

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEVON BUTCHER,

Claimant,

vs.

ADVANCE SERVICES, INC.,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5068391.01

ARBITRATION DECISION

Head Notes: 1400; 1402.20; 1800;
1802; 2200; 2500; 2501; 2700;
3000; 3001; 3002;**STATEMENT OF THE CASE**

The claimant, Devon Butcher, filed a petition for arbitration seeking workers' compensation benefits from Advance Services, Inc. ("Advance"), and its insurer ACE American Insurance Company. James Ballard appeared on behalf of the claimant. Timothy Wegman appeared on behalf of the defendants.

The matter came on for hearing on May 25, 2021, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred via CourtCall. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-15, Claimant's Exhibit 1-10, and Defendants' Exhibits A-M. The claimant testified on his own behalf. Amy Rose was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on June 28, 2021, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.

2. The claimant sustained an injury arising out of, and in the course of, employment on April 9, 2019.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The alleged injury is a cause of permanent disability.
5. The disability is an industrial disability.
6. The claimant was single, and entitled to one exemption.
7. With regard to disputed medical expenses:
 - a. The fees or prices charged by the providers were fair and reasonable.
 - b. The treatment was reasonable and necessary.
 - c. Although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses, and defendants are not offering contrary evidence.
 - d. Although causal connection of the expenses to a work injury cannot be stipulated, the listed expenses are at least causally connected to the medical condition(s) upon which the claim of injury is based.
8. Prior to the hearing, the claimant was paid 23.15 weeks of temporary total disability benefits, and 19.42 weeks of permanent partial disability benefits.
9. The costs requested in Claimant's Exhibit 10 have been paid.

The defendants waived their affirmative defenses. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant is entitled to temporary total disability, temporary partial disability, or healing period benefits from July 30, 2019, to July 31, 2019, October 26, 2019, to December 10, 2019, and October 19, 2020, to the present and ongoing.
2. Whether the claimant was off work from July 30, 2019, to July 31, 2019, October 26, 2019, to December 10, 2019, and October 19, 2020, to the present and ongoing.
3. The extent of permanent partial disability benefits, if any are awarded.

4. The commencement date for permanent partial disability benefits, if any are awarded.
5. Whether the claimant's gross earnings were five hundred forty and 00/100 dollars (\$540.00) per week, as alleged by the defendants, or five hundred fifty and 52/100 dollars (\$550.52) per week, as alleged by claimant.
6. Whether the claimant's weekly rate of compensation is three hundred forty-seven and 42/100 dollars (\$347.42) or three hundred fifty-five and 97/100 dollars (\$355.97).
7. Whether the claimant is entitled to payment of medical expenses as listed in Claimant's Exhibit 9. With regard to the disputed medical expenses:
 - a. Whether the listed expenses were causally connected to the work injury.
 - b. Whether the requested expenses were authorized by the defendants.
8. Whether the stipulated credit was paid at the proper rate.
9. Whether the claimant is entitled to a specific taxation of costs.

FINDINGS OF FACT

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

Devon Butcher, the claimant, was 29 years old at the time of hearing. (Testimony). He is single. (Testimony). He lives in Villisca, Iowa, with his disabled mother. (Testimony). Mr. Butcher graduated from high school at Corning Community Schools in 2009. (Testimony). He testified that school was difficult for him, as he has dyslexia and comprehension issues. (Testimony). He testified to being in special education classes in school. (Testimony). He can read and write, but not well. (Testimony). Mr. Butcher was not an excellent historian on certain issues, but he appeared truthful and credible based upon my observance of his testimony and behavior during the hearing.

Subsequent to high school, Mr. Butcher attended Southwestern Iowa Community College for a welding certification. (Testimony). This was a 24-hour course, and he had assistance from a professor and friend in completing paperwork for the course. (Testimony). Mr. Butcher had no additional schooling. (Testimony).

Mr. Butcher worked at Feeders Grain and Supply from 2009 to 2011. (Testimony; Defendants' Exhibit B:7). He built fence and did odd jobs. (Testimony). He described this as a physically intensive job. (Testimony). He then moved to Corning Community Schools, where he worked as a part-time custodian. (Testimony). He worked there for one year before moving to Creston Community Schools. (Testimony).

On October 10, 2012, Mr. Butcher had an MRI of his lumbar spine at Mercy Hospital in Corning, Iowa. (Joint Exhibit 1:1). The MRI showed a large posterior central disk protrusion at L4-5, and a large paracentral disk protrusion at L5-S1. (JE 1:1). The MRI also showed central spinal stenosis and accompanying facet joint arthropathy. (JE 1:1).

From 2011 to 2012, Mr. Butcher worked as a custodian for the Corning Community School District. (DE B:7).

He worked full time for Creston Community Schools from 2012 to 2015. (Testimony; DE B:8). He cleaned, lifted desks and chairs, moved items, removed snow, and removed garbage from schools. (Testimony). In 2014, he injured his lower back at Creston Community Schools. (Testimony).

On March 19, 2014, Mr. Butcher presented to ACH Mercy Hospital in Corning, Iowa, for another lumbar MRI. (JE 1:2). The MRI showed a stable large posterior central disc protrusion at L4-5, an increasing large left paracentral disc protrusion at L5-S1 with accompanying stenosis, and no other significant changes from his 2012 MRI. (JE 1:2). On April 3, 2014, Mr. Butcher reported to Mercy Hospital Corning for an epidural steroid injection at L5-S1. (JE 1:3-4). The injection was due to left leg radiculopathy, stable central disk protrusion at L4-5, an increasing large left paracentral disk protrusion at L5-S1, lateral spinal stenosis, and increased changes since 2012. (JE 1:3). Mr. Butcher was referred to Midwest Neurosurgery & Spine Specialists for a visit on April 11, 2014. (JE 2:5-6). Keith Lodhia, M.D., examined Mr. Butcher. (JE 2:5-6). Mr. Butcher complained of low back pain, and left lower extremity pain. (JE 2:5). Mr. Butcher told Dr. Lodhia that he experienced intermittent back pain for several years before feeling a large pop in his back on March 17, 2014. (JE 2:5). Dr. Lodhia diagnosed Mr. Butcher with left lower extremity weakness, herniated nucleus pulposus at L4-5, and herniated nucleus pulposus at L5-S1 with associated left lower extremity radiculopathy. (JE 2:6). Dr. Lodhia recommended proceeding with a microendoscopic discectomy at the left L5-S1. (JE 2:6). Mr. Butcher agreed. (JE 2:6).

On June 17, 2014, Mr. Butcher reported to the emergency department at Bergan Mercy Medical Center. (JE 3:7-9). He slipped in the shower the day prior and complained of intractable back pain. (JE 3:7). His local emergency department referred him to Bergan Mercy so that he could have an MRI. (JE 3:7). An MRI of the lumbar spine showed moderate central disc protrusion mildly to moderately deforming the ventral thecal sac and abutting the descending left nerve root at L4-5. (JE 3:8). The MRI also showed a large paracentral disc extrusion deforming the left ventral thecal sac and narrowing the left lateral recess likely displacing the descending left nerve roots at L5-S1. (JE 3:8). The emergency department provider recommended that Mr. Butcher attend his follow-up with a neurosurgeon to discuss potential surgery. (JE 3:9).

Lynn Nelson, M.D., examined Mr. Butcher at Des Moines Orthopaedic Surgeons, P.C. on June 19, 2014. (JE 4:10-12). Mr. Butcher reported pain in the back, buttock, hip, and leg. (JE 4:10). Dr. Nelson diagnosed Mr. Butcher with left-sided low back pain, left lower extremity radicular pain. (JE 4:11). Dr. Nelson indicated that a copy of the recent MRI was needed to determine which surgery may be appropriate. (JE 4:11). Dr.

Nelson noted that a possible surgical treatment would be a decompression and partial diskectomy at L4-5 and L5-S1. (JE 4:11).

On July 9, 2014, Mr. Butcher reported to UnityPoint Health Iowa West for an L4-5 decompression, left L5-S1 decompression, and left diskectomy. (JE 4:13-14). Dr. Nelson performed the surgery, and indicated that Mr. Butcher had a central L4-5 herniated nucleus pulposus and a left L5-S1 herniated nucleus pulposus. (JE 4:13).

Several months after his surgery, Mr. Butcher had a nerve conduction study at the Iowa Clinic with Todd C. Troll, M.D., C.I.M.E., on September 16, 2014. (JE 5:50-51). Dr. Troll noted the history of Mr. Butcher's injury and treatment. (JE 5:50). Mr. Butcher could not walk on his heels on the left side. (JE 5:50). The nerve conduction study was abnormal. (JE 5:51). Dr. Troll opined that "[t]he findings are suggestive of axonal injury and motor unit loss in the left S1 distribution." (JE 5:51). Dr. Troll found no evidence of neuropathy. (JE 5:51).

Mr. Butcher had a lumbar MRI on October 8, 2014, which showed post laminectomy changes at L5-S1 with residual central to left paracentral disk protrusion. (JE 6:52). The disk protrusion was decreased in size compared to previous examinations. (JE 6:52). The MRI also showed left lateral recess narrowing and mild neural foraminal narrowing. (JE 6:52). Post laminectomy changes were also observed at L4-5. (JE 6:52). A small residual central disk protrusion was seen, however, it was decreased in size compared to the previous examination. (JE 6:52).

On October 9, 2014, Mr. Butcher followed up with Maen Haddadin, M.D. (JE 6:54). Mr. Butcher continued to complain of pain, but was still working. (JE 6:54). Dr. Haddadin recommended that Mr. Butcher continue taking hydrocodone for pain, and that Mr. Butcher follow up for further management with Dr. Long. (JE 6:54).

On October 28, 2014, Dr. Nelson examined Mr. Butcher. (JE 4:15). Mr. Butcher complained that his employer was not accommodating his restrictions. (JE 4:15). Dr. Nelson recommended that Mr. Butcher attempt to increase his activities outside of work. (JE 4:15).

Mr. Butcher continued his care with Dr. Nelson on January 13, 2015. (JE 4:16). Mr. Butcher told Dr. Nelson that his symptoms were "by far" better than his preoperative condition. (JE 4:16). However, he continued to complain of ongoing low back and left calf pain and cramping. (JE 4:16).

On March 24, 2015, Mr. Butcher followed up with Dr. Nelson. (JE 4:17). Mr. Butcher reported improvement in his symptoms. (JE 4:17). Mr. Butcher had occasional low back pain and intermittent left lower extremity spasms. (JE 4:17). Dr. Nelson found no evidence of paraspinal spasm. (JE 4:17). Dr. Nelson indicated that Mr. Butcher needed to use common sense, but that the doctor did not believe that permanent work restrictions were required. (JE 4:17). Mr. Butcher agreed with the doctor. (JE 4:17). The doctor provided Mr. Butcher with an unrestricted work release, and declared that Mr. Butcher achieved maximum medical improvement. (JE 4:17).

Mr. Butcher saw Dr. Haddadin again on May 7, 2015, for increased complaints of back pain. (JE 6:55-58). His pain progressed from his back to his legs. (JE 6:55). Dr. Haddadin ordered x-rays of the thoracic spine, and prescribed Neurontin for his chronic back pain. (JE 6:57). The x-ray of the thoracic spine showed normal vertebral alignment and very early anterior spondylosis. (JE 6:58).

The claimant made a workers' compensation claim which settled in 2018. (Testimony). The parties stipulated that Mr. Butcher sustained a 35 percent industrial disability as a result of the 2014 work injury. (DE J:4). He returned to his job as a custodian after recovering from his surgery, and worked regular duty with no accommodations or restrictions. (Testimony).

Mr. Butcher then accepted a position with Villisca Community Schools as a custodian in 2015. (Testimony; DE B:8). He performed the same job duties as he described at Creston Community Schools. (Testimony). He opined that the Villisca Community Schools position had higher physical demands. (Testimony).

After one year with Villisca Community Schools, Mr. Butcher was offered a job by NSK. (Testimony). He worked at NSK from 2015 through 2016. (DE B:8). He accepted the job because it offered better pay and benefits. (Testimony). At NSK, he worked as a machine operator in ball bearing assembly. (Testimony; DE B:8). His job required lifting pallets up to 50 pounds on a regular basis. (Testimony). He had no problems doing this job in spite of his prior back issues. (Testimony).

On July 21, 2016, Mr. Butcher completed a medical questionnaire for Advance. (CE 4:25). He disclosed his previous disc related surgery. (CE 4:25). He also informed Advance of his 2014 workers' compensation claim, and provided them with the restrictions that arose from that matter. (CE 4:25).

Mr. Butcher accepted a job with PPI. (Testimony). This job was closer to his home. (Testimony). He assembled rollers for conveyor belts. (Testimony). In this role, he had to lift parts weighing 50 to 100 pounds. (Testimony). He then moved into forklift operation, where he drove a forklift, as it was less physically demanding. (Testimony). While working for PPI, the claimant stepped off a forklift and tweaked his lower back. (Testimony). After this incident, Mr. Butcher had an MRI, but no surgery was recommended. (Testimony). Mr. Butcher's employment with PPI ended in 2018. (Testimony). Mr. Butcher cared for his disabled mother, and needed to change his shift in order to provide her care. (Testimony). He worked at PPI from 2016 to 2018. (DE B:8).

On January 27, 2017, Mr. Butcher visited Linda Robinson, D.O., for his continued complaints of low back pain. (JE 6:59). Mr. Butcher also complained of radiation of pain down his legs. (JE 6:59). Mr. Butcher indicated that he recently started a new job, which required more lifting. (JE 6:59). The increased lifting aggravated his back pain. (JE 6:59).

Mr. Butcher returned to Dr. Robinson's office on May 1, 2017, for complaints of low back pain. (JE 6:60). He injured his back while attempting to lift his mother from

the floor. (JE 6:60). He did not have radiation of the pain down his legs. (JE 6:61). Dr. Robinson diagnosed Mr. Butcher with a lumbar strain. (JE 6:61).

On September 7, 2017, Mr. Butcher visited with Dr. Robinson. (JE 6:62-64). The claimant "tweaked" his back three days prior, and was in "a lot of pain" since. (JE 6:62). The pain began in the lumbar spine and radiated to his left buttock. (JE 6:62). Mr. Butcher denied numbness. (JE 6:62). Upon physical examination, Dr. Robinson observed muscle spasm in the left and right lumbar areas, and tenderness in the sacroiliac joint. (JE 6:63). Dr. Robinson saw Mr. Butcher lying slumped in his chair due to his pain. (JE 6:63). Based upon her examination of the claimant, Dr. Robinson provided a diagnosis of intractable lumbar pain. (JE 6:63). She ordered an x-ray of his lower back, and provided an injection of triamcinolone and Toradol. (JE 6:64). She prescribed prednisone, hydrocodone, and cyclobenzaprine. (JE 6:64).

Mr. Butcher had an x-ray of his lumbar spine on September 8, 2017. (JE 6:65). The x-ray showed increased degenerative narrowing of the L5-S1 interspace when compared to the October 8, 2014, imaging. (JE 6:65).

Dr. Robinson saw Mr. Butcher again on November 14, 2017, for his continued lower back pain. (JE 6:66). The pain radiated into Mr. Butcher's legs. (JE 6:66). Dr. Robinson diagnosed Mr. Butcher with chronic bilateral low back pain with left-sided sciatica, and ordered an MRI. (JE 6:66).

On November 16, 2017, Mr. Butcher had an MRI of his lumbar spine. (JE 6:67-68). Neil Sergel, M.D., interpreted the MRI. (JE 6:67). The MRI showed a redemonstration of postsurgical changes with residual disc bulges at L4-5 and L5-S1. (JE 6:68). The bulging discs did not produce a mass effect and the MRI was unchanged. (JE 6:68). The MRI also showed postsurgical fibrosis within the anterolateral spinal canal and left foramen at L5-S1. (JE 6:68). Finally, the radiologist opined that the MRI showed moderate right L5 foraminal stenosis. (JE 6:68). This was increased since October 8, 2014. (JE 6:68).

In late 2018, Mr. Butcher sought employment through Advance as a temporary employment agency. (Testimony). On December 20, 2018, Mr. Butcher completed a physical capacity profile. (Testimony; JE 7:69-71). Mr. Butcher told the examiner that he occasionally felt radicular pain down both of his legs. (JE 7:70). Mr. Butcher applied for a job considered "heavy work." (JE 7:69). This required exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly. (JE 7:69). Based upon the results of the examination, Mr. Butcher could perform the position. (JE 7:69). The examiner opined that the claimant's history of back surgery with associated complaints of low back pain led to a job placement presumptive impairment of 10 percent. (JE 7:70). There is no indication as to how this determination was made. (JE 7:70).

Advance placed Mr. Butcher at American Hydraulics. (Testimony). He built and assembled cylinders. (Testimony). His job required lifting up to 50 pounds, bending, stooping, and kneeling. (Testimony). He did this job for two months before requesting a move to Culligan Water. (Testimony). Mr. Butcher testified that he wanted "out of the factory life." (Testimony).

On January 21, 2019, Steven Freeman, M.D., examined Mr. Butcher following an emergency room visit on January 15, 2019. (JE 8:72-74). Mr. Butcher complained of severe left shoulder pain and difficulty lifting his left arm. (JE 8:72-74). Mr. Butcher denied injury or trauma, but noted that his job required heavy, repetitive lifting. (JE 8:72). Dr. Freeman diagnosed Mr. Butcher with left rotator cuff tendonitis due to overuse. (JE 8:73). He also diagnosed the claimant with anxiety disorder, agoraphobia, and panic disorder. (JE 8:73).

In February of 2019, Advance provided Mr. Butcher with a job description including the physical demands of a job with Culligan Water. (Testimony; CE 4:29). The job description noted, "[y]ou will be driving a Culligan delivery truck delivering bottled water and salt to residential and commercial customers. Always follow all safety rules for driving and lifting." (CE 4:29). Among demands, the position required lifting 50 or more pounds, and sitting or driving for long periods of time. (Testimony; CE 4:29). Mr. Butcher worked from 8:00 a.m. to 5:00 p.m., Monday through Friday. (DE M:9-10). He earned thirteen and 50/100 dollars (\$13.50) per hour with Advance. (DE M:9-10).

Mr. Butcher had a pre-assignment physical at Cass County Health System on February 6, 2019. (Testimony; JE 9:78-80). Mr. Butcher told the examiner about his previous back injury in 2012 or 2013, and indicated that he had no problems with that anymore. (JE 9:78). However, he also reported occasional discomfort and left-sided sciatica with his history of a ruptured disc. (JE 9:78). The result of the examination showed that he could perform the position without the need for accommodations or restrictions. (Testimony; JE 9:80). The examiner also noted only one abnormality to the examination, which was Mr. Butcher's obesity. (CE 4:26). He had no limitations. (CE 4:27). Mr. Butcher testified that he loved the Culligan Water position and could perform the key functions of the position prior to his work injury. (Testimony).

Mr. Butcher followed up with Dr. Freeman again on February 7, 2019. (JE 8:75-77). He continued to report insomnia and anxiety. (JE 8:75). Mr. Butcher reported not sleeping at all, which caused him to feel exhausted. (JE 8:75). Dr. Freeman diagnosed Mr. Butcher with bipolar disorder, anxiety, and insomnia. (JE 8:76).

On April 9, 2019, Mr. Butcher testified that he climbed into a Culligan truck. (Testimony). He grabbed a 40 pound jug of water. (Testimony). The jug fell onto his shoulder, which caused him pain into his lower back. (Testimony). He also felt a pop in his lower back, and then developed numbness into his legs. (Testimony). He testified that this differed from his 2018 injury or pain. (Testimony). He reported the pain and rested at home. (Testimony). The pain increased so he reported to a doctor for care. (Testimony).

Mr. Butcher followed up with Thomas Schmadeke, P.A., on April 10, 2019. (JE 10:91-93). He reported "extreme back pain to the right lower back with radiation." (JE 10:91). Upon examination, Mr. Schmadeke found muscle spasms in Mr. Butcher's lower back. (JE 10:91). Mr. Schmadeke prescribed cyclobenzaprine, Klonopin, and hydrocodone. (JE 10:92). Mr. Schmadeke provided a Toradol injection, as well. (JE 10:92).

On April 15, 2019, Mr. Butcher reported to the Cass County Health System, where Angela Weppler, M.D., examined him. (JE 9:81-85). Mr. Butcher complained of pain in his lumbar spine and numbness in both of his legs. (JE 9:81). The pain began when he lifted a bottle of water, and heard a pop. (JE 9:81). He reported receiving Flexeril and hydrocodone from his primary care provider. (JE 9:81). Dr. Weppler observed Mr. Butcher walking with a slow gait, and a slight forward bend while leaning to the left. (JE 9:83). Dr. Weppler prescribed a steroid and gabapentin to reduce inflammation and pain. (JE 9:83). Dr. Weppler also ordered physical therapy and a neurosurgery consult. (JE 9:83). Dr. Weppler provided restrictions including lifting, pushing, and pulling no more than 10 pounds, frequent sitting, and limited standing and walking. (JE 9:83). The doctor also recommended that Mr. Butcher should rarely climb, bend, stoop, and twist. (JE 9:84).

Mr. Butcher had an initial physical therapy evaluation at Pure Rehabilitation, LLC, in Clarinda, Iowa, on April 25, 2019. (JE 11:121-123). Mr. Butcher described progressively worsening symptoms of low back pain, numbness, and weakness through the left lower extremity. (JE 11:121). He noted that the only comfortable position was leaning towards the right side. (JE 11:121). The examiner also observed that Mr. Butcher had considerable trouble with ambulation. (JE 11:121).

Dr. Weppler examined Mr. Butcher again on April 29, 2019. (JE 9:86-90). Mr. Butcher continued to have lumbar pain rated 8 out of 10, weakness in his left leg, numbness in his left leg, and paresthesia in his left leg. (JE 9:86). Mr. Butcher described fecal and urinary urgency during muscle spasms. (JE 9:86). He had a few incidents of fecal incontinence while sleeping. (JE 9:86). When Dr. Weppler entered the room, she observed Mr. Butcher leaning to the right to keep his left buttock and hip off of the chair upon which he sat. (JE 9:88). He also walked slowly and "almost drags the left leg." (JE 9:88). Dr. Weppler diagnosed Mr. Butcher with acute left-sided low back pain with left-sided sciatica, and incontinence of feces with fecal urgency. (JE 9:88). Dr. Weppler noted, "he needs neurosurgery. I can't do anything else for him at this time." (JE 9:89). Dr. Weppler continued work restrictions including: no listing/pushing/pulling more than 10 pounds, rarely walking/standing/bending/squatting/climbing/kneeling/twisting/repetition/operating a vehicle, and occasional sitting. (JE 9:89).

Pure Rehabilitation, LLC discharged Mr. Butcher from care on May 17, 2019. (JE 11:124-125). Mr. Butcher failed to appear for two consecutive appointments. (JE 11:124). He also failed to return phone calls. (JE 11:124).

On May 31, 2019, Mr. Butcher had a lumbar MRI at DMOS. (JE 4:18-19). James Choi, M.D. interpreted the MRI. (JE 4:18). Dr. Choi compared the MRI to an October 8, 2014, MRI. (JE 4:18). Dr. Choi opined that there was an interim enlargement to the left paracentral disc protrusion that occupied the left ventral third of the spinal canal at L5-S1. (JE 4:18). This caused a "prominent mass effect especially compressing the left S1 nerve within the lateral recess." (JE 4:18). Dr. Choi also observed mild left greater than right neural foraminal narrowing without compression of the exiting L5 nerves. (JE 4:18). At L4-5, the MRI showed a stable, small, shallow

posterior central disc protrusion indenting the ventral thecal sac. (JE 4:18). There was no effect on the nerves. (JE 4:18).

On June 24, 2019, Mr. Butcher received a modified work offer from the defendants. (Testimony; DE F:2). He was assigned to Atlantic & Rural Community Thrift in Atlantic, Iowa. (Testimony; DE F:2). The offer included the restrictions as follows: “[m]ay lift, push/pull up to 10 pounds. Rare walk, stand, bend, squat, climb, kneel, twisting repetition, sitting and operating vehicle.” (DE F:2). The thrift store owner supervised him, and provided him with tasks to perform. (Testimony). Mr. Butcher was to make thirteen and 50/100 dollars (\$13.50) per hour and work 9 a.m. to 5 p.m. on Monday through Friday. (DE F:2). He would organize clothes, face merchandise, and help with inventory. (DE F:2). Mr. Butcher checked a box indicating that he accepted the offer, and signed the offer. (DE F:2).

Mr. Butcher indicated that some of the tasks were outside of his previously provided restrictions. (Testimony). He told his attorney that he was required to repetitively bend and twist while handling merchandise and stocking shelves. (CE 7:36). He also was required to stand more frequently. (CE 7:36). He was asked to carry clothes, books, and general items like decorations and glass items. (DE M:13). He alleged that these boxes weighed more than 10 pounds. (DE M:13). He alleged that this caused him significant pain. (DE B:16). Mr. Butcher reported these issues to Advance. (Testimony; CE 7:36-37). He testified that Advance told him that the job was within his restrictions and that he was refusing work. (Testimony). They sent him home. (Testimony). Mr. Butcher alleged that this was an unsuitable offer of light duty work. (DE B:16). He received no compensation for these days of work. (DE M:13).

Mr. Butcher followed up with Dr. Nelson on June 27, 2019. (JE 4:20-22). Mr. Butcher complained of left buttock and lateral thigh and leg pain. (JE 4:20). Mr. Butcher related feeling a pop in his back in early April while unloading 5 gallon barrels of water. (JE 4:20). He complained of “very severe pain.” (JE 4:20). The pain increased with sitting, standing, walking, lifting, twisting, bending forward, bending back, coughing, sneezing, and sleeping. (JE 4:20). Mr. Butcher felt that his pain was 40 percent in his back and 60 percent in his buttock, hip, and leg. (JE 4:20). Dr. Nelson observed limited lumbar flexion and extension. (JE 4:20). Dr. Nelson also observed that Mr. Butcher walked in a stooped fashion. (JE 4:20). Dr. Nelson opined that the complaints, physical findings, and radiographic evidence “reasonably match” the MRI demonstrated left L5-S1 herniated nucleus pulposus. (JE 4:21). Treatment options included conservative care, epidural steroid injections, and surgical treatment. (JE 4:21). Dr. Nelson discussed the options with Mr. Butcher. (JE 4:21). They agreed that Mr. Butcher would have an epidural steroid injection. (JE 4:21). Dr. Nelson recommended that the claimant lose weight, as he gained 50 pounds from 2014 to 2019. (JE 4:21). Dr. Nelson released Mr. Butcher to work with restrictions of 10 pounds of lifting, no repetitive twisting and bending, no stairs, and alternating sitting and standing occasionally. (JE 4:21).

Mr. Butcher returned to the thrift store. (Testimony; DE M:7). He worked briefly, and was told that the work was no longer available to him. (Testimony; DE M:7). He was sent home with no explanation. (DE M:7).

At some time after that, Mr. Butcher was terminated. (DE M:13). However, he alleges that he found out about his termination via a letter from his attorney. (DE M:13). He testified in his deposition that he never received anything from Advance telling him that his employment was terminated. (DE M:13).

Sometime between June of 2019 and August of 2019, Mr. Butcher developed a left foot drop. (Testimony). This pushed his surgical timeline forward. (Testimony). Advance approved Mr. Butcher's surgery. (Testimony).

On July 18, 2019, Mr. Butcher returned to DMOS for an examination by Dr. Nelson. (JE 4:24-25). Mr. Butcher felt that an epidural steroid injection on July 8, 2019, helped his back pain, but provided no relief of radicular pain. (JE 4:24). Mr. Butcher's left lower extremity hurt more than the lower back. (JE 4:24). Mr. Butcher took gabapentin, Norco, and cyclobenzaprine. (JE 4:24). Mr. Butcher ambulated and transitioned slowly, while limping moderately on the left side. (JE 4:24). Dr. Nelson expressed skepticism that a repeat epidural steroid injection would provide a benefit to Mr. Butcher. (JE 4:24). Dr. Nelson recommended a revision left L5-S1 decompression and partial disectomy. (JE 4:25).

Dr. Nelson wrote a letter to defendants' counsel dated July 29, 2019. (JE 4:26). In the letter, Dr. Nelson opined that Mr. Butcher's current lumbar spine condition, "including recurrent left L5-S1 HNP is related to his reported work injury on or about 4/9/10 [sic]." (JE 4:26).

On August 1, 2019, Mr. Butcher continued his care with Dr. Nelson. (JE 4:27-29). Dr. Nelson noted that surgery was approved. (JE 4:27). Mr. Butcher continued to report left lateral buttock, lateral thigh, and calf pain and paresthesias. (JE 4:27). Mr. Butcher also complained of dragging his left foot for the previous two weeks. (JE 4:27). Dr. Nelson observed the claimant walk with "a rather odd gait" as he ambulated. (JE 4:27). Dr. Nelson observed that Mr. Butcher was "basically pushing his left foot into the floor during the swing phase of gait." (JE 4:27). Mr. Butcher opted to pursue a revision of a left L5-S1 decompression and partial left disectomy on August 5, 2019. (JE 4:27). Dr. Nelson took Mr. Butcher off work. (JE 4:29).

Mr. Butcher had an L5-S1 partial disectomy and decompression and a left L5-S1 revision laminectomy on August 5, 2019. (JE 4:30-31). Dr. Nelson's preoperative and postoperative diagnosis was recurrent L5-S1 herniated nucleus pulposus. (JE 4:30).

On August 13, 2019, Dr. Nelson re-examined Mr. Butcher at DMOS. (JE 4:32). Mr. Butcher reported developing wound drainage. (JE 4:32). Mr. Butcher reported a positional frontal headache without significant light sensitivity. (JE 4:32). Examination of the wound showed an open 3 cm slit with a small amount of clear fluid. (JE 4:32). Dr. Nelson opined that this represented a "CSF leak." (JE 4:32). Dr. Nelson discussed

placement of a blood patch. (JE 4:32). This was a dural tear, which caused headaches. (Testimony).

On September 3, 2019, Mr. Butcher continued his follow up with Dr. Nelson. (JE 4:33-35). Mr. Butcher felt slight improvement in his bilateral buttock and left posterior thigh and lateral leg pain. (JE 4:33). He also reported improvement in his headaches after receiving a second blood patch. (JE 4:33). Mr. Butcher continued to ambulate in an odd manner with forced left plantarflexion. (JE 4:33). Dr. Nelson opined that Mr. Butcher was making slow progress. (JE 4:33). Dr. Nelson kept Mr. Butcher off work, but recommended that he increase activity around his home. (JE 4:33). Dr. Nelson also recommended that Mr. Butcher not lift more than 10 pounds, and that Mr. Butcher not bend or twist repetitively. (JE 4:35).

Dr. Nelson examined Mr. Butcher again on September 24, 2019. (JE 4:36-38). Mr. Butcher reported that his headaches had resolved. (JE 4:36). He continued to have aching and spasms in his right calf, and foot weakness. (JE 4:36). Upon examination, Dr. Nelson found decreased sensation in the L5 dermatome. (JE 4:36). Mr. Butcher reported that physical therapy, Robaxin, and gabapentin were beneficial. (JE 4:36). Mr. Butcher continued to drag his left foot while walking. (JE 4:36). Dr. Nelson noted that Mr. Butcher's gait was difficult to explain physiologically. (JE 4:36). The nerve root involved in the surgery should not cause this. (JE 4:36). Dr. Nelson recommended lifting no more than 15 pounds and continuing to avoid repetitive bending and twisting. (JE 4:36). Finally, Dr. Nelson recommended that Mr. Butcher continue physical therapy twice per week. (JE 4:36).

On September 26, 2019, Lynda Showalter from Corvel, wrote a letter to claimant's counsel. (DE G:1). Ms. Showalter noted Mr. Butcher's restrictions provided by Dr. Nelson on September 24, 2019. (DE G:1). Ms. Showalter noted, "Advance Services would have been able to accommodate the current work restrictions" had Mr. Butcher not been terminated for "reasons unrelated to his work injury." (DE G:1). Corvel indicated that Mr. Butcher's temporary total disability benefits would discontinue as of October 26, 2019. (DE G:1).

Mr. Butcher had another therapy evaluation on October 17, 2019, at Pure Rehabilitation, LLC. (JE 11:126-127). He reported improvement since his last appointment. (JE 11:126). He had an improved gait, but after about one block, his fatigue increased and he dragged his foot. (JE 11:126).

Mr. Butcher continued therapy on October 22, 2019, with Pure Rehabilitation, LLC. (JE 11:128-129). Mr. Butcher had foot drop on the left side and shortened step length on the right. (JE 11:128). Mr. Butcher reported that his back hurt "a bit" on the right side. (JE 11:128). He felt a burning in his ankle that he described as "really sharp." (JE 11:128).

Defendants ceased payment of healing period benefits on October 26, 2019. (DE H:1).

On October 29, 2019, Mr. Butcher continued his care with Dr. Nelson. (JE 4:39-41). Mr. Butcher reported unchanged left foot weakness, left calf paresthesia, and left

foot paresthesia. (JE 4:39). Mr. Butcher denied improvement from physical therapy. (JE 4:39). Dr. Nelson diagnosed Mr. Butcher with upper motor neuron signs, left foot equinus, and slow progress. (JE 4:39). Dr. Nelson allowed Mr. Butcher to return to office work only. (JE 4:39).

Dr. Nelson responded to a letter from defendants' counsel with a letter dated November 18, 2019. (JE 4:44). Dr. Nelson opined that Mr. Butcher continued to recover from his injury and low back surgery. (JE 4:44). Mr. Butcher was only released to office work, and Dr. Nelson was holding on physical therapy. (JE 4:44). Dr. Nelson recommended an evaluation by a neurologist. (JE 4:44). Dr. Nelson anticipated that Mr. Butcher would not achieve MMI until about six months post-surgery. (JE 4:44). Finally, Dr. Nelson opined that there was no causal relationship, nor need for medical treatment for, any psychiatric component of Mr. Butcher's injury. (JE 4:44).

Mr. Butcher presented to MercyOne Ruan Neurology Care on November 22, 2019. (JE 12:131-132). Steven Adelman, D.O., examined him. (JE 12:131). Mr. Butcher felt somewhat better since his revision surgery, but continued to have persistent pain in his left leg. (JE 12:131). Mr. Butcher reported that he dragged his left foot prior to the surgery, and believed that it was worse. (JE 12:131). Mr. Butcher also described numbness along his lateral calf and left foot. (JE 12:131). Dr. Adelman diagnosed Mr. Butcher with lumbosacral radiculopathy at L5. (JE 12:132). Dr. Adelman recommended that Mr. Butcher wear an AFO splint, and undergo an EMG of his left leg. (JE 12:132).

On December 10, 2019, Mr. Butcher continued his care with Dr. Nelson. (JE 4:45-46). Mr. Butcher continued to complain of low back pain, left lateral calf paresthesia and left foot paresthesia. (JE 4:45). Mr. Butcher requested a full duty release so that he could return to work. (JE 4:45). Dr. Nelson noted that Mr. Butcher could walk on his heels and toes, but had slight weakness with walking on his left heel. (JE 4:45). Dr. Nelson reminded Mr. Butcher to exercise common sense with his back. (JE 4:45). Dr. Nelson also expressed his belief that Mr. Butcher reached MMI. (JE 4:45). Accordingly, Dr. Nelson released Mr. Butcher with no restrictions. (JE 4:45).

Mr. Butcher also had an EMG at MercyOne Ruan Neurology Care on December 10, 2019. (JE 12:133-135). Dr. Adelman opined that the EMG results showed nonspecific changes within the extensor digitorum brevis. (JE 12:133). Dr. Adelman found no definitive evidence of a left L5 radiculopathy. (JE 12:133). Dr. Adelman noted that the muscle strength appeared improved. (JE 12:133).

After his surgery, Advance never offered him the opportunity to return to work. (Testimony). Mr. Butcher re-applied at Advance twice in December of 2019; however, Advance told him that he was ineligible for further employment with Advance. (Testimony). Mr. Butcher testified that he had overdue bills, and was afraid he would lose his home. (Testimony). He asked to be discharged from care so that he could find work. (Testimony).

Dr. Nelson wrote a letter to Lynda Showalter of Corvel on December 20, 2019. (JE 4:47). Dr. Nelson opined that Mr. Butcher sustained a 3 percent impairment based upon his back injury. (JE 4:47). Dr. Nelson noted that Mr. Butcher received an 11

percent impairment rating from his previous injury in 2015. (JE 4:47). Combining the two ratings resulted in a 14 percent impairment rating. (JE 4:47).

Mr. Schmadeke examined Mr. Butcher again on January 7, 2020. (JE 10:94-96). Mr. Butcher indicated that his mood ranged from normal, to depressed, to very angry. (JE 10:94). His mother's issues and illnesses caused him stress. (JE 10:94). Mr. Schmadeke increased his medications. (JE 10:95).

On January 14, 2020, Mr. Butcher followed up with Mr. Schmadeke regarding his medication adjustments. (JE 10:97-99). Mr. Butcher felt better, but noted that some days were still a struggle. (JE 10:97). He requested a refill of Trazodone. (JE 10:97). Mr. Schmadeke noted that Mr. Butcher had a normal gait and station. (JE 10:98).

Mr. Butcher began reporting daily headaches, back pain, and neck pain to Mr. Schmadeke on January 29, 2020. (JE 10:100-104). Mr. Butcher noted that he felt how he did when he had a dural tear. (JE 10:100). Mr. Butcher experienced vision changes including double and/or fuzzy vision with his headaches. (JE 10:100). Mr. Schmadeke diagnosed Mr. Butcher with headache, vision changes, tremors, and cervicgia with decreased range of motion. (JE 10:103). Mr. Schmadeke recommended that Mr. Butcher have an eye exam, and consult with neurology. (JE 10:103).

Effie Martinez, A.R.N.P. examined Mr. Butcher on March 3, 2020, due to complaints of back pain and foot dragging. (JE 10:105-109). Mr. Butcher required assistance with showering and bathing due to his foot drop. (JE 10:105). He also had bladder leakage upon laying down. (JE 10:105). Ms. Martinez found sciatic nerve pain down Mr. Butcher's left leg. (JE 10:109). Ms. Martinez told Mr. Butcher that if his headache worsened, he should report to the emergency room. (JE 10:109).

Mr. Butcher attended an examination with Michael Chen, D.O. on March 9, 2020. (JE 13:136-139). Dr. Chen is a neurologist. (JE 13:136). Dr. Chen indicated that the reason for the examination was that Mr. Butcher had constant headaches since his lumbar surgery. (JE 13:136). Dr. Chen ordered an MRI of the brain, an MRI of the lumbar spine, prescribed Topamax for headaches, and referred Mr. Butcher to neurosurgery. (JE 13:139).

A lumbar MRI was completed on March 14, 2020. (JE 13:140-141). Benjamin LaCrosse, M.D. interpreted the MRI results. (JE 13:140-141). The MRI showed postoperative changes at L5 with a large central and left paracentral disc protrusion that impinged on the traversing left S1 and potentially the exiting left L5 nerve roots. (JE 13:141). The MRI also showed posterior epidural and soft tissue enhancement at L5 which Dr. LaCrosse related to the prior surgery. (JE 13:141). Dr. LaCrosse saw no convincing findings suggestive of leaking cerebrospinal fluid. (JE 13:141).

On April 28, 2020, Dr. Nelson wrote a letter to defendants' counsel in response to a phone conference on April 14, 2020, and a subsequent letter on April 15, 2020. (JE 4:48-49). Dr. Nelson reviewed an EMG report from Dr. Adelman, and records of visits at Villisca Family Health Center. (JE 4:48-49). Based upon his review, Dr. Nelson opined that the proposed cervical MRI, brain MRI, or referral to a neurologist were not

related to the work incident. (JE 4:49). Dr. Nelson recommended another lumbar MRI, and opined that his impairment rating remained 3 percent. (JE 4:49).

Mr. Butcher attended an independent medical examination ("IME") with John Kuhnlein, D.O., M.P.H., F.A.C.P.M., F.A.C.O.E.M., on July 1, 2020. (Claimant's Exhibit 1:1-16). Dr. Kuhnlein is board certified in occupational and environmental medicine. (CE 1:14). Dr. Kuhnlein issued a report on July 23, 2020. (CE 1:1-16). Mr. Butcher told Dr. Kuhnlein that his job at Culligan required him to lift 100 pound tanks once or twice per week. (CE 1:1). He also lifted between 50 and 100 pounds in what he described as awkward positions. (CE 1:2). He told Dr. Kuhnlein that he spent about 20 percent of his workday working from the floor to the waist, 40 percent of his day from the waist to the shoulder, and 40 percent at or above shoulder height. (CE 1:2). Mr. Butcher also indicated that he constantly gripped or grasped. (CE 1:2). He frequently stood, walked, squatted, bent, or climbed stairs. (CE 1:2). He also occasionally sat and knelt. (CE 1:2). He rarely climbed ladders or crawled. (CE 1:2).

Dr. Kuhnlein proceeded to review Mr. Butcher's medical history including his pre-April 2019, medical history and his post April 9, 2019, medical history. (CE 1:2-7). At the time of the examination, Mr. Butcher was not seeing any healthcare providers. (CE 1:7). He was taking tramadol on a daily basis. (CE 1:7). On his worst days, he took ibuprofen or Tylenol, as well. (CE 1:7). Mr. Butcher wore an AFO brace when he undertook increased activities. (CE 1:7). Mr. Butcher continued to have constant aching left-sided low back pain. (CE 1:7). The pain radiated through his left buttock to the lateral left leg, calf, and lateral foot. (CE 1:7). He also told Dr. Kuhnlein that his left foot dragged if he was more active. (CE 1:7). At the time of his evaluation, his pain was 4 out of 10, and was usually 3 out of 10. (CE 1:7). At the time of the exam, he worked as a cook at Kentucky Fried Chicken/Taco Bell. (CE 1:8). Mr. Butcher reported difficulty in lifting more than 40 pounds in his job at Taco Bell. (CE 1:8). Mr. Butcher also related issues with traveling, using stairs, and intimacy. (CE 1:8). Mr. Butcher's symptoms improved and stabilized since his August 5, 2019, surgery. (CE 1:8). Mr. Butcher had uncontrollable leg spasms and charley horses in both of his legs. (CE 1:9). This disturbed his sleep, and caused him to awaken unrested in the morning. (CE 1:9).

Dr. Kuhnlein observed Mr. Butcher limping about the room during his examination. (CE 1:9). He also dragged his anterior left foot in a swinging fashion. (CE 1:9). He was unsteady, and could not walk on his heels. (CE 1:9). He grimaced and groaned as he walked. (CE 1:9). He had limited lumbar range of motion, as measured by dual inclinometers. (CE 1:9). Dr. Kuhnlein noted pain with palpation in the left gluteal area, in the left paralumbar muscles, and the left sacroiliac joint. (CE 1:9). Dr. Kuhnlein reviewed the March 14, 2020, lumbar MRI, and the May 31, 2019, MRI. (CE 1:10). Dr. Kuhnlein opined that there was a recurrent L5-S1 disc herniation compared to the preoperative MRI. (CE 1:10). Dr. Kuhnlein diagnosed Mr. Butcher with an L5-S1 disc herniation with radiculopathy and an August 5, 2019, left L5-S1 revision laminectomy and partial discectomy/decompression. (CE 1:10).

Dr. Kuhnlein opined that the most recent MRI suggested a recurrent L5-S1 disc herniation and scar tissue that would be sequelae of the April 9, 2019, injury. (CE 1:11). Dr. Kuhnlein noted Mr. Butcher's left foot drop, and dragging of the left foot during the

swing phase of his gait, but found it “puzzling” that the clinical picture is not correlated by the EMG/NCV performed by Dr. Adelman. (CE 1:11). Dr. Kuhnlein also did not find any atrophy in the lower extremity. (CE 1:11). Dr. Kuhnlein deferred on any opinion regarding the left foot drop until Mr. Butcher was seen and evaluated again by a neurologist. (CE 1:12).

Dr. Kuhnlein recommended that Mr. Butcher return to Dr. Nelson to determine if further surgical intervention is necessary based upon the most recent MRI. (CE 1:12). He also recommended that Mr. Butcher return to either Dr. Adelman or Dr. Chen with regard to the etiology of the left foot drop. (CE 1:12). If Drs. Nelson, Adelman, or Chen did not recommend additional intervention, then Dr. Kuhnlein recommended that Mr. Butcher treat conservatively. (CE 1:12). Finally, Dr. Kuhnlein recommended that Mr. Butcher try to lose weight, stop smoking, and decrease his caffeine intake. (CE 1:12).

Dr. Kuhnlein provided restrictions including occasionally lifting 30 pounds from the floor to the waist, occasionally lifting 40 pounds from the waist to the shoulder, and occasionally lifting 20 pounds over the shoulder. (CE 1:13). He could occasionally sit, stand, or walk with the ability to change positions for comfort. (CE 1:13). Mr. Butcher could occasionally bend at the waist, crawl, climb stairs, work at or above shoulder height, and stoop or squat. (CE 1:14). He could frequently kneel. (CE 1:14). Until the foot drop issue was further defined, Dr. Kuhnlein would not allow Mr. Butcher to work on ladders or at height. (CE 1:14). Dr. Kuhnlein allowed Mr. Butcher to travel for work, as long as he could take stretch breaks from time to time. (CE 1:14).

Dr. Kuhnlein opined, “Mr. Butcher has not reached maximum medical improvement if the course of action outlined above is approved and undertaken.” (CE 1:12). If the recommended course of action is not approved, or Mr. Butcher declined, then Dr. Kuhnlein indicated that Mr. Butcher achieved MMI on March 14, 2020. (CE 1:12). Dr. Kuhnlein assigned an 8 percent impairment for Mr. Butcher’s initial injury involving surgery and resolution of his symptoms. (CE 1:13). He then assigned a 2 percent whole person impairment related to the April 9, 2019, date of injury. (CE 1:13). These combine to a 10 percent whole person impairment based upon radiculopathy. (CE 1:13). Dr. Kuhnlein assigned a 15 percent whole person impairment for decreases in range of motion. (CE 1:13). Due to the sensory loss found in the L5 distribution, Dr. Kuhnlein assigned a 3 percent left lower extremity impairment rating, which translates to a 1 percent whole person impairment rating. (CE 1:13). Considering the impairment ratings noted above, Dr. Kuhnlein utilized the combined values chart on page 604 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to assign a 25 percent whole person impairment. (CE 1:13). Dr. Kuhnlein noted that apportionment may be appropriate in this case because his ratings are based upon the impairment caused by the first surgery, and the subsequent surgery. (CE 1:13). Dr. Kuhnlein declined to assign an impairment rating for the foot drop issues “until the etiology has been more clearly defined.” (CE 1:13).

Mr. Schmadeke examined Mr. Butcher again on August 4, 2020, for a medication review. (JE 10:110-113). Mr. Schmadeke treated Mr. Butcher for insomnia, anxiety, bipolar disorder, and obesity. (JE 10:112).

On October 9, 2020, Mr. Butcher returned to Mr. Schmadeke's office for another medication review. (JE 10:114-117). Mr. Butcher continued to complain of trouble sleeping and chronic lumbar spine pain managed by Tramadol. (JE 10:114). Mr. Butcher displayed an antalgic gait with dragging of his left foot. (JE 10:116). He also had tenderness with palpation of the lumbar spine. (JE 10:116).

Bradley Nielsen, PA-C, and Jamie Wilson, M.D. examined Mr. Butcher on October 19, 2020. (JE 14:142-146). Mr. Butcher recounted his medical history for the providers. (JE 14:142-143). Mr. Butcher complained of progressive lumbar mechanical pain with accompanied left-sided radiculopathy and weakness. (JE 14:143). The providers reviewed the March 14, 2020, MRI, and noted disc degeneration with bulging at L5-S1 with significant neural foraminal stenosis. (JE 14:146). The providers recommended additional imaging including x-rays and a CT scan of the lumbar spine. (JE 14:146). Upon receiving the results, the claimant was to have a telehealth visit with Dr. Wilson to discuss his surgical options. (JE 14:146).

Mr. Butcher had a CT scan of his lumbar spine on October 27, 2020, which demonstrated lower lumbar degenerative disc disease with potential nerve root impingement from L4 to S1. (JE 14:147-150). The CT scan also showed posterior subcutaneous soft tissue thickening, which the interpreting doctor opined was a sequela of the prior surgery. (JE 14:147-150).

On October 30, 2020, Dr. Wilson met with Mr. Butcher via Zoom for a telehealth visit. (JE 14:151-152). Dr. Wilson discussed the possibility of nonoperative management, which would include transforaminal injections. (JE 14:152). However, Dr. Wilson felt that these were not an effective long-term strategy. (JE 14:152). Mr. Butcher told Dr. Wilson that he did not wish to proceed with injections. (JE 14:152). Mr. Butcher was "keen to proceed with fusion surgery." (JE 14:152). Dr. Wilson mentioned significant risks including an increased risk of infection, a significantly lower chance of obtaining relief from left leg pain, and a high risk of further cerebrospinal fluid leaks. (JE 14:152). Dr. Wilson recommended that Mr. Butcher attempt to quit smoking before pursuing surgery. (JE 14:152).

Mr. Butcher met with Dr. Wilson again via Zoom on November 20, 2020. (JE 14:153-154). Mr. Butcher advised that he quit smoking, and wanted to pursue the lumbar fusion surgery. (JE 14:154). Dr. Wilson indicated that he would perform an L4-S1 posterior decompression and lumbar fusion with interbody cages at L4-5 and L5-S1. (JE 14:154). After discussing the risks and need for surgery, Mr. Butcher "was happy to proceed with the surgery." (JE 14:154). Mr. Butcher also had a CT scan of his lumbar spine on November 20, 2020. (JE 15:167-168). The CT was compared to the August of 2019 CT scan. (JE 15:167-168). The CT scan showed a small central and left paracentral disc extrusion that posteriorly displaced the left S1 nerve root at L5-S1. (JE 15:168). The examiner recommended correlating for left S1 radiculopathy. (JE 15:168). The reviewer also noted a small, broad-based posterior disc bulge with a small central disc fissure at L4-5. (JE 15:168).

On January 28, 2021, Mr. Schmadeke examined Mr. Butcher again. (JE 10:118-120). Mr. Butcher complained of pain in his lumbar spine and ongoing left lower

extremity weakness causing left-sided foot drop and gait abnormality. (JE 10:118). Mr. Schmadeke opined that Mr. Butcher was a good surgical candidate for a discectomy and fusion with Dr. Wilson. (JE 10:120). Mr. Schmadeke diagnosed Mr. Butcher with low back pain and radiculopathy. (JE 10:120).

Mr. Butcher reported for surgery on February 9, 2021. (JE 14:155-156). Dr. Wilson performed the following procedures: posterior instrumented arthrodesis at L4; additional levels of instrumented arthrodesis at L5, S1; revision discectomy at L4-5 with complete facetectomy; interbody fusion at L4-5; revision discectomy at L5-S1 with complete facetectomy; and, an interbody fusion at L5-S1. (JE 14:155).

On February 24, 2021, Mr. Nielsen examined Mr. Butcher. (JE 14:157-159). Mr. Nielsen removed the staples from the incision. (JE 14:157). Mr. Butcher reported doing well from a pain standpoint. (JE 14:158). His chronic lumbar pain "significantly improved." (JE 14:158). However, he did not feel any improvement to the left foot. (JE 14:158).

Mr. Butcher spoke to Mr. Nielsen on March 17, 2021. (JE 14:160-161). Mr. Butcher indicated that his mechanical back pain resolved completely. (JE 14:160). He noted that his main complaint continued to be left lower extremity radicular symptoms. (JE 14:160). Mr. Nielsen recommended that Mr. Butcher have additional imaging of the lumbar spine, and also continue physical therapy and occupational therapy. (JE 14:161).

Dr. Wilson issued a letter on March 23, 2021. (CE 2:19-21). Dr. Wilson noted that he is the neurosurgery attending at the University of Nebraska Medical Center in Omaha, Nebraska. (CE 2:19). Dr. Wilson noted that Mr. Butcher presented with diagnoses of degenerative lumbar spine disease at L4-5 and L5-S1 with prolapsed disks at L4-5 and L5-S1, a previous lumbar discectomy at L4-5 and L5-S1, a left-sided foot drop secondary to disc prolapse, and obesity. (CE 2:19). Dr. Wilson outlined his examinations of Mr. Butcher, as well as the imaging results. (CE 2:20). Dr. Wilson indicated that Mr. Butcher presented with "extensive degenerative disc disease at L4-5 and L5-S1" with a prior surgical history. (CE 2:20). Dr. Wilson continued, "Mr. Butcher's case is likely to be influenced by his occupational activities, obesity and prior smoking status." (CE 2:20). According to Dr. Wilson, prolapse of a lumbar disc is associated with kinetic movements such as heavy lifting, bending, and twisting. (CE 2:20). Due to the sudden onset of symptoms and left-sided foot drop correlating with the work injury of April of 2019, Dr. Wilson concluded that the work injury was a substantial contributing factor to accelerating the degenerative disc disease. (CE 2:20). Therefore, it was a causal factor in the eventual need for surgery. (CE 2:20).

On March 30, 2021, Mr. Butcher followed up with Mr. Nielsen and Dr. Wilson. (JE 14:162-166). Mr. Butcher reported doing "exceptionally well following surgery." (JE 14:162). He denied lumbosacral pain. (JE 14:162). Mr. Butcher noted improvement with strength with his left foot drop/foot issues. (JE 14:162). He no longer wore a brace on his left foot. (JE 14:162). He did, however, report left-sided radicular symptoms that continued. (JE 14:162). He also had persistent numbness and tingling within his foot, though the symptoms were not as severe or frequent as prior to the surgery. (JE

14:162). Mr. Butcher continued to perform extensive physical therapy. (JE 14:162). Mr. Nielsen reviewed lumbosacral x-rays, which showed stable posterior stabilization and anterior fusion from L4 to S1 with no evidence of hardware complications. (JE 14:166). Mr. Nielsen declared that Mr. Butcher was doing exceptionally well following his surgery. (JE 14:166). Mr. Nielsen recommended that Mr. Butcher continue to take pregabalin, as well as continue physical therapy and occupational therapy. (JE 14:166). Mr. Nielsen concluded by recommending that Mr. Butcher return in two months. (JE 14:166).

Dr. Wilson responded to an April 1, 2021, letter from claimant's counsel regarding Mr. Butcher's fitness for work. (CE 2:22). Dr. Wilson noted that it was his assessment on October 19, 2020, that Mr. Butcher was unfit for physical labor at that time. (CE 2:22). This was due to Mr. Butcher's significant symptoms of back pain and leg pain in combination with degenerative changes seen on the MRI. (CE 2:22). As of early April of 2021, Dr. Wilson opined that Mr. Butcher could only return to light duties that do not include heavy lifting or periods of prolonged standing. (CE 2:22). Dr. Wilson indicated that Mr. Butcher would reach MMI four to six months from the date of his letter, April 13, 2021. (CE 2:22).

Dr. Kuhnlein reviewed additional medical records related to Mr. Butcher's care subsequent to the previous IME. (CE 1:17-18). Dr. Kuhnlein provided an addendum to his IME dated April 16, 2021. (CE 1:17-18). Dr. Kuhnlein reported that the August 5, 2019, surgery by Dr. Nelson failed. (CE 1:18). This caused Mr. Butcher to develop a recurrent disc herniation as a sequela. (CE 1:18). This led to the need for Dr. Wilson to perform the fusion in February of 2021. (CE 1:18). Based upon this chronology or pattern, Dr. Kuhnlein related the fusion surgery in February of 2021, to the April 9, 2019, work incident. (CE 1:18).

On April 22, 2021, Mr. Schmadeke issued a letter to claimant's counsel. (CE 3:23-24). Mr. Schmadeke noted that he was Mr. Butcher's primary care provider. (CE 3:23). Mr. Schmadeke reported that Mr. Butcher first displayed significant left foot drop on March 3, 2020, but that he also had an abnormal gait from the first time that Mr. Schmadeke saw him. (CE 3:23). Mr. Schmadeke opined that "there is a direct connection between Devon's work injury in April 2019 and his fusion surgery done on February 9, 2021." (CE 3:24). Mr. Schmadeke also opined that Mr. Butcher's left foot weakness, foot drop, and abnormal gait, were directly related to the April of 2019 work injury. (CE 3:24). Mr. Schmadeke does not provide further explanation as to how he arrived at these conclusions.

After working for Advance, Mr. Butcher applied for jobs with Hy-Vee, Farm & Home, and Fareway. (Testimony). He also applied for unemployment, but was denied because it was determined that he quit his job with Advance. (Testimony).

Mr. Butcher then worked for Molded Plastics. (Testimony; CE 5:30-32). His attendance records show that he worked one full week of 40 hours in April of 2020. (CE 5:30). He then worked 4 hours during the week of April 17, 2020. (CE 5:30). He worked 8 total hours during the week of April 24, 2020. (CE 5:30). He then did not work at all until being terminated during the week of June 5, 2020. (CE 5:31). He

worked 52 hours over three weeks for Molded Plastics. (Testimony; CE 5:30-32). He made facemasks for the COVID-19 pandemic. (Testimony). He opined that this was a fairly easy job, but that he could not do it with his back issues. (Testimony).

As noted in his IME, Mr. Butcher attempted to work at Kentucky Fried Chicken and Taco Bell. (Testimony). He made tacos as a line cook. (Testimony). He worked there for two months in a part-time position. (Testimony). He could not physically do the work, so he stopped. (Testimony). The records from Kentucky Fried Chicken and Taco Bell indicate that Mr. Butcher was terminated on August 22, 2020, due to "illness/injury." (CE 6:33-34). Since August of 2020, he has not worked anywhere else. (Testimony). He also has not collected unemployment. (Testimony).

Mr. Butcher opined that he could not perform any of the jobs that he held prior to his work injury with Advance. (Testimony). Due to his learning disability, he also opined that he could not operate a cash register or perform telephone sales. (Testimony).

Around the home, he does his own laundry and occasionally does dishes. (Testimony). He also walked when he was able. (DE M:11). He no longer provides primary care for his mother, as discussed above, because she has nurses that assist her with her activities of daily living. (Testimony).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Temporary Disability and/or Healing Period Benefits

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable, rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall &

Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

The first question in this case is whether the treatment prior to, and subsequent to, the February of 2021 lumbar fusion surgery was causally related to the April 9, 2019, work incident. In reviewing the evidence, I find that the opinions of Dr. Kuhnlein and Dr. Wilson are most convincing and persuasive. Dr. Kuhnlein utilized both objective and subjective measures to determine that Mr. Butcher's ongoing low back issues were related to the April 9, 2019, work incident. Dr. Kuhnlein opined that the August 5, 2019, surgery of Dr. Nelson failed. This failure caused Mr. Butcher to develop a recurrent disc herniation as a sequela, and directly led to the need for the fusion surgery in February of 2021. Therefore, I find that the subsequent lumbar fusion surgery resulted from the April 9, 2019, work incident, either due to a new injury incurred on April 9, 2019, or because the claimant suffered a material, permanent, aggravation of his pre-existing back issues.

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

Additionally, Iowa Code 85.33(3) provides in pertinent part:

If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Iowa Code 85.33(3).

The Iowa Supreme Court held that there is a two-part test to determine eligibility under Iowa Code 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012). If an employee

refuses an offer of temporary work by claiming that the work is not suitable, the employee must communicate the refusal, and reasons for refusal, to the employer in writing when the offer of work is refused. Iowa Code section 85.33(3)(b). If an employee does not communicate the reason for a refusal in writing, the employee is precluded from raising suitability of the work as the reason for refusal until the reason for the refusal is communicated in writing to the employer. Id.

As a general rule, “temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition.” Clark v. Vicorp Rest., Inc., 696 N.W.2d 596 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to “partially reimburse the employee for the loss of earnings” during a period of recovery from the condition. Id. The appropriate type of benefits depends on whether or not the employee has a permanent disability. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury.

Iowa Code 85.33(1) provides

...the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the first employment in which the employee was engaged at the time of injury, whichever occurs first.

Temporary total disability benefits cease when the employee returns to work, or is medically capable of returning to substantially similar employment.

Iowa Code 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until: (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or, (3) the worker has achieved maximum medical recovery. The first of the three items to occur ends a healing period. See Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012); Evenson v. Winnebago Indus. Inc., 881 N.W.2d 360 (Iowa 2012); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App., Mar. 20, 2020). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Compensation for permanent partial disability shall begin at the termination of the healing period. Id.

In this case, Advance provided a written offer of modified duty to Mr. Butcher to begin on June 24, 2019. He was to be paid thirteen and 50/100 dollars (\$13.50) per hour, work from 9:00 a.m. to 5:00 p.m., and work Monday through Friday at the Atlantic & Rural Community Thrift store. He was to organize clothes, face merchandise, and

help with inventory. Mr. Butcher's physical restrictions were noted. There also was a sentence indicating that Mr. Butcher's benefits may be affected if he refused modified duty within the physical limitations assigned by a physician.

Mr. Butcher alleged that his work at the thrift store was outside of his restrictions. Mr. Butcher was required to stand. He also had to bend and twist routinely, according to his testimony. He communicated these concerns to Advance. He also communicated these concerns to his attorney. On July 5, 2019, the claimant's attorney sent defendants' attorney a letter outlining Mr. Butcher's restrictions, including rare standing, bending and twisting. Mr. Butcher's attorney indicated that the work at the thrift store required the claimant to repetitively bend and twist. It also required him to stand "much more frequently than on a rare basis." In this letter, the claimant's attorney requested that the defendants either initiate healing period benefits or offer additional light duty work that complied with Mr. Butcher's restrictions.

The defendants sent another letter to the claimant's attorney on July 17, 2019. The claimant's attorney wrote back indicating that, despite the fact that the thrift store offered Mr. Butcher a chair, Mr. Butcher was still asked to perform tasks outside of his restrictions. Again, claimant's counsel requested that the defendants commence payment of healing period benefits or offer transitional light duty work.

Based upon the evidence in the record, Mr. Butcher did not communicate his reasons for refusing the work offered at the thrift store until July 5, 2019. Therefore, until this written communication of his reasons for refusal, it was appropriate for the defendants to withhold benefits.

It is unclear as to the justification for healing period benefits from July 30, 2019, to July 31, 2019. The claimant argues that he is owed these benefits, but the undersigned does not find any reason to award benefits for these two days.

On October 29, 2019, Mr. Butcher was released to return to office work only. At that time, it appears that Mr. Butcher was no longer employed by Advance, although his exact termination date remains unclear. There is no evidence in the record of when Mr. Butcher's employment with Advance ended. During this time, there is no evidence that Advance offered Mr. Butcher any office-type work. Additionally, as determined above, the previous offer of light duty was not in compliance with Mr. Butcher's restrictions.

The restrictions of office work remained in place until Dr. Nelson released Mr. Butcher to work full duty on December 10, 2019. Mr. Butcher noted that he requested that Dr. Nelson release him to work. He testified that he needed to work in order to pay his bills, and that he was afraid of losing his home. Dr. Nelson's record from that date indicated that Mr. Butcher *requested* his release to full duty, which correlates that Mr. Butcher made this request. (Emphasis added). Dr. Nelson provided no restrictions and told Mr. Butcher to "exercise common sense" with regard to his back. Dr. Nelson opined that Mr. Butcher achieved MMI. This contradicts Dr. Nelson's November 18, 2019, note, in which he opined that Mr. Butcher would not reach MMI until six months post surgery. Six months post surgery would have been early January of 2020. There are no indications in the records that Mr. Butcher made a miraculous recovery between November 18, 2019, and December 10, 2019. Healing period benefits from October 29,

2019, to December 10, 2019, are appropriate, as Mr. Butcher was no longer employed by Advance during this time, and was only released to office work. No temporary modified duty offers were made during this time. On December 10, 2019, Dr. Nelson opined that Mr. Butcher achieved MMI.

The final period that the claimant alleges being owed temporary disability benefits is from October 19, 2020, and ongoing. In this case, the claimant requested to be released to full duty work. His physician acquiesced to his request, and declared him at MMI while releasing him to full duty work. The evidence in the record indicates that Mr. Butcher had about two months from his release in December of 2019 to his next documented lower back pain in early 2020. By March of 2020, Mr. Butcher began experiencing left foot drop and dragging. In April of 2020, the treating physician, Dr. Nelson, recommended an additional lumbar MRI.

Mr. Butcher then had an IME with Dr. Kuhnlein. Dr. Kuhnlein is board certified in occupational and environmental medicine. Dr. Kuhnlein opined that the most recent MRI suggested a recurrent L5-S1 disc herniation and scar tissue that would be sequelae of the April 9, 2019, injury. Dr. Kuhnlein noted Mr. Butcher's left foot drop, and dragging of the left foot during the swing phase of his gait, but found it "puzzling." Dr. Kuhnlein further opined that the clinical picture is not correlated by the EMG/NCV performed by Dr. Adelman. Dr. Kuhnlein also did not find any atrophy in the lower extremity. Dr. Kuhnlein deferred on any opinion regarding the left foot drop until Mr. Butcher was seen and evaluated again by a neurologist. Dr. Kuhnlein opined that Mr. Butcher had not reached MMI unless/until the claimant was seen by Dr. Nelson, Dr. Adelman, or Dr. Chen with regard to his ongoing complaints. The defendants apparently declined to return Mr. Butcher to care with any of the doctors.

Dr. Kuhnlein later opined that the August 5, 2019, surgery of Dr. Nelson failed. This failure caused Mr. Butcher to develop a recurrent disc herniation as a sequela, and directly led to the need for the fusion surgery in February of 2021.

Finally, in October of 2020, Mr. Butcher commenced care with Dr. Wilson and Mr. Nielsen. Based upon the examinations and imaging, Dr. Wilson recommended a lumbar fusion. This was performed on February 9, 2021. Dr. Wilson opined that, as of October 19, 2020, Mr. Butcher was unfit for physical labor, and that in early April of 2021, Mr. Butcher could only return to light duty. Dr. Wilson concluded that Mr. Butcher would reach MMI in four to six months from his April 13, 2021, letter.

I find the opinions of Dr. Kuhnlein and Dr. Wilson most persuasive in this matter. Dr. Kuhnlein, using the objective imaging results and the subjective complaints of the claimant, provides the most logical explanation of what occurred in this case. That is, that Mr. Butcher had a back injury in 2014, he had surgery, and recovered. He reinjured his lower back in April of 2019. In August of 2019, he had a revision surgery. That surgery failed, and required a spinal fusion in February of 2021.

After the spinal fusion, Mr. Butcher reported great improvement in his symptoms. Dr. Wilson opined that, as of October 19, 2020, Mr. Butcher was unfit for physical labor. He also noted that Mr. Butcher will not reach MMI until sometime in 2021. Therefore,

the claimant is entitled to healing period benefits from October 19, 2020, and ongoing until the provisions of Iowa Code section 85.34(1) are satisfied.

Permanent Partial Disability

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(u) or for loss of earning capacity under Iowa Code 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a) – (u) are applied. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

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

In this case, the parties dispute the date for commencement of benefits, as well as the extent of permanent disability. I previously found that the claimant is entitled to healing period benefits from October 19, 2020, and ongoing. The claimant has not met the prerequisites to suspend healing period benefits based upon the judgment of Dr. Wilson. Therefore, a determination of permanent disability is not ripe at this time.

Gross Earnings and Weekly Rate

The parties have a dispute regarding the claimant's weekly workers' compensation rate. Iowa Code 85.36 states "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Weekly earnings are defined as the gross salary, wages, or earnings of an employee had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for work of employment. Id. The subsections of Iowa Code 85.36 set forth methods for computing weekly earnings depending upon the type of earnings and employment.

If an employee is paid on a daily, or hourly basis, or based upon output, weekly earnings are computed by dividing by thirteen (13) the earnings over the thirteen (13) week period immediately preceding the injury. However, any week that does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week that is a fair representation of the employee's customary earnings. Iowa Code 85.36(6). The calculation shall include shift differential pay, but not overtime or

premium pay in the calendar weeks immediately preceding the injury. Id. If the employee was absent during the time period subject to calculation for personal reasons, the weekly earnings are the amount the employee would have earned had the employee worked when work was available to other employees in a similar occupation for the employer. Id.

The claimant submitted wage records in this case. The defendants did not submit any evidence regarding the claimant's wage. The claimant submitted wage documentation dating back to January 13, 2019, and included records from Mr. Butcher's employment at American Hydraulics. However, Mr. Butcher was still an employee of Advance during this time.

The information in Claimant's Exhibit 8 contains wage records. The hours worked in each period are as follows:

Week	Hours Worked
January 7, 2019	46.5 hours
January 14, 2019	10.0 hours
January 21, 2019	40.1 hours
January 28, 2019	10.0 hours
February 4, 2019	8.0 hours
February 11, 2019	41.0 hours
February 18, 2019	33.5 hours
February 25, 2019	39.0 hours
March 4, 2019	40.25 hours
March 11, 2019	42.0 hours
March 18, 2019	39.75 hours
March 25, 2019	38.5 hours
April 1, 2019	25.25 hours
April 8, 2019	22.75 hours

Based upon the above chart, the results from January 14, 2019, January 28, 2019, February 4, 2019, April 1, 2019, and April 8, 2019, do not fairly reflect the claimant's customary earnings. Beginning in February of 2019, the claimant earned thirteen and 50/100 dollars (\$13.50) per hour. This was his rate of pay at the time of the injury. The claimant used several weeks of pay at fourteen and 50/100 dollars (\$14.50) per hour in their calculation. This is incorrect, as the measurement is meant to reflect the claimant's gross earnings at the time of the injury. Iowa Code section 85.36. When those weeks are removed, and the claimant's wages are considered at thirteen and 50/100 dollars (\$13.50) per hours, the claimant's gross earnings are five hundred forty and 90/100 dollars (\$540.90) per week (\$13.50 per hour x hours per week / 9 weeks of representative wages = \$540.90).

For the reasons set forth above, I conclude that the claimant's gross weekly wages are five hundred forty and 90/100 dollars (\$540.90) per week. The claimant is unmarried and entitled to one exemption. Based upon the information contained in the

2018-2019 Ratebook, the claimant's weekly workers' compensation rate is three hundred forty-eight and 02/100 dollars (\$348.02).

Considering the foregoing, there is an underpayment of benefits for those paid by the defendants for temporary total disability and permanent partial disability. While the parties stipulated as to the number of weeks of benefits paid, the claimant alleged that the benefits were paid at an improper rate. The claimant is correct. The parties stipulated that the defendants paid 23.15 weeks of temporary disability benefits and 19.42 weeks of permanent disability benefits at the rate of three hundred forty-seven and 42/100 dollars (\$347.42). Therefore, the claimant is owed an additional zero and 60/100 dollars (\$0.60) per week in benefits. This totals twenty-five and 54/100 dollars (\$25.54) (42.57 weeks x \$0.60 = \$25.54).

Payment of Medical Expenses

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 1975).

Pursuant to Iowa Code 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if he/she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

In cases where the employer's medical plan covers the medical expenses, claimant is entitled to an order of reimbursement only if he has paid treatment costs; otherwise, the defendants are ordered to make payments directly to the provider. See Krohn, 420 N.W.2d at 463. Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution."). See also Carl A. Nelson & Co. v. Sloan, 873 N.W.2d 552 (Iowa App. 2015)(Table) 2015 WL 7574232 15-0323.

The employee has the burden of proof to show medical charges are reasonable and necessary, and must produce evidence to that effect. Poindexter v. Grant's Carpet Service, 1 Iowa Industrial Commissioner Decisions, No. 1, at 195 (1984); McClellan v. Iowa S. Util., 91-92, IAWC, 266-272 (App. 1992).

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company, No. 1 Industrial Comm'r report 356, 358 (1980)

(claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v. Vieth Construction Corp., File No 5044438 (App. May 27, 2016)(Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v. Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills)

Nothing in Iowa Code section 85.27 prohibits an injured employee from selecting his or her own medical care at his or her own expense following an injury. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 205 (Iowa 2010). In order to recover the reasonable expenses of the care, the employee must still prove by a preponderance of the evidence that unauthorized care was reasonable and beneficial. Id. The Court in Bell Bros. concluded that unauthorized medical care is beneficial if it provides a “more favorable medical outcome than would likely have been achieved by the care authorized by the employer.” Id.

In this case, much of the claimant’s care after the defendants allege that he achieved MMI allowed the claimant to achieve a more favorable medical outcome than had the claimant received no care. Some bills alleged to be owed by the claimant are excluded from the below analysis. This is because either no records existed in evidence, or the records did not correlate to beneficial care. I am only ordering reimbursement for billing that I found to be reasonable and beneficial based upon medical evidence in the record.

Dr. Adelman conducted a nerve study on December 10, 2019. According to the claimant, Dr. Adelman billed six hundred eleven and 00/100 dollars (\$611.00) for the EMG. It is unclear why this bill remained outstanding, as Dr. Adelman was a treating physician, who recommended the study. The defendants are ordered to pay Dr. Adelman’s bill.

The claimant alleges that Medicaid paid for treatment at Clarinda Regional Health Center on January 29, 2020, March 3, 2020, October 9, 2020, November 20, 2020, November 24, 2020, January 28, 2021, and March 9, 2021. (CE 9:46). Based upon my review of the records, and the billing submitted in evidence, I find that the defendants shall reimburse Medicaid four hundred eighty-five and 82/100 dollars (\$485.82). This is not the full amount requested by the claimant for treatment with Clarinda Regional Health Center.

The claimant alleges that Medicaid paid for treatment with Dr. Chen in March of 2020. After reviewing the records, I find that the defendants shall reimburse Medicaid one thousand nine and 37/100 dollars (\$1,009.37).

The claimant alleges that Medicaid paid for treatment with the University of Nebraska Medical Center and Dr. Wilson in 2020 and 2021. After reviewing the records, I find that the defendants shall reimburse Medicaid twenty-eight thousand seven hundred ninety-five and 62/100 dollars (\$28,795.62). The defendants shall also reimburse the provider three hundred twenty and 00/100 dollars (\$320.00) for the COVID test provided on February 7, 2021.

The defendants shall reimburse the provider fifty and 00/100 dollars (\$50.00) for treatment with Iowa Radiology on August 5, 2019.

The defendants shall reimburse Iowa Methodist West thirty-six thousand five hundred seventy-nine and 81/100 dollars (\$36,579.81) for treatment on August 5, 2019.

The defendants shall reimburse Medicaid one hundred eight and 29/100 dollars (\$108.29) for a lumbar MRI performed on March 14, 2020, at Diagnostic Radiology, P.C. I did not find the brain MRI billed on the same date to be reasonable or beneficial.

I also order the defendants to reimburse the claimant twenty-five and 00/100 dollars (\$25.00) and the claimant's personal health insurer one hundred twenty and 50/100 dollars (\$120.50) for care on April 10, 2019.

In total, I order the defendants to reimburse Medicaid thirty thousand three hundred ninety-nine and 10/100 dollars (\$30,399.10). I also order the defendants to reimburse various providers thirty-seven thousand five hundred sixty and 81/100 dollars (\$37,560.81).

Alternate Care Pursuant to Iowa Code section 85.27

Iowa Code 85.27(4) provides, in relevant part:

For purposes of this section, the employer is obligated to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care.... The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code 85.27(4). See Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

"Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). "In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers." Ramirez, 878 N.W.2d at 770-71 (citing Bell Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

Under the law, the employer must furnish "reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee."

Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003) (emphasis in original)). Such employer-provided care “must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Iowa Code 85.27(4).

An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee’s discontent with the employer and if the parties cannot reach an agreement on alternate care, “the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order the care.” Id. “Determining what care is reasonable under the statute is a question of fact.” Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995); Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. Because “the employer’s obligation under the statute turns on the question of reasonable necessity, not desirability,” an injured employee’s dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

The claimant requests authorization for continued care with Dr. Wilson as a follow up of the February of 2021 spinal fusion. I previously found that the claimant’s continued lower back care, including the fusion, were related to the April 9, 2019, work incident. I also found that the claimant had yet to achieve MMI in relation to the April 9, 2019, work incident. It is reasonable for the claimant to continue to follow up with Dr. Wilson and Mr. Nielsen at the University of Nebraska Medical Center. Therefore, the claimant’s request for alternate care is granted. The defendants shall continue to authorize care with Dr. Wilson and/or Mr. Nielsen for Mr. Butcher’s continued post-surgical follow up.

COSTS

Claimant seeks the award of costs as outlined in Claimant’s Exhibit 10. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 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, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(6). The Iowa Supreme Court reasoned, “a physician’s report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor’s testimony,” while “[t]he underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition.” Id. (noting additionally that “[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition”). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019).

In this case, the claimant requests costs for the filing fee, service of the original notice and petition, the March 23, 2021 report of Dr. Wilson, and the supplemental report of Dr. Kuhnlein. I award the claimant the above costs, except for a portion of the costs of Dr. Kuhnlein’s report that is labeled as “abstract medical records.” I do not consider the abstract of the medical records to be part of the report in this case. In my discretion, I order the defendants to reimburse the claimant one thousand eighty-one and 80/100 dollars (\$1,081.80).

ORDER

THEREFORE, IT IS ORDERED:

The defendants shall pay claimant healing period benefits from October 29, 2019, to December 10, 2019.

The defendants shall pay claimant healing period benefits from October 19, 2020, through the date of the arbitration hearing, and into the future until such time as the first qualifying factor outlined in Iowa Code section 85.33 or Iowa Code section 85.34 shall be achieved.

The claimant’s gross earnings were five hundred forty and 90/100 dollars (\$540.90) per week, resulting in a weekly compensation rate of three hundred forty-eight and 02/100 dollars (\$348.02).

The defendants shall be given credit for benefits previously paid, as stipulated.

The defendants shall pay unto claimant twenty-five and 54/100 dollars (\$25.54) for benefits previously paid at an incorrect rate.

The defendants shall pay outstanding medical expenses as outlined.

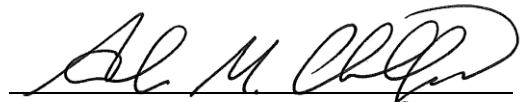
The claimant’s request for alternate medical care is granted. The defendants shall authorize care with Dr. Wilson.

The defendants shall reimburse the claimant one thousand eighty-one and 80/100 dollars (\$1,081.80) for costs.

The 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 Technology, File No. 5054686 (App. Apr. 24, 2018).

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

Signed and filed this 27th day of August, 2021.


ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Ballard (via WCES)

Timothy Wegman (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.