BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RALEIGH J. BEAVERS, Claimant, vs. DOHRN TRANSFER COMPANY, Employer, and PROTECTIVE INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED APR 24 2018 WORKERS COMPENSATION	File No. 5062860 ARBITRATION DECISION Head Note Nos.: 1402.30, 1402.40, 1403.10, 1801, 1801.1, 1803, 2206, 2501, 4000, 4100

Claimant Raleigh Beavers filed a petition in arbitration on December 8, 2016, alleging he sustained injuries to his left shoulder and cervical spine while working for the defendant, Dohrn Transfer Company ("Dohrn"). Dohrn and its insurer, the defendant, Protective Insurance Company ("Protective"), filed an answer on January 3, 2017.

An arbitration hearing was held on January 31, 2018, at Iowa Workforce Development in Sioux City, Iowa. Attorney Dennis Mahr represented Beavers. Beavers appeared and testified. Attorney Kent Smith represented Dohrn and Protective. Kim Huffman appeared on behalf of Dohrn and Protective, but did not testify. Joint Exhibits ("JE") 1 through 22, and Exhibits A through C were admitted into the record. The record was held open through March 9, 2018, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Dohrn and Protective waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Beavers and Dohrn at the time of the alleged injury.

2. Beavers sustained an injury on May 16, 2016, which arose out of and in the course of his employment with Dohrn.

3. If Dohrn and Protective are liable for the alleged injury Beavers is entitled to temporary partial disability benefits from May 14, 2016 through October 29, 2016, and temporary total disability benefits from December 3, 2016 through October 25, 2017.[1]

4. Although entitlement cannot be stipulated to, Dohrn and Protective agree Beavers was off work during this period of time.

5. If the injury is found to be a cause of permanent disability, the disability is an industrial disability.

6. If the injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is October 6, 2017 for the left upper extremity, or October 26, 2017.

7. At the time of the alleged injury Beavers's gross earnings were $1,434.90 per week, he was married and entitled to two exemptions, and the parties believe the weekly rate is $887.90.

8. Prior to the hearing Beavers was paid six weeks of compensation at the rate of $878.88 per week and temporary disability benefits totaling $20,214.24.

9. Dohrn and Protective agreed to pay costs set forth in Exhibits 14 and 22, including the cost of the independent medical examination.

ISSUES

1. What is the nature of the injury?

2. Is the alleged injury a cause of temporary disability during a period of recovery?

3. Is the alleged injury a cause of permanent disability?

4. If the alleged injury is found to be a cause of permanent disability, what is the extent of disability?

5. Has Beavers established he is permanently and totally disabled under the statute or under the common law odd-lot doctrine?

6. Is Beavers entitled to payment of medical expenses set forth in Exhibit 13?

7. Is Beavers entitled to alternate care under Iowa Code section 85.27?

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[1] In his post-hearing brief Beavers reported he received temporary total disability benefits from November 5, 2016 through April 14, 2017, as set forth in Exhibit C. Beavers relayed he is seeking temporary total disability benefits from April 15, 2017 through October 25, 2017. (Claimant's Brief, pages 40-41)

8. Should Beavers be awarded penalty benefits for alleged late payments totaling $3,512.52 from November 5, 2016 through December 2, 2016, for an alleged failure to pay temporary total disability benefits, and for a failure to pay temporary partial disability benefits?

FINDINGS OF FACT

Beavers is married and has four adult children. (JE 16, p. 2, Transcript, pp. 12-14) Beavers and his wife live in North Sioux City, South Dakota. (JE 18, p. 2) Beavers repeated the eighth grade and dropped out of school in the ninth grade because he was failing his classes. (JE 11, p. 9; JE 16, p. 3; JE 18, p. 7; Ex. B, p. 28; Tr., pp. 14-15) Beavers reported he was "pretty good in math." (Tr., p. 16) Beavers has not received any additional schooling. (JE 11, p. 9; JE 16, p. 3) Beavers is right-hand dominant. (Tr., p. 88) After his work injury, but before the hearing Beavers quit smoking. (JE 18, p. 7) At the time of the hearing he was sixty-six. (JE 16, p. 2; Tr., p. 12)

As a teenager Beavers worked as a cook, custodian, and dishwasher. (JE 16, p. 4; Tr., pp. 17-21) As an adult, Beavers has worked as a gas pump attendant, truck driver, laborer, furniture mover, and meat cutter. (JE 16, pp. 5-7; Tr., pp. 21-33) Since 1987 he has worked exclusively as a truck driver. (JE 16, pp. 6-7) Beavers holds a Class A commercial driver's license ("CDL"). (Tr., p. 81) Beavers has not undergone a physical for his CDL since his employment with Dohrn ended. (Tr., p. 82)

Dohrn hired Beavers to work as a truck driver, loader, and unloader for its Sioux City facility on October 18, 2006. (JE 16, p. 7; JE 17, p. 10) Dohrn hauls general freight, including food, steel, car axles, motors, televisions, tires, and John Deere parts. (JE 16, p. 7) Beavers initially drove in South Dakota, Iowa, Nebraska, and Minnesota for Dohrn. (JE 16, p. 7; Tr., p. 43) Based on his seniority, Beavers drove the Rock Valley route for the last seven years of his employment. (JE 16, p. 7; Tr., pp. 43, 36) Dohrn paid Beavers $21.75 per hour. (JE 16, p. 7) During his employment Beavers lifted items weighing two to three hundred pounds with assistance from others. (Tr., p. 46)

Beavers reported on May 16, 2016,

> I was loading a pallet of steel at Siouxland Machine & Babbs, Rock Valley, Iowa, with a pallet jack because they do not have a dock, which is an everyday deal. And I pushed my floor jack into the pallet, and they Saran wrapped their pallets completely with plastic.
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> And my wheels got stuck in the pallet inside when I was jacking it up, and I was pulling and twisting trying to get my jack loose. And that's when it pulled everything, pulled on my neck and my shoulder, and that's went I called in and told them I'd try to finish out the day to see how it would come out.

(Tr., p. 48) Beavers used the pallet jack with wheels on the bottom to lift items from one end of the trailer to the other. (Tr., pp. 49-50) Beavers reported he would push up to 3,000 pounds of steel out of Siouxland Machine with the pallet jack. (Tr., pp. 50-51, 121)

Beavers reported his work injury to Gerald Woolcock, a dispatcher for Dohrn. (JE 2, p. 1; JE 16, p. 8) Beavers completed a first report of injury form reporting he injured himself when he was pulling out a floor jack. (JE 2, p. 1) Dohrn documented Beavers reported he was injured while pulling a pallet jack and that he had a sore left arm and shoulder. (JE 2, p. 2)

On May 18, 2016, Beavers attended an appointment with Rodney Cassens, M.D., with Mercy Business Health Services, complaining of left shoulder pain. (JE 1, pp. 9-10) Dr. Cassens documented Beavers reported on May 16, 2016 he was pulling a floor jack when he experienced acute left shoulder pain. (JE 1, p. 10) Dr. Cassens assessed Beavers with a left shoulder strain and left trapezius strain, prescribed Flexeril and physical therapy, ordered Beavers to take Naproxen, and imposed a lifting restriction of fifteen pounds and restrictions of limiting "pushing, pulling to occasionally above the shoulder reaching" with the left upper extremity. (JE 1, p. 10) During cross-examination, Beavers testified he told Dr. Cassens he had "a sharp pain in my neck when – because we thought everything was in the shoulder." (Tr., p. 92) Beavers acknowledged the medical record notes he had full motion in his neck. (Tr., pp. 93-94)

Beavers returned to Dr. Cassens on May 25, 2016, reporting his left trapezius pain had improved, but he continued to have left shoulder pain. (JE 1, p. 11) Dr. Cassens assessed Beavers with a left shoulder strain versus rotator cuff tear and left trapezius strain, and ordered magnetic resonance imaging. (JE 1, p. 11) Dr. Cassens imposed a fifteen pound lifting restriction, and restrictions of occasional gripping and pinching, and no above the shoulder reaching with the left upper extremity. (JE 1, pp. 11, 13)

On June 6, 2016, Beavers underwent left shoulder magnetic resonance imaging. (JE 3, p. 1) The reviewing radiologist listed an impression of a small SLAP 2 lesion of the superior labrum at the biceps anchor, and small focal areas of subchondral cyst formation of the humeral head, and found no other abnormalities. (JE 3, p. 1)

During Beavers's recheck on June 7, 2016, Dr. Cassens noted the left shoulder magnetic resonance imaging revealed a small tear of the labrum of the left shoulder. (JE 1, p. 12) Dr. Cassens referred Beavers to an orthopedic surgeon, and continued his medications and restrictions. (JE 1, pp. 12, 15)

On June 23, 2016, Beavers attended an appointment with Benjamin Bissell, M.D., an orthopedic surgeon, complaining of left shoulder pain. (JE 4, pp. 1-3) Beavers reported he was experiencing a burning pain "that goes down his posterior left shoulder, down the posterior humerus/triceps area, and then he gets tingling going into his hand. He also gets left lateral neck pain" that is worse with activity and lifting, but is better when he holds his left arm on the top of his head. (JE 4, p. 1) Dr. Bissell examined

Beavers, assessed him with cervical radiculopathy, and ordered light duty, physical therapy and cervical spine magnetic resonance imaging. (JE 4, pp. 2, 31)

On July 14, 2016, Beavers underwent cervical magnetic resonance imaging. (JE 4, p. 37) The reviewing radiologist listed an impression of degenerative impingement of the left neural foramen, C6-C7, mild degenerative anterolisthesis, C7-T1, and multilevel disc bulge. (JE 4, p. 37)

Dr. Bissell's partner, Michael Espiritu, M.D., an orthopedic spine surgeon, examined Beavers on July 26, 2016. (JE 4, p. 4) Beavers complained of left neck, shoulder, and radiating arm pain. (JE 4, p. 4) Dr. Espiritu assessed Beavers with "disc osteophyte complex left C6-7 likely causing a left C7 radiculitis/radiculopathy," and prescribed a Medrol Dosepak and physical therapy with traction. (JE 4, p. 5) Beavers continued to treat with Dr. Espiritu, declined a cervical epidural injection, and elected to proceed with a C6-7 anterior cervical discectomy. (JE 4, p. 11) Dr. Espiritu continued his light duty restrictions. (JE 4, pp. 11, 32)

On October 7, 2016, Dohrn notified Beavers the Sioux City facility was being closed within the next ninety days. (JE 20, p. 14) Dohrn offered Beavers a transfer to Spencer, as a line haul driver, or to Des Moines, as a city driver. (JE 20, p. 14) The letter notified Beavers "all eligibility requirements must be met" for both positions, and the position in Des Moines would pay one dollar more per hour than his current position. (JE 20, p. 14)

Dohrn notified Beavers on November 2, 2016, his employment was ending November 5, 2016, and that he should contact Dohrn if he was interested in another position. (JE 20, p. 15) Beavers's attorney sent a letter to Protective the same date, notifying Protective Dohrn's Sioux City facility was closing on November 5, 2016, and requesting Beavers's temporary partial disability benefits be converted to temporary total disability benefits. (JE 12, p. 1) Beavers's attorney sent another letter on November 9, 2016, requesting Beavers receive temporary total disability benefits. (JE 12, p. 2)

Beavers testified from the time of his work injury until his termination, he was on light duty and he never returned to his old job. (Tr., p. 58) While on light duty he swept out trailers, cleaned the dock, painted posts, and took placards off trailers. (Tr., pp. 58, 66-67)

On January 30, 2017, Douglas Martin, M.D., an occupational medicine physician, performed an independent medical examination of Beavers for Dohrn and Protective. (Ex. A) Dr. Martin reviewed Beavers's medical records, and examined him. (Ex. A) Dr. Martin assessed Beavers with leftward C7 radiculopathy and recommended he proceed with cervical epidural injections or nerve root blocks with physical therapy. (Ex. A, p. 5)

With respect to causation, Dr. Martin opined,

> [i]t appears that there was some degree of injury that did occur on or about May 16, 2016. It probably involved a left shoulder strain and could have involved a left trapezius strain. It appears that there was initially some concern about a small labral tear on Dr. Cassen's part. However, it must be stated that many of these small labral tears, often times, are not symptomatic. It would appear that is the case, in this situation. When Dr. Bissell evaluated this gentleman, he felt that there was a cervical radicular problem and the MRI scan imaging study indicated a degenerative neuroforaminal encroachment condition with a disk osteophyte complex that is creating the issue.
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> Said disk osteophyte complex does not have a correlation to trauma. Instead, what we know from the evidence based literature that has been published on causation regarding this subject is that these degenerative conditions develop as a result of age, genetics and anthropomorphic factors. They do not have a trauma relationship, either from an acute standpoint or a cumulative standpoint.
>
> Thus, there would be no work relationship to the development of the left C7 radiculopathy because the radiculopathy is a result of a degenerative condition seen in the cervical spine.
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> I do not believe that there is any residual issue with regards to either a shoulder problem or a trapezius strain. On examination, those do not appear to be symptomatic or indicative of any objective limitation.

(Ex. A, p. 6)

Dr. Martin opined the May 16, 2016 incident was not a material and substantial factor of Beavers's current cervical condition, recommended Beavers seek treatment for his condition, and recommended a twenty pound material handling restriction, with limited lifting of material above shoulder level with the left extremity on a temporary basis. (Ex. A, p. 7)

Dr. Martin submitted a supplemental report on February 24, 2017, opining Beavers "never did sustain a shoulder injury" and opining he was "misdiagnosed by Dr. Cassens and others." (Ex. A, p. 9) On March 16, 2017, counsel for Dohrn and Protective notified counsel for Beavers given Dr. Martin's opinion Beavers had not sustained a left shoulder injury, Beavers's temporary total disability benefits were being terminated on April 15, 2017. (JE 12, p. 3)

Counsel for Beavers sent a letter to counsel for Dohrn and Protective on April 12, 2017, enclosing copies of the last check stub Beavers received from March 31, 2017, covering temporary total disability benefits through March 31, 2017, and requesting his checks be reinstated through April 15, 2017. (JE 12, p. 4) Counsel for Dohrn and Protective responded the next day stating it was his belief the checks were being issued and he would check with his clients. (JE 12, p. 5)

Dohrn and Protective denied liability with respect to Beavers's neck condition. Beavers underwent a cervical epidural injection at C6-7 and reported he received two days of relief, until he returned to his baseline. (JE 4, p. 15; JE 5, pp. 1-5) Dr. Espiritu assessed Beavers with herniation of a cervical intervertebral disc with radiculopathy, cervical radiculopathy, neck stiffness, and degenerative cervical spinal stenosis. (JE 4, p. 17) Beavers elected to proceed with surgery. (JE 4, p. 16)

On April 21, 2017, Beavers underwent a C6-7 anterior cervical discectomy and fusion, with an admitting diagnosis of left foraminal stenosis with disc degeneration C6-7, axial neck pain, and left upper extremity radiculitis. (JE 4, p. 19; JE 5, pp. 6-7, 11) Dr. Espiritu imposed a lifting restriction of five pounds, and restrictions of no strenuous activity or overhead reaching for extended periods of time. (JE 5, pp. 10-11) On May 3, 2017, Dr. Espiritu released Beavers to light duty with a fifteen pound lifting restriction. (JE 4, p. 41)

Following surgery Beavers attended an appointment with his family physician, Michael Harder, D.O. (Ex. 6, pp. 4-5) During the appointment Beavers reported he was doing well and had no concerns, noting he could lift his left arm which he could not do prior to surgery. (Ex. 6, p. 4)

Following surgery Beavers continued to have left shoulder pain. (JE 4, p. 22) Beavers was referred back to Dr. Bissell with no restrictions related to his neck. (JE 4, p. 23)

Beavers returned to Dr. Bissell on August 3, 2017. (JE 4, pp. 24-25) Dr. Bissell assessed Beavers with left shoulder impingement, offered injections, which he declined, and recommended a left shoulder arthroscopy, subacromial decompression, and possible biceps tenotomy. (JE 4, p. 25)

On September 1, 2017, Beavers underwent a left shoulder arthroscopy with decompression, biceps tenotomy, bursectomy, labral debridement, and cuff debridement, with an admitting diagnosis of left shoulder impingement and SLAP tear. (JE 4, p. 26; JE 5, p. 12) During a follow-up appointment on October 5, 2017, Dr. Bissell opined Beavers could resume his normal activities as tolerated without restrictions. (JE 4, p. 28)

Beavers underwent a functional capacity examination, requested by his attorney, on November 17, 2017. (Ex. 7) The physical therapist noted the validity results were ninety-four percent, which suggested a valid result. (Ex. 7, p. 1) For material handling ability, the physical therapist determined Beavers could shoulder lift thirty pounds infrequently, twenty-five pounds occasionally, fifteen pounds frequently, and ten pounds constantly, overhead lift twenty pounds infrequently, fifteen pounds occasionally, ten pounds frequently, and five pounds constantly, two hand carry thirty pounds infrequently, twenty-five pounds occasionally, fifteen pounds frequently, and ten pounds constantly, one hand carry twenty-five pounds infrequently, twenty pounds occasionally, ten pounds frequently, and five pounds constantly, walk push/pull twenty-five pounds infrequently, twenty-five pounds occasionally, fifteen pounds frequently, and five pounds

constantly, and stand push/pull twenty-five pounds infrequently, twenty-five pounds occasionally, fifteen pounds frequently, and ten pounds constantly. (JE 7, p. 19) For repetitive and static work ability, the physical therapist determined Beavers could forward reach and overhead reach frequently. (JE 7, p. 19) The physical therapist determined Beavers can perform work in the medium work classification. (JE 7, p. 19)

On November 22, 2017, counsel for Beavers sent a letter to Dr. Bissell, requesting him to check yes or no to questions he posed. (JE 4, p. 47) Dr. Bissell responded on November 30, 2017, agreeing Beavers sustained a permanent injury to his left shoulder on May 16, 2016, as a result of his work injury, and the surgery performed on September 1, 2017, was necessitated as a result of the work injury. (JE 4, p. 47) Dr. Bissell wrote Beavers reached maximum medical improvement for his left shoulder on October 31, 2017, and using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001), assigned an impairment rating of four percent to the left upper extremity and two percent whole person impairment under Table 16-3, page 439 of the AMA Guides. (JE 4, pp. 47-48) Dr. Bissell's report appears to have a scrivener's error. In the medical records, and as stipulated by the parties, Dr. Bissell opined Beavers reached maximum medical improvement on October 5, 2017, when he released Beavers from care. (JE 4, p. 28)

Dr. Bissell rejected the findings in the functional capacity evaluation performed on November 17, 2017, and opined Beavers has no limitations with respect to his left shoulder or need for future care. (JE 4, pp. 48-49) Beavers testified at hearing he does not take any prescription or over-the-counter medication for his left shoulder. (Tr., p. 89)

Counsel for Beavers also sent a form letter to Dr. Espiritu, asking him to check yes or no to questions he posed. (JE 4, pp. 50-51) Dr. Espiritu sent a response letter on December 6, 2017, agreeing Beavers sustained a material aggravation of a preexisting condition in his cervical spine on May 16, 2016, as a result of his work injury when he was tugging a floor jack with 500 to 600 pounds of steel on it across a dock, requiring surgery on April 21, 2017. (JE 4, p. 52) Dr. Espiritu opined Beavers reached maximum medical improvement for his cervical spine injury on October 25, 2017, and using the AMA Guides, assigned a permanent partial impairment rating of twenty-five percent. (JE 4, pp. 52-53) Dr. Espiritu found Beavers should follow the results of the November 17, 2017 functional capacity evaluation with respect to his future work and activities of daily living as a result of his work injury and recommended no further medical care. (JE 5, pp. 53-54) Beavers was not taking any medication for his neck condition at the time of the hearing. (Tr., pp. 89-90)

Sunil Bansal, M.D., an occupational medicine physician, performed an independent medical examination for Beavers on December 19, 2017. (Ex. 8) Dr. Bansal reviewed Beavers's medical records and examined him. (Ex. 8) Dr. Bansal opined the mechanism of forcibly pulling on a heavy pallet jack to free it is consistent with his cervical spine and left shoulder injuries, and need for surgery, noting Beavers was asymptomatic before the incident. (JE 8, pp. 45-49) Dr. Bansal placed Beavers at maximum medical improvement for his left shoulder injury on October 5, 2017, and for

his cervical spine injury on October 25, 2017. (JE 8, pp. 46, 49) Using the AMA Guides, Dr. Bansal assigned a twenty-five percent permanent impairment for the cervical spine injury under Table 15-5, and six percent permanent impairment for the upper extremity or a four percent body as a whole impairment for the left shoulder injury using Figures 16-40 through 16-46. (JE 8, pp. 46, 49) Dr. Bansal found the functional capacity evaluation was valid, and opined Beavers should follow the restrictions set forth in the report. (JE 8, pp. 47, 49-50)

Beavers retained Rick Ostrander, to provide a vocational opinion. (JE 11) Ostrander interviewed Beavers, reviewed his medical records, and provided his opinion on December 19, 2017. (JE 11) Using data from the labor market in the Sioux City area, Ostrander determined there were 13,680 positions consistent with his vocational profile within the medium exertional level. (JE 11, pp. 11-12) Ostrander opined given the functional limitations in his functional capacity evaluation, only 650 positions could be identified, which he believes results in a loss of employability of eighty percent, and a reduction in labor market access of ninety-five percent. (JE, p. 12) In reaching his conclusions Ostrander opined Beavers is not qualified for the full range of medium work because he is unable to maintain constant sitting, standing, or walking. (JE 11, p. 12)

In looking at the wages paid for the 650 positions, Ostrander determined the wage range is $20,000 to $25,000 per year, and Beavers's preinjury earning capacity was in the range of $70,000 to $75,000 per year, which "would suggest a reduction in earning capacity based on wage level of approximately 70% to 75%." (JE 11, p. 13) Ostrander then noted wages alone are not synonymous with earning capacity, and determined Beavers has "very few opportunities for full-time employment" given his unemployment status, lack of education, and reduction in labor market access, so he "would add approximately 10% to his total loss," for a total loss of earning capacity of eighty to eighty-five percent. (JE 11, pp. 13-14)

Dohrn and Protective retained René Haigh, to provide a vocational opinion. (Ex. B) Haigh reviewed Beavers's medical records, deposition, and interrogatory answers, but did not interview him. (Ex. B; Tr., pp. 17, 78) Haigh determined Beavers's past relevant work fell within the medium to very heavy physical demand levels. (Ex. B, p. 34) Haigh relayed that based on Dr. Martin's conclusion Beavers has sustained no impairment, Dr. Espiritu's opinion Beavers has no restrictions for his neck, and Dr. Bissell's conclusion Bissell is capable of performing all physical demand categories, Beavers has sustained no loss of access to pre-injury employment options. (Ex. B, pp. 34-38) Haigh located nine truck driving positions requiring a Class A CDL in the Sioux City area, and determined the median wage is $19.37 per hour. (Ex. B, p. 38)

After Dr. Espiritu released Beavers on October 25, 2017, he did not immediately seek employment. (Tr., pp. 103-04) Beavers applied for unemployment insurance benefits through Iowa Workforce Development. (Tr., pp. 23-24) Beavers was receiving benefits at the time of the hearing. (Tr., p. 24) Beavers submitted records to Iowa Workforce Development, showing between December 14, 2017, and January 26, 2018, he contacted fourteen employers to inquire if the employers were hiring, and he submitted three applications for employment. (Ex. 19) Beavers testified he has been

applying for local driving jobs, with the exception of a painting position and plumbing position. (Tr., p. 56, 117)

Beavers is not interested in over-the-road trucking, but reported he is qualified for over-the-road trucking. (Tr., p. 111) Beavers believes he could work as a painter and delivering cars. (Tr., p. 113) Beavers relayed he believes he could work as a truck driver using a Class A CDL. (Tr., p. 115)

CONCLUSIONS OF LAW

I. Nature of the Injury

The parties stipulated Beavers sustained a work injury on May 16, 2016. Beavers contends he sustained temporary and permanent impairments to his left shoulder and cervical spine as a result of his work injury. Dohrn and Protective reject his assertion and contend he did not sustain temporary or permanent impairments to his left shoulder and cervical spine as a result of the work injury.

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

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (quoting Bushing v. Iowa Ry. & Light Co., 208 Iowa 1010, 1018, 226 N.W.719, 723 (1929)).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N

Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

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

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

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

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

Four physicians have provided opinions concerning causation in this case, Dr. Bissell, a treating orthopedic surgeon who performed shoulder surgery on Beavers, Dr. Espiritu, a treating orthopedic surgeon who performed cervical spine surgery on Beavers, Dr. Martin, an occupational medicine physician retained by Dohrn and Protective to conduct an independent medical examination only, and Dr. Bansal, an occupational medicine physician retained by Beavers to conduct an independent medical examination only. I find the opinions of Drs. Bissell and Espiritu, both treating orthopedic surgeons with advanced training superior to that of Drs. Bansal and Martin, most persuasive.

Dohrn and Protective initially paid Beavers's medical care up until Dr. Martin issued his opinion. (Ex. A) Following his examination, Dr. Espiritu assessed Beavers with "disc osteophyte complex left C6-7 likely causing a left C7 radiculitis/radiculopathy." (JE 4, p. 5) After examining Beavers and reviewing his medical records Dr. Martin opined Beavers's condition is degenerative in nature and not caused by an acute or cumulative injury, the May 16, 2016 incident was not a material and substantial factor causing his current cervical condition, and Beavers never sustained a shoulder injury, but had been "misdiagnosed" by Dr. Cassens and others with a shoulder injury. (Ex. A, pp. 6-9)

Dr. Espiritu, who treated Beavers over the course of many months, disagreed with Dr. Martin, opining Beavers sustained a material aggravation of a preexisting condition in his cervical spine as a result of the work injury. (JE 4, p. 52) Dr. Bissell, who treated Beavers over the course of many months, also disagreed with Dr. Martin, opining Beavers sustained a permanent injury to his left shoulder as a result of the work injury. (JE 4, p. 47)

The opinions of Drs. Bissell and Espiritu are both supported by Dr. Bansal, who noted Beavers was asymptomatic before the May 2016 work injury. (JE 8, pp. 45-49) There is no evidence in the record Beavers complained of cervical spine or left shoulder problems for years before the work injury. During cross-examination, Beavers reported he did not recall receiving a Flexeril prescription for a neck problem in 1993. (Tr., p. 124) The record evidence supports Beavers's work injury caused a material aggravation of a preexisting condition in his cervical spine, and an injury to his left shoulder, both causing temporary disabilities during periods of recovery, requiring surgery, and causing permanent disabilities.

II. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u).

Beavers contends he is permanently and totally disabled under the statute and under the common law odd-lot doctrine. Dohrn and Protective reject his assertion.

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

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

As discussed, above, I found the opinions of Drs. Bissell and Espiritu most convincing. Using the AMA Guides, Dr. Bissell assigned a two percent whole person permanent impairment rating for Bissell's left shoulder condition, and Dr. Espiritu assigned a twenty-five percent permanent impairment rating for Bissell's cervical condition. Dr. Bissell placed Beavers at maximum medical improvement for his left shoulder condition on October 5, 2017. (JE 4, p. 28) Dr. Espiritu found Beavers was at maximum medical improvement for his cervical spine condition on October 25, 2017. (JE 4, pp. 29, 52-53)

The parties retained two vocational experts, Ostrander and Haigh to provide vocational opinions. I do not find the opinion of either expert persuasive.

Ostrander interviewed Beavers, reviewed his medical records, and provided his opinion on December 19, 2017. (JE 11) Using data from the labor market in the Sioux City area, Ostrander determined there were 13,680 positions consistent with his vocational profile within the medium exertional level. (JE 11, pp. 11-12) Ostrander opined given the functional limitations in his functional capacity evaluation, only 650 positions could be identified, which he believes results in a loss of employability of eighty percent, and a reduction in labor market access of ninety-five percent. (JE, p. 12) In reaching his conclusions Ostrander opined Beavers is not qualified for the full range of medium work because he is unable to maintain constant sitting, standing, or walking. (JE 11, p. 12) I found Beavers sustained injuries to his left shoulder and cervical spine as a result of the May 2016 work injury. Beavers's treating physicians and Dr. Bansal did not relate limitations with respect to sitting, standing, or walking to the alleged work injury to Beavers's left shoulder and cervical spine. I do not find Ostrander's opinion persuasive.

Haigh never interviewed Beavers. (Ex. B; Tr., pp. 17, 78) She also based her opinions on Dr. Martin's finding Beavers has sustained no impairment, her belief that Dr. Espiritu recommended no restrictions for his cervical spine, and Dr. Bissell's opinion that he is capable of performing all physical demand categories, finding Beavers sustained no loss of access to pre-injury employment options. (Ex. B, pp. 34-38) Haigh's opinion is flawed. Dr. Espiritu opined Beavers should follow the results of the functional capacity evaluation, which identifies a number of restrictions set forth above. (JE 4, pp. 53-54)

Beavers has limited education, and the majority of his past relevant work has been in truck driving. Beavers was a poor student, which affects his ability to engage in retraining. Beavers does not possess any computer skills. Beavers did not apply for work after Dr. Espiritu released him on October 25, 2017. Beavers waited to apply for work after he applied for unemployment insurance benefits.

Beavers's past relevant work falls in the medium to heavy range. Beavers has permanent restrictions identified in the functional capacity evaluation, which were accepted by Dr. Espiritu. (JE 7, p. 19) He does not have permanent right shoulder restrictions. I found Beavers to be a very credible witness at hearing based on his eye contact, rate of speech and demeanor. Beavers acknowledged during cross-examination he believed he could return to work as a painter or driver. Beavers has permanent restrictions as a result of his work injury. Based upon all of the factors of industrial disability, I find Beavers has sustained a seventy percent permanent impairment under the statute.

Beavers contends he is permanently and totally disabled under the odd-lot doctrine. Beavers lives in the urban area of Sioux City. I do not find he has met his burden of proof that the services he can perform are so limited in quality, dependability, or quantity that a reasonably stable market for his services does not exist. Beavers is entitled to 350 weeks of permanent partial disability benefits at the weekly rate of $887.90, commencing on October 26, 2017.

III. Temporary Partial and Temporary Total Disability Benefits

The parties stipulated if Dohrn and Protective are liable for the alleged injury, Beavers is entitled to temporary partial disability benefits from May 14, 2016 through October 29, 2016, as set forth in Exhibit 21 totaling $9,987.85, and temporary total disability benefits December 3, 2016 through October 25, 2017. In his post-hearing brief Beavers reported he received temporary total disability benefits from November 5, 2016 through April 14, 2017, as set forth in Exhibit C. (Claimant's Brief, p. 40) In his post-hearing brief Beavers seeks temporary total disability benefits from April 15, 2017 through October 25, 2017. (Claimant's Brief, pp. 40-41) Dohrn and Protective did not address temporary benefits in their post-hearing brief.

Pursuant to the stipulation of the parties, and Beavers's concession about benefits received in his brief and request for temporary total disability benefits, Beavers is entitled to $9,987.85 in temporary partial disability benefits from May 14, 2016

through October 29, 2016, and temporary total disability benefits from April 15, 2017 through October 25, 2017, at the weekly rate of $887.90.

IV. Medical Expenses and Alternate Care

Beavers seeks to recover medical expenses incurred for treatment he received for the May 2016 work injury. He also requests alternate care with Drs. Bissell and Espiritu.

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

The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). The Iowa Supreme Court has held an employer may be responsible for unauthorized care "upon proof by a preponderance of the evidence that such care was reasonable and beneficial," meaning "it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Gwinn, 779 N.W.2d at 206.

As analyzed above, Beavers has established he sustained temporary and permanent impairments to his left shoulder and cervical spine as a result of the May 2016 work injury, requiring surgery. Beavers seeks to recover the medical expenses set forth in Exhibit 13, which total $76,166.16 paid by his wife's insurance carrier, and out-of-pocket expenses totaling $1,234.96. (Ex. 13) The expenses are for medical treatment he received for his work injury. Dohrn and Protective are responsible for all causally related medical bills and treatment.

Neither Dr. Bissell nor Dr. Espiritu have recommended any additional treatment for Beavers. Should Beavers require additional treatment for his work injuries, Dohrn and Protective are responsible for the treatment with Drs. Bissell and Espiritu.

V. Penalty

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

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

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

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

Beavers seeks penalty benefits for alleged late payments totaling $3,512.52 from November 5, 2016 through December 2, 2016, and for a failure to pay temporary partial disability benefits. In his post-hearing brief Beavers also asserted entitlement to underpayment of the rate by $9.02. Any claim to penalty for the underpaid rate was waived by Beavers at hearing, when it was marked out in red pen by the parties on the Hearing Report. Dohrn and Protective aver no penalty benefits should be awarded.

Dohrn and Protective failed to timely pay benefits totaling $3,512.52 from November 5, 2016 through December 2, 2016. Beavers also seeks penalty benefits for the failure to pay any temporary partial disability benefits totaling $9,987.85. There was no justification provided for the failure to timely pay temporary total disability benefits or failure to pay temporary partial disability benefits. Dohrn and Protective should be assessed a penalty. Beavers did not present any evidence of the penalty history for Dohrn and Protective. Dohrn and Protective are assessed $5,000.00 in penalty benefits.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant nine thousand nine hundred eighty-seven and 85/100 dollars ($9,987.85) in temporary partial disability benefits from May 14, 2016 through October 29, 2016, and temporary total disability benefits from April 15, 2017 through October 25, 2017, at the weekly rate of eight hundred eighty-seven and 90/100 dollars ($887.90), pursuant to the parties' stipulation and the claimant's concession concerning benefits paid.

Defendants shall pay the claimant three hundred and fifty (350) weeks of permanent partial disability benefits, at the rate of eight hundred eighty-seven and 90/100 dollars ($887.90) per week, commencing on October 26, 2017.

Defendants shall pay accrued benefits in a lump sum with interest on all weekly benefits provided by law.

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

Defendants are responsible for all causally related medical treatment and medical bills, including seventy-six thousand one hundred sixty-six and 16/100 dollars ($76,166.16) paid by private insurance, and out-of-pocket medical bills totaling one

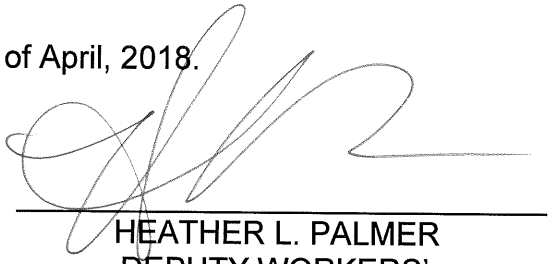
thousand two hundred thirty-four and 96/100 dollars ($1,234.96), set forth in Exhibit 13. Defendants are responsible for any future causally related medical treatment with Drs. Bissell and Espiritu.

Defendants shall pay the claimant five thousand and 00/100 dollars ($5,000.00) in penalty benefits.

Defendants are assessed the costs set forth in Exhibits 14 and 22, pursuant to the parties' stipulation.

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

Signed and filed this 24th day of April, 2018.



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HLP/srs

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.