

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 PEDRO TARELO GALLEGOS,

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 Claimant,

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 vs.

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 SHELLY KRIEG INC.,

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 Employer,

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 and

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 GRINNELL SELECT INSURANCE
 COMPANY,

:

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 Insurance Carrier,
 Defendants.

:

File No. 5066131

A R B I T R A T I O N

D E C I S I O N

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 Headnotes: 1108.20, 1108.50, 1402.30,
 1402.40, 1802, 1803.1, 1804, 2204,
 2206 2501, 2502, 2907, 3002, 4100

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Claimant Pedro Gallegos filed a petition in arbitration on September 21, 2018, alleging he sustained injuries to his left lower extremity, bilateral shoulders, bilateral upper extremities, back, and body burns while working for the defendant, Shelly Krieg Inc. (“the Employer”), on March 23, 2018. The Employer and its insurer, the defendant, Grinnell Select Insurance Company (“Grinnell”), filed an answer on September 25, 2018. Gallegos later amended his petition to include permanent total disability, odd-lot, and a claim for penalty benefits.

An arbitration hearing was held in Des Moines on October 1, 2019. At hearing Gallegos further alleged he sustained a mental injury caused by the work injury. Attorney Thomas Drew represented Gallegos. Gallegos appeared and testified. Attorney Stephen Spencer represented the Employer and Grinnell. David Krieg, Shelly Krieg, and Mary Kay Ireland appeared and testified on behalf of the Employer and Grinnell. Karen Deters provided Spanish interpretation services during the hearing. Joint Exhibits (“JE”) 1 through 13, and Exhibits 1 through 13 and A through K were admitted into the record. The record was held open through November 22, 2019, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

At the start of the hearing the parties submitted a hearing report, listing stipulations and issues to be decided. The Employer and Grinnell waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.
2. Gallegos sustained an injury on March 23, 2018, which arose out of and in the course of his employment.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The alleged injury is a cause of permanent disability.
5. At the time of the alleged injury Gallegos was married and entitled to three exemptions.
6. Costs have been paid.

ISSUES

1. What is the nature of the injury?
2. What is the extent of disability?
3. Has Gallegos established he is permanently and totally disabled under the statute or common law odd-lot doctrine?
4. Is Gallegos entitled to temporary disability benefits?
5. Are the Employer and Grinnell entitled to a credit?
6. What is the commencement date for permanent partial disability benefits?
7. What is the rate?
8. Is Gallegos entitled to payment of medical expenses?
9. Is Gallegos entitled to recover the cost of an independent medical examination?
10. Is Gallegos entitled to an award of penalty benefits for an alleged failure to pay temporary partial disability benefits?
11. Should costs be assessed against either party?

FINDINGS OF FACT

Gallegos is married with three children. (Exhibit 6, page 65) Gallegos was born in Michoacan, Mexico, and he moved to the United States as a teenager. (Transcript, p. 13) Gallegos completed the sixth grade in Mexico, and ninth and tenth grades in California. (Ex. 6, p. 66; Tr., pp. 13-14, 43, 45) Gallegos reported he did not do well in high school because he did not understand English well. (Tr., p. 14) Gallegos testified he can read and write in Spanish, but not in English. (Tr., pp. 15-16) Gallegos has a driver's license. (Tr., p. 16)

After high school Gallegos returned to Mexico for a period of time. (Tr., pp. 46-47) Gallegos returned to the United States approximately twenty-seven years ago. (Tr., p. 47) Gallegos has not completed any education beyond the tenth grade. (Tr., p. 14) At the time of the hearing he was forty-eight. (Tr., p. 13)

After moving to the United States, Gallegos worked as a farmhand, picking avocados and citrus fruit. (Tr., p. 16) Gallegos later worked for an Italian restaurant preparing pizzas, and as a lawn care worker. (Ex. 6, pp. 67-68; Tr., pp. 16-17) Gallegos has worked with hogs for two farming operations for many years. (Tr., pp. 17-18) Gallegos reported his agricultural work was heavy in nature and required him to bend, stoop, and lift. (Tr., p. 17)

The Employer hired Gallegos in November 2011. (Ex. 6, p. 73) Shelly and David Krieg are married farmers who grow crops and raise livestock. (Tr., p. 69) Shelly Krieg is the owner of the Employer or the hog operation Gallegos worked for at the time of his work injury. The operation is farrow-to-finish and produces roughly 35,000 hogs per year. (Tr., pp. 69-70) During various stages of development, the hogs are moved to different buildings on the Employer's property. (Tr., pp. 69-70)

While working for the Employer, Gallegos was responsible for checking the nurseries and finish buildings, working with hogs weighing between twelve and 300 pounds, performing daily chores, including walking pens and alleys, climbing gates, checking and adjusting feeders, removing dead animals, sorting pens and animals, vaccinating hogs, maintaining rodent traps, washing livestock trailers and hog buildings, cleaning the shop area, and loading hogs for market. (Ex. 6, p. 73) Gallegos testified the job required constant pulling, climbing, stooping, and bending. (Tr., p. 19) Gallegos reported he had to jump over the pens and twist at the waist. (Tr., p. 19) Gallegos did not have access to an interpreter while working for the Employer and the Krieges spoke to him in English. (Tr., pp. 15, 45)

On March 23, 2018, Gallegos was moving hogs for the Employer. (Tr., p. 21) Gallegos noticed a heater was not working properly. (Tr., p. 21) Gallegos disconnected the heater and there was an explosion. (Tr., pp. 21-22) Gallegos cannot recall the explosion. (Tr. p. 22) After the explosion Gallegos woke up ten to fifteen feet from where the explosion took place. (Tr., p. 22) The explosion destroyed the building where the heater was located.

Gallegos could not stand and called for help. (Tr., p. 22) Gallegos recalled having swelling and pain in his foot, burns on his face, and problems or pain in his shoulder and lower back near his waistline. (Tr., pp. 23-24) Gallegos was transported by ambulance to the hospital. (Tr., p. 23)

Gallegos was admitted to the hospital and released the next morning. (JE 5, p. 29; Tr., p. 24) A head computerized tomography exam, chest x-ray, and left foot x-ray were normal. (JE 5, pp. 33-34, 38-39) Gallegos complained of pain in his face, a gritty feeling in his eyes, and he was assessed with partial-thickness facial burns. (JE 5, p. 37) Gallegos testified after his discharge from the hospital his foot was badly swollen, he could not walk, and he was experiencing bad back pain. (Tr., p. 24)

On March 30, 2018, Gallegos attended an appointment with Cynthia Guthmiller, ARNP, complaining of leg pain. (JE 8, p. 83) Guthmiller diagnosed Gallegos with a burn, a deep vein thrombosis (“DVT”) of the left lower extremity, prescribed Silvadene, Eliquis, and Hydrocodone-Acetaminophen, and ordered Gallegos to wear TED hose on both legs and to elevate his legs. (JE 8, pp. 84-85) Gallegos testified at that time he was having pain in his foot, back, shoulder, and face. (Tr., p. 25)

On April 10, 2018, Gallegos attended an appointment with Alexandria Kohn, ARNP, for a second opinion, complaining of right shoulder blade, mid back, and lower back pain starting in his trapezius muscle and radiating down into the lower portion of his back, left ankle pain, difficulty bearing weight on the left lower extremity, and itching and pain in his face. (JE 2, p. 4) Gallegos expressed anxiety about the accident, noting he was concerned his wife could be burned while cooking on the stove, and reporting he had woken his wife up at night to check the heater that was making a noise. (JE 2, p. 4) Kohn assessed Gallegos with burns to his face, left wrist, and ear, bilateral eye irritation, mid to lower back pain, itching of the face, anxiety related to trauma, left ankle pain, and DVT of the left lower extremity, recommended Gallegos complete the burn care ordered by the trauma surgeon, prescribed medication and an ankle brace, and ordered physical therapy. (JE 2, pp. 6-7)

Gallegos testified, “[s]ince the day of the accident, my attitude changed a lot. I got mad about just any little thing.” (Tr., p. 25) On April 24, 2018, Gallegos attended a psychiatric diagnostic evaluation appointment with Leslie McDonald-Gonzalez, LISW, with Siouxland Mental Health Center, reporting he was anxious about returning to work because he would have to work with heaters again. (JE 1, p. 1) Gallegos reported having some flashbacks and being more sensitive to certain things since the accident, including the furnace kicking on, and plugging in or unplugging items. (JE 1, p. 1) McDonald-Gonzalez assessed Gallegos with adjustment disorder with mixed anxiety and depressed mood and noted Gallegos was not interested in services. (JE 1, p. 2)

Gallegos returned to Kohn on April 26, 2018, reporting his symptoms had improved overall, but he was experiencing pain in his low back that was interfering with his sleep. (JE 2, p. 8) Kohn noted Gallegos’s burns on his wrist and face had improved, but he had difficulty with flexion and extension of his back and bending to the

right side. (JE 2, p. 8) Kohn noted Gallegos had sustained burns to his eyes, and documented Gallegos was using eye drops for the irritation. (JE 2, p. 8) Gallegos reported he had attended an appointment with Siouxland Mental Health Center and they were not recommending follow-up care. (JE 2, p. 8) Kohn assessed Gallegos with burns to the face, left wrist, and ear, bilateral eye irritation, and lower back pain, and noted his face itching had resolved, and his anxiety related to trauma, ankle pain, and DVT of the lower extremity were resolving. (JE 2, p. 10) Kohn discontinued the compression stocking, continued Gallegos's Eliquis, eye drops, Biotin, and amino collagen C, prescribed Lyrica, encouraged icing, ordered lumbar spine magnetic resonance imaging, and restricted Gallegos from working. (JE 2, p. 11)

Gallegos underwent lumbar spine magnetic resonance imaging on May 2, 2018. (JE 3, p. 21) The reviewing radiologist listed an impression of degenerative changes to the lumbar spine, resulting in mild thecal sac effacement and mild to moderate neural foraminal narrowing. (JE 3, p. 22) Gallegos testified for the first few months following the accident he was in a lot of pain and his condition did not change much. (Tr., p. 26)

On May 11, 2018, Gallegos attended an appointment with Kohn. (JE 2, p. 12) Kohn noted Gallegos's range of motion in his low back, left shoulder, and left ankle had improved, but he continued to have problems with his low back when bending to the left side. (JE 2, p. 13) Kohn continued his medications, continued his physical therapy, and released him to return to work on May 14, 2018, with restrictions of no work over four hours at a time, no lifting, bending or twisting, occasional squatting and kneeling "very minimally," and sitting and standing, as needed. (JE 2, pp. 13-14)

Gallegos testified when he returned to work, Dave Krieg, his boss, told him he would be doing easier work, and to work on the mousetraps on the perimeter of the pens on the outside of the finishers, and to make sure the pigs had enough feed and water. (Tr., pp. 27, 76) Krieg testified he told Gallegos to do "whatever you're comfortable doing." (Tr., p. 76) Gallegos reported when he went to change out the food in the traps he had to constantly bend down, which bothered his back. (Tr., p. 27) Gallegos testified he told Krieg what was going on, and Krieg sent him home. (Tr., p. 27)

Gallegos returned to Kohn on May 18, 2018, reporting when he returned to work the Employer told him the Employer was unable to accommodate his work restrictions. (JE 2, p. 15) Kohn noted Gallegos's affect and mood were normal, but he expressed some concern about wondering if his employer believed him about his injury. (JE 2, p. 15) Kohn released Gallegos to return to work up to four hours per day, with restrictions of occasional bending, squatting, and kneeling "very minimally," no twisting, and occasional lifting up to ten pounds, discontinued his Hydrocodone, continued his other medications and physical therapy, and prescribed Tizanidine to assist with muscle tension. (JE 2, p. 15)

On May 22, 2018, Bruce Elkins, M.D., an occupational medicine physician, performed an independent medical examination of Gallegos for the Employer and

Grinnell. (Ex. B) Dr. Elkins reviewed Gallegos's medical records and examined him. (Ex. B) Dr. Elkins noted Gallegos continued to use moisturizer and sun screen for burns to his face and left wrist, eye drops for minimal remaining irritation from flash burns to his eyes. He complained of minimal discomfort in his right shoulder and left foot and ankle, and he complained of low back pain that is still significant at times, especially with activity or when attempting to lift more than twenty-two pounds. (Ex. B, p. 12) Dr. Elkins noted Gallegos denied experiencing radiating pain from his low back, numbness, or tingling, and that Gallegos reported "significant anxiety-related symptoms initially after the accident, however these are now much improved and he denies current need for evaluation or treatment of any mental-health related issues. He does not feel that he will have any psychological difficulties with resuming his prior work, even when required to plug in heaters or work with/around electricity/outlet such as changing light bulbs." (Ex. B, p. 13)

Dr. Elkins diagnosed Gallegos with resolving facial and left wrist burns, a right shoulder sprain, left foot and ankle sprain, history of left leg DVT, adjustment disorder, and symptomatic exacerbation of pre-existing lumbar degenerative disc disease related to the March 2018 work injury. (Ex. B, p. 13) Dr. Elkins recommended additional physical therapy and a gradual return to work duties for Gallegos's lumbar spine condition and opined Gallegos had not reached maximum medical improvement. (Ex. B, p. 14)

On May 29, 2018, Gallegos attended a follow-up appointment with Kohn, complaining of increased back pain and shoulder pain, some tightness near his scapula, and left ankle pain with internal rotation and flexion. (JE 2, p. 18) Kohn restricted Gallegos from working, ordered work hardening, continued his physical therapy, and referred Gallegos to a foot and ankle specialist. (JE 2, p. 19)

On June 5, 2018, Gallegos attended an appointment with Michael Nguyen, M.D., with CNOS. (JE 6, p. 40) Dr. Nguyen reviewed Gallegos's imaging, examined him, ordered additional imaging of the left lower extremity and right shoulder, and imposed work restrictions of no lifting over twenty pounds occasionally, no reaching above the shoulder with the left arm, and occasional work with restricted standing for no more than four hours without being able to rest. (JE 6, pp. 41-43) Gallegos received left midfoot and right shoulder magnetic resonance imaging. (JE 6, pp. 45-46) The reviewing radiologist listed an impression of elongated os peroneum without bone edema and no demonstrated occult fracture in the left lower extremity, mild supraspinatus tendinosis without demonstrated rotator cuff tear, suspected posterior labral tear, and mild acromioclavicular arthrosis. (JE 6, pp. 45-46)

Gallegos returned to Dr. Nguyen on June 20, 2018, to discuss his imaging. (JE 6, p. 47) Dr. Nguyen assessed Gallegos with left foot and ankle tendinitis, a right posterior labral tear, and low back pain. (JE 6, p. 48) Dr. Nguyen noted there was evidence of a posterior labral tear and referred him to Brian Johnson, M.D., an orthopedic surgeon, for evaluation and management, documented the imaging of

Gallegos's lumbar spine and left ankle did not show anything surgical, and ordered physical therapy. (JE 6, pp. 47-48)

On July 23, 2018, Gallegos returned to Dr. Nguyen complaining of right shoulder, low back, left foot, and ankle pain. (JE 6, p. 49) Dr. Nguyen assessed Gallegos with low back pain with facet hypertrophy and left foot and ankle tendinitis. (JE 6, p. 49) Dr. Nguyen recommended an immobilization belt, injections, and therapy for his low back, and to continue with a home exercise program for his left lower extremity. (JE 6, p. 49)

During an appointment with Dr. Nguyen on August 22, 2018, Gallegos reported his back brace was helpful. (JE 6, p. 52) Dr. Nguyen discontinued Gallegos's physical therapy for his back, recommended home exercises for his low back pain, and continued his shoulder physical therapy. (JE 6, p. 52)

After his shoulder surgery Gallegos attempted to return to work. (Tr., p. 31) Gallegos testified Krieg had him go and check some areas with pigs and when he started jumping into the pens to check the pigs his lower back hurt. (Tr., p. 31) Gallegos was also using a power washer, which he reported put pressure on his shoulder and bothered his back. (Tr., p. 31) Krieg denied he ever had Gallegos perform work with a power washer. (Tr., pp. 76, 79) Krieg reported the only power washer set up is for cleaning off boots at the shop. (Tr., p. 77)

On September 10, 2018, Gallegos attended a follow-up appointment with Dr. Nguyen. (JE 6, p. 53) Gallegos complained of pain with power washing at work. (JE 6, p. 53) Dr. Nguyen assessed Gallegos with L5-S1 bilateral foraminal stenosis and a left peroneal strain and recommended an epidural flood for his low back. (JE 6, p. 54) Dr. Nguyen opined "[a]ll of these injuries I do believe are related to the explosion and are symptomatic and being treated appropriately at this time." (JE 6, p. 54)

Gallegos attended an appointment with Dr. Johnson on October 12, 2018, complaining of right shoulder pain. (JE 6, p. 55) Dr. Johnson noted Gallegos had received injections for his right shoulder pain. (JE 6, p. 55) Dr. Johnson assessed Gallegos with a right shoulder SLAP tear with associated impingement, biceps tendinopathy, and symptomatic AC degenerative joint disease, discussed treatment options with Gallegos, and noted Gallegos wanted to proceed with surgery. (JE 6, p. 56)

On October 30, 2018, Dr. Johnson performed a diagnostic arthroscopy and biceps tenotomy on Gallegos's right shoulder. (JE 4, p. 23) Dr. Johnson listed post-operative diagnoses of right shoulder impingement syndrome, SLAP tear, symptomatic AC degenerative joint disease, and anterior and superior labral tearing. (JE 4, p. 23)

Gallegos received lumbar spine magnetic resonance imaging on November 27, 2018. (JE 5, p. 25) The reviewing radiologist listed an impression of multilevel degenerative changes, most notable at L5-S1 where there is a moderate to large disc

bulge/osteophyte complex, bilateral facet arthrosis, and bilateral foraminal narrowing. (JE 5, p. 26)

On December 5, 2018, Gallegos returned to Dr. Nguyen, complaining of low back pain. (JE 6, p. 57) Dr. Nguyen noted imaging showed a worsening of his L5-S1 foraminal stenosis with an increasing disc bulge, combined with bilateral facet arthropathy, and “a little bit more worsening on the left than the right for foraminal stenosis, which actually probably corresponds to that lingering pain he has had from his ankle.” (JE 6, p. 57) Dr. Nguyen assessed Gallegos with bilateral foraminal stenosis, left worse than right, with left leg radicular features, and referred Gallegos to Michael Espiritu, M.D., an orthopedic spine surgeon, for a surgical evaluation. (JE 6, pp. 57-58)

Gallegos attended an appointment with Dr. Espiritu on December 19, 2018, complaining of low back pain. (JE 6, p. 59) Dr. Espiritu reviewed Gallegos’s imaging and examined him, assessed him with lumbosacral disc degeneration at L5-S1, noted he did not believe Gallegos was a surgical candidate, and he found Gallegos had reached maximum medical improvement for his back. (JE 6, p. 60)

On January 4, 2019, Gallegos attended an appointment with Dr. Johnson, reporting he had noticed swelling or fluid on his right elbow over the last month. (JE 6, p. 62) With respect to his right shoulder, Dr. Johnson performed an injection into the shoulder, continued physical therapy, and imposed restrictions of lifting up to fifty pounds, occasional overhead reaching, frequent pushing and pulling, gripping, and pinching. (JE 6, p. 63) Dr. Johnson assessed Gallegos with right elbow bursitis, and recommended Gallegos wait three months before performing an aspiration. (JE 6, p. 63)

On January 16, 2019, the Employer and Grinnell offered Gallegos modified duty work at Mission of the Messiah, working thirty hours per week, and earning \$22.75 per hour, starting on January 23, 2019. (Ex. 5, pp. 59-60) Gallegos reported the Employer sent him there as a volunteer for six months. (Tr., p. 32) Gallegos sorted merchandise, placed prices on merchandise, and helped with sweeping. (Tr., p. 32) When he started with Mission of Messiah, Gallegos received two checks, one from the Employer, and one from the insurance company. (Tr., pp. 58, 62) Shelly Krieg testified at the time he worked there the Employer paid Gallegos \$7.50 per hour. (Tr., p. 97) His normal wage was \$17.00 per hour. (Tr., p. 98)

Gallegos attended an appointment with Dr. Johnson on February 1, 2019, reporting the shoulder injection dramatically helped his shoulder pain. (JE 6, p. 64) Dr. Johnson assessed Gallegos with right shoulder impingement and biceps tendinitis, and olecranon bursitis of the right elbow, recommended Gallegos work on home therapy exercises, and imposed restrictions of lifting up to fifty pounds, occasional overhead reaching, and frequent pushing, pulling, gripping, and pinching with the right shoulder and aspirated the right elbow. (JE 6, pp. 64-65)

On March 8, 2019, Gallegos returned to Dr. Johnson, noting the aspiration had resolved his right elbow issue, but reporting his right shoulder remained stiff, but was better since surgery. (JE 6, p. 66) Gallegos reported his back was bothering him more than his shoulder. (JE 6, p. 66) Dr. Johnson recommended a functional capacity evaluation and noted “[a]s far as having been involved in an explosion and the PTSD, but overall, just the anxiety and weight of having to deal with this injury and the burden of going back with a not perfect body to work, I think he could benefit possibly from seeing the psychologist again.” (JE 6, p. 66)

Gallegos attended a follow-up appointment with Dr. Johnson on April 3, 2019, regarding his right shoulder. (JE 6, pp. 67, 77) Dr. Johnson noted the results of the functional capacity evaluation were invalid, and documented Gallegos had posttraumatic stress disorder and anxiety. (JE 6, pp. 67-68, 77-78) Dr. Johnson deferred to Dr. Elkins on permanent restrictions given the invalid functional capacity evaluation, and noted Gallegos reported his main complaint was his low back. (JE 6, pp. 68, 78)

On April 18, 2019, Dr. Elkins conducted a second independent medical examination of Gallegos for the Employer and Grinnell. (Ex. B) Dr. Elkins again reviewed Gallegos’s medical record and examined him. (Ex. B) Dr. Elkins diagnosed Gallegos with status post right shoulder arthroscopy, adjustment disorder versus primary mood disorder, and symptomatic exacerbation of pre-existing lumbar degenerative disc disease related to the March 2018 work injury. (Ex. B, p. 18) Dr. Elkins found Gallegos had not reached maximum medical improvement for the adjustment/mood disorder and for his right shoulder injury, and noted appropriate current work restrictions included no lifting over twenty pounds with occasional bending and twisting. (Ex. B, p. 18)

On June 12, 2019, Robert Arias, Ph.D., conducted a neuropsychological evaluation of Gallegos for the Employer and Grinnell. (Ex. A) Dr. Arias performed a neuro PSI 2 Neuropsychological Testing Battery, Test of Memory Malingering, Green’s Word Memory Test, MMPI-2, and conducted a clinical interview with Gallegos, Gallegos’s wife, and an interpreter. (Ex. A, pp. 3, 8) Gallegos testified Dr. Arias asked him many questions that he did not understand, and reported he was confused and his head hurt bad when he left. (Tr., p. 35) During the testing Gallegos had access to an interpreter. (Tr., p. 65)

Dr. Arias noted on the Green’s Word Memory Test, Gallegos failed all five conditions, noting the test “has been shown to be approximately 100% accurate in identifying good or poor effort in simulator studies. Notably, two of the five scores fell markedly below empirically established cut-offs, at levels seldom seen in clinical practice. . . . Failure on two more independent performance validity indices has been shown to equate with at least a 95% level of accuracy at identifying individuals with non-credible cognitive performance.” (Ex. A, pp. 3, 8) Dr. Arias concluded on the TONI-4, Gallegos obtained a standard score of 80, corresponding to the low average to borderline range of intellectual functioning, and on the Neuro PSI-2 Index Scores,

Gallegos obtained an attention and executive functions total index score of 111, which is above average, a memory total index of 94, which is average, and an attention and memory total index score of 99, which is average. (Ex. A, pp. 3, 8) Dr. Arias found the results of the MMPI-2 were considered invalid due to extreme symptom minimization, noting Gallegos's lie score was more than four standard deviations above the mean, invalidating the results. (Ex. A, pp. 4, 9) Dr. Arias noted Gallegos's clinical profile nevertheless contained three out of ten significant elevations indicating somatic complaints despite his psychological symptom minimization and noted his somatic complaints are likely to be of a neurological nature. (Ex. A, pp. 4, 9) Dr. Arias concluded:

[t]hese results revealed failures on multiple independent performance validity measures indicating suboptimal effort or an intent to perform poorly. Secondary gain factors are the most parsimonious explanation for this performance. It is notable that these results provide convergent data with regard to the patient's physical therapy evaluation results of March 19, 2019, which "were not always consistent with anatomical and physiological principles" rendering the results invalid. He also had an elevated score on the Waddell's protocol, "indicating that there is a non-organic component to his pain and disability." There was suggestion of "very poor effort that is not necessarily related to pain, impairment, or disability." He has also been found to have no focal neurological deficits by Dr. Espiritu, who also gave him no restrictions with regard to his back.

Moreover, the nature of his injury, with reported brief unconsciousness/posttraumatic amnesia and no other neurological complications, would typically resolve within 10-14 days in terms of any cognitive or emotional symptoms, but at a maximum of three months. Individuals with similar mild traumatic brain injuries have been shown to have complete resolution of symptoms within this time frame definitively. This was also the conclusion reached by the American Medical Association, American Psychological Association, Board of Healthcare, Department of Veterans Administration, Department of Defense, as well as six meta-analyses representing hundreds of studies and thousands of individuals.

Emotionally, he does present with subjective reports of concerns with regard to returning "to normal life." Although he does not present as meeting diagnostic criteria for a separate mental disorder. To be diagnosed even with a simple Adjustment Disorder, DSM-5 criteria require "marked distress that is in excess of what would be expected from exposure to the stressor, and/or significant impairment in social or occupational (academic) functioning. He does not meet these criteria at this time. He has also been noted in an IME at Elkins Medical Services on May 22, 2018, to not present as having "any psychological difficulties with

resuming his prior work, even when required to plug in heaters or work with/around electricity/outlet, such as changing lightbulbs.”

Of final note, his cognition in this evaluation was within expected limits of variability for any normally functioning individual. Across numerous measures administered to any normal individual, the scatter of test results is expected to conform to a normal curve distribution. Thus, a small percentage of scores outside of normal limits are expected in any normally functioning individual. His test data approximate this pattern. The non-credible performance on multiple validity measures, both in this evaluation, as well as in the previous physical therapy evaluation also would be of concern with regard to interpreting any of his data as reflective of a genuine impairment.

(Ex. A, pp. 1-2, 6-7) Dr. Arias found no treatment was indicated from the March 23, 2018 incident, opined Gallegos reached maximum medical improvement from a neuropsychological standpoint on June 23, 2018, and assigned no work restrictions. (Ex. A, pp. 2, 7)

On July 25, 2019, Dr. Elkins issued an addendum to the second independent medical examination of Gallegos after reviewing the June 12, 2019 neuropsychological evaluation. (Ex. B) Dr. Elkins found Gallegos had reached maximum medical improvement and recommended no permanent work restrictions for Gallegos. (Ex. B, p. 20)

On July 17, 2019, Jacqueline Stoken, D.O., a physiatrist, conducted an independent medical examination for Gallegos, and issued her report on July 30, 2019. (Ex. 1) Dr. Stoken reviewed Gallegos’s medical records and examined him. (Ex. 1) Dr. Stoken opined the March 2018 explosion caused or aggravated Gallegos’s injuries to his left lower extremity, bilateral shoulders, bilateral upper extremities, back, body burns, and post-traumatic stress. (Ex. 1, p. 12)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides”), Dr. Stoken assigned no impairment rating for Gallegos’s left lower extremity or body burns. (Ex. 1, pp. 11-12) Dr. Stoken did not issue an impairment rating for a mental health condition, noting Gallegos “may benefit from psychological counseling to address his mixed anxiety and depressed mood.” (Ex. 1, p. 12) Referring to Table 15-3, page 384 of the AMA Guides, Dr. Stoken opined Gallegos falls into DRE Lumbar Category II for his low back pain, with a five to eight percent impairment of the whole person due to chronic lumbar pain, noting prior to the work injury he was able to work full duty without restrictions or pain that restricted his function. (Ex. 1, p. 12)

With respect to his right shoulder, Dr. Stoken opined, under Chapter 16, Figure 16-1b, page 437, he has ten percent impairment of the left upper extremity due to

deficits in range of motion. Dr. Stoken further found,

[u]sing the *Guides*, Chapter 16, table 16-35, page 510, he has 6% Upper Extremity Impairment due to deficits of flexion strength, 3% Upper Extremity Impairment due to deficits in abduction strength, 2% Upper Extremity Impairment due to deficits in adduction strength, and 2% Upper Extremity Impairment due to deficits in internal rotation strength.

Using the *Guides*, Chapter 16, table 16-27, page 506, he is allowed 10% Left Upper Extremity Impairment due to distal clavicle excision.

Using the *Guides*, Combined Values Chart, page 604, in combining the above impairments of 10% + 10% + 6% + 3% + 2% + 2% = 28% Left Upper Extremity Impairment.

Using the *Guides*, Chapter 16, table 16-3, page 439, this converts to 17% Impairment of the Whole Person.

(Ex. 1, p. 11) Dr. Stoken assigned permanent work restrictions of lifting up to eighteen pounds on a frequent basis, twenty-five pounds on an occasional basis, and thirty-five pounds on a rare basis, placing Gallegos into the light to medium category of work. (Ex. 1, p. 11)

Gallegos attended a functional capacity evaluation with Todd Schemper, PT, DPT, with WorkWell, on July 26, 2019. (Ex. 2) Schemper opined Gallegos gave maximal effort on the test items as evidenced by predictable patterns of movement and found the results of the evaluation were valid. (Ex. 2, p. 20) Schemper opined:

1. These projections are for 8 hours per day and 40 hours per week at the levels indicated on the FCE Test Results and Interpretation grid.
2. The client's capabilities are in the light category of (waist to floor lifting up to 20 pounds on an occasional basis and 30 pounds on a rare basis) of physical demand characteristics. Specific capabilities are noted with the FCE Test Results and Interpretation grid.
3. His ability with front carrying did fall within the medium category, carrying up to 30 pounds occasionally and 40 pounds rarely.

(Ex. 2, pp. 20-21) No physician has adopted the findings from the functional capacity evaluation conducted by Schemper.

Jeff Johnson, M.S., conducted a vocational evaluation for Gallegos on July 17, 2019, and issued his report on August 14, 2019. (Ex. 3) Gallegos's attorney provided Johnson with a copy of Dr. Stoken's and Schemper's functional capacity evaluation. (Ex. 3, p. 32) Johnson noted Gallegos's work history includes working as a fruit harvest worker, cook helper, laborer for landscape, and farmworker for livestock. (Ex. 3, p. 33)

When Johnson met with Gallegos, Gallegos was working for Mission of Messiah six hours per day sorting and pricing donated items. (Ex. 3, p. 33) Johnson found Gallegos had performed work throughout his life in the medium and heavy exertional levels, and noted Gallegos's work restrictions place him in the light exertion level of work. (Ex. 3, p. 34)

Johnson opined Gallegos had incurred an eighty-five percent loss of access to employment as a result of the March 2018 work injury. (Ex. 3, pp. 35, 38) Johnson identified six job openings that may fall within Gallegos's permanent work restrictions, including grounds crew, earning \$13.00 per hour, groundskeeper/gardener earning \$11.00 to \$14.00 per hour, groundskeeper, janitorial worker earning \$10.50 per hour, dishwasher earning \$10.50 per hour, and custodian earning \$9.00 per hour. (Ex. 3, p. 37)

On August 2, 2019, Mission of the Messiah notified Gallegos he was through with his position. (Ex. 8, p. 77a) Gallegos's attorney notified the Employer Gallegos would be returning to work on August 5, 2019. (Ex. 8, p. 77a) Gallegos's attorney wrote the attorney for the Employer and Grinnell on August 7, 2019, noting Gallegos had returned to work on August 5, 2019, David Krieg told him he did not have work for him, and when Gallegos called the next day, Krieg again stated he did not have work for him. (Ex. 8, p. 77a) Gallegos testified when he tried to return to work Krieg told him he did not have any work for him to do on one occasion. (Tr., p. 37) Gallegos reported on the last occasion he told Krieg his back hurt and Krieg sent him home. (Tr., p. 37)

On August 27, 2019, Dr. Elkins issued a permanent impairment rating, after reviewing additional medical records and examining Gallegos. (Ex. B) Gallegos reported he was continuing to experience low back pain associated with right leg pain that radiates to the bottom of his right foot that is worse with activity, but without numbness or tingling, right shoulder discomfort that is worse since surgery and left shoulder discomfort from overuse due to the right shoulder injury, without numbness or tingling, left foot and ankle discomfort that is more pronounced and frequent since he was released to return to work, and a buzzing sensation in both ears that began at the time of the work incident. (Ex. B, pp. 22-23)

Using the AMA Guides, Dr. Elkins issued impairment ratings for Gallegos's injuries. (Ex. B) With respect to his low back, using page 384 of the AMA Guides, Dr. Elkins opined Gallegos fell in DRE Category I and assigned a zero percent impairment rating. (Ex. B, p. 24) Dr. Elkins found Gallegos's current complaints had not been consistently present since the time of injury and his current complaints of low back pain and right radicular symptoms were distinctly different medically from his prior symptoms with left radicular complaints, and opined given there was no confirmation of the specific source of the pain, Gallegos did not meet the Category II criteria. (Ex. B, p. 24)

Dr. Elkins found Gallegos had sustained a mild ankle sprain of the anterior talofibular ligament, noting there were no current findings consistent with the prior diagnosis of left peroneal strain for which he was placed at maximum medical

improvement by his treating orthopedist on November 6, 2018. (Ex. B, p. 25) Dr. Elkins found the condition had resolved without a residual impairment. (Ex. B, p. 25)

With respect to Gallegos's his right shoulder, Dr. Elkins opined using the AMA Guides at page 476,

shoulder flexion and extension (impairment percentage of the upper extremity): FF 3%; extension 1%; Abduction 4%. These add to yield 8% of the upper extremity for range of motion loss. Distal clavicle excision is applicable under "other conditions", Section 16.7: 10% of the upper extremity from Table 16-7, page 506. These values combine to 17% of the upper extremity. This would convert to a 10% of the whole person for the right shoulder.

(Ex. B, p. 25) Dr. Elkins did not evaluate Gallegos for a mental health permanent partial impairment, noting he erroneously determined Gallegos had reached maximum medical improvement for his mental health condition on July 25, 2019, using South Dakota criteria for determining maximum medical improvement for a mental health condition. (Ex. B, p. 25)

On September 5, 2019, Gallegos attended an appointment with Amy Payne, PA-C, with Family Health Care, regarding anxiety and depression. (JE 8, p. 80) Payne assessed Gallegos with an adjustment disorder with mixed emotional features, and prescribed Cymbalta. (JE 8, p. 82) Payne did not opine Gallegos had sustained a permanent mental health condition caused by his work injury.

On September 10, 2019, Gallegos's attorney sent a letter to the attorney for the Employer and Grinnell, reporting that day Gallegos returned to work with a workers' compensation temporary/transitional duty assignment form served by the attorney for the Employer and Grinnell, and David Krieg informed Gallegos he knew nothing of the "return to work form" and sent him home. (Ex. 8, p. 77c)

The attorney for the Employer and Grinnell responded on September 16, 2019, stating the temporary/transitional duty assignment form he served was an old form and nothing to do with his client's current employment status. (Ex. 14, p. 104) The letter notified Gallegos's attorney when his client showed up for work on August 6, 2019, he told the Employer he could not do his job because of symptoms in his body, including his ears, and the Employer believed he was refusing to return to work and that he had quit or abandoned his job after being released by his physicians. (Ex. 14, p. 104) Gallegos testified he wanted to return to work. (Tr., p. 40)

Gallegos has not sought work since his work injury. (Tr., pp. 65-66) At hearing Gallegos testified he did not believe he could perform his regular job for the Employer because he cannot sort the small pigs, pull dead pigs, climb ladders to check the food, jump the pens, or twist his back. (Tr., p. 40) Gallegos reported he did not believe he could perform any of his past work with his current problems. (Tr., pp. 40-41) Gallegos

related he did not believe he could work for McDonald's because he could not stand on his feet for eight hours per day with his back condition, and he cannot communicate with people. (Tr., p. 40)

At the time of the hearing Gallegos was taking gabapentin, naproxen, Lisinopril, and duloxetine. (Tr., p. 41) During the hearing Gallegos testified approximately four to five months before the hearing he started hearing a buzzing in his ears that is always there. (Tr., p. 36) Gallegos testified his shoulder pain is better, but his foot and back pain are the same. (Tr., p. 52) Gallegos admitted he told Dr. Stoken his shoulder, back, and foot bothered him. (Tr., p. 52) Gallegos stated he believes his back restrictions are that he cannot carry, pull, or lift. (Tr., p. 41)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including causation, temporary benefits, nature and extent of disability, commencement date for permanency, rate, penalty, recovery of medical bills, recovery of the cost of an independent medical examination, and interest under Iowa Code sections 85.27, 85.33, 85.34, 85.36, 85.39, 86.13, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Given the work injury in this case occurred in March 2018, the changes to Iowa Code chapters 85, 86, and 535 apply to this case.

II. Nature of Disability

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

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an

abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties agree Gallegos sustained a work injury, but disagree on the nature and extent of his injury.

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

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

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

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

A. Injury to the Left Lower Extremity and Burns to the Face and Left Upper Extremity

Gallegos contends the work injury caused permanent disfigurement and pain to his face and left arm as a result of the burn, and to his left lower extremity. The Employer and Grinnell agree Gallegos sustained an injury to his left lower extremity and burns to his face and left arm caused by the work injury, but aver Gallegos sustained no permanent impairment caused by the work injury.

Dr. Elkins conducted an independent medical examination for the Employer and Grinnell and Dr. Stoken performed an independent medical examination for Gallegos. Neither expert assigned a permanent impairment rating for Gallegos's burns or for his left lower extremity. (Exs. 1, pp. 11-12; B, p. 25) Gallegos has not met his burden of proof he sustained permanent impairments to his left lower extremity or to his face or left arm from his burns.

B. Buzzing or Tinnitus

At hearing Gallegos alleged he sustained buzzing or tinnitus caused by the work injury. The Employer and Grinnell reject his assertion. The work injury occurred in March 2018. No medical provider has causally connected Gallegos's reported buzzing or symptoms of tinnitus to the work injury. No medical provider has opined Gallegos sustained permanent buzzing in his ears or tinnitus caused by the March 2018 work injury. Gallegos has not established he sustained buzzing in his ears or tinnitus caused by the March 2018 work injury.

C. Mental Health Condition

Treating ARNPs McDonald-Gonzalez and Kohn, Dr. Elkins, an occupational medicine physician who conducted an independent medical examination of Gallegos for the Employer and Grinnell, Dr. Johnson, a treating orthopedic surgeon who operated on Gallegos, Dr. Arias, a licensed psychologist who conducted a neuropsychological evaluation of Gallegos, and Dr. Stoken, a physiatrist who conducted an independent medical examination of Gallegos, have examined Gallegos and provided diagnoses and/or opinions on his mental health. I find the opinion of Dr. Arias, who conducted neuropsychological testing on Gallegos, to be the most persuasive.

On April 10, 2018, ARNP McDonald-Gonzalez diagnosed Gallegos with an adjustment disorder with mixed anxiety and depressed mood and she noted Gallegos was not interested in any service at that time. (JE 1, p. 2) ARNP McDonald-Gonzalez has not diagnosed Gallegos with a permanent mental health condition caused by the work injury.

On April 26, 2018, ARNP Kohn assessed Gallegos with anxiety related to trauma, and documented McDonald-Gonzalez' office was not recommending follow-up care. (JE 2, pp. 8, 10) During an appointment on May 11, 2018, Kohn documented Gallegos's affect and mood were normal, but he expressed some concern about whether his employer believed him about his injury. (JE 2, p. 15) ARNP Kohn has not diagnosed Gallegos with a permanent mental health condition caused by the work injury.

Dr. Elkins conducted three independent medical examinations of Gallegos. During the first examination on May 22, 2018, Dr. Elkins diagnosed Gallegos with an adjustment disorder, noting after the accident Gallegos initially complained of "significant anxiety-related symptoms," but "these are now much improved and he

denies current need for evaluation or treatment of any mental-health related issues. He does not feel that he will have any psychological difficulties with resuming his prior work, even when required to plug in heaters or work with/around electricity/outlet such as changing light bulbs.” (Ex. B, p. 13) During the second examination on April 18, 2019, Dr. Elkins diagnosed Gallegos with adjustment disorder versus primary mood disorder. (Ex. B, p. 18) Dr. Elkins opined Gallegos needed treatment “for the apparent adjustment/mood disorder that has likely resulted from the work incident,” and noting he advised Gallegos “to follow up with his treating provider for consideration of initiation of an anti-depressant (for pain and mood).” (Ex. B, p. 18) During his third independent medical examination of Gallegos in August 2019, Dr. Elkins documented “[t]he ongoing mental health issues were not addressed, as the specific criteria for compensability of the mental health issues under Iowa’s workers’ compensation rules is not known to this examiner.” (Ex. B, p. 25) Dr. Elkins did not diagnose Gallegos with a permanent mental health condition caused by the work injury.

On March 8, 2019, following Gallegos’s right shoulder surgery, Dr. Johnson, an orthopedic surgeon, recommended a functional capacity evaluation and noted “[a]s far as having been involved in an explosion and the PTSD, but overall, just the anxiety and weight of having to deal with this injury and the burden of going back with a not perfect body to work, I think he could benefit possibly from seeing the psychologist again.” (JE 6, p. 66) During an appointment on April 3, 2019, Dr. Johnson documented Gallegos had posttraumatic stress disorder and anxiety. (JE 6, pp. 67-68, 77-78) Dr. Johnson has not opined whether Gallegos has sustained a permanent mental health condition caused by the work injury.

Dr. Arias, a psychologist conducted a neuropsychological evaluation of Gallegos on June 12, 2019. Dr. Arias found the testing was invalid, determined Gallegos did not meet the diagnostic criteria for a separate mental disorder, and recommended no additional treatment. (Ex. A) Gallegos did not seek an opinion from any of his treating providers or another provider after Dr. Arias issued his opinion.

Dr. Stoken conducted an independent medical examination of Gallegos on July 17, 2019. (Ex. 1) Dr. Stoken’s report indicates she obtained a “Beck’s Depression Inventory score” that indicates Gallegos may need medical treatment and “Hamilton Anxiety Rating Score,” which “places him in the category of mild to moderate anxiety.” (Ex. 1, p. 10) In the impression section of her report, Dr. Stoken listed six items, including “[a]djustment disorder with mixed anxiety and depressed mood.” (Ex. 1, pp. 10-11) Dr. Stoken did not assess or diagnose Gallegos with post-traumatic stress disorder. When issuing her impairment rating, Dr. Stoken opined the explosion “caused or aggravated the patient’s injury to the left lower extremity, bilateral shoulders, bilateral upper extremities, back, body burns, PTSD, and body as a whole.” (Ex. 1, p. 2) Dr. Stoken did not opine the work injury caused or aggravated an adjustment disorder with mixed anxiety and depressed mood.

Dr. Stoken did not assign an impairment rating to Gallegos for post-traumatic stress disorder or adjustment disorder with mixed anxiety and depressed mood. (Ex. 1,

p. 12) Dr. Stoken did not opine Gallegos sustained a permanent mental health impairment or find he had not reached maximum medical improvement with respect to any mental health condition. (Ex. 1, p. 12) Dr. Stoken stated she believed Gallegos “may benefit from psychological counseling.” (Ex. 1, p. 12) She did not recommend a referral to a psychiatrist or psychologist for treatment of any mental health condition.

Dr. Arias was deposed on September 24, 2019. Dr. Arias testified the cognitive tests and validity tests his staff administered to Gallegos were in Spanish, and the cognitive tests administered to Gallegos were specifically normed on Hispanic, Spanish speaking people. (Ex. 13, p. 32) Dr. Arias testified Gallegos performed in an invalid manner within a reasonable degree of neuropsychological certainty and that he performed in a non-credible fashion. (Ex. 13, pp. 35-36)

While Dr. Arias is not familiar with the training of Dr. Johnson or Dr. Elkins, he opined he did not see that either Dr. Johnson or Dr. Elkins used any objective tests when diagnosing Gallegos with mental health conditions. (Ex. 13, p. 37) In contrast, Dr. Arias used objective tests during his examination of Gallegos. Dr. Arias also has specialized training and experience in evaluating people with post-traumatic stress disorder. (Ex. 13, p. 43) Dr. Arias has been a recent speaker on post-traumatic disorder for workers’ compensation symposiums in Kansas and Nebraska. (Ex. 13, p. 43)

Dr. Arias testified during his evaluation Gallegos did not meet the criteria for a diagnosis of post-traumatic stress disorder. (Ex. 13, p. 44) Dr. Arias reported Dr. Stoken’s impairment rating is inconsistent with her diagnosis, noting “[s]he makes reference at the end to PTSD as something as though she opined that he has PTSD, but she didn’t actually diagnose him with PTSD which is contradictory.” (Ex. 13, p. 47) Dr. Arias agreed with the statement “in fact, her assessment included was adjustment disorder with mixed anxiety and depressed mood, that’s different than PTSD, right?” (Ex. 13, p. 47) Dr. Arias opined Dr. Stoken’s report is “[o]verly inclusive and overly diagnostic in the end,” in that she “has an endorsement, apparently, that there’s PTSD when there was no actual diagnosis of PTSD given.” (Ex. 13, p. 48) Dr. Arias relayed Dr. Stoken did not administer any validity tests to discern the validity of Gallegos’s complaints, and noted the Beck Depression Inventory she administered is a subjective test that does not have a built-in validity component. (Ex. 13, pp. 46-49)

Based on the record evidence, I find Gallegos sustained a temporary mental health impairment caused by the work injury, as supported by the opinions of McDonald-Gonzalez, Dr. Elkins, and Dr. Johnson. Gallegos’s treating providers have not opined he has a permanent mental health condition. Dr. Stoken’s opinion is inconsistent and conclusory. I do not find it persuasive. I find Dr. Arias’s opinion to be the most persuasive for the reasons discussed above. Based on the foregoing, I do not find Gallegos has established he has sustained a permanent mental health impairment caused by the work injury.

D. Low Back

Dr. Elkins and Dr. Stoken provided competing opinions on whether Gallegos has sustained a permanent impairment to his lumbar spine caused by the work injury. I find Dr. Stoken's opinion to be more persuasive than Dr. Elkins's opinion on causation.

Dr. Elkins opined Gallegos falls in DRE Category I and that he has not sustained a permanent impairment. (Ex. B, p. 24) In support of his opinion, Dr. Elkins found "[t]he current complaints have not been consistently present since the time of injury. The current complaints of low back pain and right radicular symptoms is [sic] distinctly different medically than the previous back symptoms with left radicular complaints." (Ex. B, p. 24)

Dr. Stoken diagnosed Gallegos with a history of lumbar spondylosis, lumbar facet syndrome, and chronic low back pain, and opined the work injury aggravated Gallegos's back condition. (Ex. 1, pp. 10-12) Using the AMA Guides, Dr. Stoken assigned Gallegos an eight percent whole person impairment for chronic lumbar pain, finding before the work injury Gallegos was able to work full duty without restrictions or pain restricting his function. (Ex. 1, p. 12)

There is no record evidence Gallegos complained of low back symptoms or that he sought treatment for his low back before the work injury. After the explosion, which also caused a traumatic injury to his right shoulder, requiring surgery, Gallegos complained of back pain. During his appointment with Kohn on April 10, 2018, Kohn documented Gallegos was complaining of low back pain. (JE 2, p. 4) Gallegos continued to complain of low back pain to Kohn, Dr. Elkins, Dr. Nguyen, and Dr. Johnson. (See e.g., JE 2, p. 8, 13, 18; JE 6, pp. 48-49, 57, 66; Ex. B, p. 12) Based on the foregoing, I find Gallegos has established the work injury aggravated, accelerated, worsened, or "lighted up" his back condition.

E. Bilateral Shoulders and Upper Extremities

Gallegos contends he sustained permanent impairments to his bilateral shoulders and upper extremities caused by the work injury. The Employer and Grinnell aver he has only sustained a permanent impairment to his right shoulder. Drs. Elkins and Stoken provided impairment ratings in this case for the right upper extremity or shoulder. (Ex. 1, p. 11) Dr. Stoken assigned a 28% upper extremity impairment, which she converted to a 17% whole person impairment. (Ex. 1, p. 11) Dr. Elkins assigned an 8% permanent impairment for loss of range of motion, and a 10% permanent impairment due to distal clavicle excision. (Ex. B, p. 25) While Dr. Stoken's report contains errors at page 11, where she refers to the left shoulder, instead of the right in the text, under the heading "Right Upper Extremity/Shoulder Injury," I find these errors to be scrivener's errors. (Ex. 1, p. 11) Dr. Stoken's objective findings from her examination, found at Exhibit 1, page 16, clearly refer to the right shoulder.

Dr. Stoken and Dr. Elkins both assigned a 10% impairment due to distal clavicle excision, and disagree some on their range of motion findings. (Ex. 1, p. 11; Ex. B, p. 25) Dr. Elkins did not address Dr. Stoken's strength findings, or list any of his objective findings apart from forward flexion, extension, and abduction. (Ex. 1, pp. 11, 16; Ex. B, p. 25)

With respect to range of motion for the right shoulder, Dr. Stoken found Gallegos had 140 degrees for forward flexion and assigned a 3% permanent impairment, 40 degrees for extension and assigned a 1% permanent impairment, 30 degrees for adduction and assigned a 1% impairment, 130 degrees for abduction and assigned a 2% permanent impairment, 40 degrees for internal rotation and assigned a 3% permanent impairment, and 60 degrees for external rotation. (Ex. 1, p. 16) Dr. Elkins documented he found Gallegos had 140 degrees for forward flexion, 100 degrees for abduction, 40 degrees for extension, 40 degrees for adduction, and full range of motion for internal and external rotation, and he assigned a 10% total upper extremity impairment for the right shoulder. (Ex. B, p. 24) Dr. Stoken and Dr. Elkins both assigned no impairment for external rotation. Dr. Stoken assigned a 3% impairment for her finding of 40 degrees internal rotation. (Ex. 1, p. 16) While Dr. Elkins noted the results of his testing of internal rotation and external rotation were normal, he did not list the values supporting his finding in his report. (Ex. B, p. 24)

Dr. Stoken assigned a 10% impairment due to deficits in range of motion, a 6% impairment due to deficits in flexion strength, a 3% impairment due to deficits in abduction strength, a 2% impairment due to deficits in adduction strength, a 2% impairment due to deficits in internal rotation strength, and a 10% impairment due to distal clavicle excision. (Ex. 1, p. 11) Dr. Stoken attached a copy of her measurements to her report. (Ex. 1, p. 16) Dr. Elkins's report contains no findings with respect to strength. (Ex. B) Dr. Elkins did not address Dr. Stoken's strength findings in his report. (Ex. B) Dr. Elkins did not attach or discuss his measurements in his report. For this reason, I find Dr. Stoken's opinion more persuasive. Gallegos has established he sustained a permanent impairment to his right shoulder caused by the work injury.

No physician has opined Gallegos has sustained an impairment to his left shoulder caused by the work injury. I do not find Gallegos has met his burden of proof that he sustained a temporary or permanent impairment to his left shoulder.

Dr. Stoken recommended permanent restrictions of no lifting over eighteen pounds on a frequent basis, no lifting over twenty-five pounds on an occasional basis, and no lifting over thirty-five pounds on a rare basis, placing Gallegos in the light to medium category of work. (Ex. 1, p. 12) Dr. Stoken did not recommend any additional restrictions beyond lifting restrictions. Given that I found Dr. Stoken's opinions with respect to Gallegos's low back and shoulder to be the most persuasive, I adopt her restrictions as Gallegos's permanent restrictions.

III. Rate

The parties stipulated at the time of the alleged injury Gallegos was married and entitled to three exemptions, but disagree upon the rate. Gallegos avers his rate is \$610.20, and the Employer and Grinnell paid him benefits at the weekly rate of \$593.82. In their post-hearing brief, the Employer and Grinnell aver the weekly rate is actually \$592.12 and the rate of \$593.82 should stand.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. The statute defines "weekly earnings" as

gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar.

Id. The term "gross earnings" is defined as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61. Weekly earnings for employees paid on an hourly basis shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings. Id. § 85.36(6). Thus under the statute, overtime is counted hour for hour, and shift differential, vacation, and holiday pay are also included. Irregular pay is not included.

Gallegos produced his paychecks from June 11, 2017, through March 19, 2018. (Ex. 10, p. 82) Gallegos was paid straight wages of \$17.00 per hour for the first 100 hours per paycheck. (Tr., pp. 65, 100) He received overtime compensation at the rate of \$25.50 per hour for all hours exceeding 100 in a pay period. (Tr., pp. 65, 100) Under the statute, overtime is compensated hour for hour. Thus, for the eighteen weeks before the work injury, Gallegos worked the following hours, when his overtime pay is divided by \$25.50 to determine the straight hours of overtime, added to the regular

hours, multiplied by seventeen, for his gross weekly wages for determining his weekly rate, as follows:

Week Ending	Regular Pay	Overtime	Hours	Gross Pay
3/19/18	\$1,700.00	\$207.40	108.13	\$1,832.21
3/4/18	\$1,700.00	\$255.00	110	\$1,870.00
2/19/18	\$1,700.00	\$268.60	110.53	\$1,879.01
2/5/18	\$1,673.37	\$0	98.43	\$1,673.37
1/22/18	\$1,700.00	\$231.62	109.08	\$1,854.36
1/7/18	\$ 329.00	\$0	19.35	\$ 329.00
12/11/17	\$ 804.38	\$0	47.32	\$ 804.38
11/27/17	\$1,700.00	\$306.85	112.03	\$1,904.51
11/12/17	\$1,700.00	\$184.45	107.23	\$1,822.91

Looking at Gallegos's earnings from June 11, 2017 through March 19, 2018, the records show that during holiday weeks, his wages were substantially less than normal. (Ex. 10, p. 82) Gallegos typically worked at least 100 hours. I find the weeks ending December 11, 2017, and January 7, 2018, are not representative. Gallegos did work less than 100 hours occasionally during non-holiday weeks, such as the week ending February 5, 2018. (Ex. 10, p. 82) I find this week representative. Taking the above pay periods which are representative, totaling \$12,836.37, divided by fourteen, results in gross weekly wages of \$916.88, which is rounded to \$917.00. Under the ratebook in place at the time of the work injury, Gallegos's weekly rate is \$596.64.¹

IV. Extent of Disability

As noted above, I found Gallegos sustained permanent impairments to his shoulder and back. At the time of the hearing he was not working. Therefore, under the new provisions of the statute, the extent of his disability is determined under an industrial analysis. (Iowa Code § 85.34(2)(v) (2018). "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. V. Pease, 807 N.W.2d 839, 852 (Iowa 2011).

¹ <http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/2017-2018ratebook.pdf>.

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

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability begins at the termination of the healing period. Iowa Code § 85.34(2). Compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016). The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

Gallegos contends he is permanently and totally disabled under the statute or alternatively, under the common law odd-lot doctrine. The Employer and Grinnell reject his assertion.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id. The odd-lot doctrine applies when the claimant has established the claimant has sustained something less than 100 percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." IBP, Inc., 604 N.W.2d at 633.

As discussed above, I adopted Dr. Stoken's permanent restrictions. Dr. Stoken recommended permanent restrictions of no lifting over eighteen pounds on a frequent basis, no lifting over twenty-five pounds on an occasional basis, and no lifting over

thirty-five pounds on a rare basis. (Ex. 1, p. 12) She did not recommend any additional restrictions beyond lifting restrictions. (Ex. 1)

Gallegos has limited education. He has not graduated from high school. At the time of the hearing he was forty-eight. While Gallegos's education is limited, I observed he was articulate at hearing and he followed questions posed of him clearly while testifying. And while Gallegos does not speak English fluently, he passed a driver's license examination in English. Based on my observations of Gallegos at hearing, I believe Gallegos is capable of retraining.

The Employer and Grinnell did not obtain a vocational evaluation in this case. Johnson performed a vocational evaluation for Gallegos in July 2019 and issued his report in August 2019. (Ex. 3) In reaching his conclusions, Johnson relied on the reports from Dr. Stoken, and the second functional capacity evaluation report, which no physician has adopted. Johnson found the work Gallegos had performed throughout his life has been in the medium to heavy exertional levels and noted Gallegos's work restrictions place him in the light exertion level of work. (Ex. 3, p. 34) His findings do not mirror those of Dr. Stoken. Johnson noted he had identified six job openings that fall within Gallegos's permanent restrictions, including grounds crew, earning \$13.00 per hour, groundskeeper/gardener, earning \$11.00 to \$14.00 per hour, groundskeeper with an unknown salary, janitorial worker, earning \$10.50 per hour, dishwasher, earning \$10.50 per hour, and custodian, earning \$9.00 per hour. (Ex. 3, p. 37)

I do not find Gallegos is motivated to work. At the time of the hearing Gallegos had not applied for any jobs since his work injury. Based on all of the evidence presented at hearing I find Gallegos has sustained a sixty percent industrial disability.

Alternatively, Gallegos contends he is permanently and totally disabled under the odd-lot doctrine. As discussed above, at the time of the hearing Gallegos had not applied for any jobs since his work injury. Gallegos did not present any evidence of the job market in the locality where he lives. I do not find he has established he is permanently and totally disabled under the odd-lot doctrine.

I find the commencement date for permanency is July 30, 2019, the date of Dr. Stoken's report opining Gallegos had reached maximum medical improvement and assigning Gallegos a permanent impairment rating. Iowa Code § 85.34 (2018) (compensation for permanent partial disability benefits commences "when it is medically indicated that maximum medical improvement from the injury has been reached and the extent of loss or percentage of permanent impairment can be determined" under the AMA Guides). Gallegos is awarded 300 weeks of permanent partial disability benefits, at the rate of \$596.64 per week, commencing on July 30, 2019.

V. Temporary Benefits

Gallegos alleges he is entitled to temporary partial disability benefits for the periods he was working and earning less than his normal wage of \$17.00 per hour for the Employer from the date of the work injury through July 29, 2019.

Iowa Code section 85.33 (2018) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018). The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. As discussed above, Gallegos has sustained a permanent impairment, therefore any temporary benefits he is entitled to are healing period benefits.

At hearing Gallegos presented a summary document, Exhibit 11, page 83, alleging he was underpaid temporary partial disability benefits for twenty-eight weeks while he was working for Mission of Messiah from January 21, 2019, through August 5, 2019. Gallegos did not attach any wage records to his summary. In his post-hearing brief Gallegos did not address the dates he believes he was underpaid.

At hearing Gallegos admitted the Employer sent him a separate check from the insurance company when he was working for Mission of Messiah. (Tr., p. 62) Gallegos also admitted there was a time when the Employer stopped paying him wages and he only received a weekly check from Grinnell at the rate he was paid at the time of the hearing. (Tr., p. 63) At hearing Shelly Krieg testified the Employer initially paid

Gallegos \$7.50 per hour when he worked at Mission of Messiah. (Tr., p. 97) After the Employer stopped paying wages to Gallegos for the charitable, alternative, light-duty assignment at Mission of Messiah, on March 18, 2019, Grinnell paid Gallegos temporary total disability or healing period benefits commencing on March 18, 2019. This is reflected through Exhibit G, pages 40 through 43. The Employer and Grinnell then paid Gallegos permanent partial disability benefits starting on July 29, 2019. (Ex. G, p. 42) Gallegos has not established he is entitled to \$4,828.60 in temporary partial disability benefits from January 21, 2019 through August 5, 2019. Given the rate calculation above, Gallegos was underpaid temporary benefits of \$2.82 per week. Gallegos is entitled to temporary benefits at the correct rate for the weeks set forth in Exhibit G.

VI. Medical Bills

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

While the employer retains the right to choose the employee's medical care under the statute, the employee is not prohibited from seeking his or her own care when the employer denies compensability for the injury or the employee "abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Brewer Strong v. HNI Corp., 913 N.W.2d 235, 248 (Iowa 2018) (quoting Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010)). In Brewer-Strong and Gwinn, the court held the employer's duty to furnish reasonable medical care includes unauthorized care if the employee is able to prove "by a preponderance of the evidence that such care was reasonable and beneficial" under the totality of the circumstances. Id. (quoting Gwinn, 779 N.W.2d at 206). The court further held "unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

Gallegos has outstanding balances of \$1,600.00 from Dunes Anesthesia, P.C. from February 13, 2019, and \$225.00 from Family Care of Siouxland dated September 5, 2019. (Ex. 9) The parties did not address medical bills in their post-hearing briefs.

The September 5, 2019 appointment is for anxiety and depression. As analyzed above, I found Gallegos failed to establish he has sustained a permanent mental health impairment caused by the work injury. The Employer and Grinnell are not responsible for the September 5, 2019 bill from Family Health of Siouxland. No information was produced concerning the outstanding \$1,600.00 bill from Dunes Anesthesia, P.C. The Employer and Grinnell are not responsible for the bill, but remain responsible for all causally related medical bills and treatment.

VII. Penalty Benefits

Gallegos seeks an award of penalty benefits for a delay in paying temporary partial disability benefits. The Employer and Grinnell aver no penalty benefits should be awarded.

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

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

Benefits must be paid beginning on the eleventh day after the injury, and “each week thereafter during the period for which compensation is payable, and if not paid when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

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

As analyzed above, I did not find Gallegos established he was underpaid temporary partial disability benefits. Gallegos received temporary benefits at the weekly rate of \$593.82. The correct weekly rate is \$596.64. The exhibits do not demonstrate Gallegos challenged the rate calculation and that the Employer and Grinnell ignored his challenge. As analyzed above, neither party correctly determined the rate in this case. I decline to award penalty benefits to Gallegos in this case.

VIII. Independent Medical Examination

Gallegos seeks to recover the \$3,800.00 cost of Dr. Stoken’s independent medical examination. The Employer and Grinnell aver Gallegos is not entitled to recover the cost of the independent medical examination under Iowa Code section 85.39 because no impairment rating had been issued before Dr. Stoken conducted her independent medical examination.

After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39 (2018). If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee “shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee’s own choice” Id. Dr. Stoken conducted an independent medical examination for Gallegos on June

12, 2019, and issued her report on July 25, 2019. Dr. Elkins did not issue an impairment rating until August 27, 2019. No physician provided an impairment rating before Dr. Stoken provided her rating in this case. Gallegos is not entitled to recover the cost of Dr. Stoken's independent medical examination under Iowa Code section 85.39.

IX. Costs

Gallegos seeks to recover \$100.00 for the filing fee, \$95.32 for service of a witness subpoena on for David Krieg, \$220.00 for roundtrip mileage for Krieg, \$35.00 for Krieg's witness fee, \$3,800.00 for Dr. Stoken's independent medical examination and report, \$992.00 for the functional capacity evaluation conducted by WorkWell, \$1,750.00 for the vocational evaluation and report, \$3,000.00 for the deposition of Dr. Arias, and \$499.24 for the transcript of Dr. Arias's deposition. (Exs. 12-13) The Employer and Grinnell aver Gallegos is not entitled to recover the costs he seeks.

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

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

A. Filing Fee and Deposition Transcript

The administrative rule expressly allows for the recovery of the filing fee and deposition transcript. 876 IAC 4.33(6). Using my discretion, I find Gallegos is entitled to recover the \$100.00 filing fee and the \$499.00 fee for the transcript.

B. Subpoena, Mileage, and Witness Fee for David Krieg and Witness Fee for Dr. Arias

Gallegos seeks to recover \$220.00 in mileage for Krieg, \$35.00 for Krieg's witness fee, and \$95.32 for service of a witness subpoena on David Krieg to compel him to attend the arbitration hearing. The administrative rule expressly allows for the recovery of the cost of service of subpoenas and for witness fees and expenses as

provided in Iowa Code section 622.69, which pertains to lay witnesses and Iowa Code section 622.72, which pertains to expert witnesses. Id.

1. Fees for David Krieg's Appearance at Hearing

David Krieg was not designated as an expert witness, and thus, the provisions of Iowa Code section 622.69 apply. Iowa Code section 622.69 provides, in part, "[w]itnesses shall receive ten dollars for each full day's attendance, and five dollars for each attendance less than a full day, and mileage expenses pursuant to section 602.1509 for each mile actually traveled." No evidence was presented that the mileage paid exceeded the actual mileage David Krieg drove roundtrip to the hearing.

Under the administrative rules and the statute, Gallegos is entitled to recover \$10.00 for the witness fee, \$220.00 for mileage, and \$95.32 for service of the subpoena. Iowa Code § 622.69; 876 IAC 4.33(6).

2. Fee for Dr. Arias's Deposition

Gallegos seeks to recover the \$3,000.00 deposition witness fee he incurred to take the deposition of Dr. Arias. As noted above, the administrative rule allows for the recovery of expert witness fees in accordance with Iowa Code section 622.72. 876 IAC 4.33(6). Iowa Code section 622.72, provides,

[w]itnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed one hundred fifty dollars per day while so employed.

The statute does not allow for recovery of a fee exceeding \$150.00. Gallegos is entitled to recover \$150.00 for Dr. Arias's expert witness fee.

C. Dr. Stoken's Examination and Report

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

[w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Thus, under Young, Gallegos is not entitled to recover the cost of Dr. Stoken's examination under rule 876 Iowa Administrative Code 4.33. Dr. Stoken's bill is itemized. Dr. Stoken billed \$1,400.00 for her examination and \$2,400.00 for her report. (Ex. 12, p. 85) While the Employer and Grinnell aver Dr. Stoken's bill is unreasonable, they have presented no documentary evidence supporting their bare assertion. Using my discretion, I find Gallegos is entitled to recover the \$2,400.00 cost of Dr. Stoken's report.

D. Reports

Gallegos also seeks to recover the \$1,750.00 cost of the vocational evaluation and report, and the \$992.00 cost of the functional capacity evaluation. (Ex. 12, pp. 88-91) The administrative rule only allows for the recovery of the reasonable cost of two doctors' or practitioners' reports. Given Gallegos was awarded the cost of Dr. Stoken's report, he is only entitled to recover the cost of one additional report under the administrative rule. 876 IAC 4.33.

In the case of Drake v. Cedar Rapids Cmty. Sch. Dist., File No. 5051095 (Remand Dec. Apr. 10, 2019), the Iowa District Court for Polk County remanded the matter to Workers' Compensation Commissioner Joseph Cortese to determine whether the claimant was entitled to recover the cost of a vocational assessment and report under rule 876 Iowa Administrative Code 4.33. Commissioner Cortese noted the preparation of a vocational expert report is a cost that can be taxable. The district court found the agency erred in concluding it was precluded by law from taxing the full cost of the vocational assessment and report under Young. The district court held the decision of whether to tax the vocational assessment and report was within the discretion of the agency. Commissioner Cortese noted based on the district court's remand decision, the Division of Workers' Compensation is not bound by Young, in determining costs under 876 Iowa Administrative Code 4.33 pertaining to vocational expert assessments and reports and the taxing of a vocational assessment and report is within the discretion of the agency. As to the merits of the case, Commissioner Cortese found the arbitration decision gave little weight to the vocational expert's opinions, and awarded the \$390.00 cost of the report only. Unlike that case, I found the report beneficial. Using my discretion, I find Gallegos is entitled to recover the \$1,750.00 cost of the vocational assessment and report. I decline to award the cost of the functional capacity evaluation.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant three hundred (300) weeks of permanent partial disability benefits at the weekly rate of five hundred ninety-six and 64/100 dollars (\$596.64), commencing on July 30, 2019.

Based on an incorrect rate calculation, the claimant was underpaid two and 82/100 dollars (\$2.82) in healing period benefits per week. Defendants shall pay the claimant an additional two and 82/100 dollars (\$2.82) per week for all healing period benefits set forth in Exhibit G.


Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall receive a credit for all benefits paid to date.

Defendants shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, four hundred ninety-nine and 00/100 dollars (\$499.00) for the deposition transcript, ten and 00/100 dollars (\$10.00) for the witness fee, two hundred twenty and 00/100 dollars (\$220.00) for witness mileage, ninety-five and 32/100 dollars (\$95.32) for service of the subpoena, one hundred fifty and 00/100 dollars (\$150.00) for the expert witness fee, two thousand four hundred and 00/100 dollars (\$2,400.00) for Dr. Stoken's report, and one thousand seven hundred fifty and 00/100 dollars (\$1,750.00) for the vocational evaluation and report.

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

Signed and filed this 20th day of February, 2020.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Stephen Spencer (via WCES)
Tom Drew (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.