, 2017, January 28, 2017, January 4, 2017, December 31, 2016, December 24, 2016, and December 10, 2016 from his calculations. (JE20, pg. 1) Supporting this position, he cites to *Healy v. Mercy Medical Center*, 801 N.W.2d 865, 870-873 (Iowa App. 2011); *Weishaar v. Snap-On Tools Corp.*, 582 N.W.2d 177, 182 (Iowa 1998), and *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 619 (Iowa 1995). These cases are distinguishable. Claimants in said cases were either supplementing their hours with vacation hours or working less than what was "customary" due to personal reasons. With regard to the case at bar, Claimant has presented no evidence suggesting he was unable to work forty hours due to personal reasons, that he was supplementing his weekly hours with vacation time, that he was scheduled to work 40-hour weeks, or that he was being punished for not working 40-hour weeks.

Claimant is simply excluding any weeks not meeting the 40-hour mark in order to substantially increase his AWW. Claimant cites to the handbook as support for his calculations. (JE20, pg.1) Specifically, Claimant quotes "Full-Time Team Member: This classification applies to Team Members whose positions normally require year-round scheduling of 40 hours per week" and "Full time employees are required to average 40 hours per week." *Id.* Menard, Inc. did not unequivocally provide that employees must work 40 hours a week every single week. Rather, Menard, Inc. provided guidelines much less stringent than what Claimant alleges. Claimant has even conceded that he has never been written up or reprimanded for not working 40 hours per week. (Transcript pg. 139:5-139:8) Defendants' AWW calculation of $419.99 should be adopted.

It is the determination of this deputy; claimant's gross weekly wage was $628.00 per week on the date of his work injury. He was married with two exemptions. His weekly benefit rate is $419.99 per week for all past due and future benefits.

The next matter to decided is the issue of medical benefits pursuant to Iowa Code section 85.27. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers'

compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Claimant attached a summary of the medical bills claimant incurred as a result of his work injury on February 27, 2017. Defendants did not stipulate to the causal connection of the expenses to the work injury. However, defendants agreed the listed expenses were causally connected to the medical condition upon which the claim of injury is based. (Hearing Report and Order approving the same.) It is the determination of this deputy; defendants are liable for all causally connected medical expenses, as detailed in the attachment to the hearing report.

Defendants shall also pay for medical mileage as detailed in the attachment to the hearing report. Defendants stipulated they would pay the $120.12 mileage owed to claimant for his attendance to and from certain independent medical examinations. Those are detailed in the attachment to the hearing report.

Claimant is requesting future medical care pursuant to Iowa Code section 85.27. Claimant is requesting future treatment with Samuel P. Phillips, M.D., at GIKK Ortho Specialists, Keith R. Lodhia, M.D., at Midwest Neurosurgery & Spine. Claimant is also requesting treatment for his spine and legs with his rheumatologist, William R. Palmer, M.D. All choices seem reasonable, given the fact, claimant has seen these physicians in the past. The doctors have all made reasonable and necessary recommendations for claimant. Defendants shall authorize care for claimant with these three physicians and establish appointments for claimant within ten days of the filing of the decision.

The next issue to address is the matter of penalty benefits pursuant to Iowa Code section 86.13.

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

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

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

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

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

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

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

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112),

or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

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

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

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

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

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

Penalty benefits are not in order in the present case. Defendants had a reasonable basis for denial of the claim. Claimant had long-standing osteoarthritis. He had treated with Dr. Palmer for numerous years. Defendants were aware of claimant's preexisting conditions. Claimant had previously undergone a total shoulder replacement and bilateral carpal tunnel surgeries. Claimant had previously complained of back pain to his supervisor as well as to his co-workers. It is understandable management personnel at Menard, Inc. would suspect claimant's problems were the result of his osteoarthritis and not work-related. Then there was the opinion of Dr. Wampler. He reviewed MRI testing and Dr. Palmer's medical records for claimant prior to rendering his independent medical report. Defendants had a reasonable basis for denying benefits under the workers' compensation statutes. It is the decision of this deputy penalty benefits are not warranted in the present case.

The final issue for determination is the matter of costs.

Iowa Code section 86.40 states:

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

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

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

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

The following costs are assessed to defendants:

Filing fee	$100.00
Service fee	$12.92

Report of Dr. Segal	$1,687.50
Witness Mileage for Rick Sloth	$116.63
Phil Davis report	$600.00

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant four point one zero (4.10) weeks of temporary partial disability benefits at the weekly benefit rate of four hundred nineteen and 99/100 dollars ($419.99) per week.

Defendants shall pay unto claimant a running award from November 2, 2017 and until such time as claimant has reached maximum medical improvement and said benefits shall be paid at the weekly benefit rate of four hundred nineteen and 99/100 dollars ($419.99) per week.

All accrued benefits shall be paid in a lump sum with interest as described in the body of this decision.

Defendants shall pay all causally connected medical expenses as detailed in the attachment to the hearing report and order.

Within ten days of the filing of this decision, defendants shall schedule medical appointments for claimant with Dr. Palmer, Dr. Phillips and Dr. Lodhia.

Defendants shall pay the costs to litigate as detailed in the body of the decision.

The attorneys of record, if they have not already done so, shall register within seven (7) days of this order in the Workers Compensation e-Filing System (WCES) and as a participant in this case to receive future filings from this agency.

Defendants shall file all reports as required by law

Signed and filed this 22nd day of November, 2019.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Paul Prentiss (via WCES)
Saffin Parrish-Sams (via WCES)
Kelsey J. Paumer (via email)

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.