BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN KOWALSKE, Claimant, vs. MIKE FINNIN FORD, Employer, and ACUITY INSURANCE, Insurance Carrier, Defendants.	:	File No. 5059495 ARBITRATION DECISION Head Note Nos.: 1803, 2206, 2501 2701

FILED
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WORKERS COMPENSATION

Claimant Steven Kowalske filed a petition in arbitration on August 28, 2017, alleging he sustained an injury to his back, left leg, buttocks, and left foot and toes while working for the defendant, Mike Finnin Ford, on October 22, 2015. Mike Finnin Ford and its insurer, the defendant, Acuity Insurance ("Acuity"), filed an answer on September 5, 2017, admitting Kowalske sustained a temporary injury only.

An arbitration hearing was held on September 10, 2018, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Mark Sullivan represented Kowalske. Kowalske appeared and testified. Attorney Coreen Sweeney represented Mike Finnin Ford and Acuity. Joint Exhibits ("JE") 1 through 17, Exhibits 1 through 4, and A through G were admitted into the record. The record was held open through November 13, 2018, for the receipt of post-hearing briefs, and for pages 1 through 15 of JE 8. The pages 1 through 15 of JE 8 and 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. Mike Finnin Ford and Acuity waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Mike Finnin Ford and Kowalske at the time of the alleged injury.

2. Kowalske sustained an injury on October 22, 2015, which arose out of and in the course of his employment with Mike Finnin Ford.

3. Temporary benefits are no longer in dispute.

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

5. The commencement date for permanent partial disability benefits, if any are awarded, is October 23, 2015.

6. At the time of the alleged injury Kowalske's gross earnings were $568.24 per week, he was single and entitled to one exemption, and the parties believe the weekly rate is $355.34.

7. Mike Finnin Ford and Acuity agreed to pay the medical mileage set forth in Exhibit 2, but not the medical mileage for July 3, 2017 and October 31, 2017.

8. Costs have been paid.

ISSUES

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

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

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

4. Is Kowalske entitled to payment of medical expenses?

5. Is Kowalske entitled to alternate medical care?

6. Is Kowalske entitled to reimbursement for medical mileage?

7. Should costs be assessed against either party?

FINDINGS OF FACT

Kowalske lives in Dubuque, Iowa, with his girlfriend. (Exhibit A, page 3; Ex. F, p. 6; Transcript, p. 7) Kowalske was married for twenty-one years until his wife died in 1997. (Ex. A, p. 3; Tr., pp. 7-8) Kowalske graduated from Wahlert High School in Dubuque in 1972. (Ex. A, p. 4; Tr., p. 8) In high school Kowalske earned C grades. (Tr., p. 8) After high school Kowalske attended Loras College and he graduated with a bachelor's degree in music education in 1976. (Ex. A, p. 4; Tr., p. 8) Kowalske earned

a B average in college. (Tr., pp. 8-9) Kowalske has never taught music. (Tr., p. 9) At the time of the hearing he was sixty-four. (Ex. A, p. 3; Tr., pp. 8, 49)

Kowalske worked as a professional musician, playing trumpet and keyboard for a band off and on between 1970 and 1984. (Ex. A, p. 6; Tr., pp. 9-10) Kowalske's wife was also a back-up singer and performed with him. (Ex. F, p. 3) Kowalske stopped performing professionally when his now adult son was young. (Tr., pp. 9-10)

From 1973 through 1977, Kowalske worked for Central States Food as a delivery driver. (Ex. A, p. 5) In 1997, Vallet Food Service hired Kowalske as a delivery driver. (Ex. A, p. 6) Kowalske worked his way up in the company as a warehouse worker, in sales, as a buyer, and ultimately as the plant manager. (Ex. A, p. 6; Tr., pp. 10-11) As the plant manager Kowalske was in charge of equipment maintenance, hiring employees, filling in for sales representatives, opening new accounts, and training new employees. (Tr., pp. 106-07) Kowalske held a Class C CDL and he instructed employees on driving trucks. (Tr., p. 107) At the time of the hearing Kowalske's CDL was current. (Tr., p. 108)

When Vallet Food Service downsized in May 2010, Kowalske's employment was terminated. (Ex. A, p. 6; Tr., p. 11) Kowalske's starting wage was $5.04 per hour, and at the end of his employment he earned $650.00 per week. (Ex. A, p. 6)

Kowalske applied for unemployment insurance benefits through Iowa Workforce Development. (Tr., p. 112) Kowalske earned Iowa's Gold Level National Career Readiness Certificate from Iowa Workforce Development to present to employers, showing he tested well in academic areas. (Tr., p. 111-12)

In 2010 Mike Finnin Ford hired Kowalske as a shipping and receiving clerk and delivery driver. (Ex. A, p. 6; Tr., p. 19) Kowalske received and shipped car parts daily, delivered car parts in the area, and picked up and returned parts and cores with a step van. (Ex. A, p. 6) Cores include transmissions and engines. Kowalske's starting wage was $12.05 per hour. (Ex. A, p. 6) In 2017, he was earning $13.74 per hour. (Ex. A, p. 6) At the time of the hearing Kowalske was still working for Mike Finnin Ford. Kowalske testified the parts he handles at work weigh between a few ounces and sixty to seventy pounds. (Tr., pp. 19, 21)

This case concerns an alleged injury to Kowalske's low back. Kowalske has a history of low back problems dating back to 2000, a left knee problem, right and left shoulder problems, and circulation problems in both of his legs. (JE 14, p. 1; Ex. A, p. 8; F, pp. 10-169; Tr., pp. 29-31, 80)

On June 6, 2000, Kowalske attended an appointment with Gerald Meester, M.D., an orthopedic surgeon, complaining of back pain that was "going down his foot and into his leg," numbness, tingling, and an inability to walk on his heel. (JE 14, p. 1) Dr.

Meester examined Kowalske, prescribed a Medrol Dosepak, and ordered magnetic resonance imaging. (JE 14, p. 1)

When Kowalske returned to Dr. Meester he reported he was not any better, Dr. Meester noted the magnetic resonance imaging showed "severe degeneration at 3-4 with a central and right lateral disc protuberance on the left side which is probably a free fragment from L4-5 and degenerative disc at 4-5. He needs this removed ASAP" and recommended surgery. (JE 14, p. 1) On June 21, 2000, Dr. Meester performed a hemilaminectomy of L4-L5 with a left disc excision. (JE 14, p. 2) Following surgery Kowalske reported no numbness in his foot, but a feeling of a "tight stocking" and groin pain. (JE 14, p. 2) Kowalske attended physical therapy, reported he had discomfort, but not pain, but complained of a feeling of continued tightness on his foot. (JE 14, p. 2)

After Dr. Meester released Kowalske to full duty he continued to complain of a tight feeling on his foot. (JE 14, p. 2) Dr. Meester ordered magnetic resonance imaging. (JE 14, p. 3) Dr. Meester reviewed the imaging and found Kowalske had

> [a] bulging disc at 1-2 and 3-4, predominantly on the right hand side with no nerve root effacement, little bit of dural pressure here at 4-5 level which is operated. This seems to be mostly peri neural and peri dural scarring here and it is difficult to see that there is any disc in this material, although there may be some here. Most of this is enhanced with gadolinium. The L5-S1 has a central and left sided disc which is definitely putting some contact on the S1 nerve root. Some of his left foot pain and increase [in] symptoms may be from this. I am going to recommend an L4-S1 left epidural steroid in hopes of making this somewhat better . . . .

(JE 14, p. 3)

During an appointment on February 21, 2001, Kowalske complained of continued problems and Dr. Meester documented, "he has about reached the end of his rope." (JE 14, p. 3) Dr. Meester noted he thought Kowalske was experiencing a different problem, and injections had not provided much relief. (JE 14, p. 3) Dr. Meester opined all he had to offer Kowalske was surgery on the left side at L5-S1. (JE 14, p. 3)

In 2004 Kowalske treated with Dr. Meester for a left knee injury and he underwent an arthroscopy with debridement and partial medial meniscectomy. (JE 14, p. 4) While treating for his knee, Kowalske also complained about numbness and tingling in his left leg, and weakness in his left leg with standing and walking. (JE 14, p. 5) Dr. Meester ordered magnetic resonance imaging. (JE 14, p. 6) The reviewing radiologist noted:

> [a]xial images through the L5-S1 level show facet hypertrophic degenerative changes. There is intermediate signal abnormality in the lateral recess on the LEFT side. This is more pronounced than seen on

> 12/20/2000. It shows some degree of enhancement but its focality and apparent mass effect on the thecal sac still favors a disc protrusion in this region. At the L4-5 level there is facet hypertrophic degenerative change particularly on the LEFT side which results in narrowing of the lateral recess on the LEFT side. There is ligamentum flavum hypertrophy and degenerative disc bulge. Previously there did appear to be a small component of central disc protrusion but this has NOT changed significantly in appearance today when compared with the old exam. At the L3-4 level there is a small RIGHT paracentral disc protrusion seen. This does NOT appear to cause significant canal narrowing or foraminal stenosis.

(JE 14, p. 11) Dr. Meester noted it appeared "L5-S1 has increased in size and there is some increasing size over in the lateral recess. It's being read as a reherniation but the patient has never had surgery there so I would doubt that it could be truly classified as a reherniation, simply perhaps increased herniation and/or prominence here," and recommended additional steroid injections. (JE 14, p. 6)

In June 2005, Kowalske attended an appointment with David Field, M.D., an orthopedic surgeon, to follow up on his left knee. (JE 15, p. 1) Kowalske also complained of a flare up in his low back to the left upper iliac crest. (JE 15, p. 1) Dr. Field noted Kowalske appeared to have mechanical back pain, and ordered physical therapy. (JE 15, p. 1)

On September 14, 2010, Kowalske attended an appointment with Chad Abernathey, M.D., a neurosurgeon, complaining of back, leg, buttock, foot pain, and weakness with complete foot drop for two weeks. (JE 16, pp. 1, 3) At that time Kowalske was working for Mike Finnin Ford. (Tr., p. 25) Kowalske did not believe his back pain was caused by his work for Mike Finnin Ford. (Tr., p. 25)

Dr. Abernathey ordered magnetic resonance imaging, which he found showed a large left L4-L5 mass lesion of unknown etiology, which he believed may be a hemorrhagic synovial cyst. (JE 16, p. 3) Dr. Abernathey listed an impression of cauda equina syndrome, left greater than right with complete foot drop on the left, and moderate weakness on the right secondary to a large L4-L5 extradural mass. (JE 16, p. 3) Dr. Abernathey performed immediate bilateral L4-L5 partial hemilaminectomies, a medial partial facetectomy on the left, a decompression, and a hemorrhagic synovial cyst resection that day. (JE 16, pp. 3-4)

During a follow-up appointment on September 22, 2010, Dr. Abernathey noted Kowalske had excellent relief of his pain and he was pleased with the result, and noted Kowalske would be released to return to work with a lifting restriction for six weeks on October 4, 2010. (JE 16, p. 5) Kowalske testified he had excellent relief from the surgery, that Dr. Abernathey did "a fabulous job," and he returned to his normal work duties without restrictions six weeks after his surgery. (Tr., pp. 27-28, 91)

In September 2011, Dr. Meester ordered lumbar magnetic resonance imaging for Kowalske. (JE 14, p. 12) The reviewing radiologist noted "[s]ome enhancement is seen with gadolinium of laminectomy site and adjacent epidural space with some enhancement around the left L5 nerve root consistent with granulation tissue in this region," moderately severe facet hypertrophic degenerative changes at the L4-L5 level with mild to moderate left-sided foraminal narrowing. (JE 14, p. 12) At hearing Kowalske could not recall why he received the imaging and reported he did not receive any treatment for his back after the imaging until his work injury in October 2015. (Tr., pp. 28-29)

On October 22, 2015, Kowalske sustained a work injury while moving a transmission for a customer weighing approximately 300 pounds. (Tr., p. 21) Kowalske testified on the date of the injury he went to the customer's business in his work step van and backed the van up to the garage doors of the customer's business where the transmission was located. (Tr., p. 32) Kowalske relayed:

> [a]nd together the customer and I lifted this transmission up onto a wheeled device, probably about – I don't know what kind of a device it was, but it was on wheels, and it was probably about 2 feet off the ground.
>
> He had one end of it. I had the other end of it. We picked it up. We put it on this wheeled device. And together we balanced it, rolled it over on this wheeled device over to where the garage door was. And then from there we hoisted this transmission – we had about another foot to go to get it into the back of the truck before it was high enough we could get the front end of it into the truck.
>
> When we lifted the transmission up into the truck, that's when – and we got it in there, that's when something just didn't quite feel right in my back.

(Tr., pp. 32-33) Kowalske's manager was not on duty the day of his work injury and he reported it the following week.

On October 30, 2015, Kowalske attended an appointment Julie Muenster, ARNP, with Tri-State Occupational Health, reporting discomfort and tingling in his left buttock, leg, foot, and occasional sharp pain in his leg after lifting a heavy transmission weighing approximately 300 pounds at work. (JE 2, pp. 1-3) Muenster diagnosed Kowalske with a low back/SI joint strain, ordered physical therapy, prescribed a Medrol Dosepak and Flexeril, and imposed a restriction of twenty pounds for lifting, carrying, pushing, and pulling, and restrictions of no repetitive bending, lifting, or twisting, or driving for work. (JE 2, pp. 3, 5) Kowalske received physical therapy.

Kowalske testified he never missed any work after his work injury and Mike Finnin Ford accommodated his work restrictions. (Tr., pp. 35, 101) For a period of time

Mike Finnin Ford assigned another employee to lift and move objects exceeding Kowalske's restrictions. (Tr., p. 36)

On November 13, 2015, Kowalske attended a follow-up appointment with Muenster reporting he had not noticed improvement in his symptoms with physical therapy, he still had pain in his lower back radiating down the left leg, and his left leg fatigued during the day, to the point he was afraid he would trip on it. (JE 2, p. 7) Muenster continued Kowalske's restrictions and ordered lumbar spine magnetic resonance imaging. (JE 2, pp. 7, 10) At hearing Kowalske testified the pain down his leg "came a little later. It didn't come immediately." (Tr., pp. 95-96)

Kowalske returned to Muenster on November 24, 2015. (JE 2, p. 11) Muenster noted the magnetic resonance imaging showed moderate central disc herniations at L3-L4, with moderate disc bulging at L5-S1 and L4-L5, mild disc bulging at L2-L3 with multilevel degenerative disc disease, stenosis and neural foraminal encroachment. (JE 2, p. 11) Muenster documented Kowalske had received no relief from physical therapy, continued his restrictions, told Kowalske to take over-the-counter pain medication, and referred him to physical medicine. (JE 2, pp. 11-12)

On December 17, 2015, Kowalske attended an appointment with Margaret Mulderig, M.D., a physiatrist. (JE 5, p. 1) Dr. Mulderig assessed Kowalske with lumbosacral radiculopathy, and performed a lumbar steroid injection. (JE 5, pp. 1-2)

On December 29, 2015, Kowalske attended an appointment with Dr. Field. (JE 4, p. 2) Dr. Field noted Kowalske had back surgery at L4-L5 in 2000, and a second surgery in 2010, and his current imaging showed multiple degenerative disc pattern and a "lumbar disc L5-S1 to the left." (JE 4, p. 2) Dr. Field noted he had reviewed the magnetic resonance imaging and he believed there was more evidence of disc protrusion at L5-S1, to the left, which could account for S1 syndrome, recommended conservative treatment with injections, and imposed a twenty pound work restriction with no driving the parts van. (JE 4, pp. 3-4)

Kowalske attended an appointment with Timothy Miller, M.D., an anesthesiologist specializing in pain management, on January 7, 2016, upon a referral from Dr. Field. (JE 6, p. 1) Dr. Miller performed an epidural steroid injection at L5-S1 on the left. (JE 6, pp. 2-5) During an appointment on January 21, 2016, Dr. Miller documented Kowalske reported "fairly transient and marginal relief" from the injection, and he performed a second injection. (JE 6, pp. 6-9)

Kowalske returned to Dr. Field on February 4, 2016, reporting he received temporary relief from two epidural injections, and complaining of numbness and tingling in his left foot down his entire leg, but mostly in the plantar side of his foot, and increased discomfort and back pain with activity. (JE 4, p. 5) Dr. Field noted Kowalske's symptoms had persisted since the work injury "into the sciatic nerve distribution, left leg," recommended Kowalske avoid surgery, but undergo

electromyography, continued his restrictions, and prescribed gabapentin. (JE 4, pp. 5-6, 8)

On February 18, 2016, Kowalske underwent electromyography with Ronald Sims, M.D. (JE 7, p. 1) Dr. Sims listed an impression of "normal NCS/EMG with the exception of absence the superficial peroneal sensory nerve action potential, which may correlate with sensory symptoms in the dorsal foot but not with other symptoms." (JE 7, p. 1)

On March 3, 2016, Kowalske attended a follow-up appointment with Dr. Field. (JE 4, p. 9) Dr. Field noted electromyography had been completed, but was not definitive and "showed more abnormality perhaps in the dorsal side of his foot." (JE 4, p. 9) Dr. Field noted Kowalske was receiving relief from gabapentin, but he continued to have some low back pain. (JE 4, p. 9) Dr. Field increased Kowalske's gabapentin, continued his restrictions, and ordered physical therapy. (JE 4, pp. 9-12)

During an appointment with Dr. Field on April 14, 2016, Dr. Field documented Kowalske reported some improvement with physical therapy, but he continued to experience fatigue in his left leg with prolonged activity and standing. (JE 4, p. 13) Dr. Field noted, "I do not think he has any true deficit. He has had back surgery and has a risk for recurrent sciatica" and imposed a lifting restriction of fifty pounds. (JE 4, pp. 13-14)

On May 19, 2016, Kowalske attended an appointment with Dr. Field, reporting increasing pain with therapy radiating from his low back down his left leg and parethesias into the plantar side of his left foot and dorsal side of his toes. (JE 4, p. 15) Kowalske questioned whether the symptoms were due to physical therapy. (JE 4, p. 15; Tr., pp. 41-42) Dr. Field documented he believed Kowalske's symptoms were more of a chronic pattern flare up of the sciatic nerve as opposed to acute radiculopathy, and prescribed a Medrol Dosepak. (JE 4, p. 15)

Kowalske returned to Dr. Field on June 6, 2016, reporting he had improved somewhat, but he still had numbness in the left side of his foot. (JE 4, p. 17) Dr. Field documented he did not believe Kowalske would see any long-term improvement with any specific treatment due to the multiple levels of degenerative disc disease, and additional back surgery was not indicated. (JE 4, p. 17) Dr. Field released Kowalske to return to work without restrictions on June 6, 2016. (JE 4, p. 19) Kowalske testified after Dr. Field released him, he returned to his normal job duties without restriction. (Tr., p. 43)

On June 28, 2016, Kowalske attended a follow-up appointment with Dr. Field, complaining of some numbness and sleepiness in his left foot. (JE 4, p. 20) Dr. Field documented he observed weakness of dorsiflexion and "4/5, weakness of toe extension. He can toe up and go back on his heels but with time he has difficulty with toeing going back on his heels suggesting weakness of L5." (JE 4, p. 20) Dr. Field

noted Kowalske's treatment options were limited, and that surgical exploration decompression of the nerve root foramen was a remote possibility, which Kowalske had declined in the past. (JE 4, p. 20) Dr. Field documented Kowalske had some numbness at L5-S1, which was dissipating and his "L5 findings appeared intermittent and still persistent" and found Kowalske had stabilized and while he was not 100 percent better he did "not know that he will gain much over the next few months." (JE 4, p. 20) Dr. Field again released Kowalske to return to work without restrictions and ordered him complete two to three additional weeks of physical therapy and to continue taking Motrin and gabapentin as directed. (JE 4, p. 21)

The record reflects Kowalske attended physical therapy from March 16, 2016 through August 5, 2016. (JE 8) The physical therapist documented Kowalske's symptoms continued to wax and wane, consistent with degenerative changes, found he had made good progress, but concluded he had plateaued and he had received maximum medical benefit from physical therapy. (JE 8, pp. 28-29) Dr. Field discontinued Kowalske's physical therapy.

On September 12, 2016, Kowalske returned to Dr. Field regarding his low back pain and left leg radiculopathy, reporting no new definitive weakness, but increasing pain when on his feet for long periods. (JE 4, p. 22) Dr. Field noted a fifty pound lifting restriction had been suggested due to his two previous back surgeries, and imposed a fifty pound lifting restriction. (JE 4, pp. 22-23) Dr. Field found he did not have much else to offer Kowalske, noting he would support another opinion, and stated Kowalske should stay on his same medications for the next six months to year. (JE 4, p. 22)

On December 12, 2016, Kowalske attended an appointment with Dr. Abernathey. (JE 9, p. 3) Dr. Abernathey recommended Kowalske undergo new lumbar spine magnetic resonance imaging. (JE 9, p. 3)

Kowalske underwent lumbar spine magnetic resonance imaging on December 21, 2016. (JE 10) The reviewing radiologist listed an impression of multilevel degenerative disc disease, facet arthropathy, and degenerative spondylolisthesis within the lumbar spine, effacement of the left lateral recess at L4-L5 with contact and possible compression of the traversing left L5 nerve root, and moderate spinal canal narrowing at L3-L4. (JE 10, p. 2)

On December 21, 2016, Kowalske returned to Dr. Abernathey. (JE 9, p. 4) Dr. Abernathey noted the imaging showed a small L4-L5 recurrent disc extrusion and minimal degenerative changes with mild stenosis at L5-S1. (JE 9, p. 4) Dr. Abernathey discussed conservative management and lumbar fusion surgery with Kowalske and Kowalske declined additional surgery. (JE 9, p. 4; Tr., pp. 45-48)

On May 19, 2017, Dr. Abernathey prepared an opinion letter at the request of Mike Finnin Ford and Acuity. (JE 9, pp. 5-7) Dr. Abernathey opined Kowalske had reached maximum medical improvement as of May 19, 2017, Kowalske did not need

additional medical management or work restrictions due to the October 22, 2015 injury, and he did not identify a new impairment regarding the October 22, 2015 injury. (JE 9, p. 7) On June 9, 2017, Mike Finnin Ford and Acuity sent a letter to Dr. Abernathey asking whether he believed Kowalske needed any prescription medication for the October 22, 2016 work injury, and he replied "none" the same date. (JE 9, p. 8)

On July 3, 2017, Kowalske went to the emergency room at Mercy Medical Center in Dubuque, complaining of numbness and tingling down his left leg, back pain, and problems putting on his shoes and with sleeping. (JE 12, pp. 1, 3-4) Kowalske testified he struggled on Thursday and Friday that week with "tremendous, like, problems in my back that I hadn't had before" that interfered with his sleep. (Tr., pp. 50-51) On Saturday he drove himself to the emergency room, where he stayed overnight. (Tr., pp. 51-52) Kowalske received a Medrol Dosepak, and he returned to work on Tuesday and performed his normal duties. (Tr., p. 53) Kowalske testified no doctor has causally related the emergency room visit to his work injury. (Tr., p. 119)

Kowalske sought treatment with Brian Moran, M.D., a family practice physician. Kowalske testified he went to Dr. Moran after the workers' compensation carrier stopped paying for his medication. (Tr., p. 48) Dr. Moran diagnosed Kowalske with lumbago, prescribed acetaminophen-OxyCODONE, gabapentin, and a Medrol Dosepak. (JE 12, pp. 7-8; Tr., p. 48)

John Kuhnlein, D.O., an occupational medicine physician, conducted an independent medical examination for Kowalske on February 22, 2018, and issued his report on May 29, 2018. (Ex. 1) Dr. Kuhnlein examined Kowalske and reviewed his medical records. (Ex. 1) Dr. Kuhnlein diagnosed Kowalske with radiculopathy with June 21, 2000, left L4-L5 hemilaminectomy and disc excision, cauda equina syndrome and left foot drop with September 14, 2010, bilateral L4-L5 partial hemilaminectomies, medial partial facetectomy, decompression and resection of a hemorrhagic synovial cyst, and recurrent chronic back pain with S1 radiculopathy and persistent foot drop. (Ex. 1, p. 10)

With respect to causation, Dr. Kuhnlein opined:

> [t]he October 22, 2015, work injury represents a "lighting up" and material aggravation of the pre-existing lumbar pathology, making the pre-existing condition again clinically apparent.
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> Mr. Kowalske had prior problems with low back pain, including a previous radiculopathy treated by Dr. Meester in June 2000 and cauda equina syndrome related to a hemorrhagic synovial cyst that was resected by Dr. Abernathey on September 14, 2010. Mr. Kowalske is not sure how long it took him to recover from this second surgery. However, there is nothing in the currently available record regarding his lumbar spine from 2011 through the injury date of October 22, 2015.

> Mr. Kowalske says that he had no ongoing problems with his low back or lower extremity leading up to the October 22, 2015, work injury and at this time I have no reason to disbelieve what he says. He describes an incident that would have presented significant lumbar stressors while lifting a heavy transmission with someone else in an awkward position into his step van. He describes the immediate onset of low back pain, and within a week he was complaining of pain down the left leg, with findings on the MRI scan that would confirm the radiculopathy. He was treated conservatively, as he saw different surgeons who were reticent to perform further surgery.
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> Mr. Kowalske relates no intervening injuries, and, with no other known reason for his ongoing symptoms, his current low back and left leg symptoms are still related to the October 22, 2015, injury, and not to the pre-existing condition that was "lit up" and made clinically apparent by this incident. Mr. Kowalske has not returned to his pre-injury baseline, which would be symptom-free.

(Ex. 1, pp. 10-11) Dr. Kuhnlein recommended a home exercise program, aquatic exercise, gabapentin, and Tylenol. (Ex. 1, p. 11)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Kuhnlein opined:

> [t]urning to pages 379-380, the range of motion method is indicated. . . .
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> Turning to Table 15-7, Page 404, I would assign Mr. Kowalske category IID and assigned 8% whole person impairment. An additional 2% whole person impairment would be assigned for Dr. Abernathey's surgery. This would produce a total 10% whole person impairment.
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> Turning to Table 15-8, Page 407, I would assign 3% whole person impairment for decrements in lumbar flexion. I would assign 2% whole person impairment for decrements in extension. Turning to Table 15-9, Page 409, I would assign 1% whole person impairment for decrements in left lateral bending. I would assign 1% whole person impairment for decrements in right lateral bending. This would produce 7% whole person impairment for decrements in range of motion.
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> With respect to the S1 radiculopathy and turning to Table 15-18, Page 424, an initial 5% left lower extremity impairment would be assigned for the S1 radiculopathy. With respect to the sensory deficit, I would use a 25% modifier. When these values are multiplied (5% x 25%) and rounded according to the instructions on page 20, this is a 1% left lower extremity impairment for the sensory deficit in the S1 distribution. With respect to

> the motor deficit, and turning to Table 15-16, Page 424, I would use the 25% modifier. When these values are multiplied together 5% of 25%) and rounded according to the instructions on page 20, this is a 1% left lower extremity impairment for strength decrements related to the S1 radiculopathy. This would, therefore, be a 2% left lower extremity impairment for the radiculopathy. Turning to Table 17-3, Page 527 this would convert to a 1% whole person impairment for the radiculopathy.
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> Turning to the Combined Values Chart on Page 604, when these values are combined (10% x 7% X1%) this is 17% whole person impairment. Again, apportionment may be indicated, and I would defer to the commissioner in that regard.

(Ex. 1, pp. 11-12) Dr. Kuhnlein recommended material handling restrictions of lifting forty pounds occasionally from floor to waist, fifty pounds occasionally from waist to shoulder if he is able to keep the weight close to the axial plane of his body, forty pounds occasionally if he is lifting more than an elbow's distance away from his body, and forty pounds occasionally over the shoulder, and stooping, squatting, crawling, kneeling, and bending at the waist occasionally, occasional use of ladders, no operation of industrial machinery with his left lower extremity, and sitting, standing, or walking on an as needed basis. (Ex. 1, p. 12)

Kowalske testified he continues to have back pain that is located on the left side of his beltline. (Tr., p. 55) Kowalske reported walking and shifting around aggravates his back the most. (Tr., p. 56) Kowalske relayed he does not have as much pain in his buttocks, but he had constant pain in the back of his left leg that goes from his thigh into the calf area and down into his toes on the top and bottom of his foot. (Tr., pp. 56-57) At the time of the hearing Kowalske was taking two gabapentin per day, and 800 milligrams of ibuprofen three times per day. (Tr., p. 54)

Kowalske reported activities like mowing his grass, and shifting from side to side make his back worse. (Tr., p. 58) Kowalske testified it takes him double the amount of time to mow his grass now. (Tr., p. 63) Kowalske cannot shovel snow without taking a break. (Tr., p. 67) Kowalske enjoys playing his trumpet, but reported he cannot perform because he cannot stand for more than fifteen or twenty minutes, and he cannot tolerate sitting at the piano for any length of time. (Tr., pp. 63-64) No doctor has restricted Kowalske from playing musical instruments. (Tr., p. 119)

Kowalske enjoys golfing. Before his work injury he used to golf 100 times per year. (Tr., p. 69) In 2016 he played forty rounds of golf, twenty-seven or twenty-eight rounds in 2017, and at the time of the hearing he had played twenty rounds of golf. (Tr., pp. 70, 98) In 2015, before his work injury, Kowalske's handicap was between eleven and twelve and this year his handicap was nineteen. (Tr., pp. 70-71)

Kowalske testified toward the end of a day of working he notices increased weakness or foot drop in his left lower extremity. (Tr., pp. 60-61) Kowalske struggles to walk more than 400 yards. (Tr., p. 66) When driving he has to stop to take breaks, which he never did before. (Tr., p. 66) Kowalske testified since his work injury he has struggled to put on his socks, and his girlfriend has to help him put on his socks many mornings, which is embarrassing and was never a problem before his work injury. (Tr., p. 67) Walking up and down steps is also problematic for Kowalske at the end of the day, due to fatigue. (Tr., pp. 65-66) When Kowalske goes to the grocery store he has a difficult time carrying groceries up his steps to his townhome, which requires him to make multiple trips instead of one trip. (Tr., p. 68) He also has a difficult time sleeping and testified he wakes up nearly every hour to move into a different position. (Tr., pp. 68-69)

Mike Finnin Ford has made modifications to the workplace since Kowalske's work injury. (Tr., p. 74) The business installed a battery operated wench in the back of the step van to lift transmissions and engines. (Tr., pp. 74-75) Mike Finnin Ford also provided training to the employees on proper lifting techniques, and purchased an electric forklift to lift items. (Tr., pp. 75-76)

Kowalske testified the heaviest things he handles at work weigh between sixty and seventy pounds. (Tr., pp. 117-18) Kowalske noted the doors and hoods are the heaviest and he usually slides them or lifts them one at a time. (Tr., p. 118; Ex. F, p. 9)

Kowalske is a good employee. Each year Kowalske has received raises from Mike Finnin Ford. (Tr., pp. 114-16) In 2017, Kowalske made the most income he has from Mike Finnin Ford. (Tr., p. 117)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including the nature of the injury, extent of disability, recovery of medical bills and mileage, costs, and interest under Iowa Code sections 85.27, 85.34, 86.40, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). The legislature did not amend Iowa Code sections 85.27 or 86.40.

Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code section 85.34 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring before July 1, 2017. Therefore, the provisions of the new statute under Iowa Code section 85.34 do not apply to this case.

The calculation of interest is governed by Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018). (Interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent). Under Gamble, the interest rate changed for benefits accruing on or after July 1, 2017.

II. Nature of the Injury – Permanent Impairment

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

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

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). The parties agree Kowalske sustained a work injury. Kowalske avers he has sustained a permanent impairment caused by the work injury. Mike Finnin Ford and Acuity reject his assertion.

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination

occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

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

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

Two physicians have provided opinions on causation and permanency, Dr. Abernathey, a treating neurosurgeon, and Dr. Kuhnlein, an occupational medicine physician who performed an independent medical examination for Kowalske. I find the opinion of Dr. Kuhnlein most persuasive.

Dr. Abernathey treated Kowalske and performed surgery on his spine in 2010. (Tr., pp. 27-28, 91) Dr. Abernathey did not provide care to Kowalske for many years. Following the 2015 work injury, Dr. Field, an orthopedic surgeon who had also previously treated Kowalske, provided ongoing treatment to Kowalske over the course of many months, but he did not provide an opinion on causation or permanency. (JE 4) Dr. Field referred Kowalske to Dr. Abernathey and Dr. Abernathey examined Kowalske on December 12, 2016, and December 21, 2016, after reviewing magnetic resonance imaging. (JE 9) Dr. Abernathey discussed the options of conservative management or lumbar fusion surgery with Kowalske on December 21, 2016, and Kowalske declined additional surgery. (JE 9, p. 4) Kowalske returned to Dr. Abernathey to discuss his status on March 27, 2017, and Dr. Abernathey noted Kowalske again stated "he is not interested in any aggressive surgical and he simply wishes to observe his status." (JE 9, p. 4) On May 27, 2017, Dr. Abernathey issued a short opinion letter finding "I do not identify any specific new impairment regarding his 10-22-15 injury," and concluding Kowalske did not need any additional medical management or work restrictions caused by the work injury. (JE 9, p. 7) While Dr. Abernathey did not find a "new impairment," he did not address whether the work injury aggravated, accelerated, worsened, or lighted-up a preexisting condition or disability. Nor did he respond to Dr. Kuhnlein's

opinion finding the work injury lighted up and materially aggravated a preexisting condition. I do not find his opinion persuasive.

Dr. Kuhnlein found the work injury lighted up and materially aggravated Kowalske's preexisting lumbar pathology. (Ex. 1, pp. 10-11) In reaching his conclusion, Dr. Kuhnlein documented while Kowalske had received two prior surgeries and treatment for his low back condition, "there is nothing in the currently available record regarding his lumbar spine from 2011 through the injury date of October 22, 2015." (Ex. 1, p. 10) Kowalske testified to the same at hearing.

During the hearing I assessed Kowalske's credibility by considering whether his testimony was reasonable and consistent with other evidence I believe, whether he had made inconsistent statements, his "appearance, conduct, memory and knowledge of the facts," and his interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Kowalske has an obvious interest in the outcome of this case. I had the opportunity to observe Kowalske testify under oath. During his testimony he engaged in direct eye contact, his rate of speech was appropriate, and he did not engage in any furtive movements. Kowalske's memory was clear and consistent, as well as his testimony both at hearing and in his deposition. I find Kowalske's testimony reasonable and consistent with the other evidence I believe. Based on my personal observations at hearing, I found Kowalske to be a credible witness. As correctly noted by Dr. Kuhnlein, and pursuant to his testimony at hearing, Kowalske did not have ongoing symptoms from 2011 until the date of injury. Kowalske has not returned to his pre-injury baseline with respect to his activities of daily living and recreational activities. Dr. Field also noted during his Kowalske's last appointment on September 12, 2016, Kowalske should stay on gabapentin and Motrin for six months to one year, and recommended a fifty pound lifting restriction based on his first two surgeries. (JE 4, p. 22) If Kowalske had no need for ongoing treatment, he would not require additional gabapentin and Motrin.

Kowalske has a long history of preexisting low back problems. While I find the October 2015 work injury lighted up his low back condition, I find he has sustained a slight additional permanent impairment caused by his work injury.

The parties stipulated if the injury is found to be a cause of permanent disability, the disability is an industrial disability. "Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). 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).

At the time of the hearing Kowalske was sixty-four. He has graduated from high school and college. Kowalske has excellent academic skills and he performed well on testing conducted by Iowa Workforce Development following his termination from Vallet Food Service. Kowalske has prior experience working as a plant manager for Vallet Food Service, and in sales. No information was presented concerning the availability of similar jobs in the Dubuque area by either party.

Kowalske continues to work for Mike Finnin Ford, performing the same job he performed at the time of his work injury. However, since the work injury Kowalske is limited in his ability to ambulate, climb stairs, drive, and engage in activities of daily living, including putting on his socks. While Kowalske has received raises since his work injury, I find his work injury has caused a slight reduction in his earning capacity. Based on all of the factors of industrial disability, I find Kowalske has sustained a ten percent industrial disability, and he is entitled to fifty weeks of permanent partial disability benefits, at the stipulated rate of $355.34 per week, commencing on October 23, 2015.

III. Medical Bills, Medical Mileage, and Alternate Medical Care

Kowalske seeks to recover medical bills totaling $828.47 set forth in Exhibit 3 and medical mileage set forth in Exhibits 2, and alternate medical care for future medication related to the work injury. (Tr., pp. 48-49) Mike Finnin Ford and Acuity contend they are not responsible for the medical bills and agreed to pay for all medical mileage, except medical mileage for July 3, 2017 and October 31, 2017.

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

has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Exhibit 3 contains bills for medication, and $283.00 for an emergency room visit on July 3, 2017. Kowalske testified no physician had causally related the unauthorized emergency room visit to his work injury. Based on Kowalske's testimony, and considering the record evidence I find Kowalske is not entitled to recover the cost of the emergency room visit and medication from the visit from Mike Finnin Ford and Acuity.

Dr. Field recommended Kowalske continue his medications for six months to a year during the September 12, 2016 appointment. No additional records were provided from Dr. Field. Dr. Kuhnlein also opined Kowalske should continue to take gabapentin, and Tylenol for his work injury. I do not find the prescriptions for cyclobenzaprine or for Oxycodone/Methylprednisolone set forth in Exhibit 3 are necessitated by the work injury. I conclude the remaining medications, including the pain medication and for his stomach upset caused by the medication are reasonable and necessary, totaling $510.00. Mike Finnin Ford and Acuity are responsible for the causally related medical bills set forth in Exhibit 3 and for all causally connected medical care, including future care. Kowalske's request for alternate medical care for prescriptions for ibuprofen, gabapentin, and famotidine to combat complications from the medication should be granted.

I do not find Mike Finnin Ford and Acuity are responsible for the July 3, 2017 medical mileage for the emergency room visit, or for the October 31, 2017 medical mileage for Kowalske's annual physical exam.

IV. Costs

Kowalske seeks to recover the $100.00 filing fee, and $126.00 for a copy of his deposition transcript. (Ex. 4) Mike Finnin Ford and Acuity seek to recover the $387.00 cost of Kowalske's deposition. (Ex. G)

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

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

reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Kowalske was successful in proving his claim. 876 IAC 4.33(6), allows for the recovery of the costs he seeks. I decline to award costs to Mike Finnin and Acuity.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant fifty (50) weeks of permanent partial disability benefits, at the weekly rate of three hundred fifty-five and 34/100 dollars ($355.34), commencing on October 23, 2015.

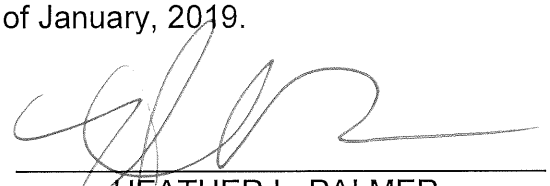
Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendants are responsible for all causally related medical bills, including future care, to include alternate medical care, as set forth in this decision.

Defendants shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee, and one hundred twenty-six and 00/100 dollars ($126.00) for a copy of his deposition transcript.

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 January, 2019.



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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.