

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ESTATE OF ALAN HARTIG, BY ASHLEY HARTIG, EXECUTOR OF THE ESTATE,  Claimant,  vs.  MEDICAL ASSOCIATES CLINIC, PC,  Employer,  SOCIETY INSURANCE,  Insurance Carrier,  Defendants.	File No. 19005447.01           ARBITRATION DECISION           Headnotes: 1803
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**I. STATEMENT OF THE CASE.**

Claimant Alan Hartig initiated this case by filing with the agency a petition seeking workers' compensation benefits from the defendants, employer Medical Associates Clinic, PC (Medical Associates) and insurance carrier Society Insurance (Society). Unfortunately, Hartig passed away before the scheduled hearing. Ashley Hartig, executor of the Estate of Alan Hartig (Estate), moved to substitute the Estate as the party of interest in this case, which the undersigned granted.

The undersigned presided over an arbitration hearing on October 3, 2022. The Estate participated by and through attorney Thomas M. Wertz. The defendants participated by and through attorney Stephen W. Spencer.

**II. ISSUES.**

Under rule 876 IAC 4.19(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) What is the extent of permanent disability caused by the alleged injury?

- 2) What is the commencement date for permanent partial disability benefits, if any are awarded?
- 3) Are the defendants entitled to a credit for workers' compensation benefits paid prior to hearing?
- 4) Are the defendants entitled to a credit for long-term disability benefits paid prior to hearing?
- 5) Is Hartig entitled to recover the cost of an independent medical examination (IME)?
- 6) Is Hartig entitled to taxation of the costs against the defendants?

### **III. STIPULATIONS.**

In the hearing report, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Hartig and Medical Associates at the time of the stipulated injury.
- 2) Hartig sustained an injury on October 31, 2019, which arose out of and in the course of his employment with Medical Associates.
- 3) The alleged injury is a cause of temporary disability during a period of recovery, but Hartig's entitlement to temporary or healing period benefits is no longer in dispute.
- 4) At the time of the stipulated injury:
  - a) Hartig's gross earnings were one thousand ninety-eight and 50/100 dollars (\$1,098.50) per week.
  - b) Hartig was single.
  - c) Hartig was entitled to one exemption.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

### **IV. FINDINGS OF FACT.**

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 6;

- Claimant's Exhibits (Cl. Ex.) 1 through 3; and
- Defendants' Exhibits (Def. Ex.) A through J.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Hartig lived in and around Dubuque his whole life. (Def. Ex. J, p. 57, Depo. p. 6) During high school, Hartig worked for his dad gutting an old building and digging ditches for irrigation systems. (Def. Ex. J, p. 57, Depo. p. 11) He graduated from Central High School. (Def. Ex. J, p. 57, Depo. p. 8) After graduation, he participated in the North Iowa Community College carpentry program. (Def. Ex. J, p. 57, Depo. pp. 8–9) Hartig did not participate in any other postsecondary education or training. (Def. Ex. J, p. 57, Depo. p. 9)

Hartig's first job after NICC was converting an old hotel building into apartments for his father. (Def. Ex. J, p. 57, Depo. p. 14) He performed carpentry work. (Def. Ex. J, p. 57, Depo. p. 14) The most physically demanding part of the work was hanging standard kitchen cabinets on walls. (Def. Ex. J, p. 57, Depo. p. 14–15)

Hartig's next job was repairing propellers and boat motors at a prop shop. (Def. Ex. J, pp. 15–16) While he could not recall specifically how heavy the motors he had to lift were, he did describe them as "heavy." (Def. Ex. J, p. 57, Depo. p. 16) The work was seasonal and Hartig looked for a new job at season's end. (Def. Ex. J, p. 57, Depo. pp. 16–17)

Medical Associates hired Hartig in or around 1997. (Def. Ex. J, p. 57, Depo. p. 17) He worked in maintenance. (Def. Ex. J, p. 57, Depo. p. 18) His job duties included electrical, plumbing, minor carpentry, general retool, and outdoor work such as caring for the lawn, landscaping, and removing snow. (Def. Ex. J, p. 57, Depo. pp. 18–19) Medical Associates provided Hartig with benefits. (Def. Ex. J, p. 57, Depo. p. 21) Among them were short-term and long-term disability benefits. (Def. Ex. J, p. 57, Depo. p. 21; Def. Ex. F)

On October 31, 2019, Hartig was working for Medical Associates, using a tractor to plow snow. (Jt. Ex. 1, p. 5; Jt. Ex. 4, pp. 2–4; Def. Ex. J, p. 57, Depo. pp. 21–22) The plow's snow blade caught on something, which caused it to stop abruptly. (Jt. Ex. 1, p. 5; Jt. Ex. 4, pp. 2–4) The sudden stop launched Hartig forward so his head collided with the tractor's windshield and his left arm hit the steering wheel. (Jt. Ex. 1, p. 5; Jt. Ex. 4, pp. 2–4; Def. Ex. J, p. 57, Depo. p. 23–24)

Hartig stated during deposition testimony that the tractor was traveling at a rate of speed analogous to a walking pace. (Def. Ex. J, p. 57, Depo. p. 23) He estimated the rate of speed to be approximately one-half to one mile per hour to Robert Broghammer, M.D., who performed an IME arranged by defense counsel. (Def. Ex. C, p. 24) During Hartig's IME with David Segal, M.D., which was arranged by claimant's counsel, he shared that the tractor he was driving did not have a speedometer and that he did not

know for certain his rate of speed but that it was likely less than five miles per hour. (Cl. Ex. 1, p. 10) The weight of the evidence shows it is more likely than not the tractor's rate of speed was between one and five miles per hour.

Medical Associates personnel called an ambulance that transported Hartig to the hospital. (Def. Ex. J, p. 57, Depo. p. 25) EMS administered morphine to address Hartig's pain but that did not alleviate it. (Jt. Ex. 4, p. 4) Hartig received care at the Mercy Hospital emergency room in Dubuque. (Jt. Ex. 4, pp. 1–4)

Jeffrey Messerly, D.O., treated Hartig in the ER and noted his chief complaint was pain in his left arm and neck. (Jt. Ex. 4, p. 4) During Hartig's deposition, he remembered immediate pain in his left arm but could not recall whether he experienced pain elsewhere. (Def. Ex. J, p. 57, Depo. pp. 24–26) While providing care on the date of the work injury, Dr. Messerly noted on examination that Hartig had back pain, muscle pain, joint pain, a headache, numbness, and tingling. (Jt. Ex. 4, p. 4) Dr. Messerly's notes are credible and establish it is more likely than not Hartig experienced back pain, muscle pain, joint pain, a headache, numbness, and tingling as a result of the stipulated work injury on the day it occurred.

Doctors did not order imaging of Hartig's lumbar spine during his ER visit or stay in the hospital immediately following the stipulated work injury. (Jt. Exs. 1–4) Instead, they focused on the areas that caused Hartig the most pain at that time and constituted his chief complaint: his cervical spine, left shoulder, and left arm. On the day of the stipulated work injury, Hartig underwent magnetic resonance imaging (MRI) and a (CT) scan of the cervical spine. (Jt. Ex. 1)

Michael Chapman, M.D., took over care later that same day and noted:

He had immediate onset of pain in the neck and down the left arm. The pain is severe and disabling. . . . Imaging studies were performed and MRI scan has shown edema in the interspinous ligament between C4 and C5 where there is spondylolisthesis. Spine consultation was requested. He complains of pain in the neck, but the worst of the pain is in the arm at roughly C6 distribution from the elbow to the hand including the thumb and he is extremely hypersensitive to touch here. They have not been able to get his pain under control. He is admitted for pain control and immobilization. He denies previous problems with his neck. He denies previous problems with the left arm. He has had a rotator cuff surgery in the past, but shoulder has been doing fine. He states along with the pain, there are some paresthesias as well and again in roughly C6 distribution. Some of the pain is in the neck and some is toward the shoulder, but the worst of it is from the elbow to the hand.

(Jt. Ex. 4, p. 2)

Dr. Chapman diagnosed Hartig with a posterior ligamentous complex injury between C4 and C5. (Jt. Ex. 4, p. 9) The MRI showed no compressive pathology. (Jt.

Ex. 4, p. 9) Dr. Chapman prescribed pain medication and steroids. (Jt. Ex. 4, p. 9) On November 3, 2019, Hartig's pain remained significant but was improved from admission, so Dr. Chapman discharged him with prescriptions for pain medication and anti-inflammatory medication and instructions to wear an Aspen collar, except when bathing, and to follow up later in the week. (Jt. Ex. 4, p. 9)

On November 11, 2019, Hartig completed a pain diagram for Society that indicated the only symptoms he was experiencing were in his neck and left arm. (Def. Ex. 1, p. 56) Dr. Chapman ordered an MRI of the left brachial plexus shortly thereafter. (Jt. Ex. 1, pp. 1–2) It did not show any significant abnormalities. (Jt. Ex. 1, p. 2) Dr. Chapman believed Hartig likely suffered a stretch of the brachial plexus. (Jt. Ex. 5, p. 20)

Hartig continued to treat with Dr. Chapman through the end of the year. His symptoms continued, but gradually improved. (Jt. Ex. 5, pp. 15–20) On December 20, 2022, Dr. Chapman released Hartig to return to work with restrictions and began tapering back his gabapentin use. (Jt. Ex. 5, pp. 18–21)

On December 31, 2019, the Society claims adjuster assigned to Hartig's workers' compensation claim, Angie Bonlander, sent a letter to Dr. Kennedy, stating, "Recently the employer was contacted by Mr. Hartig's therapist and was advised he is now complaining of low back pain he attributes to his work injury." (Jt. Ex. 5, p. 22) Society requested an examination by Dr. Kennedy and her opinion on the cause of Hartig's back complaints. (Jt. Ex. 5, p. 22) During Hartig's deposition, he testified with respect to his back pain at this time, "I think I was just slowly starting to move a little more. I was laid up for almost two months." (Def. Ex. J, p. 57, Depo. p. 31)

Hartig followed up with Dr. Chapman on January 20, 2020, who noted, "The patient has strained his neck and back quite a bit due to the recent weather and some work without wearing a cervical collar." (Jt. Ex. 1, p. 3) Dr. Chapman referred Hartig to Dr. Kennedy for his lumbar back complaints and she noted, "As he decreased medications, he noticed increasing back pain which has not been evaluated until today." (Jt. Ex. 5, p. 39) Dr. Kennedy further noted the pain was achy, could be sharp, and was located primarily over the spine, worse at the L3 level. (Jt. Ex. 5, p. 39) Hartig shared that he was experiencing some stiffness and pain in his legs as well. (Jt. Ex. 5, p. 39)

Dr. Kennedy noted the following during her examination of Hartig:

Lumbar spine is midline and appears normal. He is tender over upper lumbar levels more so than lower levels. Most tender at about L3 directly over vertebra. The paraspinal muscles are also tender. He is not tender over SI joints or about the sacrum. He can bend forward with fingertip to midshin. He has about half of normal extension and lateral bend. SLR is neg bilat.

(Jt. Ex. 5, p. 40)

Dr. Kennedy ordered an MRI of the lumbar spine, which showed advanced multilevel degenerative disk disease with disk space narrowing, disk desiccation, and degenerative end-plate changes most pronounced at L2-3, L3-4, and L4-5. (Jt. Ex. 5, p. 44) The MRI showed no significant spinal stenosis or focal disk protrusion at any level. (Jt. Ex. 5, p. 45) On February 3, 2020, Dr. Kennedy opined:

I have been asked to assess the mid/low back pain which was reported remote to injury. His gait and body mechanics are highly altered and rigid from pain contributing to low back pain. He has also come off of medications that dulled pain in the last few weeks. Within reasonable degree of medical certainty, the low back pain experienced is result of original work injury but was being treated with medications that, when discontinued, allowed for low back pain to manifest appearing to be new, when it wasn't. MRI shows pertinent findings at L4-5 and L3-4 corresponding to the level of reported symptoms. Will continued PT and ask for ESI to lumbar spine.

(Jt. Ex. 5, p. 51)

Hartig experienced a reduction in lumbar symptoms after the epidural steroid injection. (Jt. Ex. 5, p. 57) On March 6, 2020, he reported to Dr. Kennedy a dramatic improvement in low back pain. (Jt. Ex. 5, p. 57) Hartig estimated his pain level went down from a five out of ten to a one or two out of ten after the injection. (Jt. Ex. 5, p. 57) On examination, Dr. Kennedy noted he was tender to palpation over L2 and L3 but not in his muscles and he had a full and fluid range of motion. (Jt. Ex. 5, p. 58) Dr. Kennedy cautioned Hartig that the length of time the injection would last was unpredictable and directed him to continue physical therapy for the lumbar spine. (Jt. Ex. 5, p. 59)

Hartig saw Dr. Chapman on April 6, 2020, and reported that his back pain worsened after he tried raking over the weekend. (Jt. Ex. 5, p. 63) Dr. Chapman noted limited forward flexion and some significant paraspinal tenderness in the lumbar spine as well as the cervical thoracic junction. (Jt. Ex. 5, p. 63) Dr. Chapman reduced Hartig's work restrictions but left some in place because of his symptoms. (Jt. Ex. 5, p. 63)

That same day, Dr. Kennedy noted Hartig worked outside at his home, raking and pruning trees, which caused him to feel more stiff. (Jt. Ex. 5, p. 67) He also shared that he feels sore by the end of his six-hour shift at Medical Associates. (Jt. Ex. 5, p. 67) Nonetheless, his symptoms remained unchanged from his previous examination following the injection that reduced his symptoms. (Jt. Ex. 5, p. 67)

Dr. Kennedy saw Hartig a month later. (Jt. Ex. 5, p. 70) Hartig reported that his pain level was a one out of ten when inactive and that it increased to five out of ten when working. (Jt. Ex. 5, p. 72) She noted he still experienced intermittent cramping in his left groin and both calves that reduced his activity tolerance. (Jt. Ex. 5, p. 72) She assigned restrictions of working no more than seven hours and lifting no more than forty pounds. (Jt. Ex. 5, p. 72) Dr. Kennedy planned to consult with Dr. Miller about a second injection. (Jt. Ex. 5, p. 74)

Later in May, Dr. Kennedy examined Hartig, who opted not to doff his clothing because it was time consuming and caused his pain to worsen. (Jt. Ex. 5, p. 82) Dr. Kennedy noted on examination that he was tender to palpation directly over C2, C3, and C4, he was no longer tender at the paraspinal muscles, and he had full and fluid range of motion. (Jt. Ex. 5, p. 82) With respect to the lumbar spine, Dr. Kennedy noted Hartig was tender over L2, L3, and L4 midline, but not over his musculature. (Jt. Ex. 5, p. 82) Hartig could not squat due to back pain and had reduced sensation in his feet. (Jt. Ex. 5, p. 82)

Dr. Kennedy noted that Hartig's marked deterioration could be due to the injection of February 19, 2020, wearing off. (Jt. Ex. 5, p. 82) She recommended a consultation with Dr. Chapman to see if Hartig was a candidate for surgery. (Jt. Ex. 5, p. 82) Dr. Kennedy scheduled Hartig for an injection on June 3, 2020, if he was not a candidate for surgery, increased his gabapentin dose, and maintained his meloxicam dose. (Jt. Ex. 5, p. 82)

On June 10, 2020, Dr. Kennedy examined Hartig and noted:

At this time, Mr. Hartig has experienced significant deterioration since his first ESI in February when he had significant improvement. He has now had a second ESI on 5/27/20 though I do not yet have records to tell me which level was injected. He denies any improvement of back pain with his second ESI. He returns to me reporting deterioration to his worst possible state which is 8-10/10. Pain is low back with radiation to bilat[eral] lower extremities. Pain is sharp in the low back. Pain is cramping in left groin and either calf. He reports that his calves are cramping, perceives numbness at the anterior and lateral shins, cramping in posterior calves. Both feet are continuously numb at this time which is perceived entire dorsum and plantar aspect of feet, all toes. He reports symptoms are worse in right than left.

(Jt. Ex. 5, p. 85)

On June 11, 2020, Dr. Chapman determined Hartig was not a candidate for surgery to address his lumbar spine complaints. (Jt. Ex. 5, p. 89) On June 25, 2020, Hartig obtained a second opinion, from Andrew Pugely, M.D., who reached the same conclusion. (Jt. Ex. 5, pp. 89, 92; Cl. Ex. 1, p. 41) On July 21, 2020, Dr. Kennedy issued a final report noting:

At this time, Mr. Hartig reports no improvement of symptoms. He rates pain 8-10/10 which is focal at the low back (Pointing to L4-S1). It radiates to bilat[eral] lower extremities. Pain is sharp in the low back. Pain is cramping in left groin and either calf. He perceives numbness at the anterior and lateral shins. Both feet are continuously numb at this time which is perceived entire dorsum and plantar aspect of feet, all toes. He reports symptoms are worse in right than left. He denies lower extremity weakness. He has concern[s] about driving, as a result.

(Jt. Ex. 5, p. 92)

Dr. Kennedy had no additional care to offer Hartig for his symptoms. (Jt. Ex. 5, pp. 92–94) She referred Hartig for pain management and recommended a functional capacity examination (FCE) to determine permanent work restrictions. (Jt. Ex. 5, pp. 93–94) The plan was to find Hartig at MMI at his next appointment, assign work restrictions based on the FCE results, and assess permanent impairment. (Jt. Ex. 5, pp. 93–94)

In the meantime, Hartig received care from Ashley Arens, Ph.D, for depression, including suicidal ideation. (Jt. Ex. 5, pp. 115–121, 128–131) Dr. Arens found pain had impacted multiple areas of Hartig's life and he appeared to have rumination and catastrophizing thoughts relating to pain. (Jt. Ex. 5, p. 120) His decreased activity following the injury because of his ongoing pain was also a factor because Hartig was no longer able to participate in activities he enjoyed such as hunting and fishing. (Jt. Ex. 5, p. 120) Dr. Arens diagnosed Hartig with major depressive disorder. (Jt. Ex. 5, p. 120)

On November 20, 2020, Dr. Kennedy saw Hartig after the FCE. (Jt. Ex. 5, pp. 132–145) She noted the FCE found him able to work in the sedentary work category. (Jt. Ex. 5, p. 141) Dr. Kennedy filled out a form assigning permanent work restrictions that include the diagnosis of:

HNP at L2-3 and L3-4, L4 and L5 bilat[eral] sensory deficits. Cervical pain with C6 sensory changes. Degenerative disc disease diffusely in spine, work related aggravation. At MMI for physical issues. May require continued mental health care.

(Jt. Ex. 5, p. 132)

Dr. Kennedy opined Hartig would require chronic pain management with a specialist. (Jt. Ex. 5, p. 132) Dr. Kennedy also concluded Hartig was unable to return to work as of that date and assigned permanent work restrictions that included:

- Must sit, stand, lay down as needed;
  - No carrying, lifting, pushing, or pulling while ambulating;
  - No bending at the waist, kneeling, crawling, squatting, or climbing;
  - No working outdoors in bad weather; and
  - May sit for short periods of time but is unable to sit fully upright while seated.
- (Jt. Ex. 5, p. 132)

Hartig returned to Dr. Arens after Dr. Kennedy released him from care with the opinion that he could not return to his job at Medical Associates. (Jt. Ex. 5, p. 148) Dr. Arens noted:

He reports meeting with occupational medicine and learning that he is unlikely to return to his previous job. He also shared that there is unlikely any additional medical interventions that can be used. We explored his



thoughts and emotions related to this news. He shared feelings of hopelessness and depression, and thoughts of I'm a failure and uncertainty about what to do next. He shared feeling bad that he was not in a better place to help his 23-year-old son with financial difficulties. He also expressed a feeling of loss over his position and the sense of family where he worked at Medical Associates.

(Jt. Ex. 5, p. 148)

Medical Associates did not have work available for Hartig within his permanent work restrictions. (Def. Ex. J, p. 57, Depo. pp. 17–18) Medical Associates discharged Hartig in December of 2020. (Def. Ex. J, p. 57, Depo. p. 17) Don Erlise informed him of his firing, stating it was because of the physical limitations that resulted from the stipulated work injury. (Def. Ex. J, p. 57, Depo. p. 17–18)

Defense counsel arranged for Hartig to undergo an IME with Robert Broghammer, M.D., on February 1, 2021. (Def. Ex. C, p. 8) As part of the IME, Dr. Broghammer reviewed medical records and examined Hartig. (Def. Ex. C, p. 8) Dr. Broghammer's summary of Hartig's medical records from Mercy makes no mention of the back pain complaint noted by Dr. Messerly. (Def. Ex. C, p. 20)

Dr. Broghammer stated in the IME report:

I then asked Mr. Hartig when his back began to bother him. He states that this was shortly after the incident. Mr. Hartig states he was on medications and then realized other areas were painful after tapering off his medication. *[Reviewer's Note: In fact, the first mention of back pain is not until almost three months after his alleged injury.]*

(Def. Ex. C, p. 24)

Dr. Broghammer noted in his IME report:

Mr. Hartig's examination was remarkable for substantial pain behaviors. When called back to come to the examination room, Mr. Hartig was noted to have a shuffling-type gait with a forward kyphotic posture bent forward at the lumbar spine approximately 20 degrees with groaning and grimacing as he ambulated very slowly to the examination room. I would consider his pain behaviors to be marked.

(Def. Ex. C, p. 25)

With respect to the cause of Hartig's neck injury and upper-extremity symptoms, Dr. Broghammer opined:

I would opine that the worker's interspinous ligament injury is directly related to his incident in which he struck his head on the windshield. This force likely caused the interspinous ligament injury to the cervical spine.

Regarding the worker's paresthesias in the upper extremities, it is unclear exactly what these are due to. The worker has marked pain behaviors and significant complaints to a degree that are not explained by normal pathophysiological phenomena. In my medical opinion there more likely than not idiopathic and not referable to his cervical spine injury.

(Def. Ex. C, pp. 26–27)

On the question of causation with respect to Hartig's back complaints and lower extremity symptoms, Dr. Broghammer opined:

[T]he worker's lumbar pain is not related to the injury on a more likely than not basis. As noted, Mr. Hartig's symptoms did not seem to begin until some time in January of 2020, allegedly after discontinuing many of his pain medications. In my medical opinion, regardless of the use of medications or not, I do not think that the medicines he was taking would have masked his symptoms for that period of time and that if he had a lumbar spine injury from his alleged injury, he would not have noticed some type of lumbar injury prior to the January 20, 2020 date. Please recognize that this is nearly three months after his alleged injury. In my medical opinion the lumbar sprain/strain is not related to the alleged injury. Further supporting this opinion, as noted by Mr. Hartwig during his history, he was traveling at perhaps 1/2 to 1 mph. In my medical opinion this is an exceedingly low rate of speed . . . and would not be expected to result in any lumbar spine injury.

Regarding the worker's bilateral leg radiating pain with numbness and tingling in both feet, I do not think this is referable to the injury and it is not consistent with any particular known physical injury that would account for the symptoms. His MRI of the lumbar spine did not show any significant neural foraminal encroachment as reviewed by Dr. Chapman. In any event, I am of the medical opinion to a reasonable degree of medical certainty that the worker did not suffer a lumbar spine injury as a result of his alleged injury and therefore any leg complaints that may be due to the low back are not work related in my medical opinion.

(Def. Ex. C, p. 27)

Dr. Broghammer's causation opinion is based on the premise that Hartig did not complain about back pain until almost three months after the stipulated work injury. However, the first mention of back pain is not, as Dr. Broghammer asserts, "until almost three months after his alleged injury." As discussed above, Hartig complained of back pain "shortly after the incident," as he shared with Dr. Broghammer during the IME, when he was in the emergency room on the date of injury, which is documented by Dr. Messerly. Dr. Broghammer does not include any discussion of or reference to this fact in his IME report.

Moreover, in December of 2019, Hartig complained to a therapist of back pain that he believed was caused by the work injury and the therapist informed Society, which led to a Society claims adjuster writing to Dr. Kennedy and requesting a causation opinion. These facts lend further support Hartig's deposition testimony that his low back symptoms flared up in December when he started moving around more and began scaling back his pain medication. (Def. Ex. J, p. 57, Depo. p. 30) However, Dr. Broghammer's did not discuss these events in his IME report and it is unclear if he had knowledge of them.

For these reasons, Dr. Broghammer had an inaccurate understanding of the manifestation of Hartig's back complaints. Dr. Broghammer did not document or discuss Hartig's complaint of back pain to Dr. Messerly on the date of injury. Nor did Dr. Broghammer address Hartig's December complaints which spurred Society to obtain a causation opinion from Dr. Kennedy. These facts directly contradict Dr. Broghammer's belief, as stated in his IME report, that Hartig did not complain of back pain until late-January 2020. Because Dr. Broghammer's causation opinion regarding Hartig's back injury is based on an incorrect understanding of when Hartig's symptoms began, it is not credible or persuasive.

On the question of what, if any, permanent disability stemming from the stipulated work injury to Hartig's cervical spine or neck, Dr. Broghammer opined:

Given Dr. Pearson's documentation of normal range of motion of the cervical spine, I believe the appropriate impairment rating would be DRE Cervical Category I, which is a 0 percent impairment of the cervical spine.

(Def. Ex. C, p. 28)

While the substance of the IME report makes it unclear whether Dr. Broghammer utilized the Fifth Edition of the *Guides to the Evaluation of Permanent Impairment* issued by the American Medical Association (*Guides*), the reference to "DRE Cervical Category I," establishes it is more likely than not that he used the Diagnosis-Related Estimates (DRE) Method, the framework of which is found in Table 15-5 on page 392 of the *Guides*. Dr. Broghammer utilized only Dr. Pearson's range of motion documentation in arriving at his DRE categorization. He failed to consider Hartig's clinical history, as required by Table 15-5, including his immediate and ongoing symptom complaints. This undermines the credibility of his opinion on permanent impairment with respect to Hartig's cervical spine. Dr. Broghammer's opinion with respect to the permanent impairment Hartig sustained to his cervical spine is unpersuasive and is therefore rejected.

With respect to Hartig's lumbar and lower extremity symptoms, Dr. Broghammer opined:

If deemed compensable, for what constitutes to be a lumbar sprain without evidence of fracture, surgery, or documentable radiculopathy, the appropriate impairment rating would be 0% to the whole person.

(Def. Ex. C, p. 28)

With respect to the opinion on permanent impairment to low back and lower extremities in Dr. Broghammer's IME report, he does not make express reference to the *Guides*. (Def. Ex. F, pp. 8–29) He makes reference to evidence of fracture, surgery, and documentable radiculopathy that suggest he may have used Table 15-3 on page 384, which states with respect to DRE Category I, "No significant clinical findings, no observed muscle guarding or spasm, no documentable neurologic impairment, no documented alteration in structural integrity, and no other indication of impairment related to injury or illness; no fractures." However, Dr. Broghammer did not identify or discuss any factors listed in Table 15-3 other than fracture, radiculopathy, or surgery. It is more likely than not he would have cited to the *Guides* or discussed each factor supporting the DRE category he chose if he had utilized the *Guides* when evaluating Hartig's permanent impairment. Dr. Broghammer's failure to cite to the *Guides* or accurately discuss the factors considered when using the DRE method in accordance with Table 15-3 create an insufficient basis in the evidence from which to conclude Dr. Broghammer solely utilized the *Guides* when opining on Hartig's functional impairment to the lumbar spine. To conclude otherwise would require speculation inappropriate for a factfinder such as the agency in this case.<sup>1</sup>

Even assuming *arguendo* Dr. Broghammer utilized the *Guides* when opining on Hartig's permanent impairment to the lumbar spine, he did so erroneously. Dr. Broghammer failed to consider Hartig's credible complaints of ongoing symptoms. Thus, the weight of the evidence does not support the opinion that Hartig's lumbar spine disability is properly placed in DRE Category I under Table 15-3 of the *Guides*. Even if Dr. Broghammer utilized the *Guides*, his opinion is rejected as not credible because of its incorrect application of the framework for evaluating permanent impairment of the lumbar spine under the *Guides*.

The defendants relied on Dr. Broghammer's opinions to deny Hartig's entitlement to workers' compensation benefits. (Def. Ex. G, p. 49). They provided written notice through counsel that weekly indemnity checks would cease on March 5, 2021. (Def. Ex. G, p. 49) The record establishes Hartig did not receive workers' compensation benefits relating to the stipulated work injury after March 5, 2021.

During Hartig's deposition, he testified that he received short-term or long-term disability benefits (he was not sure the category under which the disability benefits were classified) from the Hartford. (Def. Ex. J, p. 57, Depo. Tr. pp. 49–50) The Hartford issued Hartig a letter dated April 22, 2021, regarding, "Long Term Disability," under a policy held by "Stratum Med, Inc. – Medical Associates Clinic, P.C." (Def. Ex. F, p. 46) Thus, the weight of the evidence establishes Medical Associates held an insurance policy with the Hartford under which Hartig was paid long-term disability benefits.

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<sup>1</sup> See Godfrey v. State, 962 N.W.2d 84, 102 (Iowa 2021) ("An inference is not legitimate if it is based upon suspicion, speculation, conjecture, surmise, or fallacious reasoning.").

The letter from the Hartford states in pertinent part:

Your Long Term Disability (LTD) benefits are intended to supplement income you may receive as a result of your disability or retirement. Since we pay a supplemental benefit, any other income benefits you receive may reduce your LTD benefits. Other income can include, but is not limited to, any Social Security benefits you or your family receives, retirement benefits, worker[s'] compensation benefits, disability benefits you receive from other entities or third party liability benefits. . . . Please be sure to inform us immediately should you become eligible or begin to receive any other income benefits, so that we can make sure your claim is paid accurately and to avoid an overpayment.

(Def. Ex. F, p. 46)

The Hartford enclosed a LTD Benefit Calculation sheet with the letter. (Def. Ex. F, pp. 47–48) The sheet identifies Hartig's disability date as July 21, 2020, and his gross monthly LTD benefit as \$2,459.99. (Def. Ex. F, p. 48) It also identifies as a reduction for other income Hartig's workers' compensation benefits of \$2,896.66 per month, which combined with benefits from the federal Social Security Administration to reduce his LTD benefit amount to \$246.00 per month. (Def. Ex. F, p. 48) The documents contain no information regarding when Hartig's LTD benefits would end or how much in LTD benefits Hartig would receive moving forward given the defendants' termination of workers' compensation payments. (Def. Ex. F, p. 48)

Therefore, the evidence shows that the Hartford reduced Hartig's monthly LTD benefits by the amount of workers' compensation benefits he received under the Iowa Workers' Compensation Act relating to the stipulated work injury. However, the evidence is insufficient to support the finding that it is more likely than not that the Hartford increased Hartig's monthly LTD benefits by \$2,896.66 per month after the defendants ceased paying him such benefits on March 5, 2021. The LTD Benefit Calculation worksheet included in evidence covered the time from October 2019 through April 2021 and showed a reduction in LTD benefits for workers' compensation for each month in that timespan. Consequently, it is unclear when the Hartford recalculated Hartig's monthly LTD benefits amount based on the defendants' decision to stop paying him permanent partial disability benefits.

On October 7, 2021, Hartig testified that he was receiving monthly LTD benefits from the Hartford during his deposition. (Def. Ex. J, p. 57, Depo. pp. 1, 49) During the deposition, defense counsel (Q.) and Hartig (A.) also had the following exchange:

Q. How much do you get from the Hartford?

A. Like, \$1,547-something a month.

Q. Do you know how long that will go for?

A. No.

(Def. Ex. J, p. 57, Depo. pp. 49–50) During the deposition, there were no additional questions or testimony regarding the Hartford's payment of LTD benefits. Because of Hartig's death, he did not testify at hearing. Nor did anyone from Medical Associates or the Hartford.

Scant testimony, combined with the limited amount of documentary evidence relating to the Hartford's payments of LTD benefits to Hartig, mean it would require speculation to determine when the Hartford increased Hartig's monthly LTD benefit amount from the amount documented in the LTD Benefit Calculation worksheet it sent to him in April 2021 to \$1,547 and change, the amount Hartig testified to in October 2021. Because the Hartford informed Hartig it would pay him LTD benefits at the end of the month, it is more likely than not the Hartford paid him \$1,547 in September 2021, but there is an insufficient amount of evidence in the record from which to conclude the Hartford paid Hartig LTD benefits from May 2021 through August 2021 or after September 2021. Such a conclusion would require speculation.

Further, even if the evidence supported the conclusion that it is more likely than not Hartig received payment of LTD benefits during these months, it is insufficient to determine the amount of LTD benefits Hartig received under the policy during this time period. The limited evidence regarding payment of LTD benefits to Hartig is sufficient to establish it is more likely than not the Hartford paid him such in the following months for the following amounts:

- October 2020, \$106.00;
- Monthly from November 2020 through April 2021, \$246.00; and
- September 2021, \$1,547.00.

The information in evidence is insufficient to establish that the Hartford paid Hartig LTD benefits during any other months or the amount it might have paid.

Defense counsel sent Dr. Chapman a check-box letter dated November 10, 2021, with a series of assertions, a blank for him to indicate agreement or disagreement with each, and space for additional comments. (Def. Ex. A) Dr. Chapman completed the check-box letter, indicating:

- Hartig's initial complaints to Dr. Chapman were of symptoms to his neck and left arm;
- He never complained to Dr. Chapman of low back or lower extremity symptoms until his January 2020 appointment;
- The medications Hartig was on from the date of the stipulated work injury until his January 20, 2020 appointment would not have masked his back or lower extremity symptoms;

- Hartig continued to have symptoms in his neck, arm, back, and legs after January of 2020; and
- Hartig's back and leg complains are "more related to progressive degeneration" than the stipulated work injury. (Def. Ex. A, pp. 1–2)

Defense counsel sent correspondence to Dr. Kennedy dated December 2, 2021, with a copy of Dr. Broghammer's IME report and the check-box letter Dr. Chapman completed. (Def. Ex. B, pp. 6–7) In a reply letter dated December 3, 2021, Dr. Kennedy opined:

I received your letter dat[ed] December 2, 2021, IME report from Dr. Broghammer dated February 1, 2021, and Dr. Chapman's response to you dated November 10, 2021. I have reviewed each of these documents. It is my opinion that Dr. Broghammer's independent medical evaluation reflects thorough review of medical records pertaining to Mr. Alan Hartig's episode of care for the October 31, 2019 injury. I agree with the opinions offered by Dr. Broghammer's thorough IME on February 1, 2021.

(Def. Ex. B, p. 6)

Dr. Kennedy expressly stated she reviewed defense counsel's letter, Dr. Broghammer's IME report, and Dr. Chapman's check-box letter before responding. (Def. Ex. B, p. 6) Dr. Kennedy's letter makes no mention of any other medical records she reviewed before responding to defense counsel's inquiry. (Def. Ex. B, p. 6) It is more likely than not Dr. Kennedy would have identified in the letter any other records she reviewed if she had reviewed any other records. The weight of the evidence therefore establishes Dr. Kennedy did not review any other medical records relating to the care Hartig received for the alleged injuries at the center of this case, only Dr. Broghammer's report.

Further, Dr. Kennedy does not explain why her opinion on causation changed from when she was providing care for Hartig's work injury. The conclusory adoption of Dr. Broghammer's opinion, without explaining her reasoning, calls its credibility into question. Making Dr. Kennedy's opinion in the December 3, 2021 letter all the more unpersuasive is the fact that she describes Dr. Broghammer's review of the medical records as "thorough" even though it is missing documented instances of Hartig's back complaints, one of which led Society to request a causation opinion from Dr. Kennedy.

Claimant's counsel shared Dr. Segal's IME report with Dr. Kennedy and she responded with a letter dated April 21, 2022, stating:

Please be advised that I have reviewed IMEs performed by Dr. Broghammer on February 1, 2021, and by Dr. Segal on July 20, 2021. I also want to be forthcoming that as a shareholder physician of Medical Associates Clinics, there is a conflict of interest that precludes me from issuing medical opinions on Mr. Hartig's claim. That said, I have known

Mr. Hartig as a fast-paced, hard worker through our employment of over a decade at a mutual location. I have not had reason to question his motivation to return to work or other functional concerns.

At this time, I am issuing this letter rescinding my statement of December 3, 2021, and decline to offer further opinions on work-related or permanency related to Mr. Hartig's October 31, 2019 injury at Medical Associates Clinic.

(Cl. Ex. 2, p. 3)

Thus, Dr. Kennedy expressly rescinded her opinion endorsing Dr. Broghammer's report, which was in conflict with her earlier opinions as a treating physician. Dr. Kennedy expressly retracted only her endorsement of Dr. Broghammer's report; she did not do so with her earlier opinions regarding causation and work restrictions, the latter of which Medical Associates relied upon when discharging Hartig from employment. For all of these reasons, Dr. Kennedy's endorsement of Dr. Broghammer's report is not credible.

Claimant's counsel arranged for Hartig to undergo an IME by David Segal, M.D., J.D. (Cl. Ex. 1, pp. 1–3) As part of the IME, Dr. Segal conducted a records review and on May 14, 2021, a physical examination of Hartig. (Cl. Ex. 1, pp. 4–56) He then issued an IME report detailing his findings on physical examination, Hartig's treatment history, and answering questions regarding Hartig's injury and resultant disability. (Cl. Ex. 1, pp. 4–56)

During Dr. Segal's discussion with Hartig about his complaints, Hartig told Dr. Segal that his low back pain began on October 31, 2019, the date of the stipulated work injury. (Cl. Ex. 1, p. 9) This is in line with the back pain Dr. Messerly noted at the Mercy ER, a note which Dr. Segal emphasized in his IME report. (Cl. Ex. 1, pp. 17, 26) He also informed Dr. Segal that he began experiencing more noticeable back symptoms in December 2019, when he reduced pain medication usage and returned to work, which is in line with the complaints that led Society to request an opinion on causation from Dr. Kennedy. (Cl. Ex. 1, p. 9) Dr. Segal accurately states in his IME report, "Hartig had lumbar discomfort immediately after the work injury, but the symptoms became severe about two months after the injury when he returned to work and decreased his pain medication." (Cl. Ex. 1, p. 16)

Hartig also shared with Dr. Segal his history of symptomology in his neck and low back. He accurately informed Dr. Segal that he had no history of symptomology in either body part until the stipulated work injury. (Cl. Ex. 1, p. 16) The evidence is insufficient to conclude Hartig experienced symptoms of the severity described following the stipulated work injury. The weight of the evidence establishes that it is more likely than not, as Dr. Segal states in his IME report, "This work injury caused Mr. Hartig impairment that started with the work injury onward. Mr. Hartig did not have these symptoms and impairment prior to the October 31, 2019." (Cl. Ex. 1, p. 16)



Dr. Segal found that the stipulated work injury caused Hartig's ongoing cervical symptoms. (Cl. Ex. 1, pp. 42–43) The IME report demonstrates Dr. Segal had a complete and accurate understanding of Hartig's symptomology from before the work injury to the date of his examination. Dr. Segal is a neurosurgeon with experience treating similar injuries. The weight of the evidence establishes Dr. Segal's opinion on causation with respect to Hartig's cervical spine injury is credible.

On the question of permanent impairment to the cervical spine, Dr. Segal opined:

Mr. Hartig's pathology is most appropriately evaluated using the DRE method and the Cervical DRE chart on page 392. I did consider using the ROM method because there are two independent areas of injury; the anterolisthesis at C4-C5 and the left C6 radiculopathy. Because the etiology of the C6 radiculopathy was uncertain (was possibly brachial plexus injury) and because there are currently only minimal left C6 radicular findings, the anterolisthesis is the primary impairment factor. As discussed above, I measured the anterolisthesis of C4 on C5 as 3.5 mm. This meets criteria and places Mr. Hartig in the DRE category IV 25–28% whole person impairment (WPI); "Alteration of motion segment integrity or bilateral or multilevel radiculopathy; alteration of motion segment integrity is defined from flexion and extension radiographs as at least 3.5 mm of translation of one vertebra on another."

Because the cervical pain remains at least moderate, but most of the radiculopathy has improved, Mr. Hartig is appropriately rated at **26% WPI for his cervical injury**.

(Cl. Ex. 1, p. 44) (emphasis in original).

Dr. Segal addressed the question of causation with respect to Hartig's back and leg symptoms. (Cl. Ex. 1, p. 17) He recognized it was possible that Hartig's preexisting back condition went from being asymptomatic before the stipulated work injury to causing significant symptoms afterwards. (Cl. Ex. 1, p. 17) However, he concluded that it is most likely the work injury was a material factor in lighting up or aggravating the underlying condition and making it symptomatic in December 2019 because Hartig had returned to work and was therefore more active than he was during the two-month period immediately following the injury when he was off work and largely inactive, he weaned off pain medication at that time, two months is within the time period where temporal relationship to injury exists, and it is unlikely that Hartig experienced an onset of symptoms independent of the work injury. (Cl. Ex. 1, p. 17)

Dr. Segal's training is as a neurosurgeon. Unlike Dr. Broghammer, Dr. Segal's report documents an accurate understanding of the timeline of Hartig's lumbar spine and lower extremity complaints. In his IME report, he offers a thorough and well-reasoned opinion on the question of whether the stipulated work injury was a significant factor in aggravating or lighting up Hartig's degenerative condition. Dr. Segal's opinion on causation is credible and therefore adopted.

With respect to permanent impairment of the lumbar spine, Dr. Segal opined:

The lumbar injury is challenging to categorize for impairment rating. Mr. Hartig does have radicular symptoms that respond to epidural injections. My exam found bilateral L5 dermatomal distribution loss, and his providers have felt that his symptoms corresponded to a L3 or L4 radiculopathy. He does have mild motor deficits that correspond to a L5 or S1 radiculopathy. The difficulty is that the MRI shows multilevel disease, and there is not level with high grade nerve root impingement, but the worse levels are L3-L4 on the right L4-L5 on the left. These levels do not necessarily match my exam findings. There does not necessarily need to be nerve impingement to qualify for DRE category II, but based on all the above, Mr. Hartig best fits non verifiable radicular complaints which are defined in the *AMA Guides* as: "Nonverifiable pain is pain that is in the distribution of a nerve root but has no identifiable origin; i.e., there are no objective physical, imaging, or electromyographic findings. For dermatomal distributions, see Figures 15-1 and 15-2." This fits best because Mr. Hartig does have a radiculopathy, but my exam findings do not match the prominent levels of pathology on MRI, his radicular symptoms are mostly sensory, and I believe that it is possible the lower extremity sensory disturbance is from his cervical spinal cord.

Therefore, based on the Lumbar DRE Chart on page 384 [Table 15-3], Mr. Hartig would be DRE Lumbar Category Class II for "Clinical history and examination findings are compatible with a specific injury; findings may include significant muscle guarding or spasm observed at the time of the examination, asymmetric loss of range of motion, or non verifiable radicular complaints, defined as complaints of radicular pain without objective findings." His lumbar pain is severe and he would rate **8% WPI for lumbar injury**, and this would include pain from facet arthropathy.

(Cl. Ex. 1, p. 46) (emphasis in original).

The weight of the evidence establishes Dr. Segal had a complete and accurate understanding of Hartig's medical history. He provides a thorough and detailed explanation of the basis for his impairment rating. Dr. Segal also expressly cites the *Guides* and credibly explains the basis for his opinion on permanent impairment with respect to Hartig's medical history, his examination of Hartig, and the *Guides*. The weight of the evidence establishes Dr. Segal's opinion on permanent impairment to the lumbar spine is credible. It is more likely than not the stipulated work injury caused an eight percent permanent impairment to Hartig's whole person.

Dr. Segal also diagnosed injuries to the left upper extremity and shoulder. However, Hartig's petition only identified the "Body as a Whole" as the part of the body affected or disabled, he did not amend the petition, and counsel did move to conform to proof at hearing. Therefore, this decision does not consider these injuries or any possible disability they might have caused.

Dr. Segal opined that the work injury was also a factor in causing Hartig's depression. Dr. Segal's expertise is in neurosurgery not mental health. While the evidence demonstrates the work injury caused Hartig to experience depression, the evidence regarding Hartig's ongoing mental health is less developed than that regarding his physical health. Therefore, the evidence is insufficient from which to conclude it is more likely than not that the work injury caused a permanent mental impairment.

Using the Combined Values Chart on pages 604 and 605 of the *Guides*, Hartig's 26 percent impairment to the whole person resulting from his cervical injury is added to the 8 percent whole person impairment caused by his lumbar injury to equal a 29 percent permanent impairment to the whole body. Thus, the weight of the evidence establishes the stipulated work injury caused Hartig a 29 percent permanent impairment to the whole body under the *Guides*.

The evidence shows Hartig did not have any permanent work restrictions before he sustained the stipulated work injury. Dr. Segal opined Hartig's permanent work restrictions are caused mainly by his cervical and lumbar spine injuries. (Cl. Ex. 1, p. 47) He explained that the goal of the permanent work restrictions is to prevent Hartig from experiencing severe pain throughout the work day. (Cl. Ex. 1, p. 47) Dr. Segal referenced the functional capacity examination (FCE) of November 13, 2020, when assigning permanent work restrictions but not exclusively in accordance with the *Guides*. (Cl. Ex. 1, p. 48) He assigned the following permanent work restrictions based on his review of the medical records, clinical evaluation, and the FCE:

- Alternate between sitting and standing in 15-minute intervals;
- Sit for up to 4 total hours per day;
- Stand for up to 3 total hours per day;
- Walk for up to 15 minutes at a time, followed by laying down to rest, and for no more than 2 total hours in a day;
- Drive for up to 15 minutes at a time, followed by getting out of the car to rest, and for no more than 1 total hour per day;
- Occasionally reach overhead with right arm, lift 10 pounds with each hand, carry 0 to 10 pounds, push 20 pounds with both arms, or push 20 pounds on wheels;
- Rarely bend, reach overhead, perform fine motor skills with the left hand, lift 20 pounds with both hands, carry 11 to 15 pounds with both hands, pull 10 pounds on wheels, or use stairs;
- No repetitive bending, carrying over 15 pounds, kneeling, crouching, squatting, using ladders, or crawling. (Cl. Ex. 1, p. 48)

These restrictions are based on Dr. Segal's expert opinion as a neurologist, a complete and accurate understanding of Hartig's medical history, Dr. Segal's examination of Hartig, and Hartig's credible complaints. The evidence shows it is more likely than not they are appropriate. They are therefore adopted.

The *Guides* outline a standard method to determine permanent impairment. See *Guides*, ch. 2. The *Guides* require a history, *id.* at 21, which Dr. Segal performed with the records review costing \$875.00 dollars and discussion with Hartig during the in-person evaluation, which is itemized to cost \$1,125.00. The *Guides* also mandate an evaluation of the individual, which would also be included under the itemized cost of \$1,125.00 for Dr. Segal's in-person evaluation. Further, the *Guides* direct the physician to issue a written report with all the required information in it, *id.* at 21–24, which Dr. Segal has itemized at \$3,250.00. Dr. Segal's actions and report in performing an evaluation of permanent impairment are in accordance with the framework in the *Guides*. There is no evidence in the record suggesting Dr. Segal's fee is out of line with that charged by other non-treating physicians in and around Cedar Rapids when performing an evaluation of permanent disability caused by injuries arising out of and in the course of employment. Further, based on the undersigned's experience, it is not out of line with fees charged by other doctors who evaluate injured workers in cases before the agency. The weight of the evidence establishes Dr. Segal's fee is reasonable.

Claimant's counsel and Dr. Chapman discussed Hartig's injury and ongoing symptoms. (Cl. Ex. 2, p. 4) He then summarized his understanding of the opinions Dr. Chapman expressed during their conversation in a check-box letter dated May 20, 2022. (Cl. Ex. 2, pp. 4–6) Dr. Chapman checked the box indicating he agreed with the assertions that Hartig was given strong pain medications and steroids that would have tended to mask any low back symptoms to some degree, the focus of Dr. Chapman's treatment was Hartig's neck and arm complaints, Dr. Chapman does not assign permanent impairment ratings in his practice, and it is Dr. Chapman's belief that the primary factor causing Hartig's low-back and leg symptoms was progressive degeneration and "the work injury, while not the primary factor regarding his low back problems, is more likely than not a substantial contributing factor, as is his time off work following the injury wherein the sedentary nature of being off work would have likely brought about deconditioning of the whole body." (Cl. Ex. 2, p. 5)

In response to the assertion by claimant's counsel that the work injury would have been a more than slight aggravation of Hartig's pre-existing low back degenerative condition, Dr. Chapman did not check a box. (Cl. Ex. 2, p. 6) Instead, he wrote, "I have seen patients injure their back just bending over and I have seen people have no problems following a high velocity car crash. Having said that, it is not surprising that this significant injury of 10/19 stirred up his back." (Cl. Ex. 2, p. 6) Dr. Chapman signed and dated his responses to the check-box letter on May 26, 2022. (Cl. Ex. 2, p. 6) Dr. Chapman's opinions, taken as a whole, are not incompatible with the opinions expressed by Dr. Segal or Dr. Broghammer. They are therefore given little weight.

On June 24, 2022, Hartig went boating on the Mississippi River. (Def. Ex. E) His pontoon boat was beached on a sand bar and he went into the river in an apparent

attempt to dislodge it. (Def. Ex. E, p. 40) The pontoon boat became dislodged and began drifting down the river. (Def. Ex. E, p. 40) Hartig was last seen pursuing it. (Def. Ex. E, p. 40) After a missing person report, emergency services personnel conducted a search of the river and ultimately recovered his dead body. (Def. Ex. E, pp. 38–41)

## **V. CONCLUSIONS OF LAW.**

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. *Id.* at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. See Smidt v. JKB Restaurants, LC, No. 5067766, 2020 WL 7489048 (Iowa Work. Comp. Comm'r, Dec. 11, 2020).

### **A. Permanent Disability.**

The parties stipulated that the work injury caused Hartig to sustain industrial disability. They dispute the extent of industrial disability. Hartig contends he is entitled to permanent partial disability (PPD) benefits in addition to what the defendants have already paid. The defendants contend Hartig is not entitled to any additional benefits.

"The amount of compensation for an unscheduled injury resulting in permanent partial disability is based on the employee's earning capacity." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012) (citing Broadlawns Med. Ctr. v. Sanders, 792 N.W.2d 302, 306 (Iowa 2010)). The assessment of a claimant's earning capacity is based on multiple factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics of the claimant, the claimant's inability, because of the injury to engage in employment for which the claimant is fitted, and the employer's inability to accommodate the claimant's functional limitations. *Id.*; IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Whether the employer is able to maintain the claimant's employment after the assignment of work restrictions is:

Another important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190/5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. Jan. 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. Jan. 22, 1993); see also Larson, *Workers' Compensation Law*, Section 57.61, pps. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F.Supp. 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer knows the demands that are

placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

McNitt v. Nordstrom, Inc., Rehr'g Decision, No. 5065697, 2020 WL 4342758 \*3 (Iowa Workers' Comp. Comm'r, July 20, 2020) (aff'd and adopted as final agency decision, Appeal Decision, 2020 WL 4747495 (Iowa Workers' Comp Comm'r, Aug. 7, 2020).

As found above, the evidence establishes Hartig sustained a permanent impairment to the whole body of 29 percent. Medical Associates discharged Hartig because of the work restrictions Dr. Kennedy assigned him. The evidence shows it is more likely than not Hartig could not return to work at Medical Associates or any of his previous employers under the permanent work restrictions assigned by Dr. Segal and adopted by this decision. The weight of the evidence establishes the stipulated work injury caused Hartig to sustain a 65 percent permanent industrial disability.

Industrial disability is calculated on a 500-week scale. 65 percent multiplied by 500 equals 325 weeks. However, Hartig passed away on June 24, 2022, which means he is not entitled to PPD benefits after that date. Tebbs v. Denmark Light & Tel. Corp., 230 Iowa 1173, 1180, 300 N.W. 328, 331 (1941). Therefore, Hartig is entitled to 67.572 weeks of PPD benefits for the time period beginning on the commencement date of November 20, 2020, through Hartig's date of death, June 24, 2022, minus the credits discussed below.

## **B. Rate.**

The parties stipulated Hartig's gross earnings on the stipulated injury date were \$1,098.50 per week. They also stipulated he was single and entitled to one exemption at the time. Based on the parties' stipulations, Hartig's workers' compensation rate is \$668.46 dollars per week.

## **C. Credit.**

### **1. PPD Benefits Paid.**

As found above, Hartig reached MMI on November 20, 2020, the date Dr. Kennedy and Dr. Segal placed him at MMI. All benefits the defendants paid to Hartig from then through March 5, 2021, the date they ceased payment of benefits, are PPD benefits to which they are entitled to a credit. Therefore, the defendants are entitled to a credit for 15 weeks of PPD benefits paid. The total amount of this credit is 15 multiplied by his weekly benefit rate of \$668.46, which equals \$10,026.90.

## **2. LTD Benefits.**

Iowa Code section 85.38 governs the reduction in obligations of an employer under the Iowa Workers' Compensation Act. The legislature enacted the statute "for the purpose of avoiding a double recovery by a disabled employee who receives benefits under both workers' compensation and a group disability plan provided by the employer." State v. Erbe, 519 N.W.2d 812, 815 (Iowa 1994). Section 85.38(2) requires the agency to recognize a credit against disability benefits to which an injured employee is entitled under the Act for benefits paid under group plans.

Agency precedent holds that the defendants shoulder the burden to prove entitlement to a credit under Iowa Code section 85.38(2). Tripp v. Scott Emergency Communication Ctr., File No. 5066673, 2022 WL 17171437 \*7 (Iowa Workers' Comp. Comm'r, App., Sep. 1, 2022), on remand, 977 N.W.2d 459 (Iowa 2022) (citing SKW Biosystems/Degussa Health & Nutrition v. Wolf, 723 N.W.2d 448 \*4 (Iowa App. 2006) (Table); Albertsen v. Benco Mfg., File No. 5010764, 2007 WL 2216397 \*15 (Iowa Workers' Comp. Comm'r, App. Jul. 27, 2007); Damiano v. Universal Gym, File No. 1071309, 2008 WL 256768 (Iowa Workers' Comp. Comm'r, App. Jan. 17, 2008); Miller v. Maintainer Corp. of Iowa, File No. 5020192, 2009 WL 4959650 (Iowa Workers' Comp. Comm'r, App. Dec. 2, 2009)). To establish entitlement to a credit under section 85.28(2), the employer must prove each of the following elements:

- 1) The claimant received benefits under a group plan;
- 2) The employer paid contribution to the group plan;
- 3) The benefits should not have been paid if workers' compensation benefits were received; and
- 4) The amount to be credited with respect to workers' compensation benefits to which the claimant is entitled under Iowa workers' compensation law.  
Albertsen, 2007 WL 2216397 at \*15.

As discussed above, the weight of the evidence establishes the first three elements listed above. With respect to the fourth element, the evidence is spotty. There is no itemized list of LTD benefits paid to Hartig by the Hartford under the policy held by Medical Associates.

The evidence in the record shows the Hartford reduced Hartig's monthly LTD benefits based on the amount of his workers' compensation benefits from October 2020 through April 2021, meaning the defendants are not entitled to a credit for the LTD benefits paid in these months. Hartig's deposition testimony establishes that he received payment of \$1,547 and some odd cents in September. It is unclear how much in LTD benefits he may have received between May 2021 and August 2021 or after September 2021. Thus, the evidence is sufficient to establish the defendants are entitled to a credit of \$1,547.00 for LTD benefits.

**D. IME.**

The parties identified the issue of IME reimbursement as being in dispute in the hearing report. However, the defendants did not address the question in their post-hearing brief. The defendants have therefore waived this issue.

**E. Costs.**

Iowa Code section 86.40 gives the agency discretion to tax hearing costs. “Fee-shifting statutes using ‘all costs’ language have been construed ‘to limit reimbursement for litigation expenses to those allowed as taxable court costs.’” Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Because Hartig prevailed on the disputed issues of commencement date, reimbursement of IME, and extent of permanent disability, the following costs are taxed against the defendants under rule 876 IAC 4.33:

- \$13.92 for the cost of service of the original notice;
- \$103.00 for the petition filing fee and convenience fee incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES); and

**VI. ORDER.**

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) The defendants shall pay to Hartig 67.572 weeks of permanent partial disability benefits at the rate of six hundred sixty-eight and 46/100 dollars (\$668.46) per week from the commencement date of November 20, 2020, through June 24, 2022, his date of death.
- 2) The defendants shall pay accrued weekly benefits in a lump sum.
- 3) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
- 4) The defendants shall be given a credit for:
  - a) PPD benefits previously paid for the amount of ten thousand twenty-six and 90/100 dollars (\$10,026.90); and
  - b) LTD benefits paid in the amount of one thousand five hundred forty-seven and 00/100 dollars (\$1,547.00).



- 5) The defendants shall reimburse Hartig five thousand two hundred fifty and 00/100 dollars (\$5,250.00) for the reasonable expenses of Dr. Segal's evaluation.
- 6) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 7) The defendants shall pay to Hartig the following amounts for the following costs:
  - a) One hundred three dollars and 00/100 (\$103.00) for the filing fee and WCES convenience fee; and
  - b) Thirteen and 92/100 dollars (\$13.92) for the cost of serving the original notice and petition on the defendants.
- 8) The parties shall be responsible for paying their own hearing costs. Each party shall pay an equal share of the cost of the transcript.

Signed and filed this 6<sup>th</sup> day of April, 2023.



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BEN HUMPHREY  
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Thomas M. Wertz (via WCES)

Stephen W. Spencer (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.