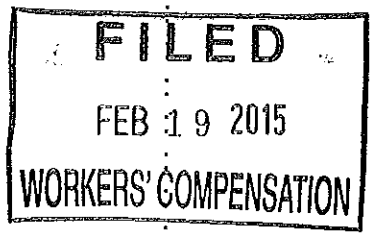
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DERIK STRAIT, Claimant, vs. M.C. LINT, INC. d/b/a POLK COUNTY HEATING & COOLING, Employer, and UNITED FIRE & CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 5041734 ARBITRATION DECISION Head Note Nos.: 1100; 1108

STATEMENT OF THE CASE

Claimant, Derik Strait, filed a petition in arbitration seeking workers' compensation benefits from M.C. Lint, Inc. d/b/a Polk County Heating and Cooling, employer, and United Fire and Casualty Company, insurance carrier, both as defendants, as a result of an alleged injury sustained on March 29, 2011. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on January 24, 2014, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 through 13, defendants' exhibits A through H, and the testimony of the claimant and Mark Young. The parties submitted post-hearing briefs, the matter being fully submitted on March 14, 2014.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury on March 29, 2011 which arose out of and in the course of his employment; and if so,
2. Whether claimant's claim is barred for failure to give timely notice under Iowa Code section 85.23;
3. The period in which claimant is entitled to temporary disability benefits;
4. The extent of claimant's stipulated industrial disability;
5. The proper commencement date for permanent disability benefits;

6. The proper rate of compensation;
7. Whether claimant is entitled to payment of various medical expenses;
8. Whether claimant is entitlement to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39;
9. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much; and
10. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant's testimony was clear and consistent as compared to the evidentiary record and his deposition testimony. His demeanor and physical presentation at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 39 years of age at the time of hearing. He resides in Prairie City, Iowa with his wife and minor child. Claimant is right hand dominant. (Claimant's testimony; Exhibit 7, page 89) Claimant graduated high school in 1992. He thereafter began a liberal arts course of study at a community college, but left school prior to obtaining a degree or certification. Claimant then began and successfully completed a four-year electrical apprenticeship through Associated Builders and Contractors trade school, at which time claimant became a journeyman electrician. In 2010, claimant passed the examination to become a master electrician. (Claimant's testimony; Ex. 7, p. 90; Ex. 11, p. 142)

Claimant's employment history includes work as an order puller, energy efficiency installer, bore machine operator, product unloader, stocker, gas station attendant, forklift operator, small engine mechanic, glass fabricator, stable assistant, plumber's apprentice, electrical apprentice, and journeyman electrician. (Ex. 7, pp. 91-93; Ex. 11, pp. 143-150; Ex. B, p. 112) Claimant began working for defendant-employer in September 1999. (Ex. 8, p. 116; Ex. 9, p. 124; Ex. B, p. 112) For the first one to two years of his employment, claimant worked as a plumber's assistant. Thereafter, he worked as an electrician. His duties revolved around new construction and remodels of homes. He regularly lifted 30 to 40 pounds and could be required to lift up to 80 or 90 pounds. He estimated over 50 percent of his work was performed overhead. (Claimant's testimony)

Claimant's medical history is significant for neck complaints. In June 2002, a cervical MRI revealed a left C6-C7 bulging disc with a small superimposed herniation. (Ex. A-3, p. 17) A June 2005 cervical spine MRI revealed advanced degenerative

osteoarthritic changes at C5-C6 and C6-C7, as well as a moderate sized disc herniation at C5-C6. (Ex. A-5, p. 49) Following the June 2005 MRI, claimant received care from David Boarini, M.D., for a chief complaint of neck pain. Claimant also complained of right shoulder pain. (Ex. A-5, p. 53) Dr. Boarini described complaints of neck pain with radiation to the right shoulder. Dr. Boarini recommended an anterior fusion. (Ex. A-5, p. 57) A November 2005 cervical myelogram and cervical spine CT revealed cervical spondylosis changes at C5-C6 and C6-C7 levels. (Ex. A-5, pp. 61-62)

Claimant reported he then injured his neck while working overhead with a drill. (Claimant's testimony; Ex. A-5, p. 72) In September 2006, a cervical spine MRI revealed a disc herniation at C6-C7 on the right. (Ex. A-5, p. 81) An EMG/NCV study of September 2006 revealed results suggestive of age-determinate left C7 nerve root axonal injury. (Ex. A-5, pp. 79-80) Claimant submitted the claim to defendant-employer; the injury was denied by the workers' compensation insurance carrier as non-work related. (Ex. A-5, p. 86; Ex. E, p. 138) Claimant proceeded with care outside the workers' compensation system. (Claimant's testimony) On October 3, 2006, Dr. Boarini performed an anterior cervical fusion at C5-C6 and C6-C7, for primary complaints of neck and left arm pain. (Ex. 1, pp. 1-2; Ex. A-5, p. 88) Claimant was released from care on November 27, 2006, after reporting a complete resolution of arm pain and only slight neck tightness. (Ex. A-5, p. 96) At a subsequent visit in April 2007, claimant denied any neck or arm pain. (Ex. A-5, p. 100)

Claimant presented to Scott Meyer, PA-C on February 4, 2008 with complaints of pain located on the left side of his neck. Mr. Meyer assessed cervical disc degeneration. (Ex. A-1, p. 1) Claimant participated in a course of physical therapy. Physical therapy records note a complaint of cervical pain radiating into the bilateral upper trapezius, left greater than right. Claimant reported a history of injuring his neck at work and then developing a cramping of the right upper trapezius. (Ex. A-2, p. 7)

Claimant returned to Mr. Meyer in October 2008 with complaints of a sore neck after forcefully drilling upwards at work. Mr. Meyer assessed a cervical sprain and recommended conservative treatment, including physical therapy. (Ex. 2, p. 5; Ex. A-2, p. 11)

In January 2009, claimant returned to Mr. Meyer for a physical examination. Mr. Meyer assessed "rotator cuff sprain (capsule)," but did not specify if the assessment applied to either or both shoulders. He prescribed prednisone "to help with shoulders." (Ex. A-1, p. 3)

Claimant returned to Mr. Meyer in August 2009 with complaints of chronic neck pain. Claimant reported he engaged in a lot of looking up and drilling at work, which "really messes up his neck at times." Mr. Meyer assessed chronic neck pain and again recommended conservative treatment. (Ex. 2, p. 9)

In March 2010, claimant received care for a diagnosis of lateral epicondylitis. Treatment consisted of use of prednisone. (Ex. 2, p. 10) Claimant testified he continues to self-treat this condition with use of a wrap/brace he purchased over the counter. (Claimant's testimony)

In late summer or fall of 2010, claimant testified he gradually developed right shoulder complaints, but indicated pain and discomfort are common complaints in his field of work. (Claimant's testimony; Ex. 11, p. 152-153) Claimant's symptoms included pain, decreased lifting ability, and burning sensations. At the time, he attributed his symptoms to the sore muscles one gets with performing construction work. When the symptoms developed, claimant indicated he informed his supervisor, Tom Sally. However, the two only spoke in general terms, with claimant saying something to the effect of his shoulder was painful. (Claimant's testimony; Ex. 11, p. 153)

Claimant did not pursue medical treatment of his right shoulder until the pain became constant and began to bother him and interrupt his sleep. (Claimant's testimony; Ex. 11, p. 153) Claimant then informed Mr. Sally and Mark Young he intended to see a doctor because his shoulder had worsened. Claimant indicated he did not believe the men had an explicit discussion regarding whether the injury was caused by work; he did indicate some of his work activities were worsening or aggravating his pain. (Claimant's testimony; Ex. 11, p. 154)

On January 6, 2011, claimant returned to Mr. Meyer with complaints of neck and back pain. Claimant denied recent injuries, but reported performing a significant amount of overhead work. Mr. Meyer assessed degenerative disk disease and ordered conservative treatment. (Ex. 2, p. 11)

On February 14, 2011, claimant presented to Des Moines Orthopedic Surgeons for evaluation with board certified orthopedic surgeon, Jeffrey Davick, M.D. (Ex. A-4, pp. 25-26) Claimant completed a health history questionnaire, identifying complaints of extreme pain and limited movement of the right shoulder since December, representing a possible dislocation, and pain radiating down the right arm and over the collarbone. (Ex. 3, p. 13) Dr. Davick's notes reference a history of right shoulder pain "for years." (Ex. 3, p. 14) X-rays of the right shoulder revealed mild changes of the AC joint, with a Type I to II acromion. Dr. Davick assessed right shoulder impingement, mainly of the AC joint, and some degree of bilateral adhesive capsulitis. Dr. Davick performed a cortisone injection and advised claimant on a home exercise program. (Ex. 3, pp. 14-15)

Dr. Davick subsequently ordered an MRI arthrogram of the right shoulder, which claimant underwent on March 28, 2011. (Ex. 3, pp. 16-17) The radiologist opined the results revealed diffuse partial thickness articular surface tears of the distal supraspinatus and infraspinatus tendons; a small full thickness tear of the distal posterior supraspinatus; and possible small partial tear of the anterior inferior labrum. (Ex. 3, p. 17) Following review of the MRI results, Dr. Davick telephoned claimant on

March 29, 2011 and advised the results revealed a full thickness rotator cuff tear. Dr. Davick recommended surgery and claimant expressed an interest in waiting until the end of the year to schedule the procedure. Dr. Davick advised claimant not to expect to perform overhead activities for at least 16 weeks postoperative. (Ex. 3, p. 18)

Claimant testified on the same date he received Dr. Davick's surgical recommendation, he informed Mr. Sally and Mr. Young of his need for right shoulder surgery. Claimant testified neither man suggested claimant file a workers' compensation claim. (Claimant's testimony; Ex. 11, p. 155)

Mark Young, claimant's former supervisor and current owner of defendant-employer, testified at evidentiary hearing. Mr. Young testified he did not recall a specific date when he learned of claimant's right shoulder complaints, he simply recalls claimant indicating he was having difficulty with his shoulder and required surgery. Mr. Young testified he asked claimant if he could wait to have surgery until work was slower. Mr. Young denied claimant informed him claimant's complaints were work-related or even that claimant's work aggravated his symptoms. He indicated defendant-employer's records reveal claimant requested time off for doctor's appointments, for which claimant used personal time. In the event Mr. Young believed claimant sustained a work injury, Mr. Young indicated he would have completed an injury report and submitted the claim to defendant-insurance carrier. (Mr. Young's testimony)

Mr. Young's testimony was clear and consistent with the evidentiary record. His demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt his veracity. Mr. Young is found credible.

Claimant testified he wanted to delay surgery until after the busy construction season. During the period claimant continued to work, claimant testified his right shoulder worsened. Although he continued to perform his duties, claimant testified he delegated more of the heavy nature work to his helper and he self-treated with use of ice and over–the-counter pain relievers. (Claimant's testimony; Ex. 11, pp. 162-163)

On August 12, 2011, claimant was evaluated by board certified orthopedic surgeon, David Hatfield, M.D. (Ex. A-4, pp. 29-30) A patient history form denotes complaints of neck, back, and right arm pain, with the problem beginning gradually while at work in July. Claimant indicated the complaints did not reflect a workers' compensation injury, but also checked "yes" on the question of whether he believed the pain was related to a work injury. (Ex. 3, p. 19) Claimant also noted seeing Dr. Davick for his complaints in March 2011. (Ex. 3, p. 21) Dr. Hatfield noted reports of pain of claimant's neck, upper back, and right upper extremity since July. He recommended a CT to evaluate the prior cervical fusion and an MRI for neurologic evaluation. (Ex. 3, p. 25)

Claimant underwent the MRI and CT of his cervical spine on October 3, 2011. On October 5, 2011, claimant returned to Dr. Hatfield. At that time, claimant indicated he had "some changes in his right shoulder," but his symptoms were tolerable. Dr.

Hatfield opined claimant's fusion appeared radiographically solid and no intervention was currently warranted. Claimant was directed to follow-up if his neck symptoms warranted attention. With regard to shoulder complaints, claimant was advised to follow-up with Dr. Davick as necessary. (Ex. 3, p. 28)

On January 30, 2012, claimant advised Dr. Davick he was ready to proceed with surgery. (Ex. 3, p. 31) Dr. Davick performed surgery on February 16, 2012, consisting of right shoulder arthroscopy with a subacromial decompression and distal clavicle excision, followed by an open rotator cuff repair. (Ex. 3, pp. 32-33) Post surgery, claimant wore a sling and participated in physical therapy. (Ex. 3, pp. 34-36) In total, claimant participated in 54 physical therapy sessions from February 28, 2012 through July 5, 2012. (Ex. 4, pp. 41-60)

Claimant received a letter dated March 23, 2012 from an entity named Ingenix Subrogation Services. The letter stated United Healthcare Plan of the River Valley had paid medical benefits for claimant and had retained Ingenix to review certain claims to determine if subrogation from another responsible party was possible. The letter requested claimant complete an enclosed questionnaire to assist with this review process. (Ex. 7, p. 107) Claimant completed the enclosed questionnaire, which inquired how and where the injury occurred. Claimant replied "repetitive actions at work." (Ex. 7, p. 108)

Following receipt of the letter from Ingenix, claimant indicated he began to research the possibility his shoulder problems were caused by his work at defendant-employer. Claimant testified he contacted Ingenix and was advised to consider filing a workers' compensation claim. Shortly thereafter, he contacted Mr. Young and advised he wanted to file a workers' compensation claim. (Claimant's testimony; Ex. 11, p. 162) Mr. Young acknowledged claimant informed him of the potential workers' compensation claim at this time. Mr. Young then submitted claimant's claim to defendant-insurance carrier. (Mr. Young's testimony)

Claimant subsequently secured legal representation. On May 4, 2012, claimant's counsel authored a letter to defendant-employer's human resources department and indicated claimant believed he sustained a cumulative injury as a result of work activities at defendant-employer. (Ex. 7, pp. 109-110)

On June 11, 2012, Dr. Davick released claimant to return to work under a 10-pound lifting restriction and no work above chest height. (Ex. 3, p. 37) Claimant returned to work at defendant-employer on light duty on June 12, 2012. (Ex. 8, pp. 119-120)

Claimant tendered a letter of resignation on July 9, 2012, whereby he offered two weeks' notice. (Ex. 8, pp. 117, 120; Ex. 9, p. 125; Ex. E, p. 146) Claimant indicated he felt as if the work environment had become hostile and toxic after a change in ownership. He also indicated he was unable to keep up with the pace of work; however, claimant represented his decision to render notice was not based upon his

shoulder condition. (Claimant's testimony; Ex. 7, p. 92; Ex. 11, p. 150) Claimant worked on July 10, 2012. Defendant-employer terminated claimant on July 11, 2012 when claimant called in to work and failed to present for light duty work as offered. (Claimant's testimony; Ex. 8, pp. 117, 119; Ex. E, p. 146)

Mr. Young testified claimant provided two weeks' notice and informed him claimant intended to begin his own company. Claimant proceeded to work the day following tendering his notice, but called in to work the following day citing childcare issues. Mr. Young testified he made the decision to end claimant's employment on that date and directed Mr. Sally to collect claimant's work van and supplies. (Mr. Young's testimony)

On July 30, 2012, claimant returned to Dr. Davick. Dr. Davick noted claimant had completed therapy and returned to regular activities. Claimant reported minimal pain and feeling pleased with the status of his shoulder. (Ex. 3, p. 39) Dr. Davick released claimant from care to return as needed and also released claimant to return to work without restrictions. (Ex. 3, p. 40)

Defendant-employer represented an intention to return claimant to full duty work once released by Dr. Davick, had claimant not voluntarily resigned his employment. (Claimant's testimony; Mr. Young's testimony; Ex. 8, p. 121)

Dr. Davick subsequently authored a letter dated September 19, 2012. Dr. Davick noted he last examined claimant on July 30, 2012, at which time, he demonstrated essentially full range of motion and good strength. Dr. Davick placed claimant at maximum medical improvement (MMI) on July 30, 2012, without permanent restrictions. Dr. Davick opined claimant sustained a 10 percent upper extremity or 6 percent whole person impairment due to the distal clavicle excision along with the rotator cuff tear. (Ex. A-4, p. 18)

Claimant testified after his release by Dr. Davick, he continued to have problems with his right shoulder, including decreased range of motion and strength, impediments to working as quickly as he had prior to development of the right shoulder condition, and the need to alter the manner in which he completed tasks. However, claimant testified the treatment provided by Dr. Davick helped his symptoms and he has no complaints with the care offered by Dr. Davick. (Claimant's testimony)

In late summer of 2012, claimant applied for and was offered a job at Gritters Electric in Pella, Iowa. However, claimant declined the offer as he did not believe he was capable of performing the type of electrical work required, as this employer worked on agricultural and industrial jobs involving heavy electrical motors. (Claimant's testimony; Ex. 11, pp. 160-161)

In September 2012, claimant began his own electrical contracting business, Strait's Electrical. Claimant performed commercial and residential electrical work, as well as occasional farm work and snow removal. Claimant estimated he grossed

$10,000.00 to $15,000.00 in the period of September 2012 through January 2013. (Ex. 7, p. 93; Ex. 11, p. 151-152, 164) Claimant indicated he worked at a slower pace than he had previously worked for defendant-employer and he was required to alternate work between more and less demanding tasks. (Ex. 11, p. 161) Claimant estimated work which previously required 1 day of time took him 2 to 2 ½ days to complete. (Claimant's testimony)

Also in September 2012, claimant began part-time work at Menards, stocking shelves. Claimant earned approximately $8.30 per hour performing this work. Claimant left work at Menards in February 2013. He indicated he left employment as he was unable to physically keep up with his self-employment and Menards work, and he also feared likelihood of re-injury while lifting at Menards. Additionally, claimant testified he did not have time to continue such work, as he was busy with self-contracting. (Claimant's testimony; Ex. 7, p. 93; Ex. 11, pp. 150-151; Ex. C, p. 117)

On March 15, 2013, Mr. Meyer responded to questions posed by defendants' counsel, with a purported purpose of written confirmation of opinions expressed in a prior oral conference. By his responses, Mr. Meyer confirmed his relevant treatment of claimant pertained to neck complaints with some radiation into the right shoulder "rather than it being the other way around." Mr. Meyer further agreed Dr. Hatfield and Dr. Davick would be in a better position to address questions on causation, maximum medical improvement, physical restrictions, functional impairment, and need for future care. (Ex. A-1, p. 5)

Defendants' counsel authored a letter to Dr. Davick on March 27, 2013, purporting to set forth opinions expressed by Dr. Davick in a prior conference. Dr. Davick indicated agreement with counsel's resuscitation which included the following statements: (1) at the time Dr. Davick became involved in claimant's care in February 2011, claimant reported right shoulder pain for a period of years, with increasing pain and limited movement since December 2010; (2) no allegations were made regarding a specific work activity or incident which brought about or aggravated claimant's right shoulder condition; (3) Dr. Davick had no independent recollection nor notation of claimant making any complaints his work activities or a work incident caused or aggravated his right shoulder symptoms; and (4) Dr. Davick did not provide a "patient status report" until months after surgery and he would have issued such reports if he had any indication the right shoulder condition represented a potential work injury. (Ex. A-4, pp. 19-20)

Dr. Davick again opined claimant achieved MMI for his right shoulder on July 30, 2012, no permanent restrictions or future medical care were required, and claimant sustained a functional impairment of 6 percent whole person. (Ex. A-4, p. 21-22) On the issue of causation, Dr. Davick indicated agreement with the following statement:

> You cannot state to any reasonable degree of medical certainty that [claimant's] right shoulder complaints for which you provided treatment are causally related, either directly or through a material aggravation, to his

> work activities for his employer at the time, Polk County Heating and Cooling. You note that there are older patients that experience a cumulative tearing of their rotator cuff, but that most rotator cuff tears in patients [claimant's] age are caused by some trauma or injury. Although it is certainly a possibility [claimant's] work activities either caused a traumatic or cumulative injury to his right shoulder, there is just no specific timely history in the record that would elevate that possibility to the level of probability needed for a reasonable degree of medical certainty. As such, it is certainly just as much a possibility that [claimant's] right shoulder issues were caused by some non-work related activity or incident.

(Ex. A-4, p. 21)

On June 5, 2013, Dr. Hatfield authored a letter indicating he deferred to Dr. Davick with regard to claimant's right shoulder condition. (Ex. A-4, p. 24)

Defendants retained board certified occupational medicine physician, John Kuhnlein, D.O. to perform a medical records review. (Ex. A-5, p. 106) Dr. Kuhnlein issued a report of his opinions dated October 8, 2013. Following a detailed review of claimant's records, Dr. Kuhnlein opined claimant sustained a 3 percent upper extremity impairment for the distal clavicle excision. He explained his opinion differed from that assigned by Dr. Davick because Dr. Davick failed to apply an applicable modifier. (Ex. A-5, pp. 101-103) In respect to causation of claimant's right shoulder complaints, Dr. Kuhnlein wrote:

> After reviewing the currently available medical records, including [claimant's] deposition, I am not able to relate his right shoulder problem to his work for Polk County Heating and Cooling within a reasonable degree of medical certainty. While it is possible that his shoulder condition may be related to his work, there is not enough objective evidence in the currently available file that one could state more probably than not that the right shoulder condition is related to his work for Polk County Heating and Cooling.
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> . . . .
>
> If other information becomes available about his workplace, I would be happy to review it, but at this point, there is not enough objective information to be able to objectively relate his right shoulder condition to his work for Polk County Heating and Cooling.

(Ex. A-6, p. 103)

On October 11, 2013, claimant presented for his independent medical evaluation (IME) with Sunil Bansal, M.D., a board certified occupational medicine physician. (Ex. 5, p. 80) In performing his evaluation, Dr. Bansal indicated he reviewed claimant's medical records and claimant's deposition of May 30, 2013. (Ex. 5, pp. 61-67)

Claimant also indicated he provided Dr. Bansal with a written affidavit detailing his former job duties. (Claimant's testimony; Ex. 7, pp. 110a-110b) In addition to the written affidavit, claimant described his work duties in detail with Dr. Bansal, including near daily use of a 15 to 20 pound drill at several angles and frequently overhead. Claimant also reported a great majority of his job duties required overhead work and he used his dominant right hand when using power tools. Dr. Bansal noted a fair amount of lifting was required of claimant, with items ranging in weight from 4 to 5 pounds up to 80 or 100 pounds. Claimant estimated lifting approximately 50 percent of his work day, with the majority of that lifting being overhead. Claimant estimated spending approximately 50 percent of his time performing some type of overhead activity. (Ex. 5, pp. 69-70)

Dr. Bansal noted a patient history of development of pain, decreased strength, and decreased range of motion of the right shoulder while employed by defendant-employer. Claimant indicated he continued to work until it reached a point he could no longer tolerate the symptoms and he sought medical treatment. (Ex. 5, p. 67) At the time of the IME, claimant continued to complain of right shoulder pain. While able to work below shoulder level, overhead work reportedly caused increased pain. Shoulder pain averaged a level 2 or 3 on a 10-point scale, but could reach a level 8 to 9. He also reported occasional numbness and tingling of the right arm and hand. (Ex. 5, p. 68)

Following records review, interview, and examination, Dr. Bansal diagnosed a right rotator cuff tear, status post arthroscopy with subacromial decompression and distal clavicle excision, followed by an open rotator cuff repair. (Ex. 5, p. 73) On the question of causal connection between claimant's work activities and the alleged right shoulder injury of March 29, 2011, Dr. Bansal highlighted claimant's work duties at defendant-employer. Such duties included near daily use of a drill weighing 15 to 20 pounds, frequently overhead; a great majority of overhead work; use of power and traditional tools in his dominant right hand; lifting items ranging from 4 to 100 pounds; lifting approximately 50 percent of a work shift, with a majority of that lifting being overhead; and an estimate of over 50 percent of a work day spent working overhead. (Ex. 5, p. 73)

Dr. Bansal opined claimant's complaints fit a pattern of overuse syndrome. He elaborated to state the concept of overuse injuries is based upon the premise that tendons, ligaments, neural tissue, and soft tissues adapt to stresses placed on those tissues over time. He represented injury can occur while those tissues attempt to adapt to the demands placed upon them, unless given proper time to heal. Dr. Bansal opined claimant's job duties involved a high repetitive load and cyclic rate, as well as overhead

use of a 15 to 20 pound drill which exposed him to high mechanical load and vibration. (Ex. 5, pp. 73-74)

He opined the physical situs of the supraspinatus tendon made it highly susceptible to impingement from frequent overhead use. Dr. Bansal opined he observed such damage of the tendon on claimant's MRI. He reasoned claimant performed frequent overhead work while holding a 15 to 20 pound drill, and the variables involved of overhead posture, force, repetition, and vibration placed considerable stress on the rotator cuff tendons. Dr. Bansal indicated an association between frequent overhead work and shoulder impingement is well-known in the medical and non-medical communities. Dr. Bansal further opined it unlikely claimant engaged in non-work related tasks which cumulatively stressed the shoulder to the same degree as his workload. (Ex. 5, pp. 74-75) Dr. Bansal ultimately opined claimant's work activities were the main factor in the development of right shoulder pathology and claimant's need for surgery. (Ex. 5, p. 76)

Dr. Bansal concurred with Dr. Davick's MMI date of July 30, 2012. He indicated claimant may require intermittent cortisone injections and use of NSAIDs for maintenance purposes. (Ex. 5, p. 76) He opined claimant sustained a 3 percent upper extremity impairment as a result of decreased range of motion and 10 percent upper extremity impairment for the distal clavicle excision, for a total combined impairment of 13 percent upper extremity or 8 percent whole person. He also critiqued Dr. Kuhnlein's application of a modifier to the 10 percent upper extremity impairment for distal clavicle excision as contrary to the intent of the author of that section of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 5, pp. 76-77) In respect to claimant's need for permanent restrictions, Dr. Bansal opined:

> I feel [claimant] would benefit from and should have restrictions; however, he feels that if he has permanent restrictions it could jeopardize his employment and would be detrimental to his employment situation. He reports he has returned to work and is able to do his job as an independent contractor working at his own pace, thus I do not feel permanent restrictions are necessary at this juncture. However, if he changes jobs, I would suggest the following restrictions:
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> I would place a restriction of no lifting greater than 25 pounds occasionally, 5 pounds frequently with the right arm, along with no lifting above shoulder level or away from his body with the right arm.
>
> No pushing, pulling greater than 10 pounds with the right arm and no frequent pushing, or pulling with the right arm to avoid further damage to the right shoulder and keep pain levels in check.

(Ex. 5, pp. 77-78)

In November 2013, claimant closed Strait's Electrical. Claimant attributed this closure to his physical limitations. Claimant began work on November 18, 2013 at BK Electric. Claimant was hired in the capacity of a project manager, with an hourly wage of $27.00 per hour, 40 hours per week. (Claimant's testimony; Ex. B, p. 113) Claimant testified his work as a project manager is not the same type of work which he completed as an electrician for defendant-employer. He described his work as akin to an electrical foreman. Claimant testified he is currently working on a large job and he is uncertain if BK Electric will have need for a project manager after this job is completed. In addition to claimant, BK Electric employs three other full time employees, including the owner. (Claimant's testimony)

In the event the project manager position is no longer available, claimant indicated he does not have future employment plans; he does not believe he is capable of returning to electrical or warehouse work. Claimant explained electrical work requires overhead work, which produces shoulder pain, stiffness, soreness, and weakness when the arm is extended from the body. Claimant testified he generally develops shoulder soreness about midday; he also occasionally suffers with radiating pain. In the event he is not required to use his shoulder, he is generally pain free. (Claimant's testimony)

Claimant retained the services of vocational consultant, Carma Mitchell, M.S., to perform a vocational evaluation. Ms. Mitchell met with claimant on December 16, 2013 and authored a report of her opinions dated December 26, 2013. Ms. Mitchell detailed claimant's educational, work, and medical histories. With respect to claimant's right shoulder conditions, Ms. Mitchell indicated treating physician Dr. Davick released claimant to work without restrictions. She also noted claimant's IME physician, Dr. Bansal felt claimant should have work restrictions, but claimant indicated such restrictions could detrimentally impact his employment. Given claimant's ability to work at his own pace, Dr. Bansal indicated restrictions were not necessary at this time, but should claimant change jobs, restrictions would be warranted. These conditional restrictions included no lifting greater than 25 pounds occasionally, no lifting greater than 5 pounds frequently with the right arm, no lifting above shoulder level or away from the body with the right arm, no pushing or pulling greater than 10 pounds with the right arm, and no frequent pushing or pulling with the right arm. (Ex. 6, pp. 83-84)

Claimant informed Ms. Mitchell after leaving defendant-employer, he began performing self-employed electrical work and he worked at Menards as a stocker. He reported development of increased symptoms and pain in the right upper extremity while performing his self-employment work, especially with overhead activities. He also reported performing tasks inefficiently due to his need to alternate between tasks. Claimant informed Ms. Mitchell he intended to contract out the work on his final two jobs. Claimant also disclosed he began work with BK Electric in November 2013 as a project manager, earning $27.00 per hour and working 41 to 46 hours per week. (Ex. 6, p. 84)

After considering claimant's work history and the restrictions outlined by Dr. Bansal, Ms. Mitchell opined claimant lost access to very heavy, heavy, and medium physical demand jobs as a result of the right shoulder condition. She opined this loss equated to a 39 percent loss of access to the labor market. In the event claimant were unable to sustain work as a project manager, Ms. Mitchell indicated claimant would likely sustain a loss of earnings, as entry level electrician and electrical assembly jobs pay in the range of $14.23 per hour. She indicated work at this wage would represent a 41 percent loss of earnings compared to his wage of $24.00 per hour at defendant-employer. (Ex. 6, p. 85)

Dr. Davick was provided with a copy of Dr. Bansal's IME report. On January 9, 2014, Dr. Davick authored a letter stating he thoroughly reviewed Dr. Bansal's IME report and his opinions regarding claimant's right shoulder remained unchanged. (Ex. A-4, p. 24a)

Defendants also provided Dr. Kuhnlein with a copy of Dr. Bansal's IME report. Following review, Dr. Kuhnlein authored a follow up report dated January 20, 2014. Dr. Kuhnlein opined Dr. Bansal's report did not change the opinions Dr. Kuhnlein previously offered in his October 8, 2013 report. On the question of causation, Dr. Kuhnlein again stated claimant's shoulder condition may be causally related to his work, but the information available to him lacked sufficient objective evidence that claimant's work exposure to risk factors more probably than not caused the right shoulder condition. (Ex. A-5, pp. 104a-104b) On the issue of discrepancy in permanent impairment rating caused by Dr. Kuhnlein's use of a modifier, Dr. Kuhnlein stood by his methodology and indicated he has discussed his methodology with one of the editors of the AMA Guides, who validated his method. (Ex. A-5, pp. 104a)

On February 6, 2014, Dr. Bansal authored a letter responding to Dr. Kuhnlein's opinion on the extent of claimant's permanent disability. Dr. Bansal asserted Dr. Kuhnlein misapplied the AMA Guides in assigning claimant a 3 percent upper extremity impairment for a distal clavicle resection. Furthermore, he indicated he is aware of only one examiner, Dr. Kuhnlein, who applies the AMA Guides in this fashion. (Ex. 5, p. 78a-78b, 78f) Dr. Bansal indicated in great detail, including examples offered by the author of the specific chapter, as to why he believed Dr. Kuhnlein misapplied the tables in question. (Ex. 5, pp. 78a-78o)

At the time of claimant's alleged work injury, he earned $24.00 per hour and worked 40 to 60 hours per week for defendant-employer. Claimant testified he generally worked 40 hours per week. (Claimant's testimony; Ex. 7, p. 92; Ex. B, p. 112) The parties stipulate to the representative weeks included in computation of claimant's gross average weekly wage. During these 13 weeks, claimant earned $12,456.00 in wages. On February 4, 2011, claimant also received a $340.00 bonus. (Ex. 10, p. 134; Ex. G, p. 165) Mr. Young testified commissions are paid based upon participating in a profitable job. Shop foremen receive a percentage of the profitable job and are able to give a portion of their commission to workers on those jobs. Defendant-employer's

system allows for a transfer of monies between the at-work accounts of employees, but bonuses are not paid until an employee submits a request for withdrawal. There is no regular period for payment of such bonuses, as they lie completely at the discretion of the shop foreman. (Mr. Young's testimony)

Review of claimant's tax records reveals the following earnings: $47,083.00 in 2007 (Ex. D, p. 118); $44,558.00 in 2008 (Ex. D, p. 120); $38,399.00 in 2009 (Ex. D, p. 122); $41,575.00 in 2010 (Ex. D, p. 124); $34,885.00 in 2011 (Ex. 10, p. 138; Ex. D, p. 126); and $22,073.00 in 2012. (Ex. D, p. 130) In 2012, claimant had gross receipts from Strait's Electrical of $23,305.00 and gross profits of $11,363.00. (Ex. D, p. 128)

In treatment of his right shoulder condition, claimant incurred $2,331.01 in out of pocket medical expenses paid by claimant and $1,200.29 in medical mileage. (Ex. 12)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury on March 29, 2011 which arose out of and in the course of his employment.

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

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).

When considering the question of whether an alleged cumulative injury arose out of and in the course of a worker's employment, medical opinions are of paramount importance. Medical professionals possess the specialized knowledge required to opine as to whether risk factors associated with a worker's employment are such which could result in cumulative injury. Medical professionals also possess the knowledge to express the likelihood of such an injury occurring due to work duties. Three physicians have opined as to the issue of causal connection between claimant's work duties for defendant-employer and his right shoulder condition, Drs. Davick, Kuhnlein, and Bansal.

Dr. Davick opined he was unable to causally relate claimant's right shoulder condition, either directly or through a material aggravation, to claimant's work activities for defendant-employer. He indicated cumulative tearing of the rotator cuff typically occurs in patients older than claimant, with traumatic incidents typically accounting for tears in patients of claimant's age bracket. Dr. Davick acknowledged the possibility of claimant's work at defendant-employer causing either a cumulative or traumatic injury to the right shoulder, yet indicated the record lacked a specific timely history which could elevate the mere possibility to a probable level. Given this lack of history, Dr. Davick indicated it was as much a possibility that non-work activities caused claimant's right shoulder condition. Following thorough review of Dr. Bansal's competing opinion, Dr. Davick indicated his opinions on causation remained unchanged.

Dr. Kuhnlein performed a review of medical records and claimant's deposition. Following his review, Dr. Kuhnlein indicated he was unable to relate claimant's right shoulder condition to his work duties at defendant-employer within a reasonable degree of medical certainty. Dr. Kuhnlein opined it was possible for claimant's right shoulder injury to be related to his work, but the record lacked sufficient evidence to elevate that possibility to a level of stating claimant's work duties more probably than not caused the right shoulder injury. Following review of Dr. Bansal's competing opinion, Dr. Kuhnlein indicated his opinions remained unchanged. He again acknowledged the possibility of a causal connection between claimant's work duties and his right shoulder condition, but indicated the record lacked sufficient objective evidence that claimant's work exposure to risk factors more probably than not caused the right shoulder condition.

Dr. Bansal authored the competing opinion to that offered by Drs. Davick and Kuhnlein. Dr. Bansal highlighted claimant's specific risk factors, including frequent overhead use, and opined claimant's complaints fit a pattern of overuse syndrome. Dr. Bansal opined it highly unlikely claimant engaged in non-work related tasks which placed as much stress upon his shoulder as did his work duties. He ultimately opined claimant's work activities were the main factor in claimant's development of right shoulder pathology.

In relying upon the opinion of Dr. Bansal, claimant stresses the accuracy and breadth of Dr. Bansal's knowledge of claimant's work duties for defendant-employer. Claimant asserts due to this knowledge, Dr. Bansal's opinions are based upon the most accurate history and should accordingly be entitled to greater deference than the opinions of Drs. Davick or Kuhnlein. While valid, the undersigned ultimately rejects claimant's argument, because Drs. Davick and Kuhnlein each had the opportunity to review Dr. Bansal's report and extensive description of claimant's job duties. After such review, both Drs. Davick and Kuhnlein indicated their opinions on causation remained unchanged.

Dr. Davick served as claimant's treating physician. Dr. Davick provided claimant care over the course of approximately 17 months, including performing surgery. Of the three physicians to offer opinions with regard to causation, Dr. Davick is the only physician who had the opportunity to examine claimant on multiple occasions over a period of months and physically observe the changes in claimant's shoulder during surgery. Claimant himself selected Dr. Davick and expressed satisfaction with Dr. Davick's care. There is no indication of a breakdown in the physician-patient relationship between Dr. Davick and claimant. Given the existence of an established and successful physician-patient relationship, the undersigned is not inclined to disregard the opinions of Dr. Davick absent clear justification. Claimant attempted to use the breadth of Dr. Bansal's knowledge of claimant's job duties to demonstrate such justification; however, the undersigned rejected that argument *supra*.

Dr. Davick served as claimant's chosen treating physician and accordingly had extensive contact with claimant. Given the sheer extent of access to claimant by Dr. Davick and the successful physician-patient relationship the two established, the undersigned finds it difficult to discount the opinion of Dr. Davick in favor of one-time evaluator, Dr. Bansal. The undersigned finds no compelling reason to discount the treating physician's opinions, especially given Dr. Davick's status as an orthopedic surgeon. Additionally, Dr. Davick's opinion is buttressed by the entirely consistent opinion of Dr. Kuhnlein. The mere possibility of a causal relationship between claimant's work duties and his right shoulder pathology is insufficient to meet claimant's burden of proof.

Given the above, it is determined claimant failed to meet his burden of proving by a preponderance of the evidence that his work duties at defendant-employer were a cause of claimant's right shoulder pathology. Accordingly, it is found claimant has failed to establish he sustained a cumulative right shoulder injury arising out of and in the

course of his employment with defendant-employer. As claimant has failed to prove he sustained a work-related injury to his right shoulder, consideration of other issues presented for consideration is unnecessary, as moot.

ORDER

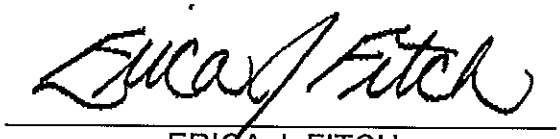
THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

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

Costs are taxed to claimant pursuant to 876 IAC 4.33.

Signed and filed this 19th day of February, 2015.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jean Mauss
Attorney at Law
6611 University Ave, Ste 200
Des Moines, IA 50324-1655
jmauss@msalaw.net

Cory D. Abbas
Attorney at Law
505 5th Ave., Ste. 729
Des Moines, IA 50309
cabbas@pattersonfirm.com

EJF/kjw

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.