

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CARLOS N. MEDINA,	:	FILED
	:	JUL 14 2017
Claimant,	:	WORKERS' COMPENSATION
vs.	:	
	:	File No. 5055609
NIS ASSEMBLING,	:	ARBITRATION
	:	
Employer,	:	DECISION
	:	
and	:	
	:	
TRAVELERS INDEMNITY COMPANY	:	
OF CONNECTICUT,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	Head Note No.: 1402.30

Claimant Carlos Medina filed a petition in arbitration on February 29, 2016, alleging he sustained an injury to his right shoulder, neck, and body as a whole on or about March 28, 2014, and averring the injury was, at least, in part, cumulative in nature. Defendants NIS Assembling ("NIS") and Travelers Indemnity Company of Connecticut ("Travelers") filed an answer on April 4, 2016.

An arbitration hearing was held on February 21, 2017, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney James Byrne represented Medina. Patricia Vargas-VerPloeg provided Spanish interpretation services during the hearing to Medina. Medina appeared and testified. Attorney James Ballard represented NIS and Travelers. Linda Murphy appeared on behalf of NIS and Travelers, but did not testify. Exhibits 1 through 12, and A through C were admitted into the record. The record was left open until April 10, 2017, for the receipt of post-hearing briefs and a supplement to Exhibit 5, pages 264I-264M. The briefs and supplementation to Exhibit 5 were received timely and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. NIS and Travelers waived all affirmative defenses.

STIPULATIONS

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

2. Although entitlement to temporary benefits cannot be stipulated, the parties agree Medina was off work for intermittent periods between July 29, 2016 and November 1, 2016, and that if NIS and Travelers are liable for the alleged injury, Medina is entitled to intermittent temporary benefits during this period of time.

3. At the time of the alleged injury Medina's gross earnings were \$407.00 per week, he was married with two exemptions, and the parties believe his weekly rate is \$283.86.

4. With respect to disputed medical expenses, the fees or prices charged by providers are fair and reasonable, the treatment was reasonable and necessary, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and the defendants are not offering contrary evidence, and although a causal connection of the expenses to the work injury cannot be stipulated, the listed expenses are at least causally connected to the medical condition upon which the claim of injury is based.

5. Costs have been paid.

ISSUES

1. Did Medina sustain an injury on or about March 28, 2014, which arose out of and in the course of his employment with NIS?

2. What is the nature of the injury?

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

4. Is Medina entitled to intermittent healing period benefits from July 29, 2016 through November 1, 2016?

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

6. If the alleged injury is a cause of permanent disability, what is the extent of disability?

7. What is the commencement date for permanent partial disability benefits?

8. Is Medina entitled to recover payment of medical expenses set forth in Exhibit 12?

9. Is Medina entitled to recover the cost of an independent medical examination?

10. Should costs be awarded to either party?

FINDINGS OF FACT

Medina lives in Iowa City with his wife. (Transcript, page 10) Medina was born in Lima, Peru. (Exhibit 7, p. 289; Tr., p. 11) Medina attended twelve years of school in Peru. (Tr., p. 11; Ex. C, p. 2) Medina left Peru and moved to New York in 1999. (Tr., p. 13; Ex. C, p. 3)

In February 2000, Medina moved to Iowa because of better employment opportunities. (Tr., pp. 14-15) Since 2000, Medina has worked for a number of employers for one and two years. (Ex. 7, pp. 291-92) Medina has experience in meat cutting, cleaning, and warehouse work. (Ex. 7, pp. 291-93) Medina was terminated by a number of his employers and earned between \$9.00 and \$15.00 per hour. (Ex. 7, pp. 291-93)

Medina has received workers' compensation benefits in the past. (Ex. 9, p. 303) Medina sought workers' compensation benefits for right elbow pain while he was working for IBP, for his left hand while working for Old Country Buffett, for his left hand and arm while working for Hawkeye Foods, for a hernia while working for Schenker, and for right arm pain and numbness in his hand while working for NIS on March 4, 2013. (Ex. 9, p. 303)

Medina speaks Spanish and some English. (Tr., p. 10) Medina is able to understand instructions provided to him in English, but he is not able to read and write in English. (Tr., p. 11) Medina is able to use a computer to access Facebook. (Tr., pp. 11-12) Medina is a smoker. (Ex. 3, p. 17) At the time of the hearing he was sixty-six. (Tr., p. 10)

Medina began working for NIS through a temporary staffing agency on January 31, 2012, working on refrigerator parts. (Ex. 9, p. 301; Tr., pp. 22-23) On December 10, 2012, NIS hired Medina as a full-time employee. (Ex. 9, p. 301; Tr., pp. 46-47) During his employment with NIS, Medina worked as an assembler and material specialist. (Ex. 9, p. 301) Medina's starting wage was \$9.00 per hour, and as of May 11, 2015, he earned \$9.45 per hour. (Ex. 9, p. 301)

Medina testified NIS assigned him to work in HV. (Tr., p. 23) Medina described his job, as follows:

In HV, we have a plastic box, and it has two holes, and I had to pass some cables through it that were very hard. I would pass the cables through. And then attached to the cable there was like a lid. I would have to pull the cables and pull on them very tightly so that they would go through so they would be airtight to avoid water getting in there. I would do that on

both sides, approximately twelve cables, and then I would add the circuits and then I would have to put in there some circuits.

(Tr., p. 23) Medina reported that when he performed the work he stood at a table that came up to his belt level. (Tr., pp. 23-24) Medina noted that he had to retrieve the circuits above his shoulder level. (Tr., p. 24) Medina testified the boxes weighed between five and six pounds and he would assemble sixty parts in ninety minutes to two hours. (Tr., p. 25) Medina reported he had to look down while assembling the parts, bending his neck. (Tr., pp. 25-26) This is confirmed by video recordings submitted by NIS and Travelers at hearing. (Ex. B)

Medina testified he worked in Mullions for NIS, where he lined the refrigerators while working on a table. (Tr., p. 26) The video recordings show employees performing both the HV and Mullions jobs. (Ex. B; Tr., pp. 27-28) Medina testified that the HV job shows three people standing there. (Tr., p. 28) Medina relayed that in 2012, NIS assigned three employees to work on HV, but in 2013 or 2014 NIS only had two employees working on HV at a time. (Tr., p. 29)

Medina relayed he also worked on "spider," where he "would have to take [products] out of containers, put them in boxes, and lift them and put them on the line for the other workers to work with them." (Tr., p. 27) Medina noted that he had to lift the boxes over his shoulder, and some of the boxes weighed forty to fifty pounds. (Tr., p. 27) Medina reported in 2014 he primarily worked in HV. (Tr., p. 32)

Medina testified while working for NIS in 2013, he experienced pain in his right arm, neck and shoulder. (Tr., p. 30) Medina could not recall a specific incident that occurred at NIS that caused his symptoms. (Tr., p. 58) Medina acknowledged he had neck and shoulder pain before he started working for NIS, but he avers the pain increased in 2013. (Tr., p. 30) Medina relayed he believed the pain was caused by the repetition and speed of his job at NIS. (Tr., pp. 30, 33) Medina testified he complained about the pain to his team leader, Mr. Harvey, and NIS sent him to Mercy Clinic for medical treatment. (Tr., p. 34) The date of the work injury listed on the petition is March 28, 2014.

Medina has a long history of treatment for neck and shoulder pain. (Ex. A) Medina attended an appointment on September 13, 2001, at the University of Iowa Hospitals and Clinics ("UIHC") complaining of neck pain radiating into his left upper shoulder, left side of the head, and right side of the head for several years. (Ex. A, p. 1) Medina was assessed with "[s]evere degenerative joint disease of the cervical spine causing chronic neck and headache." (Ex. A, p. 1) Medina received a cervical spine x-ray, and the reviewing radiologist listed an impression of "severe degenerative disc disease, C4-5 and C5-6." (Ex. A, p. 3)

In September 2004, Medina was stopped at a light in his vehicle when he was rear-ended by another vehicle, and complained of pain in his neck and throughout his

spine. (Ex. A, p. 6) Medina continued to treat at the UIHC for neck pain and right shoulder pain, and reported his pain interfered with his ability to sleep at night. (Ex. A, pp. 11-12)

Medina attended an appointment with Todd Burstain, M.D., at the UIHC on April 8, 2010, complaining of neck, shoulder, and arm pain. (Ex. A, p. 19) In May 2010, Dr. Burstain referred Medina to Matthew Howard, III, M.D., a neurosurgeon at the UIHC. (Ex. A, p. 20) During his appointment with Dr. Howard, Medina complained of pain radiating down his neck into his right arm and into the left shoulder. (Ex. A, p. 20) Dr. Howard documented Medina had been "symptomatic for decades but this is becoming progressively worse." (Ex. A, p. 20) Dr. Howard reviewed Medina's cervical magnetic resonance imaging, and found the imaging showed moderate degenerative changes most pronounced at C5-C6 and C6-C7, with some foraminal narrowing. (Ex. A, p. 20) Dr. Howard also ordered electromyography, which he noted showed no evidence of radiculopathy, but showed mild carpal tunnel syndrome on the right. (Ex. A, p. 21) Dr. Howard referred Medina to Esther Benedetti, M.D., at the UIHC Pain Management Clinic. (Ex. A, p. 21)

During Medina's appointment on August 2, 2010, Dr. Benedetti noted Medina complained of neck pain that was "sharp, shooting, burning, especially towards the right shoulder." (Ex. A, p. 22) Medina relayed his pain was constant, but usually worse in the afternoon, and was located "mainly on the right side of his neck and radiates into the head, right arm and right forearm." (Ex. A, p. 22) Medina complained his fingers were occasionally numb and would tingle, especially when elevating his arm, and complained of increased symptoms when turning his neck to the side, especially his right side, and flexing his chin on his chest. (Ex. A, p. 22) Medina told Dr. Benedetti his pain was relieved by ice packs and tramadol. (Ex. A, p. 22) Dr. Benedetti recommended facet injections. (Ex. A, p. 23)

Dr. Benedetti administered cervical facet injections on October 15, 2010, and March 7, 2011, at C2-C3, C3-C4, and C4-C5 on the right side. (Ex. A, pp. 26-29) Medina continued to receive treatment through the UIHC Pain Management Clinic. He received trigger point injections on June 1, 2011 and August 31, 2012, and a medial branch block at C2-C5 on February 5, 2013. (Ex. A, p. 29-40) Dr. Benedetti diagnosed Medina with cervical facet arthropathy. (Ex. A, p. 39) Medina underwent a left C2 through C5 radiofrequency ablation on March 5, 2013. (Ex. A, p. 42)

Medina reported a work injury to NIS. On April 1, 2014, Medina attended an appointment with Ernest Perea, M.D., an occupational medicine physician, at Mercy Occupational Health, complaining of cervical pain, right shoulder pain, right elbow pain, right forearm pain, and metacarpophalangeal joint pain. (Ex. 1, pp. 1-2) Dr. Perea ordered cervical and shoulder magnetic resonance imaging and x-rays, imposed a lifting restriction of ten pounds, and imposed restrictions of bending and twisting the neck, gripping and twisting, and fine manipulation thirty-three percent of the day, and to rotate from jobs every two hours. (Ex. 1, pp. 2, 4)

On April 7, 2014, Medina attended a follow-up appointment with Dr. Perea. (Ex. 1, p. 5) After reviewing the imaging, Dr. Perea provided an assessment of:

1. Cervical neck osteoarthritis appears to be chronic and preexisting.
2. Right shoulder pain appears to have some tendinopathy in the biceps, the supraspinatus, and the infraspinatus and could be work related. The pain and presentation is similar to his prior presentation in 2013. He has not had any trauma or fall injuries.
3. Metacarpophalangeal joint pain appears to be degenerative and preexisting in nature and his right 4th fingertip he has no problem with gripping, flexion/extension, and there does not appear to be any swelling present in a minor injury that does not show any fracture or dislocation on x-ray.

(Ex. 1, p. 6) Dr. Perea imposed a lifting restriction of twenty pounds, and restrictions of no bending or twisting of the neck, bilateral gripping/twisting, fine manipulation, reaching out, and reaching above shoulder thirty-three percent of the time, and recommended a referral to the UIHC. (Ex. 1, pp. 6, 8)

On April 23, 2014, Medina attended an appointment with Dr. Benedetti at the UIHC Pain Management Clinic. (Ex. 3, pp. 15-19) Dr. Benedetti assessed Medina with a history of chronic neck pain with radicular symptoms down the right arm, which may be from either shoulder or neck pathology. (Ex. 3, p. 18) Dr. Benedetti noted she could see shoulder pathology on his magnetic resonance imaging and she believed Medina would benefit from a diagnostic suprascapular nerve block to determine the source of the pain. (Ex. 3, pp. 18-19) Dr. Benedetti recommended repeat imaging, and prescribed gabapentin, in addition to tramadol. (Ex. 3, p. 19)

On June 5, 2014, Medina attended a follow-up appointment with Dr. Benedetti complaining of shoulder and neck pain. (Ex. 3, p. 20) Dr. Benedetti noted the imaging did not reveal any additional pathology. (Ex. 3, p. 20) Dr. Benedetti assessed Medina with right-sided neck and mainly shoulder pain with decreased range of motion, noted his symptoms are consistent with rotator cuff pathology, and recommended an orthopedic consultation. (Ex. 3, p. 25)

Medina returned to Dr. Benedetti on July 8, 2014, complaining of right shoulder pain. (Ex. 3, p. 26) Dr. Benedetti administered a right suprascapular diagnostic nerve block, and imposed restrictions of no repetitive reaching overhead or away from the body using the right arm. (Ex. 3, pp. 30-32)

Dr. Benedetti referred Medina to James Nepola, M.D., an orthopedic surgeon at the UIHC. (Tr., p. 37) During his appointment on July 15, 2014, Dr. Nepola documented Medina received a right shoulder glenohumeral injection, but he did not

receive any relief from the injection. (Ex. 3, pp. 32-38) Dr. Nepola diagnosed Medina with right shoulder pain and osteoarthritis. (Ex. 3, p. 38)

On August 5, 2014, Medina returned to Dr. Nepola, complaining of right shoulder pain. (Ex. 3, p. 42) Dr. Nepola noted Medina may have impingement and imposed restrictions of sedentary work with no repetitive reaching overhead or away from his body using his right arm, and no driving while taking medication. (Ex. 3, pp. 42-43) Medina received another right shoulder glenohumeral joint injection. (Ex. 3, pp. 44-46) Medina received another right shoulder injection on August 12, 2014. (Ex. 3, p. 47) Dr. Nepola ordered physical therapy, and continued Medina's restrictions. (Ex. 3, pp. 47-50)

On September 2, 2014, Medina attended a follow-up appointment with Dr. Nepola, complaining of right shoulder pain, pain radiating down his neck, and numbness and paresthesias in his right index and long fingers. (Ex. 3, pp. 51-52) Dr. Nepola administered another injection and Medina reported a fifty percent relief in his pain in his acromioclavicular joint following the injection. (Ex. 3, pp. 52-53) Dr. Nepola continued Medina's restrictions. (Ex. 3, p. 55)

Medina received additional right joint injections on September 30, 2014, October 28, 2014, November 25, 2014, and reported he received relief from the injections. (Ex. 3, pp. 56-67) The UIHC continued his restrictions. (Ex. 3, p. 63, 70)

On December 22, 2014, Medina returned to Dr. Benedetti complaining of left-side neck pain and shoulder pain. (Ex. 3, pp. 71-73) Dr. Benedetti assessed Medina with chronic pain, cervical facet arthropathy, cervical spondylosis, and left shoulder pathology, "AC joint arthritis vs. Bicipital tendonitis," and decreased his tramadol. (Ex. 3, p. 74)

Medina returned to Dr. Nepola on January 6, 2015, complaining of right shoulder and right neck pain with radiation into the right forearm and numbness and tingling in the right hand fingers. (Ex. 3, p. 76) Dr. Nepola continued his restrictions, and referred Medina to neurosurgery. (Ex. 3, p. 77) Dr. Nepola documented Medina understood he would not be offered shoulder surgery "unless his cervical spine is cleared by neurosurgery." (Ex. 3, p. 77) Dr. Nepola is a recognized expert in his field. Neither party produced a causation opinion from Dr. Nepola regarding Medina's right shoulder complaints.

On January 13, 2015, Medina attended an appointment with Raheel Ahmed, M.D., a neurosurgeon at the UIHC. (Ex. 3, p. 80) Dr. Ahmed reviewed Medina's imaging from 2014, and listed an impression of cervical spondylosis with associated radicular symptoms, and concurrent ongoing shoulder arthritis. (Ex. 3, p. 81) Dr. Ahmed recommended conservative management with a cervical immobilization collar, physical therapy, and electromyography. (Ex. 3, pp. 81-82)

During Medina's appointment on March 10, 2015, Dr. Ahmed noted the electromyography did not show evidence of radiculopathy, and he had recommended a trial of bracing, which Medina had not completed. (Ex. 3, p. 92) Dr. Ahmed documented he explained to Medina that his foraminal stenosis at C5-C6 may account for his neck and right upper extremity radicular pain, and it would be reasonable for him to undergo an anterior cervical decompression and fusion. (Ex. 3, p. 93)

On April 16, 2015, Abdul Foad, M.D., an orthopedic surgeon, conducted an independent medical examination of Medina for NIS and Travelers. (Ex. 4) Dr. Foad examined Medina and reviewed his medical records. (Ex. 4, p. 226) Dr. Foad noted Medina underwent a left cervical radiofrequency ablation procedure at C2-5 in March 2013, which provided relief for approximately eighteen months. (Ex. 4, p. 228) Dr. Foad diagnosed Medina with a myofascial chronic strain with significant pre-existing spondylosis with severe bilateral foraminal stenosis mainly at C5-6 and less severe at other levels, and mild acromioclavicular joint chronic arthritis and mild glenohumeral joint arthritis. (Ex. 4, p. 231) Dr. Foad opined:

1. I cannot agree that Mr. Carlos Median [sic] Aponte suffered a work-related injury (arising out of and in the course of employment) on 3/28/14 at NIS Company.
2. I do not recognize any substantial structural damage that can be related to the alleged 3/28/14 work injury. However, he does have progressive and significant multilevel cervical degenerative spondylosis and may eventually need to be addressed on his own insurance.
3. I do not recognize any damage or harm to the physical structure of the claimant's body that would have resulted from the alleged 3/28/14 incident at work.
4. No permanent impairment is indicated with regards to the 3/28/14 alleged work injury.
5. I do not find any objective information upon which to base a recommendation that the claimant should be restricted from any type of work tasks due to the damage allegedly suffered in the 3/28/14 incident at work.

(Ex. 4, pp. 232-33) On April 23, 2015, Travelers sent Medina a letter notifying him that his workers' compensation claim was being denied based on Dr. Foad's opinion that his current symptoms and need for treatment were not caused by his job duties. (Ex. 10, p. 320)

After Travelers and NIS denied Medina's claim he continued to seek treatment at the UIHC. (Tr., p. 40) Medina continued to complain of chronic right shoulder pain and pain in both hands. (Ex. 3, pp. 102-06)

Medina retained Sunil Bansal, M.D., an occupational medicine physician, to conduct an independent medical examination on January 22, 2016. (Ex. 5) Dr. Bansal examined Medina and reviewed his medical records. (Ex. 5) Dr. Bansal diagnosed Medina with aggravation of cervical spondylosis and rotator cuff tendinopathy. (Ex. 5, p. 244) Dr. Bansal agreed with Dr. Ahmed that Medina would benefit from an anterior cervical decompression and fusion. (Ex. 5, p. 244)

With respect to causation, Dr. Bansal opined “[c]loser scrutiny indicates that Mr. Medina’s right shoulder complaints are sometimes seen in the workplace, and known as ‘overuse syndrome.’ The job duties at Tyson, on a cumulative basis, are highly pathognomonic for Mr. Medina’s particular type of shoulder pathology.” (Ex. 5, p. 245) Dr. Bansal also opined Medina aggravated his underlying cervical spondylosis at NIS, because there was no mention of “invasive treatment” such as surgery before he started working for NIS. (Ex. 5, p. 246) Dr. Bansal also found Medina’s symptoms were aggravated when he returned to work while receiving treatment with repetitive flexing and extending of the neck as he went from working on the circuit box to reaching for another circuit box. (Ex. 5, p. 247)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides”), Dr. Bansal opined because Medina has multiple cervical disc involvement, the range of motion method should be used rather than the DRE method for evaluating his impairment, and found:

The three components of a range of motion impairment are:

- a. Rating of range of motion deficits of the spine using inclinometers, Tables 15-12, 13 and 15-14:

		% Impairment
Flexion:	30 degrees	2
Extension:	20 degrees	4
Left Lateral Flexion	15 degrees	2
Right Lateral Flexion	15 degrees	2

Total for range of motion = 10% impairment of the body as a whole.

- b. The rating for the accompanying diagnosis:
Table 15-7, He is assigned per IIC+F, a 7% impairment of the body as a whole.
- c. Ratings for spinal nerve deficits:
Using Tables 15-5, 15-16, and 15-18, the following calculations are derived.

Sensory deficit of 20% of C7 = $0.2 \times 8\% = 1\%$

Total neurological deficit = 5% impairment of the body as a whole.

(Ex. 5, p. 249) Dr. Bansal combined the impairments from a through c and found Medina had sustained a seventeen percent impairment to the body as a whole. (Ex. 5, p. 249) Dr. Bansal then noted, “[p]rior to the work at NIS, he would have been impaired at 15% whole person based on a DRE Category III methodology per Table 15-5. As his current impairment is 18% of the whole person, the contribution from the work at NIS is $17-15 = 2\%$ impairment of the body as a whole.” (Ex. 5, p. 249)

With respect to the right shoulder, using Figures 16-40 through 16-46, and comparing to the left shoulder, Dr. Bansal assigned:

	RANGE OF MOTION	% UE Impairment
Flexion:	168, 166, and 166 degrees	1
Abduction:	160, 164, and 162 degrees	1
Adduction	54, 54, and 52 degrees	0
External Rotation:	76, 78, and 80 degrees	0
Extension:	44, 40, and 42 degrees	1
Internal Rotation:	62, 61, and 63 degrees	2

This equals a 5% upper extremity impairment, which is equal to a 3% impairment to the body as a whole.

(Ex. 5, p. 250) Dr. Bansal recommended permanent restrictions of avoiding work or activities that require repeated neck motion or place his neck in a posturally flexed position for any appreciable duration of time greater than fifteen minutes, and with respect to the right shoulder, no lifting greater than ten pounds occasionally, or five pounds frequently, or overhead with the right arm, along with no repetitive reaching with the right arm. (Ex. 5, p. 250)

Medina continued to complain of right shoulder pain. (Ex. 3, pp. 127-28) Carolyn Hettrich, M.D., in sports medicine at the UHIC, ordered and reviewed imaging and listed diagnoses of right shoulder pain, and a tear of the right rotator cuff “unspecified tear extent.” (Ex. 3, p. 129)

Medina was involved in an altercation with his team leader, Harvey, in May 2016. (Tr., p. 41; Ex. 9, p. 302) Medina testified he asked Harvey to go outside to “fix this with our fists” and he pushed Harvey. (Ex. C, p. 6) Following the altercation NIS terminated Medina’s employment. (Ex. 9, p. 302; Tr., p. 42) Medina testified that before the altercation he spoke with a woman in human resources at NIS and told her that he was going to retire effective June 1, 2016. (Tr., p. 43; Ex. C, p. 5)

On July 12, 2016, Medina returned to the UIHC and was examined by Taylor Abel, M.D., a neurosurgeon. (Ex. 3, p. 136) Dr. Abel ordered and reviewed cervical

magnetic resonance imaging, which he noted showed stenosis at C5-C6, and mild stenosis at C6-C7. (Ex. 3, p. 136) Dr. Abel tentatively scheduled Medina for C5-C7 anterior cervical discectomy and fusion. (Ex. 3, p. 136) On July 29, 2016, Medina underwent an anterior cervical discectomy and fusion extending from C3 through C7, and a right carpal tunnel release. (Ex. 3, pp. 150, 170, 194-95) Dr. Abel imposed a ten pound lifting restriction upon Medina's discharge on July 31, 2016. (Ex. 3, pp. 152, 175)

Medina attended a follow-up appointment with Dr. Abel on September 20, 2016. (Ex. 3, p. 211) Medina reported his right shoulder pain had worsened and he complained of numbness in his right middle finger. (Ex. 3, p. 211) Dr. Abel ordered physical therapy. (Ex. 3, p. 211)

The attorney for NIS and Travelers sent a letter to Dr. Abel requesting a causation opinion. (Ex. 3, p. 214) On September 30, 2016, Dr. Abel responded by letter,

I have seen and evaluated Carlos Medina Aponte at the University of Iowa Hospitals and Clinics. On 7/29/2016, I performed a C3-7 anterior cervical discectomy and fusion on Carlos Medina Aponte for neck pain and radiculopathy related to degenerative changes in the cervical spine. Additionally, Mr. Medina Aponte had EMG changes of bilateral median nerve compression with signs and symptoms of carpal tunnel syndrome for which I performed a right carpal tunnel release.

Review of this patient's cervical MRI reveals long-standing degenerative changes in the cervical spine and it would be unusual for these changes to be related to any specific work-related event. Additionally, carpal tunnel syndrome, by nature, is a degenerative condition that would be unlikely to be related to any specific work-related event. The chronicity (>1 year) of Mr. Medina Aponte's presentation to neurosurgery clinic also suggests that his symptoms are degenerative in nature.

(Ex. 3, p. 215)

On November 1, 2016, Medina attended a follow-up appointment with Dr. Abel. (Ex. 3, p. 217) Dr. Abel documented Medina was much better, his shoulder pain had improved significantly, but he still had some shooting pain that occasionally goes down his right upper extremity while lifting. (Ex. 3, p. 217)

Medina's attorney sent a letter to Dr. Abel requesting an opinion letter. (Ex. 3, pp. 223-24) Dr. Abel responded on November 23, 2016, included his response from September 30, 2016, and added:

While Mr. Medina's long-standing degenerative changes likely existed prior to his work for NIS, it is likely that both his symptoms of cervical

radiculopathy and carpal tunnel syndrome were aggravated by his work. Thus, it is possible that the aggravation of Mr. Medina's symptoms led to the recommended of the surgeries mentioned above.

(Ex. 3, p. 225)

Dr. Bansal conducted a second independent medical examination of Medina on November 18, 2016, after receiving additional medical records and examining Medina. (Ex. 5, pp. 253, 261-62) Dr. Bansal noted that he stood by his original causation opinion, noting "[e]ssentially the work-related duties permanently aggravated his clinical condition, necessitating further intervention. This is echoed by Dr. Abel when he states that Mr. Medina's symptoms were aggravated by his work." (Ex. 5, p. 262) With respect to his neck, Dr. Bansal placed Medina at maximum medical improvement on November 1, 2016, his last appointment with Dr. Abel. (Ex. 5, p. 263) With respect to his right shoulder, Dr. Bansal placed Medina at maximum medical improvement on January 6, 2014, at his last appointment with Dr. Nepola. (Ex. 5, p. 263)

Using the AMA Guides, Dr. Bansal opined that under Table 15-5, Medina meets the criteria for DRE Category IV, given he is "status post C3 through C7 anterior cervical discectomy and fusion. Unfortunately, he continues to have pain and radiculopathy. Therefore, I assign a 27% whole person impairment." (Ex. 5, p. 263) Dr. Bansal did not change his findings regarding Medina's right shoulder. (Ex. 5, p. 263) Dr. Bansal recommended permanent restrictions of lifting twenty-five pounds with both arms, ten pounds with the right arm alone, to avoid lifting more than ten pounds overhead with both arms, five pounds maximum with the right overhead, no frequent overhead lifting, to avoid work or activities that require repeated neck motion, or place his neck in a posturally flexed position for any appreciable duration of time greater than fifteen minutes. (Ex. 5, p. 263)

Counsel for NIS and Travelers contacted Dr. Howard, the Chair of the UIHC Neurosurgery Department, and requested he review Medina's UIHC medical records prior to and after March 28, 2014, and Exhibit B, the videos of Medina's job duties. (Ex. A, p. 50) NIS and Travelers requested an opinion from Dr. Howard regarding causation, and sent Dr. Howard the following letter, which provides, in part:

My notes from our conference indicate that you stated that Mr. Medina Aponte has a long-standing history of cervical degeneration disk disease. You further stated that based on the information you have received and reviewed, that you do not feel that Mr. Medina Aponte's work duties were a substantial contributing factor to causing or materially aggravating Mr. Medina Aponte's cervical degenerative disk disease. Furthermore, you stated that Mr. Medina Aponte's cervical fusion surgery, which was performed by Dr. Abel, University of Iowa Neurosurgery Department, was not caused by or contributed to by the work duties performed by Mr. Medina Aponte, at least those depicted on the video, and which Mr.

Medina Aponte stated in his deposition he believed were the duties which contributed the most to his injury.

It was your opinion within a reasonable degree of medical certainty that the natural progression of Mr. Medina Aponte's cervical degenerative disk disease likely lead to his increase in and was the cause or most substantial cause in bringing about the need for the multilevel cervical fusion procedure performed by Dr. Abel.

Dr., if you agree with the statements which I have made in this letter, I ask that you please acknowledge your agreement by signing and dating this statement.

I, Matthew Howard, M.D., University of Iowa Neurosurgery Department, state that I am in agreement with the statements made in this letter regarding the cause of Mr. Medina Aponte's cervical pathology as well as the reason for his multilevel cervical fusion. Specifically, I do not feel that his work duties at NIS were a substantial contributing factor to causing or materially aggravating Mr. Medina Aponte's cervical pathology. Similarly, I do not feel that Mr. Medina Aponte's job duties performed at NIS were a substantial contributing factor to causing or bringing about the need for the multilevel cervical fusion procedure performed by Dr. Abel. These opinions are stated within a reasonable degree of medical certainty.

(Ex. A, p. 51) Dr. Howard signed the letter, agreeing with its content; he did not provide any handwritten comments. (Ex. A, p. 51)

Medina's counsel sent Dr. Bansal a copy of Dr. Howard's opinion, the videos, and additional materials for review. (Ex. 5, p. 264I) Dr. Bansal responded the video depicted three employees, which differed from Medina's testimony, that two people performed the job in 2013 and 2014, and noted "as your head pulls down and forward, your neck gets overloaded causing strain on those muscles and joint." (Ex. 5, p. 264J)

Medina started receiving Social Security retirement benefits in June 2016, after NIS terminated his employment. (Tr., pp. 60-61; Ex. C, p. 2) Since leaving NIS Medina has not looked for work. (Tr., p. 61) Medina relayed he feels better since he had surgery, but he has not made any progress since November 2016. (Tr., pp. 45-46) Medina testified he continues to take tramadol approximately every other day for pain. (Tr., p. 45)

CONCLUSIONS OF LAW

I. Nature of the Injury

Medina alleges he sustained a cumulative injury to his cervical spine and right shoulder while working for NIS on March 28, 2014. NIS and Travelers deny Medina sustained a work injury, and aver Medina's cervical spine and right shoulder conditions are preexisting conditions personal to Medina and his employment with NIS was not a substantial contributing factor to causing and/or materially aggravating his conditions.

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 Electric 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).

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 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 Community School 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 Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Medina alleges he sustained a cumulative injury while working for NIS. Cumulative injuries are occupational diseases that develop over time. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015). A cumulative injury results from repetitive trauma in the workplace. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). “A cumulative injury is deemed to have occurred when it manifests – and ‘manifestation’ is that point in time when ‘both the fact of the injury and the causal relationship of the injury to the claimant’s employment would have become plainly apparent to a reasonable person.’” Baker, 872 N.W.2d at 681.

Medina acknowledged at hearing he received treatment for neck and shoulder pain before he worked for NIS, but contends his work for NIS aggravated his preexisting conditions. 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).

Medina has a long history of neck and shoulder pain dating back to 2001. (Ex. A) The record reflects that he was assessed with “severe degenerative disc disease, C4-5 and C5-6” in 2001. (Ex. A, p. 3) Medina continued to complain of pain in his neck, right arm and right shoulder. (Ex. A, p. 22) Medina was referred to Dr. Benedetti at the UIHC Pain Management Clinic and he received cervical facet injections on October 15, 2010, and March 7, 2011, at C2-C3, C3-C4, and C4-C5 on the right side, trigger point injections on June 1, 2011 and August 31, 2012, a medial branch block at C2-C5 on February 5, 2013, and a left C2 through C5 radiofrequency ablation on March 5, 2013. (Ex. A, pp. 26-42)

Four physicians have provided opinions on causation, Drs. Howard and Abel, treating neurosurgeons at the UIHC, Dr. Foad, an orthopedic surgeon who performed an independent medical examination only, and Dr. Bansal, an occupational medicine physician who performed an independent medical examination only. As noted above, neither party obtained an opinion from Dr. Nepola, who treated Medina’s shoulder complaints before he was again referred to neurosurgery.

Dr. Howard opined he did not believe Medina’s “work duties at NIS were a substantial contributing factor to causing or materially aggravating” his cervical pathology, or “were a substantial contributing factor to causing or bringing about the need for the multilevel cervical fusion procedure performed by Dr. Abel.” (Ex. A, p. 51) Dr. Foad also opined Medina has not sustained a permanent impairment caused by the alleged work injury on March 28, 2014. (Ex. 4, pp. 231-33; Ex. A, p. 51)

Dr. Abel opined “[w]hile Mr. Medina’s long-standing degenerative changes likely existed prior to his work for NIS, it is likely that both his symptoms of cervical radiculopathy and carpal tunnel syndrome were aggravated by his work. Thus, it is possible that the aggravation of Mr. Medina’s symptoms led to the recommendation of the surgeries mentioned above.” (Ex. 3, p. 225) Dr. Bansal opined Medina’s symptoms were aggravated by his work for NIS, noting there was no mention of a need for “invasive treatment” such as surgery before Medina started working for NIS. (Ex. 5, pp. 244-47)

I find the opinions of Dr. Howard, a neurosurgeon, and Dr. Foad, an orthopedic surgeon, most convincing. Dr. Howard is the Chair of the Department of Neurosurgery at the UIHC. Dr. Bansal is an occupational medicine physician who conducted an independent medical examination of Medina only. I do not find his opinion persuasive. Dr. Bansal bases his opinion regarding Medina’s cervical condition on the fact there was never any mention of invasive treatment before Medina worked for NIS, and that his symptoms were aggravated when he returned to work. (Ex. 5, pp. 246-47) Dr. Bansal’s opinion minimizes the years of treatment Medina received at the UIHC, from multiple providers. Moreover, Dr. Bansal’s original opinion concerning Medina’s alleged shoulder injury discussed “overuse syndrome” based on Medina’s job duties at Tyson, on a cumulative basis. (Ex. 5, p. 245) Tyson is not Medina’s employer. Dr. Bansal’s subsequent opinion from November 18, 2016, also contains an error, noting after

Medina was terminated after he began receiving Social Security Disability Benefits. (Ex. 5, p. 261) Medina testified he receives Social Security retirement benefits. (Tr., pp. 60-61; Ex. C, p. 2)

Dr. Abel's opinion is equivocal. He opined "it is possible that the aggravation of Mr. Medina's symptoms led to the recommended surgeries" he performed. (Ex. 3, p. 225) The Iowa Supreme Court has held, a probability of causation must exist, a mere possibility of causation is insufficient. *Frye*, 569 N.W.2d at 156. Dr. Abel's opinion does not support causation. While Dr. Howard has not recently examined Medina, he has treated him in the past. Dr. Howard's opinion is clear and convincing. (Ex. A, p. 51)

Based on the causation opinions of Drs. Howard and Foad, I find Medina has failed to establish that he sustained an injury to his cervical spine and shoulder arising out of and the course of his employment with NIS on March 28, 2014. Given Medina has failed to meet his burden of proof he is not entitled to recover the medical expenses set forth in Exhibit 12, or intermittent healing period benefits from July 29, 2016 through November 1, 2016.

II. Independent Medical Examination

Medina seeks to recover the \$385.00 cost of Dr. Bansal's independent medical examination and the \$2,605.00 cost of the report. After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." *Id.* Dr. Bansal conducted his examination after Dr. Foad issued his independent medical examination report finding no causation.

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

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

867 N.W.2d 839, 846-47 (Iowa 2015). Dr. Bansal's bill is itemized. Under Young, Medina is entitled to recover the \$385.00 cost of Dr. Bansal's exam. *Id.*

III. Costs

Medina seeks to recover the \$100.00 filing fee for the petition, two service fees of \$6.74 each, the \$2,605.00 cost of Dr. Bansal's first report, and the \$1,885.00 cost of Dr. Bansal's second report. Given I found Medina failed to meet his burden of proof that he sustained an injury arising out of and in the course of his employment, I find the parties should pay their own costs.

ORDER

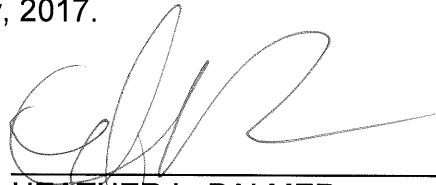
IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the three hundred eighty-five (\$385.00) cost of Dr. Bansal's independent medical examination pursuant to Iowa Code section 85.39.

Claimant shall take nothing additional in this proceeding.

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 14th day of July, 2017.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

COPIES TO:

James C. Byrne
Attorney at Law
1441 29th Street, Suite 111
West Des Moines, IA 50266
JByrne@nbolawfirm.com

James M. Ballard
Attorney at Law
14225 University Ave., Suite 142
Waukee, IA 50263
jballard@jmbfirm.com

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.