BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ELMER GURULE, Claimant, vs. LOWE'S HOME CENTERS, Employer, Self-Insured, Defendant.	:	File No. 5066730.01 ARBITRATION DECISION Headnotes: 1402.40, 1802, 1803, 2206, 2207, 2502, 4000.2

STATEMENT OF THE CASE

Claimant Elmer Gurule filed a petition in arbitration seeking worker's compensation benefits against Lowe's Home Centers, self-insured employer, for an accepted work injury date of September 25, 2018. The case came before the undersigned for an arbitration hearing on April 5, 2022. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via internet-based video. Accordingly, this case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 13, Claimant's Exhibits 1 through 22L, and Defendant's Exhibits A through G.

Claimant testified on his own behalf. No other witnesses testified, but claimant's wife Marilyn Gurule was present for the hearing. The evidentiary record closed at the conclusion of the evidentiary hearing on April 5, 2022. The parties submitted post-hearing briefs on May 20, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant is entitled to temporary disability benefits;

2. The nature and extent of permanent disability benefits, if any;

3. The commencement date for permanent disability benefits, if any;

4. Payment of certain medical expenses;

5. Payment of claimant's independent medical examination under Iowa Code section 85.39;

6. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and

7. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

At the time of hearing, claimant was a 69-year-old person. (Hearing Transcript, p. 9) Claimant is married, with three adult children and five grandchildren. (Tr., pp. 14-15) Claimant grew up in a small town near Albuquerque, New Mexico, and graduated from high school in 1971. (Tr., p. 10) Claimant was a good student, particularly in math and science. After high school, claimant worked at a company called Linker for about a year, until he qualified for an apprenticeship program at Sandia National Laboratories. (Tr., p. 11) Sandia was a research development lab in Albuquerque. Claimant trained to become a metrologist, which involves calibrating equipment and test equipment for various laboratories around the state. (Tr., pp. 11-12) The apprenticeship lasted five years, during which claimant worked his way up to becoming a standard and calibration technician. (Tr., p. 12)

While working at Sandia, claimant also took some college courses at the University of New Mexico. After about ten years at Sandia, claimant left and took a job at Los Alamos National Laboratories in Los Alamos, New Mexico. (Tr., p. 13) Claimant continued to take several engineering courses at the University of New Mexico while at Los Alamos as well, but did not receive a degree. (Tr., p. 14) However, he described the apprenticeship program as similar to an associate's degree due to the number of classes he was required to complete.

Claimant worked at Los Alamos from October 5, 1984 until January of 2001. (Tr., p. 13) He described his work at Los Alamos as a little "higher grade" then at Sandia, as he often worked with the National Bureau of Standards and trained at the lab in

Maryland. (Tr., p. 15) He also did some work on the Hubble Telescope and calibrated some of the equipment that went into the telescope. Overall, claimant testified that he loved his job.

Claimant sustained several work injuries while at Los Alamos. (Tr., p. 16) He hurt his back, his shoulder, and had carpal tunnel syndrome. Claimant had back surgeries in 1989 and 1999. He also had right shoulder surgeries in 1998 and 1999, and carpal tunnel releases at the same time. (Tr., pp. 16-17) Claimant testified that after the 1989 back surgery, he was able to return to work with no restrictions. (Tr., p. 48) However, following the 1999 low back injury, claimant was eventually left with a permanent 25-pound lifting restriction. (Tr., p. 49) As a result, he was no longer able to work at Los Alamos. (Tr., p. 17) In 2001, claimant was awarded Social Security Disability. (Tr., p. 47) Claimant testified that his employer helped him with applying for Social Security Disability benefits, and he was also fully vested in his retirement benefits at that time. (Tr., pp. 17, 47-48) When claimant turned 65 years old, his Social Security changed from disability benefits to regular Social Security retirement benefits, which he continued to receive at the time of hearing. (Tr., pp. 17, 48)

Claimant has also had some non-work-related medical treatment, including bilateral total knee replacements. (Tr., p. 18) Additionally, after leaving work at Los Alamos, claimant continued to have chronic low back pain. (Tr., pp. 18-19) On June 1, 2012, claimant saw David Mesibov, M.D., his primary care physician in New Mexico. (Joint Exhibit 9, p. 164) He complained of feeling very stressed, depressed, and overwhelmed due to family issues. He also reported pain in multiple areas, including his left knee and hip. The record notes, however, that his low back pain was stable at that time. (Jt. Ex. 9, p. 165) The next record in evidence is dated January 7, 2014, at which time claimant thought he may have symptoms of attention deficit disorder (ADD). (Jt. Ex. 9, p. 167) There is no specific mention of low back pain in that record. (Jt. Ex. 9, pp. 167-168)

On March 17, 2014, claimant returned to Dr. Mesibov with complaints of low back pain for the prior one to two weeks. (Jt. Ex. 9, p. 169) The pain was noted to be severe, with radiation to the right hip, thigh, lower leg, and foot. He also reported weakness in his right foot and leg, which was confirmed on physical examination. Dr. Mesibov ordered an MRI and neurosurgery consultation.

Claimant had the MRI on March 20, 2014. (Jt. Ex. 10, p. 192) The MRI showed multilevel spondylosis. (Jt. Ex. 10, p. 193) On March 31, 2014, claimant saw Robin Hermes, M.D., at Santa Fe Pain and Spine Specialists. (Jt. Ex. 8, pp. 161-163) Dr. Hermes noted claimant complained of a three-week history of right-sided back and leg pain, and he had been referred for an injection. (Jt. Ex. 8, p. 161) However, since the referral, his pain had improved, and he was back to baseline and did not want the injection. Dr. Hermes reviewed the recent MRI, and discussed options if his pain returned. (Jt. Ex. 8, p. 162)

Claimant returned to Dr. Mesibov on August 5, 2014, who noted that claimant's prior right lower extremity radicular pain had spontaneously resolved. (Jt. Ex. 9, p. 171) Claimant reported he continued to have his usual chronic low back pain, which was controlled with ibuprofen. On January 6, 2015, he again reported "constant but tolerable" low back pain, for which he was only taking ibuprofen. (Jt. Ex. 9, p. 174) He described his average pain level as 5 out of 10. At each of his appointments with Dr. Mesibov for the remainder of 2015 and 2016, there were no reports of increased low back pain, and the notes indicate it remained chronic and stable. (Jt. Ex. 9, pp. 176-191)

In 2016, claimant and his wife moved from New Mexico to Allen, Nebraska, for family reasons. (Tr., p. 19) On October 4, 2016, claimant saw Amanda Dannenbring, D.O., to establish care as his primary care provider. (Jt. Ex. 4, p. 41) At his next appointment on January 13, 2017, he noted left hip pain, and x-ray showed advanced degenerative joint disease of the left hip compared to the right. (Jt. Ex. 4, pp. 46-49) He also had a growth on his left pelvis and was referred to orthopedics for evaluation and consultation for a joint injection. (Jt. Ex. 4, p. 49) None of the remaining records in evidence from Dr. Dannenbring during 2017 or 2018 mention low back or hip pain. (Jt. Ex. 4, pp. 50-61)

In March of 2018, claimant began working part-time at Lowe's Home Centers in Sioux City, Iowa. (Claimant's Exhibit 9, p. 28; Tr., p. 24) Claimant testified that due to the family's financial situation at the time, someone needed to work, and his wife is disabled and cannot work. (Tr., p. 20) Claimant was hired as a stocker/receiver. (Tr., pp. 20-21) Claimant testified that Lowe's did not require a pre-employment physical, but he knew he had a 25-pound lifting restriction. (Tr., p. 21) He also testified that Lowe's did not ask him if he had any lifting restrictions, and he did not volunteer the information. (Tr., p. 49) Despite some pain in his back, he was able to do the job. (Tr., p. 21) He testified that his shift was from 4:00 a.m. until 10:00 a.m., five days per week. (Tr., pp. 21-22)

A detailed job description of the stocker/receiver job is included in evidence. (Cl. Ex. 1) The physical requirements include standing, sitting, and/or walking continuously; bending, stooping, kneeling, reaching, twisting, lifting, pushing, pulling, climbing (ladders or stairs), balancing, and crouching on a daily basis; and the ability to lift up to 25-pounds without assistance. (Cl. Ex. 1, p. 4) The job description also notes employees may lift over 25-pounds with or without assistance. Claimant testified that when he was hired at Lowe's he was physically able to perform the tasks of the job, including lifting up to 25 pounds. (Tr., pp. 21-22) Claimant testified he enjoyed his work at Lowe's and was making $12.00 per hour at the time of his injury. (Tr., p. 23) Most of his work involved stocking in the hand tools department. (Tr., p. 23) However, he occasionally was called to do receiving, which involved checking inventory that came into the store. (Tr., p. 24)

Claimant was injured while working at Lowe's on September 25, 2018. (Tr., p. 25) Prior to that, on September 6, 2018, claimant had complained of low back pain after moving a fire pit, but he did not lose any time or receive any medical treatment related to that complaint. (Tr., pp. 24-25) On September 25, 2018, claimant was nearing the

end of his shift and was performing receiving tasks. (Tr., pp. 25-26) He was in the back of a semi-trailer that was backed up to the loading dock, helping other workers with inventory. (Tr., p. 26) Claimant testified that they had just finished unloading the truck, and he and a coworker were the last two walking out of the truck, as there was nothing left inside. (Tr., p. 27) As they were stepping from the back of the trailer onto the loading dock, the truck suddenly began to pull away with no warning. (Tr., pp. 27-28) Claimant testified he had already begun to take a step as the truck pulled away, causing him to fall to the ground below. His coworker was able to jump and make it to the loading dock and was not injured.

Claimant testified that he is not certain exactly how he fell, but he landed flat on his back. (Tr., p. 28) He did not hit his head or lose consciousness. (Tr., p. 29) He testified that he fell four or five feet to concrete below. Claimant testified that he forced himself to get up and move, as he knew there would be another truck backing into that spot shortly. (Tr., p. 30) His coworkers took him to the office and suggested he seek medical attention, but at that time he thought he would be fine. (Tr., pp. 30-31) However, the following morning claimant woke up and was sore and "just couldn't move." (Tr., p. 31) His left ankle, low back, and buttocks were in a lot of pain, so he was sent to Rodney Cassens, M.D., at Mercy Business Health.

Claimant's fist appointment with Dr. Cassens was September 26, 2018. (Joint Exhibit 1, p. 2) He complained of low back pain, left wrist and left heel pain. He noted his prior lumbar surgeries. X-ray images of the lumbar spine showed degenerative changes. X-rays of the left wrist and left heel showed no fractures or dislocation. After physical examination, Dr. Cassens' impression was lumbar strain and contusion; left wrist sprain and contusion; and left calcaneus contusion. He recommended over-the-counter ibuprofen, heat and ice for his back, and return to work with sitting duties only and a 10-pound lifting limit.

Claimant returned to Dr. Cassens on September 28, 2018, with worsening back pain, including the development of pain radiating into his left upper leg, as well as continued foot pain. (Jt. Ex. 1, p. 6) Dr. Cassens now noted x-ray findings suggestive of a non-displaced fracture in the left calcaneus and recommended a CT scan of the left foot. Additionally, due to the worsening low back pain and development of left lower extremity radicular pain, he recommended an MRI of the lumbar spine. Finally, he took claimant off work completely due to the severity of his pain.

Claimant saw Dr. Cassens again on October 15, 2018, after the CT of his foot and lumbar spine MRI. (Jt. Ex. 1, p. 10) The CT scan showed no calcaneus fracture. Dr. Cassens' diagnosis for the left foot was calcaneal contusion and plantar fasciitis. With respect to the lumbar spine, the MRI showed prominent multilevel degenerative changes with disk bulge, and osteophyte complexes at multiple levels. On physical examination, Dr. Cassens noted moderate to severe left and moderate right lumbar paraspinal muscular spasm tenderness. He recommended a referral to a pain clinic for the low back pain, and to podiatry for the calcaneal pain. He kept claimant off work at that time. Claimant saw Dr. Cassens an additional time on October 29, 2018, at which

time he noted that approval of his referrals to podiatry and the pain clinic was pending. (Jt. Ex. 1, p. 11) He renewed his referrals and kept claimant off work.

On November 19, 2018, claimant filed an application for alternate medical care with this agency, alleging that defendant had not yet authorized Dr. Cassens' referrals to a podiatrist and pain management clinic. (Cl. Ex. 18, p. 73) On December 4, 2018, a deputy commissioner issued a consent order indicating defendant had agreed to promptly provide the authorization for the two referrals. (Cl. Ex. 19, p. 74)

In addition to authorizing the referrals, defendant also had claimant seen by Ian Crabb, M.D., for an independent medical evaluation (IME) on December 11, 2018. (Defendant's Exhibit C, p. 13) His report outlines the course of claimant's care to date with Dr. Cassens, including that he referred claimant to podiatry for his foot and to a pain clinic for his back. He also notes claimant's prior history of back problems and surgeries in 1989 and 1999. Claimant rated his pain at that time as between an 8 and 10 for his heel; between 8 and 9 for his back; and between 1 and 3 for his wrist. (Def. Ex. C, p. 14) He noted that with the back, claimant complained of midline pain radiating to the left, occasionally radiating to the buttock.

After physical examination, Dr. Crabb opined that claimant suffered a contusion to the low back and contusion to the left heel. (Def. Ex. C, p. 15) He noted claimant's history of back problems and evidence of degenerative changes and spondylosis throughout the lumbar spine. (Def. Ex. C, p. 16) He recommended physical therapy, strengthening exercises, weight loss, and core strengthening exercises for "exacerbation of his lumbar spondylosis and pain." With respect to the "soft tissue injury" to the heel pad, Dr. Crabb opined that evaluation by podiatry would be reasonable and related to the original injury. Finally, Dr. Crabb released claimant to full duty, stating that it had been four months since his injury.[1]

The next day, December 12, 2018, claimant saw Marty Kelley, D.P.M., at Siouxland Podiatry. (Jt. Ex. 3, p. 32) Claimant described the injuries to his left foot and back and Dr. Kelley performed a physical examination and reviewed the prior CT scan. (Jt. Ex. 3, pp. 32-33) His review of the CT scan revealed a small fracture fragment avulsion of the plantar medial tubercle of the calcaneus. (Jt. Ex. 3, p. 33) Dr. Kelley explained that likely meant claimant had landed on his left foot when he fell, and "the force of the impact loaded the plantar fascia which subsequently ripped a piece of bone off the calcaneus. This has subsequently morphed into a chronic plantar fasciitis." (Jt. Ex. 3, p. 33) Dr. Kelley recommended a good running shoe and provided a functional orthotic to provide stability for the arch, and discussed and demonstrated stretching exercises. Finally, Dr. Kelley provided an injection into the origin of the plantar fascial ligament. Dr. Kelley also provided a return-to-work status, indicating claimant was to remain off work until his next evaluation. (Jt. Ex. 3, p. 34)

[1] At the time of Dr. Crabb's exam, it had been less than 3 months since the injury.

Claimant next saw Wade Lukken, M.D., at Siouxland Pain Clinic, on December 21, 2018. (Jt. Ex. 2, p. 12) Dr. Lukken noted claimant complained of excruciating left low back pain at that time, with occasional right-sided pain as well. He also complained of occasional left leg pain "in what seems to be the L4 dermatome." Dr. Lukken performed a physical evaluation and reviewed the MRI results, noting facet arthrosis and spondylosis particularly at L4-5 and L5-S1, as well as severe foraminal narrowing on the left at L4-5, which he thought was causing the intermittent radiculopathy. (Jt. Ex. 2, pp. 12-13) He provided intraarticular facet injections on the left at L4-5 and L5-S1, and recommended physical therapy. (Jt. Ex. 2, p. 13)

Claimant started physical therapy on January 4, 2019. (Jt. Ex. 7, p. 142) He returned to Dr. Kelley on January 9, 2019, and reported some improvement with his left foot pain since the prior injection. (Jt. Ex. 3, p. 35) However, claimant still had overall pain in the plantar aspect of his foot, so Dr. Kelley did not release him for work, and told him to continue to use the orthotic and do his stretching exercises. (Jt. Ex. 3, p. 36)

Claimant returned to Dr. Lukken on January 21, 2019, at which time he reported about two weeks of benefit following the facet injections. (Jt. Ex. 2, p. 16) He reported no radicular symptoms at that visit, but felt he was "back to where he started" with his left-sided back pain. Dr. Lukken recommended medial branch blocks on the left at L2-5, followed by radiofrequency ablation if he had a good response. (Jt. Ex. 2, p. 17) The injections were performed the same day. (Jt. Ex. 2, pp. 18-19) At his next physical therapy session on January 23, 2019, claimant reported only very mild relief from the branch blocks. (Jt. Ex. 7, p. 150)

Claimant also saw Dr. Kelley again on January 23, 2019, at which time he again reported some improvement, but he still had pain with walking. (Jt. Ex. 3, pp. 37-38) Dr. Kelley continued to keep claimant off work. (Jt. Ex. 3, p. 38)

Claimant continued with physical therapy. When he returned to Dr. Lukken on February 8, 2019, he reported no significant relief from the medial branch blocks. (Jt. Ex. 2, p. 20) He again complained of left leg pain, and Dr. Lukken noted lumbar radiculopathy. (Jt. Ex. 2, pp. 20-21) Dr. Lukken recommended a left L5-S1 transforaminal epidural steroid injection. (Jt. Ex. 2, p. 21) Claimant continued with physical therapy for a few more sessions, and reported mild improvement, but overall he still experienced pain and difficulties. (Jt. Ex. 7, pp. 157-160)

Claimant returned to Dr. Kelley on February 13, 2019. (Jt. Ex. 3, p. 39) He reported doing "pretty good" with respect to his heel pain, although he still had some pain with walking. He reported more issues with his back at that time, which was not improving. Dr. Kelley indicated that claimant had not yet reached maximum medical improvement (MMI) for his foot, but expected him to improve to the point of being pain-free with no restrictions or limitations within the next four to six weeks. (Jt. Ex. 3, p. 40) As such, he released claimant from his care with the understanding that his foot would continue to heal. He stated he would release claimant to return to work if his issue was "strictly the foot," but he would hold off pending release from his back doctor. Finally, he

stated that once claimant had reached MMI he did not anticipate any permanent disability associated with the foot. (Jt. Ex. 3, p. 40)

Dr. Crabb responded to two questions, apparently from defendant, on March 5, 2019. (Def. Ex. C, p. 17) There is no indication Dr. Crabb re-examined claimant or reviewed any records of claimant's treatment since his examination prior to authoring his response. He was asked whether claimant had reached MMI for both the low back and the left heel. He responded that for the "contusion of the low back," claimant reached MMI on December 11, 2018. For the "contusion of the left heel," he stated claimant reached MMI on March 5, 2019. He further opined that there is "no permanent partial impairment for either injury."

On March 19, 2019, Dr. Crabb again authored a letter to defendant, and stated there was "no further treatment needed for [claimant] as a result of the September 25, 2018 incident." (Def. Ex. C, p. 18) As such, on March 27, 2019, defense counsel wrote to claimant's attorney and indicated that based on Dr. Crabb's reports, defendant would no longer authorize medical treatment for claimant's injuries. (Cl. Ex. 22(d), p. 85) Additionally, defendant indicated claimant's weekly benefits would terminate 30 days from the date of the letter as Dr. Crabb had placed him at MMI with no permanent impairment or restrictions. Claimant's attorney responded to the letter on March 28, 2019, and pointed out that Dr. Crabb had not examined claimant since December of 2018. (Cl. Ex. 22(e), p. 86) Additionally, claimant argued that as a consulting physician, Dr. Crabb's opinion could not serve as the basis for an employer to disregard the treatment recommendations of the authorized treating physician. Claimant's attorney wrote a second letter that same day, requesting the employer return him to suitable work, consistent with his current restrictions and limitations. (Cl. Ex. 22(e), p. 88) There is no record of defendant providing any response to these letters.

Dr. Crabb only saw claimant on one occasion, prior to him seeing both a podiatrist and pain specialist, both of whom provided different diagnoses and additional treatment for his injuries. Dr. Crabb's opinions regarding MMI are rejected. Additionally, his opinions regarding treatment, restrictions, and MMI are not supported by any of the physicians who actually treated claimant's injuries. There is no indication Dr. Crabb reviewed any medical records other than the initial treatment records with Dr. Cassens. There is no indication Dr. Crabb was even made aware of claimant's ongoing treatment with Dr. Lukken and Dr. Kelley following the IME, or their diagnoses regarding his injuries. Dr. Crabb's opinion is an outlier among all of the medical evidence in the file, and is based on incomplete information. I find Dr. Crabb's opinions are entitled to no weight and are wholly rejected.

Claimant returned to Dr. Lukken for the transforaminal epidural steroid injection at L5-S1 on March 15, 2019. (Jt. Ex. 2, pp. 22-23) He returned on April 1, 2019, and reported 60 to 70 percent relief of his radicular symptoms and low back pain following the injection. (Jt. Ex. 2, p. 24) Dr. Lukken recommended another injection with hopes of providing 90 to 95 percent improvement and getting claimant back to work. (Jt. Ex. 2, p. 25) The second injection was performed on April 5, 2019. (Jt. Ex. 2, pp. 26-27) He then

followed up with Dr. Lukken again on April 23, 2019, and reported 70 percent relief for one week following the last injection. (Jt. Ex. 2, p. 28) Unfortunately, his pain had returned, although he was better than he was prior to the injections. At that point, Dr. Lukken recommended claimant see Hendrik Klopper, M.D., for a surgical consultation. (Jt. Ex. 2, p. 29)

Claimant saw Dr. Klopper on June 3, 2019. (Jt. Ex. 4, p. 62) Dr. Klopper noted that claimant had a history of lumbar stenosis for which he had two prior surgeries, and had been living with "manageable back pain" over the years. However, after the fall at work he developed pain radiating into the left buttock, down the posterior thigh and into his foot. Dr. Klopper reviewed the MRI, and noted severe central and lateral recess stenosis at L3-4, L4-5, and L5-S1, with the worst at L3-4. (Jt. Ex. 4, p. 63) His impression was lumbar stenosis with radiculopathy. He opined that the lumbar stenosis probably preceded claimant's work injury, but he was asymptomatic. (Jt. Ex. 4, p. 64) Dr. Klopper stated that claimant's radicular symptoms "clearly started after he fell from the truck at work, and therefore I would consider that a major contributing cause to his radicular syndrome." Dr. Klopper recommended surgery, and noted that claimant had some issues related to the sale of his house in New Mexico he needed to settle first, after which he would schedule the surgery.

On June 6, 2019, claimant filed a second application for alternate medical care, seeking an order directing defendant to authorize Dr. Lukken's referral to Dr. Klopper. (Cl. Ex. 20, p. 75) Defendant subsequently filed an answer denying liability for the claim, after which the petition was dismissed. (Cl. Ex. 21, pp. 76-78)

Despite the fact that no treating physician had released claimant to return to work, and he continued to actively treat for his injuries, on June 10, 2019, Lowe's sent claimant a written offer of full duty work. (Def. Ex. B, p. 12) The letter stated that Dr. Crabb had released claimant with no restrictions on March 12, 2019, and claimant was offered the full duty position of "freight associate" starting June 16, 2019. The position would pay claimant's pre-injury wages, and his shift would be Monday through Friday, 4:00 a.m. until 1:00 p.m.

Claimant's attorney replied to the offer on June 12, 2019, and noted that given claimant's need for surgery and symptomatic condition, he likely would not be able to return to work in the freight associate position. (Cl. Ex. 22(j), p. 99) Nonetheless, he requested a job description so claimant would be able to discuss with his treating physicians prior to accepting the job. There is no record of defendant's response to that letter in evidence. On June 19, 2019, claimant's counsel wrote defendant again with a note from Dr. Lukken, dated June 17, 2019, indicating that claimant was not cleared to return to work until after surgery. (Cl. Ex. 22(k), pp. 101-102)

As noted above, defendant initially denied ongoing liability for the injury on March 27, 2019. (Cl. Ex. 22(d), p. 85) On June 25, 2019, defense counsel wrote to claimant's attorney to provide the basis for the denial of further medical care, which reiterated defendant's position that was based on Dr. Crabb's initial IME report, as well as his

supplemental reports. Defendant denied additional medical care and terminated weekly benefits 30 days after their March 27, 2019 correspondence. (Cl. Ex. 22(l), pp. 104-105)

Following defendant's second denial of liability for ongoing treatment, claimant continued to treat on his own. On June 17, 2019, he saw Dr. Lukken for a lumbar epidural steroid injection per Dr. Klopper's recommendation. (Jt. Ex. 2, p. 30) Claimant then had a pre-operative examination with Dr. Dannenbring on August 27, 2019. (Jt. Ex. 4, p. 65) He was cleared for back surgery with Dr. Klopper, which subsequently took place on September 4, 2019. (Jt. Ex. 4, p. 68; Jt. Ex. 5, p. 135)

Dr. Klopper performed an L3, L4, and L5 laminectomy with L3-4, L4-5, and L5-S1 medial facetectomies and foraminotomies. (Jt. Ex. 5, p. 135) On September 16, 2019, claimant had a post-operative follow-up with Dr. Klopper's physician assistant, James Ramos, PA-C. (Jt. Ex. 4, p. 69) At that time, claimant was doing well, and said that his radicular leg pain was much better. He still had occasional left leg discomfort in his posterior thigh, but denied leg weakness. PA-C Ramos provided restrictions of no lifting more than 5 to 10 pounds and avoiding excessive bending and twisting. (Jt. Ex. 4, p. 70)

At his next follow up on October 21, 2019, claimant reported that his left leg pain had mostly resolved. (Jt. Ex. 4, p. 71) He reported some numbness in his left foot and pain in his left buttock into his left groin that had been bothering him. He also noted that he had received injections into his left hip in the past, and was unsure if that was the cause of his symptoms. PA-C Ramos indicated that the left foot paresthesias could take up to a year to resolve, and prescribed gabapentin. (Jt. Ex. 4, p. 72) He also recommended claimant be evaluated by orthopedics for his left hip pain. He increased claimant's restrictions to no lifting more than 15 to 20 pounds and he was to continue to avoid excessive bending and twisting.

Claimant saw Michael Nguyen, M.D., on October 28, 2019 for his left hip pain and discomfort. (Jt. Ex. 4, p. 73) He stated that he had been experiencing left hip discomfort for several years, but it had worsened since his lumbar spine surgery. X-ray showed some mild osteoarthritis in the hip joint, but Dr. Nguyen felt the likely cause of claimant's pain was a large chronic exostosis off his ASIS (anterior superior iliac spine). (Jt. Ex. 4, p. 74) Dr. Nguyen did not have anything to offer for treatment.

Claimant next followed up with PA-C Ramos on January 9, 2020. (Jt. Ex. 4, p. 75) At that time, claimant reported he was "doing great" until the prior Monday, when he was involved in a one-vehicle accident. Claimant testified that the accident took place on January 6, 2020, when he hit an area of black ice while driving and lost control. (Tr., p. 40) His vehicle rolled over, and claimant was taken by ambulance to Wayne Providence Medical Center. (Tr., p. 40; Jt. Ex. 6, p. 141) X-rays showed a compression fracture at L1, in addition to his surgical changes. (Jt. Ex. 6, p. 141) With respect to his work injury, he told PA-C Ramos that his preoperative leg pain had resolved, and the paresthesias in his left leg had also improved since his prior visit. (Jt. Ex. 4, p. 75) He was sent to physical therapy related to the motor vehicle accident. (Jt. Ex. 4, pp. 75-83)

Claimant next saw PA-C Ramos on February 3, 2020, at which time he reported worsening pain in the center of his back. (Jt. Ex. 4, p. 84) He denied any leg pain or paresthesias. He was sent for a CT of the lumbar spine, which showed the L1 compression fracture. (Jt. Ex. 4, p. 87) He then had an MRI on February 11, 2020, which confirmed an acute L1 compression fracture. (Jt. Ex. 4, pp. 88-89) He followed up with Dr. Klopper on February 27, 2020, and reported his back pain from the car accident was a little better. (Jt. Ex. 4, p. 90) He continued to report no leg pain. Dr. Klopper prescribed a back brace. (Jt. Ex. 4, p. 91)

Claimant continued to follow up regularly following the car accident. (Jt. Ex. 4, pp. 93-102) His pain gradually improved. By August 28, 2020, claimant indicated that his back pain from the compression fracture had resolved, although he still had occasional low back achiness. (Jt. Ex. 4, p. 103) He denied radicular leg pain, but did have numbness in the bottom of his left foot. At that time, claimant was told to continue to increase activity as tolerated, and follow-up as needed.

Claimant's deposition was taken on September 18, 2020. (Def. Ex. G). Consistent with the medical records, he testified that the pain from the motor vehicle accident and L1 compression fracture had resolved completely. (Def. Ex. G, Deposition Transcript, p. 34)

Claimant attended an IME with Daniel McGuire, M.D., on December 1, 2020. (Cl. Ex. 10, p. 32) Dr. McGuire's report is dated December 2, 2020. Dr. McGuire reviewed medical records, and noted claimant's prior spine surgeries and chronic back pain. (Cl. Ex. 10, p. 34) However, consistent with the medical records and claimant's testimony, Dr. McGuire noted that claimant was able to work and function at a reasonable level prior to the work injury on September 25, 2018. (Cl. Ex. 10, p. 32) Since his surgery with Dr. Klopper, claimant indicated his left leg pain had improved. (Cl. Ex. 10, p. 34) His back pain at the time of Dr. McGuire's exam was "more than the backaches that he had back in the early part of this injury." He also continued to complain of left buttock pain, especially with prolonged sitting. Finally, he continued to have issues with some numbness going down into the distal extremity, which seemed to be radicular in nature.

Claimant told Dr. McGuire he was able to stand for about 45 minutes at a time and walk "halfway through the mall" with little difficulty. However, he does better when walking if he leans on a grocery cart, and sometimes uses a scooter at the grocery store. He felt at that time he might be able to return to Lowe's as a cashier and work for an hour or two at a time, or perhaps stock light items such as hand tools. With respect to his car accident, he told Dr. McGuire that the L1 compression fracture had healed and was no longer an issue. (Cl. Ex. 10, p. 34)

On examination, Dr. McGuire noted claimant walked with a pronounced limp on the left side. (Cl. Ex. 10, p. 35) Claimant had minimal weakness with dorsiflexion in his left foot. Extending his legs still gave him a small amount of posterior thigh pain. Dr. McGuire found that claimant did not have much pain over the greater trochanter, but

more in his buttock. As such, he opined that the buttock pain was more likely related to the lumbar spondylosis of his spine rather than any issue with his left hip. Dr. McGuire did not think claimant's left lower extremity numbness would resolve since it had been 14 months since his surgery.

Dr. McGuire opined that the work injury was a substantial factor in causing the aggravation and presentation of symptoms that led to claimant's surgery. (Cl. Ex. 10, p. 32) While claimant had past issues, he was able to work and function at a reasonable level prior to the fall. Something changed when he fell, and he became more symptomatic with radicular pain. Dr. McGuire opined that surgery was definitely an appropriate option after non-operative care failed.

Dr. McGuire stated that if claimant is content with not working, he would not recommend a rehabilitation program, and would consider him likely at MMI six months after surgery. He opined that claimant's left buttock pain would likely worsen if claimant attempted to return to work for four to six hours per day. Rather, he thought claimant would be able to work two to three hours at a time, with a 5 to 8 pound lifting restriction. (Cl. Ex. 10, p. 33)

Finally, Dr. McGuire provided an impairment rating using the fifth edition of the AMA Guides to the Evaluation of Permanent Impairment. Assuming his prior lumbar surgery was at one level, Dr. McGuire used table 15-3, page 384, and provided a 25 percent rating to the body as a whole as a result of the work injury. (Cl. Ex. 10, p. 33)

The parties took Dr. Klopper's deposition on December 11, 2020. (Cl. Ex. 8) Dr. Klopper noted that prior to the work injury claimant had "off-and-on" back pain, but no leg pain. (Cl. Ex. 8, p. 19; Depo. Tr., p. 7) However, after the work injury, he developed pain radiating down the left leg. Dr. Klopper agreed that the lumbar stenosis he diagnosed claimant with was a chronic problem that preexisted the work injury. (Cl. Ex. 8, p. 20; Depo. Tr., p. 9) However, claimant did not develop the radiculopathy symptoms until after the fall. (Cl. Ex. 8, p. 21; Depo. Tr., p. 13) Dr. Klopper was asked about Dr. Crabb's diagnoses, specifically his diagnosis of lumbar contusion. (Cl. Ex. 8, p. 20; Depo. Tr., p. 12) Dr. Klopper indicated that with the mechanism of injury, it would not be surprising for claimant to have a soft tissue contusion. However, that would have healed by the time he saw Dr. Klopper, and it was not his diagnosis at the time he first saw claimant. Rather, Dr. Klopper's diagnosis was lumbar radiculopathy, based on the neuropathic-type pain in the low back associated with the imaging findings of severe stenosis, and the slight weakness in his leg and foot. (Cl. Ex. 8, pp. 20-21; Depo. Tr., pp. 12-13)

Dr. Klopper indicated that as a general rule, patients with the type of injury and surgery that claimant had typically reach MMI three to six months after surgery. (Cl. Ex. 8, p. 22; Depo. Tr., p. 18) In claimant's case, based on the improvement in his radicular pain, Dr. Klopper thought about three months after surgery was more appropriate. With respect to future medical care, Dr. Klopper did not anticipate him to require any additional treatment related back to the work injury. (Cl. Ex. 8, p. 22; Depo. Tr., p. 19)

With respect to restrictions, Dr. Klopper indicated that in claimant's case, due to his prior disability, it is more complicated than a standard case. (Cl. Ex. 8, p. 22; Depo. Tr., p. 20) Typically, in a person claimant's age, he would assign lifting restrictions in the range of 40 to 50 pounds. However, given his prior issues, he opined that claimant is less likely to be able to lift that amount of weight. Dr. Klopper would have sent him for a functional capacity evaluation to determine appropriate restrictions. (Cl. Ex. 8, p. 23; Depo. Tr., p. 21) Since that was not done, he could not provide an exact recommendation for permanent restrictions.

Finally, Dr. Klopper was asked about permanent impairment. (Cl. Ex. 8, p. 23; Depo. Tr., pp. 22-23) He stated that he had reviewed the AMA Guides prior to deposition, and would place claimant at 13 percent permanent impairment. (Cl. Ex. 8, p. 23; Depo. Tr., p. 23)

On cross-examination, Dr. Klopper reiterated that claimant had some underlying stenosis or narrowing around the nerves, which resulted in some back pain. (Cl. Ex. 8, p. 24; Depo. Tr., p. 25) However, the fall at work probably injured or bruised the nerve, which caused the radicular pain shooting down claimant's leg. As such, it is more likely than not that the work trauma is what prompted the need for surgery. (Cl. Ex. 8, p. 25; Depo. Tr., p. 30) He later clarified that typically, a person with stenosis such as claimant would not require surgery if there are no symptoms or neurologic deficit. (Cl. Ex. 8, p. 27; Depo. Tr., p. 38) However, after the work injury, claimant developed radicular symptoms as well as a neurologic deficit, weakness in his left foot, which is what led to the need for surgery. (Cl. Ex. 8, p. 27; Depo. Tr., pp. 38-39) Dr. Klopper also opined that claimant's ongoing numbness in the bottom of his left foot is likely also related to the work injury, as it is not uncommon to have residual numbness in the farthest point away from the nerve after surgery. (Cl. Ex. 8, pp. 25-26; Depo. Tr., pp. 32-33) For most people it resolves eventually, however for some it is permanent. (Cl. Ex. 8, p. 26; Depo. Tr., p. 33)

Overall, Dr. Klopper's opinions regarding causation are highly credible. Dr. Klopper provided a detailed explanation of how the mechanism of injury impacted claimant's preexisting lumbar spine condition, and how the resulting symptoms necessitated the surgery he performed. He also provided a credible explanation as to why his diagnosis was different from Dr. Crabb. He was able to explain the origin of the symptoms claimant developed after the work injury and why surgery was needed as a result. I find Dr. Klopper's opinion to be the most convincing regarding causation. As such, I find claimant sustained a permanent injury to his lumbar spine arising out of and in the course of his employment.

I also find Dr. Klopper's opinion regarding MMI to be convincing. He indicated that most patients would reach MMI three to six months after surgery. In claimant's case, given the improvement in his radicular symptoms, he thought three months was more appropriate. As such, I find claimant reached MMI on December 4, 2019.

With respect to permanent impairment, while I do not completely reject Dr. Klopper's rating, I find Dr. McGuire's rating to be more reliable. Dr. McGuire provided the tables and examples he referenced when calculating his rating, and broke down each portion of the rating before combining it to reach his ultimate 25 percent impairment. To the contrary, Dr. Klopper's rating was provided orally at deposition, and he was not asked to provide the basis for that number. (Cl. Ex. 8, p. 23; Depo. Tr., p. 23) As such, I find Dr. McGuire's rating to be more reliable.

On January 7, 2021, claimant had another unfortunate accident. Claimant testified he was taking down Christmas decorations and while standing on a step stool, he lost his balance and fell backward. (Tr., p. 42) As he fell, he hit the back of his neck on an iron chair, resulting in a serious cervical spine injury. He sustained a central cord injury at C3-4, C4-5 with cord contusion, bilateral upper extremity weakness, and intractable bilateral shoulder pain. (Jt. Ex. 11, p. 197) He also had acute paralysis following the fall, with near-complete bilateral arm paralysis. (Jt. Ex. 11, pp. 194; 198) Urgent surgery was recommended due to the risk of quadriplegia. (Jt. Ex. 11, p. 197) On January 8, 2021, claimant had an anterior cervical diskectomy at C3-4 and C4-5, with placement of fibular allograft and a cervical plate. (Jt. Ex. 11, p. 194) The surgery was performed by Grant Shumaker, M.D.

Following claimant's discharge from the hospital on January 18, 2021, claimant was transferred to the Madonna acute spinal cord injury unit until March 2, 2021. (Jt. Ex. 12, p. 203) He made excellent progress at Madonna and was able to discharge home for additional outpatient physical and occupational therapy. (Jt. Ex. 12, p. 205)

He also had right shoulder pain following the fall, and an x-ray on February 16, 2021 showed a severe, chronic rotator cuff injury. (Jt. Ex. 12, p. 202) On March 9, 2021, claimant saw Trisha Anderson, PA, for evaluation of his right shoulder pain. (Jt. Ex. 4, p. 107) She provided an AC joint injection, and recommended an MRI. (Jt. Ex. 4, p. 109) Claimant returned on March 16, 2021, with complaints of neck pain and left arm numbness and tingling after being struck on the forehead with a volleyball at his granddaughter's volleyball game. (Jt. Ex. 4, p. 110) Claimant testified that this incident did not result in any additional treatment. (Tr., p. 56)

On April 20, 2021, claimant saw Joseph Carreau, M.D., for his right shoulder pain. (Jt. Ex. 4, p. 113) After reviewing the MRI, Dr. Carreau did not note any significant rotator cuff injury. (Jt. Ex. 4, p. 114) However, claimant did sustain a grade 4 posteriorly dislocated AC joint. Dr. Carreau recommended open AC joint reconstruction utilizing allograft, which was performed on April 30, 2021. (Jt. Ex. 4, pp. 114; 122; Jt. Ex. 5, p. 138)

Claimant saw Dr. Carreau for follow-up on July 20, 2021. (Jt. Ex. 4, p. 122) He noted claimant was doing fairly well until he sustained a slip and fall in a convenience store that resulted in a head laceration and a change in pain in both hands, as well as some worsening shoulder pain. Dr. Carreau found nothing concerning regarding his shoulder, but recommended he return to neurosurgery due to the symptoms in his

hands. (Jt. Ex. 4, p. 123) Claimant then saw Dr. Shumaker on August 3, 2021, noting increased numbness in his arms. (Jt. Ex. 4, p. 126) Dr. Shumaker recommended an EMG/nerve conduction study of the bilateral upper extremities to assess for possible carpal tunnel syndrome. (Jt. Ex. 4, p. 127)

On August 31, 2021, claimant saw PA Anderson for follow-up, who noted great passive range of motion, but minimal active range of motion and limited strength within the arm. (Jt. Ex. 4, p. 124) He also noted continued diminished sensation, but those symptoms were worse on the left. PA Anderson felt his deficits were likely related to his prior cervical injury, and recommended he return to neurosurgery following the EMG. (Jt. Ex. 4, p. 125)

Claimant had a telephone visit with Dr. Shumaker on October 5, 2021. [2] (Jt. Ex. 4, p. 128) Dr. Shumaker noted that the EMG/nerve conduction showed moderate right carpal tunnel, mild left carpal tunnel, and question of active C5 radiculopathy, bilateral. He recommended a CT myelogram of the cervical spine. (Jt. Ex. 4, p. 129) At his next appointment on November 9, 2021, Dr. Shumaker reviewed the myelogram and noted a solid fusion at C3-4, with possible pseudoarthrosis C4-5 and bilateral foraminal stenosis C4-5. (Jt. Ex. 4, pp. 131-132) He recommended C4-5 laminectomy and C4-5 bilateral instrumentation with bone marrow aspirate. (Jt. Ex. 4, p. 132)

On January 12, 2022. Dr. Shumaker performed a cervical laminectomy at C4-5, with placement of lateral mass instrumentation C4 to C5. (Jt. Ex. 5, p. 140) Claimant followed up with PA-C Ramos on February 2, 2022, and reported doing well until about 8 days after surgery when he slipped and fell in his home. (Jt. Ex. 4, p. 133) He felt his hands were a bit more numb since the fall. The plan was to monitor the paresthesias. At the time of hearing on April 5, 2022, claimant was still under the doctor's care related to his cervical spine, and was unsure how much more feeling he would get back in his hands. (Tr., p. 57)

With respect to his work injury and related treatment, claimant testified that as of the date of hearing, he was able to walk, "not great, but I can walk." (Tr., p. 57) He still has numbness in the left foot, and he described it as feeling like stepping on a sponge with his left foot, which is awkward and makes walking difficult. (Tr., pp. 45-46; 57-58) He also testified that he continues to have pain in his buttocks area and around his hip joint. (Tr., p. 52) Based solely on his residual symptoms from the work injury, claimant does not believe that he would be able to return to the same work he was performing at Lowe's prior to the date of injury, due to his difficulty walking from the numbness in his foot, as well as the pain in his buttocks. (Tr., pp. 45-46) At the time of his deposition, which was prior to the cervical spine injury, claimant believed he could possibly return to work as a cashier, but was unsure how long he would be able to stand. (Tr., p. 55; Def. Ex. G, Depo. Tr., pp. 43-44)

[2] This visit was via phone due to claimant and his wife contracting Covid-19 during this time period.

Claimant is not claiming that he is permanently and totally disabled as a result of his work injury. However, he argues he is entitled to significant industrial disability. Based on the evidence as a whole, I find claimant is entitled to 80 percent permanent partial disability, or 400 weeks of benefits.

CONCLUSIONS OF LAW

The first issue to determine is whether the claimant's stipulated injury was the cause of temporary and/or permanent disability. Claimant has alleged that he is entitled to healing period benefits from September 25, 2018 through December 4, 2019. Defendant disputes that claimant is entitled to benefits for this time period. Specifically, defendant argues that following Dr. Crabb's opinions, defendant provided a return to work offer to claimant in writing, pursuant to Iowa Code section 85.33.

Iowa Code section 85.33 provides that an employee who is partially temporarily disabled shall accept suitable work that is offered by the employer. If the employee refuses to accept suitable work offered by the employer, the employee is not entitled to compensation during the period of the refusal. On June 10, 2019, defendant offered claimant the freight associate position based on Dr. Crabb's March 12, 2019 opinion that claimant could return to work with no restrictions. (Def Ex. B, p. 12) Claimant's attorney replied in writing, seeking a job description and physical demand assessments, so claimant could discuss with his treating physicians to determine if the work was suitable. (Cl. Ex. 22(j), p. 99) Claimant later replied with a note from Dr. Lukken, a previously authorized physician, indicating that claimant was not to return to work until after his lumbar surgery. (Cl. Ex. 22(k), pp. 101-102)

I found Dr. Crabb's opinions to be without merit. He examined claimant one time, on December 11, 2018. His diagnoses were incorrect, and his opinions regarding treatment, restrictions, and MMI are not supported by any of the physicians who treated claimant's injuries. His declaration that claimant had reached MMI and could return to work with no restrictions is rejected. Dr. Lukken, who was an authorized treating provider, opined that claimant could not return to work. The offer of work on June 10, 2019 was not an offer of suitable work in this circumstance. As a result, I find claimant was entitled to healing period benefits from September 25, 2018 through December 4, 2019.

Defendant further argues that claimant's injury did not result in any permanent disability, again based on the opinions of Dr. Crabb. In the alternative, if permanent disability is awarded, defendant argues it is minimal.

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 Rule of Appellate Procedure 6.904(3). The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time,

place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d at 311. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d at 150.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries that result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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 possibility of causation is not sufficient; a probability is necessary. Sanchez v. Blue Bird Midwest, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) (citing Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

As noted above, Dr. Crabb's opinions are afforded no weight. I find that claimant's work injury on September 25, 2018 was the cause of permanent partial disability. The hearing report indicates that the issue of whether the disability is an industrial disability is disputed. However, defendant appears to concede in their brief

that if permanent disability is awarded, it is industrial in nature. There is no argument that claimant's permanent disability would be limited to his functional impairment rating pursuant to Iowa Code section 85.34(v). In any event, claimant has not returned to work at Lowe's, and no offer of suitable employment has been made by Lowe's since claimant's work injury occurred. As such, claimant's permanent disability is not limited to his functional impairment. Claimant is entitled to an award of industrial disability.

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). The commissioner may also consider claimant's medical condition prior to the injury, immediately after the injury, and presently in rendering an evaluation of industrial disability. IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632-633 (Iowa 2000) (citing McSpadden, 288 N.W.2d at 192).

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995); Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

In assessing an unscheduled, whole body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent

disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat. Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Defendant argues that any award of industrial disability should be reduced due to the portion of section 85.34(v) that states, "[a] determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code § 85.34(2)(v). While defendant is correct that this is one factor to consider in determining claimant's loss of earning capacity, the legislature did not specify what impact this consideration should have on a determination of earning capacity, nor did the legislature indicate this consideration should be given greater weight than the other industrial disability factors.

Before the 2017 amendments, this agency stated in countless decisions over several decades that "[t]here are no weighting guidelines that indicate how each of the industrial disability factors is to be considered." See, e.g., Logan v. ABF Freight System, Inc., File No. 5047979 (App. April 25, 2018). Had the legislature intended to give this new consideration additional weight, it could easily have said so. See Celotex Corp. v. Auten, 541 N.W.2d 252, 256 (Iowa 1995); see also Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) (setting forth proposition that the legislature is presumed to be familiar with court decisions relative to legislature enactments).

That being said, at the time of injury, claimant was around 65 years old. He had not worked since approximately 1999 until he took the job at Lowe's in March 2018. He took the job due to familial financial needs. (Tr., p. 20) His wife is disabled and cannot work. When he started at Lowe's, he had a 25-pound lifting restriction as a result of his prior back injuries. Despite his age and restrictions, claimant was able to perform his job duties at Lowe's. He went to work every day, and thought his employer was pleased with him. (Tr., p. 21) He enjoyed his job, and there is no evidence he intended to leave the job in the immediate future.

Turning to work restrictions, Dr. Klopper and Dr. McGuire both found that claimant likely needs some level of permanent restrictions. As Dr. Klopper indicated, it is more complicated in this case than in most to determine claimant's restrictions based on the work injury because he had previously been deemed disabled with a permanent 25-pound lifting restriction. (Cl. Ex. 8, p. 22; Depo. Tr., p. 20) Typically a person of claimant's age would return to work with a 40 to 50 pound restriction, but Dr. Klopper opined he would be less likely to be able to do that because of his prior issues. Without an FCE, Dr. Klopper could not say with certainty what long-term restrictions would be appropriate. (Cl. Ex. 8, p. 23; Depo. Tr., p. 21) He did say, however, that a sedentary or light position that did not involve a lot of lifting would be in the general category of what claimant could do. (Cl. Ex. 8, p. 23; Depo. Tr., p. 21)

Dr. McGuire spoke with claimant about his activities and limitations during his IME. (Cl. Ex. 10, p. 33) He also performed a physical examination prior to providing his opinions. He reviewed claimant's job description and thought some of the lifting was

"probably a bit much" given claimant's age. He thought claimant might be able to work two to three hours at a time with a five to eight pound weight restriction. His concern was that claimant's left buttock pain would likely worsen with standing and walking four to six hours per day, and walking across a large store like Lowe's would also likely accentuate claimant's left foot drop caused by the numbness and tingling. Overall, Dr. McGuire did not see claimant realistically returning to work. Considering claimant's credible testimony regarding his symptoms and limitations (without consideration of the subsequent cervical injury), I find Dr. McGuire's opinions regarding restrictions to be more representative of claimant's actual abilities following the work injury.

Defendant also argues that claimant is not motivated to return to work, which should reduce his industrial disability. While claimant has not applied for any positions since the work injury at Lowe's, he had been faced with two subsequent injuries, each of which has further limited his ability to return to the workforce. While it is true that a loss of earning capacity due to "voluntary choice or lack of motivation" is not compensable, that is not the situation in this case. Claimant testified at both his deposition and at hearing that prior to the 2021 cervical injury, he had been willing to try returning to a job such as cashiering, to see if he would be able to handle it. (Tr., p. 55) I do not find claimant's "voluntary choice or lack of motivation" to be a significant factor in his failure to seek employment since the work injury. However, his subsequent cervical injury is an unrelated issue that contributes to his inability to work at this time.

Claimant was able to maintain employment prior to the work injury at Lowe's. He was able to perform the job duties to which he was assigned, despite his prior restrictions. Following the work injury, claimant was left with residual pain into his buttocks, that worsens with prolonged standing or sitting, and numbness in his left foot that causes difficulty with walking long distances. His treating physician, Dr. Klopper, has indicated that he likely would only be able to work in the light to sedentary category, and Dr. McGuire's recommended restrictions place him similarly. Considering all the factors of industrial disability, the evidence supports an award of 80 percent permanent partial disability. I found claimant reached MMI on December 4, 2019. As such, permanent partial disability benefits commence on December 5, 2019.

The next issue to determine is payment of medical expenses. Claimant seeks an award ordering Lowe's to pay the medical expenses set out in Claimant's Exhibit 15(c), 15(e), and 16, p. 71. These expenses encompass claimant's care with Dr. Klopper from June 3, 2019, though October 21, 2019, which were paid by Medicare and claimant's insurance. (Cl. Ex. 15(c), p. 48; Cl. Ex. 16, p. 71) Additional expenses include those from Siouxland Surgery Center related to claimant's surgery on September 4, 2019, which were also paid by Medicare and claimant's insurance. (Cl. Ex. 15(e), p. 69; Cl. Ex. 16, p. 71) I found the medical care to be causally related to claimant's work injury on September 25, 2018. As such, defendant is liable for those expenses. Claimant is also entitled to medical mileage in the amount of $1,308.65. (Cl. Ex. 17, p. 72)

Claimant further alleges he is entitled to reimbursement for the costs of Dr. McGuire's IME pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the

employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

In this case, defendant sought Dr. Crabb's opinion regarding permanent disability, which was issued on March 5, 2019. (Def. Ex. C, p. 17) Claimant sought his own evaluation from Dr. McGuire on December 2, 2020. (Cl. Ex. 10, p. 32) Pursuant to section 85.39, claimant is entitled to reimbursement for Dr. McGuire's IME, as well as mileage, in the total amount of $2,735.35. (Cl. Ex. 17, p. 72)

The next issue to determine is whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13. Claimant alleges he is entitled to penalty benefits, first, because the benefits that were paid were paid at an incorrect weekly benefit rate; and second, because defendant's termination of weekly benefits occurred without reasonable or probable cause or excuse.

Iowa Code section 86.13(4) provides:

a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to

> contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
>
> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).
>
> > If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

> (5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.
>
> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
>
> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Pursuant to Iowa Code section 86.13(4)(c), the employer bears the burden to establish that the reasonable cause or excuse for the delay in benefits was preceded by a reasonable investigation, that the results of that investigation are the actual basis for denial, and that the employer contemporaneously conveyed the basis to the claimant at the time of the delay or denial.

In this case, defendant claims that claimant is not entitled to penalty benefits because at all times, the nature and extent of claimant's injuries was fairly debatable, based on Dr. Crabb's opinion. Additionally, defendant claims that claimant is not entitled to penalty based on the improper weekly benefit rate, because the rate was revised based on additional investigation and information.

There is insufficient evidence in the record on which to determine the basis for the initial incorrect rate calculation. Defendant claims that once additional information was obtained, the rate was revised and the parties eventually stipulated to the correct rate. Claimant has not provided a contrary argument or evidence otherwise. As such, claimant is not entitled to penalty benefits based on underpayment of the weekly benefit rate.

With respect to defendant's termination of benefits, the question is essentially whether defendant's basis for the termination of benefits, in this case Dr. Crabb's report, constitutes a "reasonable or probable cause or excuse." Pursuant to subsection (c), in order to be considered a reasonable or probable cause or excuse, the excuse must satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Iowa Code section 86.13(4)(c).

In this case, the defendant sought an IME from Dr. Crabb, despite agreeing to provide treatment recommended by the authorized treating physician at the time, Dr. Cassens. Claimant saw Dr. Crabb on December 11, 2018, less than three months after the work injury, and prior to seeing Dr. Kelley, the podiatrist, or Dr. Lukken, the pain management specialist. Defendant did not terminate benefits immediately following Dr. Crabb's IME, however. Defendant obtained supplemental reports from Dr. Crabb, dated March 5, 2019 and March 19, 2019, in which Dr. Crabb opined that claimant had reached MMI for his injuries, required no additional treatment, and could return to work with no restrictions. Based on those supplemental reports, defendant terminated benefits.

There is no indication defendant provided Dr. Crabb with any updated information regarding claimant's diagnoses and treatments since the initial IME when seeking those supplemental reports. Defendant withheld information from Dr. Crabb, and then based their denial of ongoing benefits on his uninformed opinion. A reasonable investigation would have included providing Dr. Crabb with updated medical records and asking if those updates changed Dr. Crabb's initial opinions. Defendant's reliance on a medical opinion from a doctor who was not provided with complete information regarding the claimant's condition and treatment was not reasonable. Defendant terminated claimant's benefits without reasonable or probable cause or excuse. As such, claimant is entitled to penalty benefits.

Defendant paid temporary benefits through April 27, 2019. Given the number of weeks claimant has been without benefits, a penalty of 50 percent is appropriate. Claimant is awarded $20,000.00 in penalty benefits, which is roughly 50 percent of the past due benefits at this time.

Finally, claimant requests costs. Iowa Code section 86.40 states that costs are taxed in the discretion of the commissioner. As claimant was successful in his claim, I award costs. Claimant is awarded the $100.00 filing fee, and the $78.00 deposition fee. (Cl. Ex. 17, p. 72) Medical records are not an allowable cost pursuant to Iowa Administrative Code Rule 876—4.33(86).

ORDER

THEREFORE, IT IS ORDERED:

All benefits shall be paid at the stipulated rate of two hundred forty-two and 18/100 dollars ($242.18).

Defendant shall pay claimant healing period benefits from September 25, 2018 through December 4, 2019.

Defendant shall pay claimant four hundred (400) weeks of permanent partial disability benefits, commencing December 5, 2019.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendant shall be entitled to a credit for all benefits previously paid, as stipulated on the hearing report.

Defendant shall pay penalty benefits in the amount of twenty thousand and 00/100 dollars ($20,000.00).

Defendant is responsible for medical expenses as outlined in this opinion.

Defendant shall pay claimant's medical mileage in the amount of one thousand three hundred eight and 65/100 dollars ($1,308.65).

Defendant shall reimburse claimant for Dr. McGuire's IME, including mileage, in the amount of two thousand seven hundred thirty-five and 35/100 dollars ($2,735.35).

Defendant shall reimburse claimant's costs in the amount of one hundred seventy-eight and 00/100 dollars ($178.00).

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

Signed and filed this ___5th___ day of October, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dennis McElwain (via WCES)

Lori Scardina Utsinger (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.