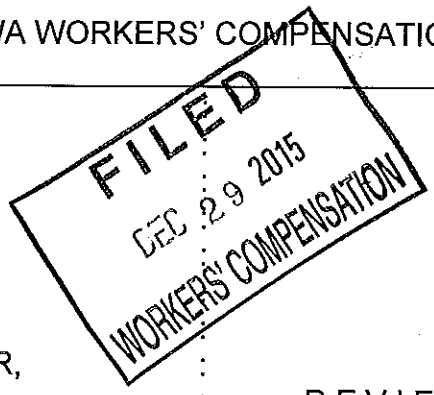
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DANTE TORIELLO,

Claimant,

vs.

MERCY MEDICAL CENTER,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5029653

REVIEW-REOPENING

DECISION

Head Note Nos.: 1802, 1803, 2905

STATEMENT OF THE CASE

Claimant, Dante Toriello, filed a petition in review-reopening seeking workers' compensation benefits from Mercy Medical Center, employer, and Indemnity Insurance Company of North America, insurance carrier, both as defendants, as a result of a stipulated injury sustained on August 25, 2006. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on October 20, 2014, in Des Moines, Iowa. A supplemental hearing was held on December 15, 2014, at which time the oral record was concluded. The record in this case consists of claimant's exhibits 1 through 21, defendants' exhibits A through G, and the testimony of the claimant and Bruce Scott Mailey. The parties submitted post-hearing briefs, the matter being fully submitted on February 23, 2015.

ISSUES

The parties submitted the following issues for determination:

1. Whether there has been a change of condition since the original arbitration hearing on May 10, 2010, that might entitle claimant to additional disability benefits and, if so;

2. Whether claimant is entitled to temporary total disability or healing period benefits from August 12, 2011 through February 12, 2012;

3. The extent of claimant's industrial disability;

4. Whether claimant is entitled to permanent total disability benefits as an odd-lot worker;

5. Whether claimant is entitled to payment of claimed medical mileage;

6. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13; and if so, how much; and

7. Specific taxation of costs.

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

FINDINGS OF FACT

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

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

Claimant was 66 years of age at the time of hearing. (Hearing Transcript page 76) He resides in Des Moines, Iowa with his wife. (Exhibit 14, p. 408) Claimant graduated from both high school and undergraduate school before obtaining his medical degree as a doctor of osteopathy from the institution now known as Des Moines University. (Hearing Tr. pp. 76-77) Claimant then served as an osteopathic physician and surgeon for 35 years, during which time he earned a board certification in family medicine. (Hearing Tr. p. 77; Supplemental Hearing Tr. p. 34)

On August 25, 2006, while in the employ of defendant-employer, claimant suffered a work-related injury. Claimant testified he suffered a snap in his neck while performing an osteopathic manipulation. (Ex. 14, p. 409) The injury formed the basis of a claim for workers' compensation benefits, which proceeded to an arbitration hearing on May 10, 2010 before a distinct deputy workers' compensation commissioner. The presiding deputy issued an arbitration decision on January 20, 2011. The deputy noted diagnoses of cervical spondylosis and cervical radiculopathy, with an impairment rating of 5 percent whole person by Cassim Igram, M.D. The deputy found claimant to be a well-educated and intelligent professional, with the ability to function within the medium work level. The deputy also noted claimant possessed the skills and licensing to practice medicine, which allowed claimant to continue earning significant income. Although claimant had then limited the procedures he performed, claimant remained capable of practicing medicine. The deputy found claimant sustained an industrial disability of 45 percent. The arbitration decision represents final agency action.

Following the arbitration hearing, claimant complained of worsening symptoms. (Ex. 14, pp. 411-412) Claimant testified he confided in his personal physician, Dr. Carol Horner, that his symptoms had flared, and he was unable to get his symptoms under control. (Hearing Tr. pp. 88-89)

On June 16, 2010, claimant presented to neurologist, Irving Wolfe, D.O., a physician of his own choosing. (Hearing Tr. p. 90; Ex. 4, p. 72) Claimant requested Dr. Wolfe complete paperwork in connection with a disability claim filed with UNUM. (Ex. 4, pp. 71-72) Dr. Wolfe assessed cervical spondylosis with bulging cervical discs/herniations at the C5-6 and C6-7 levels, with cervical neuritis on the right, and T2-T3 thoracic disc disease. Dr. Wolfe recommended claimant work within the restrictions set forth in prior functional capacity evaluations, including that claimant should not perform osteopathic manipulation and office surgical procedures, and should limit his performance of acupuncture treatments. (Ex. 4, p. 72) Additional restrictions included no lifting more than 10 pounds, no lifting from floor to waist, no work above shoulder level, and no activities requiring continuous bending at the neck or trunk. Dr. Wolfe also noted claimant's ability to produce written SOAP notes with his dominant right hand should be limited due to resultant pain and paresthesias related to overuse. (Ex. 4, p. 74) On that date, Dr. Wolfe also performed a medical acupuncture treatment upon claimant. (Ex. 4, p. 72)

Claimant returned to Dr. Wolfe for medical acupuncture treatments on July 7, 2010, July 14, 2010, July 28, 2010, and August 13, 2010. (Ex. 4, pp. 75-78) Dr. Wolfe also performed an osteopathic manipulation at the August 13, 2010 appointment. (Ex. 4, pp. 78, 80) At an appointment on August 27, 2010, Dr. Wolfe performed an acupuncture treatment and osteopathic manipulation. Dr. Wolfe also recommended claimant consider decreasing his work hours and/or the number of patients he treated per day. (Ex. 4, pp. 78, 80-81)

At the referral of claimant's personal physician, Dr. Horner, on August 18, 2010, claimant presented to rheumatologist, Lawrence Rettenmaier, M.D. (Ex. 5, p. 184; Hearing Tr. p. 89) Claimant expressed complaints of neck, arm, and scapular pain. Dr. Rettenmaier described claimant as "struggling terribly with pain issues." Dr. Rettenmaier provided refills of Valium and hydrocodone, and indicated he would be "supportive of complete disability" if claimant elected to proceed in that manner. (Ex. 5, p. 184)

Dr. Wolfe performed osteopathic manipulation and acupuncture on September 10 and September 22, 2010. (Ex. 4, pp. 82, 85)

Due to worsening symptoms, claimant presented to Mercy Employee Health and was directed to JoEllen Heims, D.O. (Hearing Tr. p. 91) Dr. Heims evaluated claimant on September 17, 2010 and assessed chronic neck pain with an acute exacerbation. She recommended claimant utilize his existing prescriptions and undergo a repeat MRI. Dr. Heims also recommended claimant return to Dana Simon, M.D. for injections after completion of the MRI. (Ex. 7, p. 219)

Claimant underwent cervical spine MRI on September 20, 2010. The radiologist read the results as revealing no change from the comparison May 8, 2008 MRI, with moderately advanced disc degeneration at C5-6 with disc bulging and spur formation at vertebral endplates causing mild central canal narrowing without critical stenosis and mild neural foramina narrowing, greater on the right, and more advanced disc degeneration at C6-7 with asymmetric right-sided disc space margin spur formation which led to neural foraminal stenosis on the right side and potentially causing irritation of the exiting right C7 nerve root. (Ex. 12, p. 394)

On October 6, 2010, at the referral of Dr. Heims, claimant presented to neurosurgeon, Chris Karas, M.D., of Mercy Brain and Spine Center. (Ex. 6, p. 211; Hearing Tr. p. 92) Following evaluation of claimant, Dr. Karas opined claimant's work restrictions were very reasonable. He explained there was an increased risk to claimant and potentially to his patients if he were to perform surgical procedures, manipulations, or acupuncture treatments. (Ex. 6, p. 211)

Dr. Karas opined claimant had "extensively exhausted" conservative treatment. Dr. Karas stated physical therapy is designed to slow the progress of degeneration, but would not reverse claimant's condition. Similarly, Dr. Karas opined oral medications and interventional pain procedures would also not reverse his condition, but were designed to alleviate symptomatology and improve function. (Ex. 6, p. 211) With respect to a course of care, Dr. Karas opined:

> Unfortunately after four years of nerve root compression, it is concerning that he may develop a chronic radiculopathy. With as many exacerbations as he has had and the increasing intensity and frequency of his exacerbations even with surgical decompression, it is difficult to say whether his nerves at this point would heal entirely.
>
> Nonetheless, I do agree with Dr. Piper that should he continue to fail conservative measures at this point surgery continues to be an option for him. In his case, I would recommend at least an anterior cervical diskectomy with fixation and fusion at C6-7. This appears to be his most symptomatic level. He has a C7 radiculopathy, and that would be from the level of C6-7. Unfortunately, he has an adjacent severely degenerative disk at C5-6. My concern is that with a fusion at C6-7 alone the risk for adjacent level disease and possible need for surgery in the future is high. I would, therefore, recommend a C5-6 and C6-7 anterior cervical diskectomy with fixation and fusion to address not only his radiculopathy but certainly a part of his neck pain. He understands that it is difficult to predict the amount of neck pain relief you can get with fixation and fusion. These decompressions are meant more for alleviation of nerve root compression. Many times this can help with the neck pain as well.
>
> Unfortunately again since [claimant] has been dealing [sic] this for so long, it is difficult to predict how at [sic] two level fixation and fusion would

> affect his neck pain as well as his radiculopathy. Even after the nerve is decompressed and given a good environment to heal, it may not heal 100 percent at this point.

(Ex. 6, p. 212)

Dr. Karas recommended surgery as an option for claimant. Dr. Karas explained to claimant that continuation of work duties, even limited ones, may cause continued injury to the nerve root and result in further risk for chronic radiculopathy, even despite decompression. Dr. Karas opined surgery could not fix a nerve root and further treatment options could be determined after the decompression was completed. Dr. Karas further explained the goal of surgery would be to prevent further worsening, but also expressed belief doing so may "significantly decrease" the intensity and frequency of exacerbations. (Ex. 6, p. 212)

On October 8, 2010, at the referral of Dr. Heims, claimant presented to pain management physician, Dr. Simon. (Hearing Tr. p. 92; Ex. 2, p. 8) At that time, claimant complained of pain in neck, stretching into right arm and four digits. (Ex. 2, p. 8) Dr. Simon performed a cervical epidural steroid injection. He cautioned, however, that epidural steroids rarely provided relief of neck pain, and the primary purpose of the injection were for treatment of claimant's right upper extremity pain. Dr. Simon also expressed belief the prospects for long-term benefit as a result of the injection was limited given the duration and progression of the condition with two-level cervical involvement. (Ex. 2, p. 9) Dr. Simon continued:

> Notes from Dr. Karas's office not available today and surgery is apparently anticipated sometime in the future. I would agree that this may be the most appropriate longer term action, unless ESI eliminates significant pain for a long duration, which I believe only has <40% chance of occurrence. ESI at this time may hopefully provide immediate and shorter term relief and primarily for radicular pain component.

(Ex. 2, p. 9)

Following a conversation with claimant on October 20, 2010, Dr. Rettenmaier ordered cervical spine x-rays with flexion and extension to evaluate for instability. (Ex. 5, p. 187) Claimant underwent said x-rays on October 21, 2010. The radiologist read the films as revealing degenerative disc disease at C5-C6 and C6-C7 which had progressed as compared to the 2006 study. (Ex. 5, p. 188)

Dr. Wolfe performed osteopathic manipulation and acupuncture on October 22 and October 29, 2010. (Ex. 4, pp. 82, 85, 87, 89) At the October 29, 2010 appointment, Dr. Wolfe recommended additional work restrictions for claimant; specifically, that claimant not perform acupuncture treatments, diminish the amount of time spent writing charts and completing paperwork regarding his practice, and not

perform activities which required claimant to flex at the upper thoracic and cervical region. (Ex. 4, p. 89)

On November 18, 2010, following a conversation with claimant, Dr. Rettenmaier opined it was not clear that surgery "is the answer." He indicated he would be supportive of a disability claim. Dr. Rettenmaier opined claimant's symptoms were irritated by work duties, but his duties were not causing additional long-term damage. (Ex. 5, p. 189)

Claimant returned to Dr. Simon on November 19, 2010. Claimant reported 90 percent relief of symptoms for two weeks, but a return to baseline symptoms within four to six weeks. Dr. Simon performed trigger point injections to the right rhomboid muscles and opined claimant's work was causing an exacerbation and persistence of pain. Dr. Simon recommended a second opinion on claimant's care by a physician not already involved in claimant's claim, such as at University of Iowa or Mayo Clinic. (Ex. 2, pp. 13-14)

On November 24, 2010, Dr. Wolfe performed an acupuncture treatment. (Ex. 4, p. 90)

On November 29, 2010, claimant presented for neurosurgical consultation with John Piper, M.D. Claimant reported constant pain since August 2010, specifically right shoulder pain radiating down his arm; pain in the neck; spasms of the neck and right shoulder; numbness and tingling of the right third, fourth, and fifth fingers; and right arm and hand weakness. (Ex. 1, p. 1) Dr. Piper indicated he suspected claimant's complaints reflected a slight variant of a typical radicular pattern for his disc problems. To be safe, Dr. Piper indicated claimant could undergo an EMG/NCV. In the event the EMG/NCV was negative, Dr. Piper opined claimant's symptoms sounded "pretty typical for radiculitis." If the condition flared and then quieted back down, Dr. Piper opined conservative care was reasonable. However, if the flare did not quiet, Dr. Piper recommended consideration of surgical fixation. (Ex. 1, p. 3) Dr. Piper opined:

> I think whether or not surgery is undertaken would be based entirely on the degree of symptoms he has. If the symptoms are minimal or fluctuate on and off, certainly it is something we could try to put off. If they become more persistent and aggravating to him, certainly surgery is something to consider.
>
> [Claimant] went into a description of an encounter that he had for two hours at Mercy Medical Center with one of the neurosurgeons there discussing how he should not do any activities at all that are involved in his work. I think this is a little bit unreasonable if someone has a treatable medical problem. I [sic] way I would look at it is, that if someone has mild flare-ups of symptoms but they quiet down, conservative measures would be reasonable. If the symptoms persist, we could always look into surgical interventions since the results of surgery for this type of problem

> are excellent. Typically the normal patient would return to normal activities without restrictions after such an intervention.

(Ex. 1, p. 3)

Dr. Simon performed repeat trigger point injections on December 1, 2010. (Ex. 2, p. 16)

On December 15, 2010, Dr. Wolfe performed osteopathic manipulation and acupuncture. On this date, Dr. Wolfe raised the possibility of removing claimant from work for four to six weeks "while he undergoes physical therapy to further evaluate to what extent the movements that are required at his work are playing a role" in claimant's continued symptomatology. (Ex. 4, p. 93)

Claimant returned to Dr. Wolfe on December 29, 2010. Dr. Wolfe performed an acupuncture treatment. He also reiterated his recommendation that claimant be off work for four to six weeks to evaluate the role of claimant's work in his continued symptomatology. (Ex. 4, p. 95)

On January 14, 2011, claimant returned to Dr. Simon. Claimant indicated he desired some confirmation regarding the necessity of a multi-level fusion; Dr. Simon recommended another neurosurgical opinion at the University of Iowa or Mayo Clinic. Dependent upon receipt of such an opinion, Dr. Simon opined claimant may need to consider "respite or necessary off time from work as work causes significant exacerbation of his pain." (Ex. 2, p. 19)

Claimant received an acupuncture treatment from Dr. Wolfe on January 28, 2011. Dr. Wolfe again reiterated his recommendation claimant be off work for four to six weeks. (Ex. 4, p. 97)

On February 1, 2011, claimant returned to Dr. Rettenmaier. On that date, Dr. Rettenmaier expressed belief surgery was "probably the right answer at this point" due to failed medical management. Claimant expressed feeling progressively disabled at work; Dr. Rettenmaier agreed claimant was "disabled." (Ex. 5, p. 190) With respect to treatment, Dr. Rettenmaier offered refills of prescriptions as needed. Otherwise, Dr. Rettenmaier indicated he had little to offer outside of encouraging claimant to consider surgery, "especially if offered and they are all in agreement." (Ex. 5, p. 191) Dr. Rettenmaier elaborated:

> I indicated given his long term duration of symptoms, I am inclined to believe that probably surgery is going to be the most appropriate next step. I think he has failed conservative management. I indicated that of course the problems always boils down to the issues of axial versus radicular. We know surgical procedures work better for the radicular and not as clearly for the axial, but many patients do get benefit for the axial complaints. I indicated since the radicular complaints have been more

> persistent, I indicated that would be fine to see the neurosurgeon. I indicated he could probably go back to the neurosurgeon here [at Mercy], too, because when he saw the neurosurgeon his radicular complaints were not as noticeable. I indicated that I think if he sees the neurosurgeon in Iowa City and they recommend surgery, I think besides just making sure they agree on what levels, i.e., the 2 levels that have already been proposed and that they are in agreement. I think consideration for surgery, either that or living with the problem. I do think his activity level play prominent roles with his "symptoms flaring up". I indicated that it is not damaging him permanently, but it just aggravates his symptoms. I indicated certainly changing his work situation, but when you think about long term, the anatomy looks like he has got enough changes. It is hard to believe that just changing his activity level because sooner or later I would expect activities of any nature would probably aggravate his symptoms the way it has gone over time.

(Ex. 5, p. 191)

Dr. Karas authored a letter setting forth his opinions regarding claimant's care options dated February 24, 2011. Dr. Karas indicated he evaluated claimant for a surgical opinion and opined a 2-level anterior cervical discectomy with fixation and fusion (ACDF) would be reasonable. He explained the goal of surgery would be to address the radiculopathy and would not reverse the existing degenerative disease. Dr. Karas opined:

> Unfortunately, after this long of a period with a radiculopathy, I feel that surgery at this point may not entirely heal his symptoms. He may have some form of chronic radiculopathy even once the pressure is relieved from the nerve root.

(Ex. 6, p. 214)

Dr. Karas opined claimant had suffered from continued exacerbations of his condition as a result of work-related activities and accordingly, should not perform his typical work duties. Following surgery, Dr. Karas expressed belief claimant would not "be able to go back to work" because the radiculopathy would heal unpredictably. He explained the goal of surgery would be to prevent further worsening due to compression of the nerve, but may not result in improvement of the radiculopathy itself. (Ex. 2, p. 214) He indicated a second opinion on claimant's treatment would be reasonable. (Ex. 2, p. 215)

On March 4, 2011, claimant returned to Dr. Wolfe and reported increased pain in the neck with radiation into the right arm after claimant felt a pop in his neck a few weeks prior while making the bed. Dr. Wolfe performed an acupuncture treatment and recommended a repeat cervical spine MRI. (Ex. 4, p. 99)

On March 14, 2011, claimant presented to Patrick Hitchon, M.D. at University of Iowa Hospitals and Clinics (UIHC). Following examination, Dr. Hitchon set forth three potential treatment plans: (1) wear a collar and use anti-inflammatories and a TENS unit for pain control; (2) pain clinic evaluation for potential epidural injection; and if (1) and/or (2) did not provide relief, (3) surgery consisting of fusion at C5 to C6 to C7. (Ex. 8, p. 222)

Claimant returned to Dr. Simon on March 18, 2011. Claimant reported evaluation with Dr. Hitchon and indicated Dr. Hitchon recommended claimant "live with his pain or have surgery on it." (Ex. 2, p. 20) Following examination, Dr. Simon opined:

> This patient needs to be off work, pending receipt of report from the University of Iowa Dr. Hitchon, in my opinion.
>
> I feel that his work is aggravating the continued problems and that Dr. Karas has previously expressed this opinion.
>
> Pending determination of the incidence of success in relief of pain with any interventional surgery for radicular complaints, the patient may in the future consider surgery by a neurosurgical or other consultant of his choice.
>
> Mixture of symptoms and signs makes making a single recommendation rather difficult. For example, rarely does he now complain primarily of shooting pain down the right upper extremity, although he has had such in the past. The success of a multi-level fusion is also variable, and this may also indeed influence the desire of the patient to have any surgery at this time.
>
> If desired in the future, a trial of medial branch blocks to the cervical spine may be considered, although again this would be highly unlikely to address mid and distal arm pain and paresthesiae noted in the past.
>
> If on the other hand, more radicular symptoms persist repeat ESI might be considered instead or in sequence.
>
> However multiple procedures have been done in the past and have only been of temporary help, and aggravated by work in my opinion.

(Ex. 2, p. 21)

On April 27, 2011, at the request of disability insurance carrier, UNUM, claimant presented for evaluation with neurosurgeon, Darin Smith, M.D. Dr. Smith opined claimant's cervical films, CT, and MRI of September 2010 demonstrated progressive and severe right foraminal stenosis at C5-6 and C6-7. He opined claimant had failed conservative treatments, and further conservative care would be "fruitless." As symptoms had continued to progress despite reduction of claimant's activities, Dr. Smith

opined further reduction of activities would also "seem to be fruitless." (Ex. 9, p. 226) With respect to treatment, Dr. Smith opined:

> It appears obvious to me that cervical decompression and fusion should be performed at C5-6-7 to resolve his radiculopathy and prevent further progression which is inevitable if this is not corrected. This should be done without delay if any hope of resolution is to be had.

(Ex. 9, p. 226)

Dr. Smith authored a letter to UNUM dated May 3, 2011. By his letter, Dr. Smith opined claimant had deteriorated since the January 2009 FCE, so a repeat FCE would more clearly demonstrate claimant's limitations. He recommended restrictions of a maximum lift of 10 to 20 pounds occasionally with the right hand, and occasional neck rotation, flexion and extension. Dr. Smith further opined the loss of sensation of claimant's right upper extremity would make performance of medical procedures "dangerous." Simply put, Dr. Smith opined claimant incapable of performing his job as a physician. Dr. Smith also opined claimant's restrictions would be permanent unless claimant underwent surgical decompression, which Dr. Smith opined "would have a reasonable chance of reversing the... neurological deficits and should allow [claimant] to perform all job demands without limitations." (Ex. 9, p. 227)

Claimant testified he continued to work for defendant-employer, but his duties affected his symptomatology. At times it became difficult for claimant to dress in his scrubs. Once he arrived at work, caring for patients impacted his symptoms, as his duties required repetitious use of his right arm in performing office work, charting, examinations, and acupuncture. Accordingly, he scheduled 15 or 20-minute breaks between patients and cut acupuncture appointments to no more than three or four per day. (Hearing Tr. pp. 105-106) As a result, claimant testified instead of seeing 45 to 60 patients per day, he began to see 8 to 10 patients. He also would frequently reschedule his acupuncture patients due to his symptomatology. (Supplemental Hearing Tr. p. 42)

On May 4, 2011, claimant returned to Dr. Wolfe. On that date, Dr. Wolfe opined claimant had developed chronic cervical radiculitis involving the right upper extremity which was exacerbated by performance of his work duties. Dr. Wolfe opined claimant's symptoms were worsening, and he had undergone a number of treatment modalities, without success. (Ex. 4, p. 102) Dr. Wolfe opined:

> It is my medical opinion that [claimant's] work situation is contributing to his impairments and that [claimant] is no longer able to perform the material duties of a practicing family physician, practitioner of osteopathic manipulation, and practitioner of medical acupuncture.

(Ex. 4, p. 102)

Claimant returned to Dr. Karas on May 5, 2011. Dr. Karas reviewed the second opinion of Dr. Hitchon, which he summarized as an opinion claimant would be a good candidate for surgical intervention should conservative care continue to fail. Dr. Karas also reviewed the opinion of neurosurgeon, Dr. Smith. Dr. Karas summarized that Dr. Smith opined claimant would continue to experience permanent limitations if he did not proceed with surgery. With surgery, Dr. Smith felt claimant may have a reasonable chance of reversing neurologic deficits and returning to job duties. (Ex. 6, p. 216) While Dr. Karas agreed claimant was unlikely to heal from the radiculopathy without surgery, he opined it was unclear whether the surgery would heal the radiculopathy. He explained that surgery cannot fix the nerve roots directly and these would need to heal on their own, leading to some uncertainty as to how the nerve roots would heal after years of compression. (Ex. 6, p. 217)

Dr. Karas noted claimant had attempted all forms of conservative treatment except for ceasing work entirely, with it being known claimant's work exacerbated his symptoms. Dr. Karas opined it would be difficult for him to wholeheartedly recommend surgery without knowing whether claimant would receive benefit from lightening his work duties. Therefore, Dr. Karas recommended further conservative management, including a three to six month hiatus from work. If after this period, claimant had improved so as to function in life, Dr. Karas indicated he would recommend claimant "continue in that direction." If after the hiatus, claimant did not notice a difference in symptoms or noticed worsening symptoms, Dr. Karas expressed belief surgery would be claimant's only treatment option. He again cautioned it was unclear if surgery would resolve claimant's radiculopathy entirely or to a sufficient degree which would allow him to practice medicine. Accordingly, Dr. Karas recommended claimant initiate disability benefits. (Ex. 6, p. 217)

Claimant returned to Dr. Simon on May 6, 2011. Dr. Simon again recommended claimant cease working and expressed belief a repeat epidural would not resolve claimant's condition. (Ex. 2, p. 22) As an epidural might provide pain control, however, Dr. Simon performed a repeat cervical epidural steroid injection. (Ex. 2, pp. 22-23)

On May 25, 2011, Dr. Wolfe performed an acupuncture treatment. (Ex. 4, p. 103)

On June 1, 2011, Dr. Rettenmaier expressed agreement with his fellow physicians who recommended claimant discontinue work. Dr. Rettenmaier opined claimant was no longer able to perform the functions of his job, and his duties were causing ongoing problems. Dr. Rettenmaier agreed with the reasonable plan of allowing claimant a six-month hiatus from work. If symptoms did not resolve, Dr. Rettenmaier indicated claimant would proceed with surgery. (Ex. 5, p. 192)

Claimant returned to Dr. Simon on June 10, 2011 and reported only limited relief following epidural injection. Dr. Simon opined the limited relief served as confirmation that treatment modality was not of long-term benefit to claimant. Dr. Simon opined:

> I believe that this patient should immediately or as soon as feasible and possible stop work on a permanent basis and determine afterwards whether his symptoms are improved or not with otherwise maximal medical therapies. If not, I would concur that surgery may be necessary on that basis.
>
> ...
>
> [Claimant] has in my opinion fought hard to keep working as much as possible, but I find at that this time from my standpoint as a pain specialist that he must stop working as the various medical and invasive [sic] have not helped him [i]n the long-run.

(Ex. 2, p. 25)

Dr. Simon set forth a plan of conservative care consisting of physical therapy, NSAIDs, and cyclobenzaprine cream. He also raised the possibility of trigger point injections after claimant had ceased work. (Ex. 2, p. 26)

On July 6, 2011, claimant returned to Dr. Wolfe, who performed an acupuncture treatment and prescribed an anti-inflammatory cream. (Ex. 4, p. 106)

After receiving the opinions of his physicians which recommended claimant cease practicing medicine for a time, claimant arranged a meeting with Dr. David Swieskowski and Sharon Phillips, director and chief operating officer of Mercy Clinics, respectively. The meeting took place on July 14, 2011. (Hearing Tr. p. 107) At that time, claimant testified he requested the meeting due to three factors: (1) his nurse had complained about the legibility of his handwriting and the fact he was dropping acupuncture needles in front of patients; (2) Drs. Karas, Smith, Hitchon and Simon had opined it was not feasible for claimant to continue practicing medicine; and (3) his Hippocratic oath required him to "do no harm." Claimant testified Dr. Swieskowski and Ms. Phillips reviewed the opinions of claimant's medical providers and stated, "[y]ou're done." (Hearing Tr. p. 108) Claimant replied he was unwilling to abandon his patients and employees and requested three months to "get things squared away." Claimant indicated Dr. Swieskowski agreed to provide claimant 30 days to wrap up his practice and a six-month medical leave was arranged by Ms. Phillips. (Hearing Tr. p. 109)

Claimant authored a letter to his patients dated July 19, 2011, indicating he would cease seeing patients following August 12, 2011. Claimant indicated he would begin "an indefinite medical leave" at the advice of his physicians in order to "care for [his] injuries and hopefully regain [his] health." (Ex. 14, p. 414)

Claimant presented to Dr. Wolfe on July 27, 2011. Dr. Wolfe performed an acupuncture treatment and prescribed an anti-inflammatory cream. (Ex. 4, p. 108) Dr. Wolfe noted claimant would be taking a medical leave of absence, with his last day

of seeing patients on August 12, 2011. Dr. Wolfe described the treatment plan as to be off work for three to six months and then reevaluate claimant's symptomatology. If claimant continued to have symptomatology after six months, Dr. Wolfe noted claimant would consider cervical fusion. (Ex. 4, p. 107)

Claimant last saw patients on August 11, 2011 and thereafter, began a medical leave. Claimant testified he did not resign his position with defendant-employer. Following the initiation of his leave, claimant received short-term disability benefits and continued insurance through defendant-employer, benefits claimant testified he would not have been entitled to had he resigned. At the time he began his medical leave, claimant testified he intended to resume the practice of medicine at the conclusion of the leave. (Hearing Tr. pp. 109-110)

On September 2, 2011, claimant returned to Dr. Simon. Claimant expressed improved symptomatology of his neck since commencing medical leave. Dr. Simon prescribed Cymbalta. (Ex. 2, pp. 27-28)

On September 7, 2011, claimant returned to Dr. Wolfe and reported improved cervical range of motion and improvement, but not resolution of, right upper extremity symptoms. (Ex. 4, p. 109) Dr. Wolfe expressed agreement with Dr. Simon's course of treatment, including physical therapy, acupuncture treatments every two to three weeks, Flector patches, transdermal gel, anti-inflammatory cream, Cymbalta, and Valium and Vicodin as needed. (Ex. 4, pp. 109-110)

When claimant returned to Dr. Wolfe on September 28, 2011, he reported improved symptoms. Claimant described intermittent flares in symptoms, but those flares were of shortened durations than prior to August 12, 2011. Dr. Wolfe performed an acupuncture treatment. (Ex. 4, pp. 111-113) Dr. Wolfe performed a repeat acupuncture treatment on October 21, 2011. (Ex. 4, p. 116)

On October 28, 2011, claimant informed Dr. Simon he felt better overall since ceasing working and beginning physical therapy. (Ex. 2, p. 29)

Claimant received acupuncture treatments from Dr. Wolfe on November 10 and November 30, 2011. On November 30, 2011, Dr. Wolfe also performed myofascial cupping treatments. (Ex. 4, pp. 118-119, 158)

On December 5, 2011, claimant returned to Dr. Rettenmaier and reported an estimated 30 percent improvement in symptoms. Dr. Rettenmaier recommended continued medication management. (Ex. 5, pp. 193-194)

Dr. Wolfe performed acupuncture treatments on December 21, 2011 and January 11, 2012. (Ex. 4, pp. 122, 124)

On January 20, 2012, claimant returned to Dr. Simon and reported 40 percent improvement in symptoms. Claimant attributed a large portion of his improvement to physical therapy. Dr. Simon described claimant as very pleased with his progress. (Ex. 2, p. 31)

Claimant underwent a repeat cervical spine MRI on January 25, 2012. The radiologist compared the results to claimant's MRI of September 17, 2010 and opined the new scan was essentially without changes. (Ex. 12, pp. 395-396; Ex. A, pp. 1-2)

On February 1, 2012, claimant returned to Dr. Wolfe and reported continued improvement in symptoms, estimating himself approximately 50 percent better than when he ceased working. (Ex. 4, p. 125) Dr. Wolfe performed an acupuncture treatment. (Ex. 4, p. 127) Dr. Wolfe also recommended that claimant "not return to the practice of medicine," as his duties would irritate the nerve roots, resulting in worsened neuritis, worsened muscle spasms, and increased impairment. (Ex. 4, p. 126) Dr. Wolfe performed another acupuncture treatment on February 29, 2012. (Ex. 4, p. 128)

On March 8, 2012, claimant presented to neurosurgeon, Robert Hirschl, M.D. of Mercy Brain and Spine Center. Dr. Hirschl reviewed claimant's MRI and opined the results were stable. He indicated claimant's treatment recommendations remained the same; specifically, that claimant remained a candidate for a 2-level ACDF or should continue conservative management. Dr. Hirschl described claimant as well-educated on treatment options. Dr. Hirschl opined given the duration of claimant's symptomatology, it was possible claimant's nerves had been permanently injured and accordingly, he may have symptoms even after surgery. (Ex. 10, p. 231; Ex. A, p. 1)

Dr. Hirschl's note reflects claimant indicated he felt out of shape and wanted to improve his conditioning before undergoing an operation. Claimant expressed desire to take three months to improve his condition. If symptoms improved during this period, claimant indicated he would continue to delay surgery. If symptoms remained the same or worsened, claimant indicated he would like to proceed with surgery. Claimant indicated he would contact Dr. Hirschl if, and when, he decided to undergo surgery. (Ex. 10, p. 231)

On March 28, 2012, Dr. Wolfe performed an acupuncture treatment. (Ex. 4, p. 129) Also on March 28, 2012, claimant returned to Dr. Simon. Claimant described his symptoms as 50 percent improved and expressed belief not engaging in work activities had diminished his symptoms considerably. (Ex. 2, p. 33) Dr. Simon noted:

> Dr. Hirschl's records reviewed in particular the March visit, and agree that if surgery were to be considered that dual level fusion would likely be necessary given above findings and with clinical correlation with persistent but variable symptoms.

...

> The patient is significantly improved, and at this time I would agree with Dr. Hirschl that waiting another few months is important. I see no urgency to make a surgical decision at this time.

(Ex. 2, pp. 33-34)

On April 4, 2012, claimant submitted an application for Social Security Disability benefits. Claimant claimed an onset of disability of August 12, 2011. (Ex. 19, p. 460) The basis of this claim was his neck, thoracic spine, and right shoulder with radiculopathy to the right arm. (Ex. 19, p. 461)

Dr. Wolfe performed an acupuncture treatment on April 19, 2012. (Ex. 4, p. 130)

On May 21, 2012, the Social Security Administration issued a determination on claimant's application for Social Security Disability benefits. Claimant was found entitled to monthly disability benefits beginning February 2012, with a monthly benefit amount of $2,475.00. (Ex. 19, p. 456) In evaluation of claimant's claim, Mary Greenfield, M.D., opined as to claimant's residual functional capacity. Dr. Greenfield noted the following limitations: occasional lift and/or carry of 10 pounds; frequent lift and/or carry of less than 10 pounds; stand and/or walk 6 hours of an 8-hour workday; sit for 6 hours of an 8-hour workday; limited pushing and/or pulling with the right upper extremity; reaching with the right upper extremity limited to the low end of the occasional range; climbing ramps or stairs occasionally; never climb ladders crawl; occasionally balance, stoop, kneel or crouch; limited reaching with the right upper extremity to the front of the body, laterally, or overhead; limited handling, fingering, and feeling with the right hand, but handling and fingering must be handled at desk height directly in front of claimant's body on only an occasional basis with the right hand; and avoidance of concentrated exposure to vibration. (Ex. 19, pp. 464-467)

The Social Security Administration ultimately found claimant was not capable of returning to past relevant work as a family physician because he was limited to sedentary work. (Ex. 19, pp. 467-468) It was determined:

> The claimant is 63 years old and of closely approaching retirement age. He is limited to sedentary jobs. At that age, under the rules, very little, if any, vocational adjustment in terms of tools, work processes, work settings or industry is considered. There are not an adequate number of jobs that he could transfer to with the limitations he has been given.

(Ex. 19, p. 468)

On June 25, 2012, claimant returned on Dr. Rettenmaier and reported improvement in symptoms. Dr. Rettenmaier explained radicular symptoms are those which best respond to surgery, and such symptoms had improved with decreased

activities to a manageable level. Dr. Rettenmaier opined it was "unclear" how well claimant's neck pain would respond to surgery. (Ex. 5, p. 200)

Over the following months, claimant continued to follow up with Dr. Wolfe, Dr. Simon, and Dr. Rettenmaier. Dr. Wolfe performed 16 acupuncture treatments between June 26, 2012 and July 5, 2013. (Ex. 4, pp. 136-147, 160-162) Dr. Rettenmaier provided medication management on January 16, 2013. (Ex. 5, pp. 201-203) Dr. Simon evaluated claimant on July 9 and October 8, 2012, as well as on June 21, 2013. (Ex. 2, pp. 37, 40, 45) At the June 21, 2013 appointment, Dr. Simon recommended consideration of orthopedic right shoulder evaluation and a repeat cervical MRI. (Ex. 2, p. 45)

On July 8, 2013, claimant underwent a repeat MRI of the cervical spine, which the radiologist read as revealing essentially no change. (Ex. B, p. 1)

On August 20, 2013, claimant presented to Kyle Galles, M.D. for right shoulder evaluation. Following examination, Dr. Galles assessed right parascapular pain, most likely radicular in nature. (Ex. 3, p. 66) In the interest of thoroughness and given the chronic nature of claimant's problems, Dr. Galles suggested a shoulder MRI to evaluate for possible rotator cuff pathology. He advised claimant to follow up after the MRI for further recommendations. (Ex. 3, p. 67)

Claimant returned to Dr. Hirschl on September 16, 2013 to discuss surgical options. Specifically, they discussed a 2-level ACDF and the accordant risks and benefits, with Dr. Hirschl stating:

> He has had these symptoms for 7 years and it's possible that no matter which route we take he could have permanent nerve injury and therefore permanent discomfort. I do think there is a chance that he improves after surgery. Surgery is certainly an option for him.

(Ex. 10, p. 234)

Dr. Hirschl noted claimant expressed a desire to attempt another epidural steroid injection. In the event the injection failed to provide relief, claimant indicated he would "strongly consider surgery." Dr. Hirschl indicated if claimant chose to undergo surgery, claimant should contact his office and the surgery would be arranged. (Ex. 10, p. 234)

On September 16, 2013, claimant returned to Dr. Simon. Dr. Simon noted claimant had not undergone right shoulder MRI as recommended by Dr. Galles, but claimant indicated Dr. Galles informed him he felt the shoulder was "OK." Dr. Simon noted Dr. Hirschl recommended surgery, including the possibility of a two-level fusion, but Dr. Hirschl was obviously unable to guarantee complete pain resolution with the fusion. (Ex. 2, p. 47) Dr. Simon performed trigger point injections to the right suprascapular and neck muscles. (Ex. 2, p. 48)

Throughout this period of increased evaluation, claimant continued to follow up with Dr. Wolfe. Dr. Wolfe performed acupuncture treatments on August 19, September 9, October 10, and November 12, 2013. (Ex. 4, pp. 148-151)

On November 14, 2013, claimant returned to Dr. Rettenmaier with complaints of worsened radicular symptoms. (Ex. 5, p. 206) Dr. Rettenmaier essentially deferred to the surgeons on the question of the appropriateness of surgery. (Ex. 5, p. 207)

Thereafter, claimant continued to follow up with Dr. Wolfe and Dr. Simon. On December 2, 2013, Dr. Simon performed a cervical/thoracic epidural steroid injection. (Ex. 2, pp. 52-53) When claimant returned to Dr. Simon on March 10, 2014, he reported 90 percent pain relief for the three months following injection, but the pain had since returned. Dr. Simon informed claimant he generally did not recommend long-term intermittent epidural injections. However, he advised claimant to return in six to eight weeks for repeat epidural injection. (Ex. 2, p. 56) During this period, Dr. Wolfe performed acupuncture treatments on December 11, 2013 and January 24, February 24, March 25, and April 23, 2014. (Ex. 4, pp. 152-155, 166)

On June 26, 2014, claimant's counsel authored email correspondence to defendants' counsel by which counsel provided a copy of an amendment to claimant's review-reopening petition. By the amendment, claimant sought to add a claim for entitlement to healing period benefits from August 12, 2011 to February 12, 2012. Counsel explained healing period benefits were not requested, as the original filing preceded the case of Waldinger Corporation v. Mettler, 817 N.W.2d 1 (Iowa 2012). Counsel expressed belief healing period benefits should have been paid after the issuance of Mettler and further indicated an intent to seek penalty benefits for defendants' failure to pay such benefits. (Ex. 16, p. 428)

On June 26, 2014, Dr. Rettenmaier signed an "Opinion Statement" which included seven individual paragraphs, to which Dr. Rettenmaier was asked to indicate if he agreed or disagreed. By this opinion statement, Dr. Rettenmaier confirmed he was supportive of claimant's claim for disability benefits. Dr. Rettenmaier opined claimant's continued work activities and the resulting exacerbations of his neck and arm pain formed the basis of Dr. Rettenmaier's support for claimant discontinuing work as a physician. Dr. Rettenmaier advised against repetitive use of the right arm, frequent turning of the head, or prolonged flexion of his neck to prevent further damage and maintain pain levels. (Ex. 5, p. 209)

On August 5, 2014, Dr. Simon signed an "Opinion Statement," the nature of which was similar to that signed by Dr. Rettenmaier. Dr. Simon's opinion statement included 13 separate paragraphs. By the statement, Dr. Simon indicated he primarily treated claimant for persistent cervical neck and right upper extremity pain and paresthesias, with claimant complaining of symptoms which varied in intensity. (Ex. 2, p. 60) Over his years of treatment of claimant, Dr. Simon opined he found claimant's presentation credible and consistent with the medical evidence. (Ex. 2, p. 62)

Dr. Simon expressed agreement claimant's continued practice of medicine continued to aggravate his symptoms and as a result, Dr. Simon recommended claimant suspend his clinical practice for a time to determine what effect cessation of work activities would have on the intensity of claimant's symptoms. As claimant's symptomatology significantly lessened following the commencement of his medical leave in August 2011, Dr. Simon agreed the work claimant had been performing had a significant impact on the severity of his pain. (Ex. 2, pp. 60-61) Although claimant's symptoms have lessened, Dr. Simon opined claimant's persistent complaints have become permanent and will continue to require treatment to maintain pain levels. (Ex. 2, p. 61)

Dr. Simon agreed that if claimant were to attempt to return to work which required repetitive use of the right arm, repetitive neck movement, or prolonged cervical flexion, his symptoms would likely increase to the levels present before he began his medical leave in August 2011. Therefore, Dr. Simon recommended claimant not seek or accept work which involved repetitive use of the right arm, repetitive neck movement, or prolonged cervical flexion. Given the lack of guarantee a cervical fusion would eliminate or not worsen his symptoms, claimant's age, and the fact claimant's pain levels are now at tolerable levels, Dr. Simon opined claimant's decision to not undergo cervical fusion is understandable and reasonable. (Ex. 2, p. 62)

On August 5, 2014, Dr. Wolfe signed an "Opinion Statement" including 17 separate paragraphs. Dr. Wolfe confirmed he provided acupuncture and osteopathic soft tissue manipulation to claimant on an ongoing basis, having evaluated and treated claimant's symptoms an average of at least once per month for the past four years. (Ex. 4, p. 167) Dr. Wolfe related these ongoing symptoms to claimant's work injury of August 25, 2006. (Ex. 4, p. 168) Over years of treatment, Dr. Wolfe agreed he found claimant's presentation credible and consistent with the medical evidence. (Ex. 4, p. 173)

During the course of his care, Dr. Wolfe indicated he recommended additional work restrictions dating to August 27, 2010. In January 2011, he recommended claimant take leave from work and on May 4, 2011, opined claimant was not able to perform his work duties. (Ex. 4, p. 169) Dr. Wolfe opined the three to six-month leave was essentially a treatment modality designed to provide physicians with additional information in crafting a plan of care. (Ex. 4, p. 170) Dr. Wolfe opined claimant's pain levels basically stabilized at the end of the six-month leave period and have generally remained at that level with the exception of temporary flares. Generally speaking, Dr. Wolfe described claimant's pain level as approximately 50 percent improved since claimant ceased working. (Ex. 4, p. 71)

Despite improvement, Dr. Wolfe opined claimant was incapable of returning to clinical medical practice. (Ex. 4, p. 171) If claimant returned to such work, Dr. Wolfe opined duties that required repetitive use of the right arm, repetitive neck movement, or prolonged cervical flexion, would increase claimant's symptoms to pre-August 2011 levels. For claimant to successfully return to work, Dr. Wolfe indicated an employer

would need to implement claimant's work restrictions and recognize claimant would have good and bad days with respect to symptomatology. (Ex. 4, p. 172)

With respect to the proposed two-level cervical fusion, Dr. Wolfe indicated no surgeon can give a guarantee such a surgery will improve and not worsen symptoms. Dr. Wolfe acknowledged claimant's pain levels were now tolerable. Given the potential risks of surgery and claimant's age, Dr. Wolfe "endorse[d]" claimant's decision to forego surgery at that time. (Ex. 4, p. 172)

Claimant's counsel authored a letter to Lana Sellner of Encore Unlimited, LLC, dated August 5, 2014. By the letter, counsel indicated claimant was willing to explore vocational rehabilitation opportunities, an option raised the prior year, should Ms. Sellner contact him. (Ex. 16, pp. 429-430) Counsel sent followup correspondence to Ms. Sellner via email on August 29, 2014 and inquired if Ms. Sellner desired to meet with claimant. (Ex. 16, p. 429)

On September 5, 2014, treating physical therapist, Steven Clark, signed an "Opinion Statement" including 13 separate paragraphs. Mr. Clark agreed he began treating claimant on September 12, 2011, but had he treated claimant at the time claimant was contemplating a medical leave, Mr. Clark would have endorsed claimant's decision to take leave. He agreed the six-month leave was a wise decision for claimant and his patients. (Ex. 11, p. 386) Mr. Clark opined claimant achieved maximum medical improvement (MMI) on or about February 12, 2012, at the end of his six-month leave. (Ex. 11, p. 388)

Over the three-year period for which Mr. Clark provided care prior to review-reopening hearing, Mr. Clark agreed he provided physical therapy to claimant on more than 130 occasions, with the frequency of sessions varying based on the intensity of claimant's symptoms. Mr. Clark agreed flares in claimant's symptoms were sometimes attributed to specific tasks or cold/rainy weather, while other times the pain flared without a clear inciting activity. Mr. Clark opined he found claimant credible in his presentation and Mr. Clark was able to objectively verify claimant's complaints through therapy. (Ex. 11, pp. 386-387)

Although claimant's condition had stabilized, Mr. Clark opined the condition was vulnerable to aggravation by "even modest activities." Mr. Clark agreed aggravating factors included claimant's holding of his head in a flexed position for a period of time and repetitive activities with the right upper extremity. Mr. Clark also wrote claimant's symptomatology was to be expected given the degree of degenerative changes present on his MRI. Mr. Clark indicated claimant's symptoms had improved, with pain and functionality improving an estimated 50 to 60 percent during the three years of care. However, Mr. Clark expressed doubt claimant would ever return to work as an osteopathic physician. (Ex. 11, p. 388) Mr. Clark opined claimant is physically unable to return to work as a physician with any level of consistency or regularity, given the increase in pain he would suffer with increased activity. He further opined claimant

would most likely be unable to report to any form of work on a "significant number of days" as a result of flares in symptoms. (Ex. 11, p. 389)

Given his experience working with patients who had undergone similar cervical surgeries as that recommended for claimant, Mr. Clark opined there was no assurance the fusion would alleviate symptoms or not result in further deterioration. Mr. Clark expressed appreciation of claimant's decision not to undergo surgery given claimant's age and quality of life. Mr. Clark indicated if he were in claimant's position, he would not proceed with surgery "as the outcome potential for *[illegible]* regression is very high." (Ex. 11, p. 390)

On September 14, 2014, claimant's counsel authored a letter to vocational consultant, Carma Mitchell, requesting evaluation of claimant's current ability to engage in competitive employment. Counsel provided the following documents for Ms. Mitchell's review: the opinion statements of Dr. Rettenmaier, Dr. Wolfe, Dr. Simon, and Mr. Clark, and a copy of arbitration decision dated January 20, 2011. (Ex. G, p. 1) Claimant presented for interview with Ms. Mitchell on September 16, 2014. (Ex. 13, p. 402)

Following records review and interview of claimant, Ms. Mitchell authored a vocational evaluation dated September 18, 2014. Based upon the opinion statements of Dr. Wolfe, Dr. Rettenmaier, Dr. Simon, and Mr. Clark, specifically with respect to the limitations upon claimant's function, Ms. Mitchell opined claimant would be unable to return to his past work as a physician. Ms. Mitchell also noted claimant would be unable to perform work which required repetitive use of the right arm, repetitive neck movement, or prolonged cervical flexion. Additionally, she noted limitation with respect to hand writing notes, utilizing a computer, and with activities requiring lifting, reaching, pushing, pulling, gripping, handling, and fingering with the dominant right upper extremity. (Ex. 13, p. 402) Ms. Mitchell opined:

> [Claimant] has good and bad days. When he has increased symptoms he needs to even further reduce his activities in an effort to get his pain under control. He would not be able to sustain work. He describes only being able to use his right upper extremity for 15 minutes at a time and then having to rest it for 15 minutes.
>
> [Claimant] cannot perform work on a full-time sustained basis.

(Ex. 13, p. 402)

In response to inquiry from defendants, vocational case manager, Bruce Scott Mailey, authored a letter to defendants' attorney dated September 19, 2014. By his letter, Mr. Mailey indicated he reviewed medical records, correspondence, and the underlying arbitration decision. With this background, Mr. Mailey opined occupations exist for which claimant is qualified and capable of performing both physically and intellectually. He further opined there were such positions currently available in

claimant's labor market. Finally, Mr. Mailey opined if claimant were to actively seek work, he would obtain gainful employment. (Ex. C, p. 1)

Mr. Mailey also testified at evidentiary hearing and via deposition on February 6, 2015 after a personal health matter rendered him unable to participate in the supplemental hearing of December 15, 2014. Mr. Mailey testified he possessed bachelors' degrees in therapeutic recreation and elementary special education, as well as a masters' degree in vocational rehabilitation with an emphasis in job placement. (Hearing Tr. p. 42) Mr. Mailey earned a certification as a disability management specialist. (Hearing Tr. p. 44) He possesses 25 years of experience in vocational placements or consulting, including as a placement and vocational director, case manager, state supervisor for rehabilitation companies, and in performance of ergonomic and physical demands assessments. In his current employment, Mr. Mailey provides case management services, expert testimony, and rehabilitation services to disabled veterans. (Hearing Tr. pp. 42-43)

Defendants hired Mr. Mailey to perform an employability opinion, not to provide placement services. (Hearing Tr. p. 8) In crafting his opinions, Mr. Mailey indicated he reviewed Ms. Mitchell's report and supporting documentation, as well as claimant's proposed exhibits totaling nearly 500 pages, claimant's answers to various discovery questions, Social Security Administration documentation, and the underlying arbitration decision. (Hearing Tr. pp. 46-49) Mr. Mailey testified he spent approximately 1 ½ hours reviewing documents prior to issuance of his opinion letter of September 19, 2014; he spent an additional 3 ½ to 4 ½ hours reviewing records following his opinion letter in preparation for hearing. (Hearing Tr. p. 12)

In review of the medical records, Mr. Mailey opined he did not see anything in the records which would "specifically preclude full-time employment." (Hearing Tr. p. 14) He explained: Dr. Rettenmaier's opinion did not indicate claimant is unable to return to gainful employment; Dr. Wolfe's opinion did not say claimant is unable to perform any work, he just set forth limitations on a successful working relationship; Dr. Smith opined claimant could work within certain restrictions or limitations; Dr. Simon did not indicate claimant was unable to work; and Mr. Clark did not exclude claimant from all jobs. (Hearing Tr. pp. 52-56, 61) Mr. Mailey testified he was unaware of any physician opining claimant is unable to work. (Hearing Tr. p. 57; Deposition of Mr. Mailey, Tr. p. 10) He was also unaware of any physician specifically restricting the number of hours or days claimant could work. (Hearing Tr. p. 58)

Mr. Mailey testified he considered the restrictions set forth by Dr. Simon, Dr. Wolfe, Dr. Rettenmaier, and Dr. Smith, the functional capacity evaluations, and Mr. Clark in formulation of his vocational opinions. (Deposition of Mr. Mailey, Tr. pp. 6-8, 24) Having so considered, he opined claimant has a "residual vocational profile to seek and obtain gainful employment, either on a part-time or full-time basis, given his skills and education and physical capabilities." (Deposition of Mr. Mailey, Tr. p. 9) Mr. Mailey further opined competitive employment is not simply limited to full-time work, as part time and three-quarter time positions are fairly common. (Hearing Tr. p. 21)

In creating claimant's residual functional capacity evaluation, Mr. Mailey indicated he placed emphasis on claimant's intellectual capabilities and ability to perform sedentary work, specifically in an office or home-based setting where there would not be frequent use of the right upper extremity above shoulder level or below waist level, no extended periods of or repetitive neck flexion, and no repetitive reaching, gripping, grasping or fingering. (Hearing Tr. p. 16; Deposition of Mr. Mailey Tr. pp. 18-20) Mr. Mailey opined claimant possessed transferrable skills including "broad medical knowledge, clinical experience, analytical skills, [and] people skills." (Hearing Tr. p. 57)

Mr. Mailey expressed belief claimant could potentially return to work as a physician, with accommodations. He explained many medical facilities are utilizing an electronic medical records system which eliminates writing of SOAP notes or utilizes a member of the nursing staff to perform data entry. (Hearing Tr. p. 18) In terms of broader potential accommodations, Mr. Mailey identified the availability of digital voice dictation equipment and programs. (Hearing Tr. p. 19) He also highlighted the importance of ergonomics in limiting offending activities to less frequent occurrences. (Hearing Tr. p. 73)

Prior to the review-reopening hearing, Mr. Mailey located eight positions he believed were available to claimant, with each position open for application on the date of evidentiary hearing. He indicated he did not contact any of the potential employers to determine if claimant's limitations could be accommodated. (Hearing Tr. pp. 8, 62) However, Mr. Mailey expressed belief he could "easily" identify additional positions available to claimant with a more extensive job search in a job placement setting. (Hearing Tr. p. 55)

Mr. Mailey described the positions he identified as "consultative-type positions," such as medical director, peer reviewer, utilization review consultant or reviewer, case manager, and adjunct professor. Mr. Mailey expressed belief claimant was capable of performing such work. (Deposition of Mr. Mailey Tr. p. 11) He explained his intention was to locate jobs within the sedentary or sedentary to light category. (Hearing Tr. p. 37) The eight positions identified were: family medicine residency program director; case manager; RN case manager part time; field nurse case manager; head coach consultant; review coordinator; MCHA instructor; and adjunct professor. (Ex. Hearing Tr. pp. 30-38)

Mr. Mailey indicated he disagreed with Ms. Mitchell's opinion claimant is unable to perform any full-time employment. (Deposition of Mr. Mailey, Tr. p. 9) He expressed belief the "vast majority of sedentary work" remained available to claimant, but acknowledged claimant's physical restrictions limited him to less than the full range of sedentary occupations. (Hearing Tr. pp. 71-72) Mr. Mailey specifically opined claimant would be capable of working on a board of directors or as a review physician, both of which he has past experience performing. (Hearing Tr. pp. 62-63) Mr. Mailey further opined claimant would be able to work as a medical expert in certain specialty areas or as an independent medical examination (IME) physician. (Hearing Tr. pp. 64-65)

Mr. Mailey expressed belief claimant could obtain and perform work in the labor market. (Hearing Tr. p. 74)

Mr. Mailey testified in completion of his assessment, he reviewed reports of physicians who opined claimant may be able to return to work without restrictions if he were to undergo surgery. Mr. Mailey opined if claimant underwent surgery and was released without restrictions, claimant would have greater access to the labor market than he had at the time of the original arbitration decision. (Deposition of Mr. Mailey, Tr. pp. 12-13)

Mr. Mailey's testimony was clear, professional, and consistent with the evidentiary record. His demeanor at the time of review-reopening hearing gave the undersigned no reason to doubt Mr. Mailey's veracity in either his in-person or deposition testimony. Mr. Mailey is found credible.

At the time of evidentiary hearing, claimant testified to the following continued symptoms:

> Pain, muscle spasm, impaired range of motion involving the neck, the right shoulder, right arm, numbness and tingling involving the fourth and fifth fingers of the right hand, pain and muscle spasm with impaired range of motion to the thoracic spine with radicular pain, radiation of pain to the neck and the low back, cephalgia, headaches, sleep disturbance, insomnia, loss of muscle dexterity and hand dexterity, weakness.

(Hearing Tr. 112)

Claimant described an average pain level of 6 on a 10-point scale. (Hearing Tr. p. 112) He also reported suffering with flares in his symptoms which cause an increase of pain. Such flares may be brought on by simple acts like getting out of bed, dressing, taking a shower, brushing teeth, driving, writing, or using a computer. Other times, pain flares without particular inciting activity. Once claimant's pain flares, claimant testified it can take four to six days, or longer, to return to baseline. (Hearing Tr. p. 113) Due to his symptomatology, claimant testified he may wake with the intention of performing a task, but is prevented from doing so by his symptoms. (Hearing Tr. p. 114)

Claimant testified he believes his symptomatology has improved since August 2011, when he last worked for defendant-employer. (Supplemental Hearing Tr. p. 32) However, he has submitted no applications for employment or made any other attempt to return to work since medical leave began on August 12, 2011. (Supplemental Hearing Tr. p. 36; Ex. 14, p. 413) Claimant testified defendant-employer made no offer to return him to work since he undertook medical leave. Claimant testified Ms. Phillips informed him he would not be able to return to work at defendant-employer unless released by his attending physicians. (Hearing Tr. pp. 115-117) Claimant's medical license remains current and he continues to undertake the continuing education necessary to maintain his licensure. (Supplemental Hearing Tr. pp. 34-25)

With respect to the positions identified by Mr. Mailey, claimant testified he does not believe himself functionally capable of working as a review physician due to the variability in his schedule due to complaints and his potential need to use narcotic medications. (Hearing Tr. pp. 115-116) He also testified, practically speaking, doctors are not allowed "scribes" to input their paperwork, and at defendant-employer he was provided a personal laptop into which he inputted his own notes. He does not believe himself capable of completing this data entry. (Hearing Tr. p. 117) Claimant testified his ability to work on a computer varies daily and may range from 10 minutes to 1 hour. In summary, he feels himself intellectually capable of performing the jobs identified by Mr. Mailey, but not physically capable. (Hearing Tr. p. 118)

Claimant testified he has thus far elected to proceed with conservative treatment as opposed to surgical intervention. Claimant explained he elected conservative care due to risks of surgery which he understood to include repetitious surgery because of deterioration of adjacent discs, loss of speech, loss of swallowing, stroke, infection, and potential for quadriplegia and death. (Hearing Tr. pp. 98-99) Furthermore, claimant testified no neurosurgeon indicated he could expect relief of pain or return of function. (Supplemental Hearing Tr. pp. 40-41)

Although claimant is no longer working for defendant-employer, he has not been without income throughout the pendency of his claim. Claimant has received income through insurance policies, Social Security Disability benefits, workers' compensation indemnity benefits, rental income from owned properties, and personal income from defendant-employer and investments. Claimant earned income through defendant-employer's "virtual private practice" (VPP) until his leave of absence began in August 2011. Claimant described this program as "you eat what you kill." (Hearing Tr. p. 16) Essentially, the medical provider receives the remainder of income after expenses are deducted from gross charges. (Hearing Tr. pp. 16-17) In August 2006, claimant's VPP payment was $214,032.00; by August 2011, claimant's VPP payment decreased to $25,000.00. (Hearing Tr. pp. 16-17; Ex. E, pp. 4-6) In 2012, claimant began receiving Social Security Disability benefits. The monthly benefit totaled $2,517.00, but had increased to $2,554.00 at the time of hearing, potentially corresponding to a change to Social Security Retirement benefits. (Hearing Tr. p. 15; Ex. E, pp. 5-6) As a result of the original arbitration hearing, claimant received 225 weeks of permanent partial disability benefits at the rate of $1,163.00. (Ex. E, p. 5)

As a result of the original work injury of August 25, 2006, claimant received long-term disability benefits through a policy paid by defendant-employer. Under this policy, claimant received 60 percent of his base salary for a period of 2 ½ years. Benefits began to run on August 25, 2006 and thus, the policy was exhausted while claimant remained employed by defendant-employer. (Supplemental Hearing Tr. pp. 13-14; Ex. E, pp. 4-5) Claimant currently receives medical disability benefits through a policy he purchased from UNUM. These benefits are set at 60 percent of his base salary, but the benefit amount is offset by receipt of Social Security benefits. After offset, claimant receives $143.70 per month from UNUM. These benefits commenced August 12, 2011 and run for a term of 5 years. (Supplemental Hearing Tr. pp. 12-14; Ex. E, pp. 4-5)

Claimant also purchased an income replacement policy through New York Life. Claimant received a flat monthly rate by this policy. The amount was set at $9,100.00 per month, but was increased to $10,301.20 per month through a cost of living adjustment. Claimant no longer receives this flat rate, however, as benefits ceased to be paid in December 2013, soon after claimant reached age 65. (Supplemental Hearing Tr. pp. 14-15; Ex. E, pp. 4-5)

Claimant also has income in the form of personal investments. Claimant estimated a monthly income of $7,500.00 in equity and bonds. (Ex. E, pp. 5-6) Claimant also owns several physical properties, including his personal residence; a vacation/weekend condominium at Lake Panorama, Iowa; a home building site in West Des Moines, Iowa; a condominium owned by his wife; and his former clinic location. (Hearing Tr. pp. 24-26) Claimant owned and rented his former clinic location to defendant-employer from January 1, 2004 to December 31, 2013. Defendant-employer paid rent of $4,166.67 during this term. After expiration of the lease term, claimant rented the property to another medical practice for $2,195.00 per month. (Hearing Tr. p. 17; Ex. E, p. 6)

Claimant is also a beneficiary of two trusts handling the assets of his deceased father. However, claimant does not derive any income from the trusts at this time. The purpose of the trusts is to provide for the health, welfare, and care of his mother, for whom they provide income. (Supplemental Hearing Tr. pp. 27-29)

Claimant's tax returns reveal the following income for claimant and his wife, who continues to be employed as a licensed practical nurse. In 2006, joint wages totaled $172,979.00. The couple claimed total income of $298,462.00, including taxable interest of $9,057.00, ordinary dividends of $42,991.00, pension/annuity of $26,579.00, and real estate rental of $50,000.00. (Ex. 17, p. 437) In 2007, joint wages totaled $127,136.00. The couple claimed total income of $245,005.00, including $4,644.00 in taxable interest, $59,206.00 in ordinary dividends, $49,851.00 in rental real estate, and executor fees of $7,028.00. (Ex. 17, p. 439) In 2008, joint wages totaled $198,860.00. The couple claimed total income of $301,443.00, including $2,313.00 in taxable interest, $57,567.00 in ordinary dividends, and $45,576.00 in rental real estate. (Ex. 17, p. 441) In 2009, joint wages totaled $115,168.00. The couple claimed total income of $194,738.00, including $31,053.00 in ordinary dividends and $50,019.00 in rental real estate. (Ex. 17, p. 443) In 2010, joint wages totaled $39,643.00. The couple claimed total income of $117,079.00, including $28,715.00 in ordinary dividends and $50,007.00 in rental real estate. (Ex. 17, p. 445) In 2011, joint wages totaled $49,503.00. The couple claimed $136,020.00 in total income, including $37,273.00 in ordinary dividends and $49,948.00 in rental real estate. (Ex. 17, p. 447) In 2012, joint wages totaled $17,729.00. The couple claimed $144,882.00 in total income, including taxable interest of $3,269.00, ordinary dividends of $56,213.00 and $48,950.00 in rental real estate. (Ex. 17, p. 449) In 2013, joint wages totaled $18,447.00. The couple claimed $275,806.00 in total income, including $4,575.00 in taxable income, $61,321.00 in ordinary dividends, $122,868.00 in pension/annuity, and $45,892.00 in rental real estate. (Ex. 17, p. 451)

CONCLUSIONS OF LAW

The first issue for determination is whether there has been a change of condition since the original arbitration hearing on May 10, 2010, that might entitle claimant to additional disability benefits.

Upon a petition for review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A review-reopening claimant need no longer prove, as an element of his claim, that the current extent of disability was not contemplated by the commissioner, in the arbitration award, or the parties, in an agreement for settlement. Kohlhaas, 777 N.W.2d 387 (Iowa 2009).

At the time of the underlying arbitration hearing on May 10, 2010, claimant's work-related conditions were stable and allowed him to continue his work as an osteopathic physician and surgeon, albeit with limitation, restrictions, and reduced income. Following hearing, claimant complained of worsening symptoms and sought care with personal physicians, Drs. Horner, Wolfe, and Rettenmaier. Claimant also returned to Mercy Employee Health and was seen by Dr. Heims. Dr. Heims initiated a plan of care which ultimately included additional pain management as directed by Dr. Simon and evaluation by neurosurgeons, Drs. Karas, Piper, Hirschl, and Hitchon. In connection with an UNUM disability application, claimant was also evaluated by neurosurgeon, Dr. Smith.

Over the fall of 2010 and spring of 2011, claimant continued to seek medical attention. During this span, Drs. Karas, Piper, Hitchon, and Smith all opined claimant was a surgical candidate. The physicians initially disagreed to some extent about the efficacy of continued conservative management. As time passed and claimant failed to progress, he began to require greater restrictions in his work duties, further limiting his performance of procedures, ability to chart, and frequency with which he saw patients. By February 2011, Dr. Karas opined claimant should no longer perform his typical work duties. In May 2011, a plan came into form whereby claimant was removed from work for three to six months in order to determine if ceasing work duties would allow claimant's symptoms to return to a tolerable level. This plan was specifically endorsed by Drs. Karas, Simon, and Rettenmaier. Due to his worsened symptomatology and the advice of his physicians, claimant arranged a six-month medical leave of absence from defendant-employer. This leave became effective August 12, 2011.

Following the arbitration hearing of May 10, 2010, claimant's symptomatology worsened. As a result of the worsened symptomatology, claimant's ability to perform his duties as an osteopathic physician for defendant-employer were further limited, and eventually it became medically necessary for claimant to cease working as an osteopathic physician. Although claimant has been determined to be a surgical candidate, claimant has opted not to undergo surgery, as his symptoms have become

manageable through his ceasing work as an osteopathic physician and with further conservative maintenance measures. Therefore, as compared to his state at the time of the arbitration hearing on May 10, 2010, claimant's physical and financial conditions have both worsened. The work injury of August 25, 2006 is a cause of both the worsened physical and financial conditions. Accordingly, it is determined claimant has proven a change in condition so as to support a review-reopening claim.

The next issue for determination is whether claimant is entitled to temporary total disability or hearing period benefits from August 12, 2011 through February 12, 2012.

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

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

The Iowa Supreme Court addressed the potential for a claimant to suffer intermittent, but compensable, healing periods in the case of Waldinger Corporation v. Mettler, 817 N.W.2d 1 (Iowa 2012). By this decision, the Court found "the article 'a' in the phrase 'a healing period' was not intended by the legislature to limit healing period benefits to a single period of temporary disability per injury." Mettler, 817 N.W.2d at 8. The Court reasoned:

> We see no principled reason why Mettler, or any similarly situated claimant, should be disqualified from a healing period remedy when ordinary and necessary medical care for a work-related injury temporarily removes them again from the work force.

Id. at 8-9

As a result of deterioration in his work-related condition, claimant's treating physicians recommended claimant cease working for a period in order to evaluate the

role of claimant's work activities in his symptomatology. Authorized physician Dr. Karas recommended continued conservative care, including a hiatus from work. Dr. Karas indicated he was unable to wholeheartedly recommend surgery without knowing if such a hiatus resulted in improvement. If sufficient improvement was not achieved, Dr. Karas indicated surgery would represent claimant's only treatment option. Dr. Wolfe opined the leave period was essentially a treatment modality designed to provide physicians with additional information in crafting a plan of care.

It is therefore determined the six-month leave period represented yet another, albeit significant, conservative treatment modality offered in an extensive course of conservative care. Claimant's participation in such a hiatus was caused by a worsening of his work-related condition. As claimant underwent this treatment modality in care of his work-related condition, claimant is entitled to temporary disability benefits pursuant to Iowa Code section 85.33(1) or section 85.34(1), whichever proves applicable. Claimant is entitled to these temporary disability benefits, as he was prevented from engaging in continued employment for a treatment period by the work-related condition; he did not voluntarily resign his employment.

Defendants have asserted claimant is not entitled to indemnity benefits for this period by distinguishing the facts of this matter from the facts of Mettler, namely that claimant never underwent subsequent surgery in connection with the intermittent healing period. The undersigned finds this attempt to distinguish the cases unpersuasive. The Court in Mettler addressed the fundamental unfairness of not granting benefits to a claimant who is again temporarily removed from the work force as a result of a work-related injury. The Court does not predicate such benefits upon a claimant undergoing surgical intervention.

It is therefore determined claimant is entitled to temporary disability benefits from August 12, 2011 through February 12, 2012 pursuant to either Iowa Code section 85.33(1) or section 85.34(1), whichever proves applicable. The parties stipulated at the time of the work injury, claimant would have been entitled to the maximum benefit rate for temporary total disability/healing period benefits. Therefore, such benefits shall be paid at the weekly rate of $1,264.00.

The next issue for determination is the extent of claimant's industrial disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and

not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 66 years of age at the time of review-reopening hearing. He possesses the requisite intelligence to secure a bachelor's degree and a medical degree as a doctor of osteopathy. After securing his medical degree, claimant acted within his chosen career field as an osteopathic physician for 35 years. As a result of the work injury of August 25, 2006, claimant was restricted in his performance of certain duties but returned to work as an osteopathic physician for defendant-employer. When he did so, his physical limitations restricted his ability to perform the treatment modalities he performed prior to the work injury and resulted in decreased income. On this general basis, claimant was awarded 45 percent industrial disability in an arbitration action.

Following the arbitration action, claimant's symptomatology progressively worsened. Claimant required more frequent and more extensive treatment modalities, without success. Due to his lack of response to conservative treatments, it ultimately became necessary for claimant to abandon work as an osteopathic physician. At the time this choice was made, the medical leave represented another conservative treatment modality. As a result of ceasing practice of medicine, claimant's symptomatology improved and accordingly, claimant did not return to practice. By losing the ability to successfully practice medicine, claimant has lost access to his chosen profession, a profession which required advanced and ongoing education, and which claimant performed the entirety of his professional working life. Additionally, claimant lost access to a significant source of income, a level of income not generally matched in the labor market outside of highly skilled and highly educated professionals.

Although claimant has essentially exhausted his conservative treatment options, he has not exhausted all treatment options available, however. Specifically, four neurosurgeons have opined claimant is a surgical candidate. The recommended procedure is consistently a C5-6 and C6-7 anterior cervical discectomy with fixation and fusion (ACDF). Although the procedure has been offered as an option by multiple

physicians, understandably, none of the physicians has guaranteed the procedure would result in resolution of claimant's symptoms.

Claimant is well-versed in his treatment options, including the two-level ACDF. After consideration, claimant has thus far declined to undergo surgery, as the risk versus reward scenario does not tip the balance to surgery given his age, symptomatology, and financial stability, as addressed in greater detail *infra*. Claimant's choice not to undergo invasive surgery with an unknown prospect for relief of symptoms is understandable. Only claimant can determine whether his symptoms are significant enough to warrant undergoing surgery or if his symptomatology can be adequately controlled through activity limitation and conservative care. Claimant alone has the right to determine what medical treatment he is willing to subject himself to. However, claimant's unwillingness to undergo surgery does have bearing on his motivation to continued employment.

No physician has assigned a numerical value to claimant's permanent impairment in excess of the rating imposed prior to arbitration hearing. However, physicians have recommended permanent restrictions more limiting than those in place at the time of the arbitration hearing. Three physicians offered opinions on claimant's limitations following the leave period, should claimant attempt to return to work. Drs. Simon and Rettenmaier both opined claimant should not engage in repetitive use of the right arm, no prolonged cervical flexion, and no frequent turning of the head/repetitive neck movement. Dr. Wolfe opined any of these activities would result in increased symptoms and further opined claimant was incapable of returning to clinical practice. Mr. Clark expressed doubt claimant would be capable of returning to the practice of osteopathic medicine and further indicated ongoing flares would prevent claimant from engaging in any employment on a significant number of days.

These opinions are consistent with one another and are unrebutted in the medical records. The necessity of such restrictions if claimant were to undergo recommended two-level ACDF is speculative. The fact remains, as claimant's condition currently stands, multiple physicians have opined these restrictions are necessary. Therefore, the undersigned adopts these restrictions in consideration of the extent of claimant's loss of earning capacity.

Two vocational experts have offered opinions regarding claimant's ability to successfully obtain and retain employment in the labor market. Claimant's chosen expert, Ms. Mitchell, interviewed claimant and reviewed the arbitration decision and the opinion statements of Dr. Wolfe, Dr. Rettenmaier, Dr. Simon, and Mr. Clark. Ms. Mitchell opined claimant would be unable to return to his past employment as a physician. She also noted claimant would be unable to perform work which required repetitive use of the right arm, repetitive neck movement, or prolonged cervical flexion, and had limitations with respect to lifting and material handling with the dominant right upper extremity. Ms. Mitchell also considered claimant's description of the duration of time he is capable of utilizing his right upper extremity and the further limitations

required should he suffer a flare in symptoms. Given these factors, Ms. Mitchell concluded claimant was incapable of performing work on a full-time sustained basis.

Defendants' expert, Mr. Mailey, did not personally interview claimant. He did, however, review a significant number of records, including all those reviewed by Ms. Mitchell, as well as Ms. Mitchell's report, claimant's hearing exhibits, claimant's answers to select discovery questions, and Social Security Administration documentation. In addition to authoring a written report, Mr. Mailey testified at hearing and via deposition. Mr. Mailey testified he saw nothing in the medical records which specifically precluded claimant from returning to work and nothing which specifically limited the number of days or hours claimant was capable of working. Mr. Mailey ultimately opined claimant retained a vocational profile which would allow claimant to seek and obtain gainful employment on a part-time or full-time basis. Mr. Mailey opined occupations existed for which claimant was qualified and capable of performing both physically and intellectually. At evidentiary hearing, Mr. Mailey testified as to eight positions for which he believed claimant may be suited, which were available as of the date of evidentiary hearing. He further expressed belief he could easily identify additional employment opportunities available to claimant should he perform a more extensive search.

After review of both vocational opinions, the undersigned provides greater weight to the opinions of Mr. Mailey. While neither expert was retained to provide job placement services, Mr. Mailey testified to specific jobs available in the labor market for which he believed claimant qualified. Furthermore, Mr. Mailey considered the possibility of less than full-time employment in his evaluation of the labor market. Ms. Mitchell opined, in a somewhat summary fashion, that claimant was simply unable to sustain work on a full-time sustained basis. Ms. Mitchell did not elaborate as to why she reached this conclusion. Importantly, Ms. Mitchell focused upon full-time employment only; she did not address whether claimant would remain capable of less than full-time work. Less than full-time workers play an important role in the labor market, and the positions available at these reduced hours are relevant to consideration.

Following the initiation of claimant's medical leave in August 2011, defendant-employer has made no offer to return claimant to employment. However, claimant has also chosen not to engage in a work search or otherwise attempt to return to the labor force. He has this luxury due to financial stability from outside sources. Claimant's wealth is certainly not held against him in an industrial disability analysis. However, claimant's independent wealth is highly relevant to the issue of claimant's motivation. Due to claimant's financial stability, claimant need not engage in traditional employment. In fact, claimant has chosen not to do so.

Claimant is an intelligent professional with 35 years of experience as an osteopathic physician. He is precluded from performing the type of procedures and practice of osteopathic medicine that he did at the time of his work injury or at the time of the original arbitration hearing. Claimant may not desire to perform a large category of sedentary or unskilled jobs due to his extensive education and over-qualification.

Although claimant may not choose to accept such employment, that does not change the fact that such positions remain available within the labor market. Although these jobs are available, the reality also is that such jobs carry significantly lesser earnings than those earned by claimant as an osteopathic physician prior to the work injury of August 25, 2006.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 75 percent industrial disability as a result of the stipulated work-related injury of August 25, 2006. Such an award entitles claimant to 375 weeks of permanent partial disability benefits (75 percent x 500 weeks = 375 weeks), commencing on the stipulated date of March 1, 2013. Such benefits shall be paid at the weekly rate of $1,163.00, as determined by the arbitration decision. Defendants shall receive credit for benefits previously paid as a result of the arbitration decision, specifically 225 weeks of permanent partial disability benefits.

The next issue is whether claimant is entitled to permanent total disability benefits as an odd-lot worker.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Claimant carries the burden of demonstrating a prima facia case of total disability by producing substantial evidence that a worker is unemployable in the competitive labor market. In evaluating such evidence, the undersigned may consider a number of

factors. In consideration of the issue of industrial disability *supra*, the undersigned found the vocational opinion of Mr. Mailey entitled to greater weight than that of Ms. Mitchell. While claimant has also presented evidence of permanent work restrictions, these restrictions are not severe enough to convince the undersigned they prevent claimant from gaining any form of employment. Claimant has provided no evidence he attempted, but was unsuccessful, in attempting to return to work. Claimant has made no effort whatsoever to return to work, despite being a clearly intelligent individual with broad knowledge of the medical field.

Given these factors, it is determined claimant has failed to make a prima facia case of total disability. Accordingly, claimant does not qualify as an odd-lot employee.

The next issue is whether claimant is entitled to payment of claimed medical mileage. At the time of evidentiary hearing, defendants stipulated payment would be made for the medical mileage expenses claimed in Exhibit 20. Therefore, no determination on this issue is necessary.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13; and if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

The employer's failure to communicate the reason for the delay or denial to the employee contemporaneously with the delay or denial is not an independent ground for imposition of a penalty, however. Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount

unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Iowa Code 86.13, as amended effective July 1, 2009, states:

> 4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph *"b"*, an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

By this decision, the undersigned determined claimant is entitled to healing period benefits from August 12, 2011 through February 12, 2012, as well as 150

additional weeks of permanent partial disability benefits. Claimant therefore has two potential bases for a claim for penalty benefits.

Defendants have not paid any additional healing period benefits or permanent partial disability benefits beyond those ordered in the arbitration decision. Therefore, claimant has demonstrated a delay or denial of benefits. The burden then shifts to defendants to prove a reasonable or probable cause or excuse for the delay or denial. Section 86.13(4)(c) sets forth specific requirements for defendants to fulfill in order to establish a reasonable or probable cause or excuse. Defendants failed to provide evidence complying with section 86.13(4)(c), most notably contemporaneous conveyance to claimant of the basis for the delay or denial of benefits. As defendants failed to do so, claimant is entitled to an award of penalty benefits.

Claimant was awarded healing period benefits from August 12, 2011 through February 12, 2012 by this decision, a total of 26.429 weeks. Such benefits are to be paid at the weekly rate of $1,264.00, for a total monetary entitlement of $33,406.26. Although up to 50 percent of the amount denied can be assessed as a penalty, the undersigned does not believe such an award is warranted on the facts of this case. Claimant filed his review-reopening petition on March 1, 2013. He did not, however, convey an intention to seek healing period benefits until June 26, 2014. It was not until this point, 4 months prior to review-reopening hearing but 15 months after filing the petition that defendants were put on notice of the claim for benefits. Therefore, while benefits were delayed or denied by defendants, the severity of the delay only extends to late June 2014, as opposed to the entitlement period from August 12, 2011 through February 12, 2012. Therefore, the undersigned awards a penalty of 10 percent of the delayed healing period benefits, for a total penalty award of $3,340.63.

Claimant was also awarded an additional 125 weeks of permanent partial disability benefits by this decision. The parties stipulated such benefits commence on the date of filing of the review-reopening petition, March 1, 2013. Accordingly, all benefits ordered have accrued. These benefits are to be paid at the weekly rate of $1,163.00 and thus have a monetary value of $145,375.00. Again, a penalty of up to 50 percent of this amount can be assessed as a penalty. However, the undersigned does not believe such a significant penalty is warranted. Claimant suffered a clear change in his physical condition which prevented him from continuing practicing medicine. As a result, claimant lost a significant source of income. However, claimant made no attempt to return himself to the work force, thus lessening his claim for loss of earning capacity. He also denied surgical intervention which offered the possibility of improved function and/or the prevention of further worsening. Given the facts of this case, the undersigned awards a penalty of 15 percent of the delayed permanent partial disability benefits, for a total penalty award of $21,806.25.

Claimant is entitled to penalty benefits of $3,340.63 for delayed healing period

benefits and $21,806.25 for delayed permanent partial disability benefits. Claimant is accordingly, awarded a total of $25,146.88 in penalty benefits.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $100.00 filing fee; $12.22 service fee; $1,000.00 in expenses of Dr. Simon; $325.00 in expenses of Dr. Rettenmaier; and vocational report of Ms. Mitchell totaling $351.00. (Ex. 21, pp. 490-499) Defendants do not dispute taxation of these costs. These are allowable costs and are taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant healing period benefits at the weekly rate of one thousand two hundred sixty-four and 00/100 dollars ($1,264.00) for the period of August 12, 2011 through February 12, 2012.

Defendants shall pay unto claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing March 1, 2013 at the weekly rate of one thousand one hundred sixty-three and 00/100 dollars ($1,163.00).

Defendants shall receive credit for two hundred twenty-five (225) weeks of permanent partial disability benefits previously paid.

Defendants shall pay claimant's prior medical expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall pay penalty benefits in the amount of twenty-five thousand one hundred forty-six and 88/100 dollars ($25,146.88).

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools, 757 N.W.2d 330, 339 (Iowa 2008).

Defendants shall pay accrued weekly benefits in a lump sum.

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

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 29th day of December, 2015.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/sam

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