

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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HAROLD CRITCHLOW,

Claimant,

vs.

MENARD, INC.,

Employer,

and

XL INSURANCE AMERICA, INC.,

Insurance Carrier,  
Defendants.File Nos.: 21700895.01  
1660829.01

ARBITRATION DECISION

Head Notes: 1402.40; 1402.60;  
1803.1; 2505

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**STATEMENT OF THE CASE**

Claimant Harold Critchlow filed petitions in arbitration seeking worker's compensation benefits against Menard, Inc., employer, and XL Insurance America, Inc., insurer, for accepted work injury dates of December 29, 2018, and October 9, 2020. The cases were consolidated and came before the undersigned for an arbitration hearing on July 28, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, the hearing took place via videoconference using Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report for each file prior to the commencement of the hearing. On the hearing reports, 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 8, Claimant's Exhibits 1 through 9, and Defendants' Exhibits A through E.

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on July 28, 2022. The parties submitted post-hearing briefs on September 6, 2022, and the case was considered fully submitted on that date.

## **ISSUES**

### **File No. 1660829.01 (Date of Injury December 29, 2018)**

1. The nature and extent of claimant's permanent partial disability;
2. The commencement date for permanent partial disability benefits;
3. Payment of medical expenses; and
4. Taxation of costs.

### **File No. 21700895.01 (Date of Injury October 9, 2020)**

1. Whether the stipulated injury is a cause of permanent disability;
2. If so, the nature and extent of permanent disability;
3. The commencement date for payment of permanent partial disability benefits, if any;
4. Payment of medical expenses; and
5. 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 43-year-old person. (Hearing Transcript, p. 78) Claimant graduated from high school in 1997, after which he attended Indian Hills Community College and earned an associate's degree in computer programming and arts and sciences. (Tr., pp. 10-11) He then attended Buena Vista College and earned a bachelor's degree in business management. (Tr., p. 11)

In high school, claimant worked a seasonal job detasseling corn. (Tr., p. 12) From approximately 2003 until 2005, claimant worked part-time as a janitor at the Davis County Hospital. (Tr., p. 13; Defendants' Exhibit C, p. 25) In 2006, claimant was hired to work at Menard. (Def. Ex. C, p. 25) His first job was at the Ottumwa location, and he worked as a floor cleaner. (Tr., p. 16) After he graduated from Buena Vista, he became a manager trainee at Menard, and attended the manager trainee program. (Tr., pp. 17-

18) He worked in several departments, including millwork, hardware, front end, the outside yard, and plumbing. (Tr., p. 18) After about a year, he transferred to the Galesburg, Illinois store, and worked as an electrical assistant. (Tr., p. 20) The Galesburg store was new, and claimant's job was to get the department up and running. (Tr., p. 21) After a few months, he was promoted to electrical manager, and he stayed in that position until he was transferred to another new store in Columbia, Missouri. (Tr., p. 22)

In the Columbia store, claimant was also an electrical manager. He worked there for about five or six years. The last six months at that store he worked as the plumbing manager, before he was promoted and moved to the Cedar Rapids south store. (Tr., p. 22) At the Cedar Rapids store he became a second assistant general manager. (Tr., p. 23) In this position, claimant made sure everyone was doing their job, and made sure things got fixed around the store.

On December 29, 2018, claimant was injured when he slipped on ice in the parking lot at work and fell. (Tr., pp. 26-27; Def. Ex. C, p. 26) Claimant picked himself up, got inside the store, and then realized that his head was bleeding. (Tr., p. 27) He alerted one of the general managers, and was told to go to the hospital. A coworker then took him to the emergency room.

At the emergency room, claimant complained of mid and lower back pain, as well as a mild headache and "feeling like I'm going to pass out," in addition to a laceration on the back of his head. (Joint Exhibit 1, p. 1) X-rays and a CT scan were ordered, and revealed a mild anterior wedge compression deformity of the T12 vertebral body. (Jt. Ex. 1, p. 4) Kevin Eck, M.D., was consulted, and he placed claimant in a Jewett back brace, and told him to follow up in a week. Claimant also had two staples placed in the wound to his head.

Claimant followed up at Dr. Eck's office on January 7, 2019. (Jt. Ex. 2, p. 10) Dr. Eck noted claimant had thoracolumbar pain secondary to a T12 compression fracture. Claimant reported the Jewett brace was helping. Dr. Eck did not recommend invasive treatment for the fracture. (Jt. Ex. 2, p. 11) Instead, he recommended continued use of the Jewett brace. He provided claimant with temporary work restrictions, and advised it would take about six to eight weeks for the fracture to heal. He also examined claimant's scalp laceration, which looked good with no evidence of infection, so the staples were removed. Claimant was to follow up in six weeks. Claimant did not miss any time from work following the injury. (Tr., pp. 62-63)

Claimant returned to Dr. Eck on February 4, 2019. (Jt. Ex. 2, p. 12) Dr. Eck recommended claimant continue to use the Jewett brace. (Jt. Ex. 2, p. 13) He noted that claimant could gradually begin weaning from the brace in about two to three weeks. Dr. Eck indicated that claimant would return in four weeks, at which time if everything looked good he would have claimant begin physical therapy.

Claimant next saw Dr. Eck on March 4, 2019. (Jt. Ex. 2, p. 14) At that time, claimant reported that he was not having much pain in the low thoracic spine, but he did occasionally feel dizzy when first getting out of bed and with tipping his head back. Dr. Eck recommended claimant discontinue using the back brace at that time, and gave him a prescription to see a physical therapist for “education regarding appropriate self-directed aerobic exercise, core strengthening, and stretching.” (Jt. Ex. 2, p. 15) He recommended claimant lose weight, and indicated claimant could progress with activities as tolerated. He noted claimant’s intermittent positional dizziness, but stated claimant was neurologically intact. He suggested that claimant establish himself with a primary care physician.

Claimant began physical therapy at Athletico on March 13, 2019. (Jt. Ex. 3, p. 21) Notes from that date indicate claimant presented with limited thoracic mobility and pain with rotation. Claimant continued to work and had no restrictions at that time. He reported current symptoms as going from numbness to sharp pains, all on the right side of his mid back. Most symptoms were coming on with twisting. Claimant reported he could still lift as much as before, but had to watch his angles when doing so. He reported that prior to the work injury he experienced no functional limitations. (Jt. Ex. 3, p. 22)

After about four physical therapy appointments, on March 22, 2019, claimant reported his back felt like it was getting worse. (Jt. Ex. 3, p. 28) He stated the pain was starting to radiate out from the spine, and noted he was “working strenuously” at work and noticed the pain got worse when twisting. By his next appointment on March 25, 2019, claimant’s back was doing a little better, although he continued to have occasional sharp pain between the shoulder blades. (Jt. Ex. 3, p. 30) By March 27, he continued to report some discomfort in the mid back with tenderness to mobilization, and some numbness or occasional sharp pains in the mid back. (Jt. Ex. 3, p. 32) It was noted he was meeting some job demands but not all, and the therapist thought he was appropriate to continue therapy, pending follow up with Dr. Eck.

Claimant followed up with Dr. Eck on April 8, 2019. (Jt. Ex. 2, p. 16) At that time he reported occasional recurrent pain at the level of his fracture, especially when twisting. He had no pain with bending forward and no tenderness to percussion at the level of the fracture. (Jt. Ex. 2, p. 17) Claimant indicated his pain was much better at that time, and declined any further diagnostic imaging or injections. (Jt. Ex. 2, pp. 16-17) Dr. Eck continued to recommend weight loss, and encouraged claimant to continue with appropriate exercise and stretching. (Jt. Ex. 2, p. 17) He told claimant to participate in activities as tolerated, letting pain be his guide, and follow up at any time in the future.

Claimant returned to physical therapy on April 11, 2019, and noted some continued irritation, but was discharged from physical therapy. (Jt. Ex. 3, p. 36) Unfortunately, claimant returned to Dr. Eck on May 30, 2019, with complaints of persistent thoracolumbar pain, often intensified with prolonged standing and bending backwards. (Jt. Ex. 2, p. 18) He also reported occasional tingling in his feet with walking, but did not have typical neurogenic pain or radicular pain in the lower

extremities. Imaging taken that day did not reveal any new compression fractures. On physical examination, Dr. Eck noted mild pain to percussion in the midline at T12, and increased thoracolumbar pain with lumbar spinal extension. (Jt. Ex. 2, p. 19) Dr. Eck did not recommend surgical intervention, but encouraged “judicious use of over-the-counter medications,” as well as continuing with exercise and weight loss. He also referred claimant to a pain management physician to see if he may be a candidate for injection therapies, and told him to follow up as needed.

Claimant testified that he was never sent to the pain doctor for the injection referral. (Tr., p. 31) He stated he got a phone call from Ms. Harney at Gallagher Bassett, who said “not that they didn’t want to pay for it,” but they would send him to another doctor. Claimant testified that he kept in contact with her via email, and she “kept saying she was going to find a doctor that was going to help me.” (Tr., p. 32) However, after some time, he was instead sent to Cassim Igram, M.D. (Tr., p. 32; Jt. Ex. 4, p. 37)

Claimant saw Dr. Igram for a “second opinion regarding back” on July 24, 2019. (Jt. Ex. 4, p. 37) Claimant testified that the appointment was “a joke” and that it only lasted for about five to ten minutes. (Tr., pp. 32-33) He testified that the visit was so short he did not incur a fee at the University of Iowa parking lot. (Tr., p. 33) Dr. Igram’s record notes that claimant reported intermittent stabbing midline back pain at a level 6 out of 10 at that visit. (Jt. Ex. 4, p. 37) He also reported numbness going up his back to the back of his head, with a headache. He reported numbness in his legs and hands bilaterally when walking. He was only taking over-the-counter ibuprofen for pain. He reported physical therapy in the past made his back pain worse, possibly because he was out of the back brace. He stated he continued to do his home exercise program, and he continued to work with no restrictions.

On physical examination, Dr. Igram noted claimant was tender to palpation at the thoracolumbar junction. (Jt. Ex. 4, p. 38) His review of radiographs from March and May 2019 showed a compression fracture that appeared to be well healed. Dr. Igram’s assessment was healed T12 compression fracture with secondary complaints of “a numbish feeling in the back going all the way up to the head causing headaches.” (Jt. Ex. 4, p. 39) He stated that the onset of the symptoms was not in time connected to the work injury, as it had started only three months prior. Dr. Igram stated that claimant’s symptoms “certainly seem to warrant investigation,” but he was not able to causally connect the headaches and numbness to the December work injury. He recommended claimant follow up with his family physician for “appropriate work-up and eventually treatment recommendations.”

Later, on October 11, 2019, based on his July 24 visit, Dr. Igram issued an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 4, p. 40) Using Table 15-4, he provided claimant with an impairment rating of 5 percent of the whole person, based on a compression fracture less than 25 percent of one vertebral body. Defendants paid claimant 25 weeks of permanent partial disability compensation as a result of Dr. Igram’s 5 percent rating. (See Hearing Report)

Claimant testified that following Dr. Igram's appointment, workers' compensation ended his treatment. (Tr., pp. 33-34) As such, he established care with Qadnana Anwar, M.D. (Tr., p. 34; Jt. Ex. 5, p. 41) Dr. Anwar performed a complete physical examination on July 29, 2019. (Jt. Ex. 5, p. 41) She noted his history of the work injury and symptoms of pain in the mid spine, which were sometimes more numbness than pain, and sometimes went up to his neck. After physical examination, Dr. Anwar recommended that claimant consider a pain clinic evaluation. (Jt. Ex. 5, p. 43) She recommended he cut down on NSAIDs and lose weight, while also continuing his home exercise program. She also prescribed gabapentin, and scheduled him to follow up in six weeks. (Jt. Ex. 5, pp. 43-44)

Claimant continued to follow up with Dr. Anwar. At his next visit on September 3, 2019, claimant had lost ten pounds, and indicated the gabapentin was helping the numbness in his mid-back. (Jt. Ex. 5, pp. 45-46) Dr. Anwar increased his gabapentin and suggested he try to lose another ten to fifteen pounds. (Jt. Ex. 5, p. 47) He continued to follow up, and his back pain continued but did not worsen. (Jt. Ex. 5, pp. 48-50) By January 21, 2020, claimant had lost over 30 pounds. (Jt. Ex. 5, p. 51) He continued to complain of intermittent electrical pain starting at T12 going to the base of his skull. Dr. Anwar ordered cervical and thoracic spine x-rays and referred claimant for physical therapy. (Jt. Ex. 5, p. 53) X-rays were performed that day and showed mild wedging along the superior endplate of T12, with mild to moderate degenerative changes with anterior vertebral body spurring. (Jt. Ex. 6, p. 76) The cervical spine x-ray was unremarkable.

Claimant started physical therapy at St. Luke's Therapy Plus on February 3, 2020. (Jt. Ex. 6, p. 77) He again noted pain in the mid back, more numbness but sometimes sharp when lifting. (Jt. Ex. 6, p. 78) He indicated the pain had been consistent since his initial fall at work in December 2018. The physical therapist indicated that claimant's signs and symptoms were consistent with thoracic facet arthropathy, and claimant would benefit from therapy. (Jt. Ex. 6, p. 80)

Claimant had an MRI of the thoracic spine, ordered by Dr. Anwar, on February 6, 2020. (Jt. Ex. 6, pp. 81-82) The MRI showed mild compression deformity of T12, but no marrow signal abnormalities to indicate an acute fracture. (Jt. Ex. 6, p. 82) The MRI also showed mild multilevel degenerative disc disease at multiple levels, most pronounced at T11-T12 where there was mild canal narrowing. Claimant was then referred to Stanley Mathew, M.D., at St. Luke's Physical Medicine & Rehabilitation.

Claimant saw Dr. Mathew on February 10, 2020. (Jt. Ex. 6, p. 83) Dr. Mathew noted claimant presented for evaluation of chronic mid back pain, ever since his slip and fall at work in December 2018. Claimant stated the pain also went into his neck, and is generally worse at the end of the day. Dr. Mathew reviewed claimant's recent MRI and noted degenerative changes. On physical examination, he documented tenderness over the cervical and thoracic spine. (Jt. Ex. 6, p. 84) His impression was thoracic radiculopathy, enthesopathy of the cervical and thoracic spine, and degenerative

changes at T12. (Jt. Ex. 6, p. 85) He recommended continuing physical therapy; prescribed a Medrol Dosepak and a trial of methocarbamol; and referred claimant for a thoracic epidural injection. He noted in the future he might consider trigger point injections, and told claimant to follow up in four to six weeks.

Claimant had an epidural steroid injection at T11-T12 on February 18, 2020, performed by Mark Kline, M.D. (Jt. Ex. 6, p. 86) He reported to physical therapy that the injection did not really help. (Jt. Ex. 6, p. 93) He continued with physical therapy until March 25, 2020. (Jt. Ex. 6, pp. 95-100) On April 6, 2020, he returned to Dr. Mathew and reported the methocarbamol was beneficial, but he continued to have severe mid and low back pain aggravated by activity. (Jt. Ex. 6, p. 101) Dr. Mathew provided injection therapy, which immediately improved claimant's pain by about 70 percent. (Jt. Ex. 6, p. 103) Dr. Mathew provided a note at that visit, indicating claimant could return to light duty, working no more than eight hours per day, no repetitive lifting more than 20 pounds, and no repetitive bending. (Jt. Ex. 6, p. 104)

Claimant consulted with Dr. Anwar via telephone call on April 21, 2020. (Jt. Ex. 5, p. 54)<sup>1</sup> At that time he reported that overall he felt his back pain was stable. He still had intermittent tingling and numbness in his hands and feet. He continued taking gabapentin. Claimant stated that the trigger point and epidural injections had not helped, so Dr. Anwar increased his gabapentin. (Jt. Ex. 5, p. 56) She advised he should continue his home therapy exercises, and continue with Dr. Mathew and Dr. Kline. She also stated her belief that "there is a certain component of anxiety related to pain which can be assessed in future and consider starting him on SSRI. . ." She again encouraged some additional weight loss and advised claimant to stay active.

Claimant returned to Dr. Kline on May 4, 2020. (Jt. Ex. 6, p. 105) Dr. Kline noted that the prior epidural injection was not helpful, and claimant's pain at that time was described as a sharp pain in the lower thoracic region radiating into his lumbar region. (Jt. Ex. 6, p. 106) Dr. Kline's impression was lower thoracic pain and upper lumbar pain in the setting of T12 compression fracture and associated facet arthropathy. (Jt. Ex. 6, p. 107) He noted claimant's presentation was consistent with facet syndrome, which was a sequela of claimant's previous injury and associated compression fracture. Because the symptoms had persisted despite conservative treatment, and the epidural was not helpful, Dr. Kline recommended facet injections. Claimant agreed, and Dr. Kline provided bilateral T11-T12 and T12-L1 facet injections. (Jt. Ex. 6, pp. 107-108)

On May 18, 2020, claimant followed up with Amanda Kuehl, ARNP, at Dr. Mathew's office. (Jt. Ex. 6, p. 109) He reported the facet injections only provided relief for about one day. He continued to report moderate pain, and numbness in his hands and fingers. ARNP Kuehl provided injection therapy, continued physical therapy, and ordered an EMG. (Jt. Ex. 6, p. 111)

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<sup>1</sup> The appointment took place via telephone due to the COVID-19 pandemic.

Claimant had an EMG on June 1, 2020. (Jt. Ex. 6, p. 112) The electrical findings were within normal limits, as there was no electrical evidence of a cervical radiculopathy or peripheral polyneuropathy. (Jt. Ex. 6, p. 113) Dr. Mathew recommended retesting in 6 to 12 months due to clinical evidence of cervical radiculopathy on the left.

Claimant continued to follow up with providers at Dr. Mathew's office for injection therapy and medication management. (Jt. Ex. 6, pp. 114-123) He also followed with Dr. Anwar, who noted on July 24, 2020, that claimant had been able to lose close to 40-pounds in one year. (Jt. Ex. 5, p. 57)

On July 16, 2020, claimant attended an independent medical examination (IME) with Farid Manshadi, M.D. (Claimant's Exhibit 1, p. 1) Dr. Manshadi's report is dated July 30, 2020. Dr. Manshadi reviewed the medical records and interviewed claimant. (Cl. Ex. 1, pp. 1-3) On the date of his examination, claimant reported intermittent back pain that worsens with walking and sitting or stooping over. (Cl. Ex. 1, p. 3) He reported the pain going up to his upper spine in between the shoulder blades. He also reported bilateral hand numbness off and on since the fall, and neck pain going down into his shoulder blade area. He reported working 8 hours per day with a lifting restriction of 20 pounds. He denied any injuries to his neck or back prior to the work injury.

On physical examination, Dr. Manshadi noted limited range of motion in the neck, and tenderness to palpation over the lower cervical paraspinals and upper traps bilaterally. (Cl. Ex. 1, p. 3) He also noted tenderness over the C6-7 spinous process. Claimant's thoracic range of motion was also decreased, and the thoracic spinous processes were tender to palpation over the T12 and L1 region. Based on the medical records review and his examination, Dr. Manshadi opined that claimant sustained injuries involving his thoracic and cervical region on December 29, 2018.

Using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Manshadi provided a rating of 6 percent of the whole person due to the T12 compression fracture. (Cl. Ex. 1, p. 4) With respect to his neck, Dr. Manshadi provided a 5 percent impairment for the cervical spine injury. Using the combined values chart found in the AMA Guides, this comes to a total of 11 percent of the whole person. Dr. Manshadi also opined that the medical care provided by Dr. Mathew, Dr. Kline, and Dr. Anwar had been and remained reasonable and medically necessary to treat claimant's injuries caused by the work incident. With respect to restrictions, Dr. Manshadi recommended claimant continue to avoid lifting more than 20 pounds, avoid activities that require repetitious flexion or rotation of his thoracic spine, and avoid activities that require repetitious movement of his neck in different directions.

Overall, it appears from the records that claimant's condition was relatively stable going into the fall of 2020. However, claimant testified that he struggled to get by while working. (Tr., p. 38) He tried not to lift anything or bend, as those actions aggravated his symptoms. (Tr., pp. 38-39) Claimant testified that in the late-summer and fall of 2020, the store was "crazy" because of the derecho that went through the area in August 2020. (Tr., p. 39) Sales were "through the roof," and they were understaffed.



On October 9, 2020, which was a Friday, claimant sustained another injury while working. (Tr., p. 41) He testified that he was in the back of the store sorting freight, and had his arms overhead. (Tr., p. 42) He is not sure whether a box slipped or a pallet fell over, but he somehow caught his foot on a pallet and fell flat on his behind, right on his tailbone. Shortly after he fell, the new general manager, Zach Deming, came and asked him if he was okay. Claimant said yes, went to take his regular muscle relaxer, and went back to work. (Tr., p. 44) A short time later, claimant was called to the “back office,” and was taken to a conference room with Mr. Deming and Marilyn, the HR coordinator. He was informed that he was “not a good fit for the store,” and that he should call Dan in the Iowa City store. Prior to that conversation, claimant had worked in the Cedar Rapids store for about six years, and was not aware that his position was at stake.

Prior to leaving that day, claimant reported his workers’ compensation claim related to his fall to Christine in the “front office.” (Tr., p. 45) Claimant testified that Christine “called the line to get to the nurse,” and the nurse told him to go home and sit on a pillow. The record of that call indicates claimant was advised to use ice for the first 48 hours, followed by heat, and take over-the-counter pain medications. (Jt. Ex. 8, pp. 275-276) Claimant went to the Iowa City store on Monday after the injury, and spoke to the general managers about his transfer. (Tr., p. 46) He then took a week of vacation due to the pain from his fall. He testified that he could barely walk and had trouble sitting. After that week of vacation, on October 19, 2020, he started at the Iowa City store. (Cl. Ex. 5, p. 19) His transfer also came with a demotion to a sales associate in the electrical department, and a pay decrease from \$18.15 per hour to \$14.55 per hour. (Tr., p. 48; Cl. Ex. 5, p. 19)

Following the October injury, claimant testified that Menard did not reach out to schedule him for any treatment. (Tr., p. 46) He already had an appointment scheduled with Dr. Mathew’s office, which he attended on October 13, 2020. (Tr., p. 46; Jt. Ex. 6, p. 124) He noted that he fell earlier that week at work, and had worsening sacral pain and neck pain with headaches. He declined injections that day, and radiographs of his cervical and lumbosacral spine were ordered due to the increased pain. (Jt. Ex. 6, p. 126) The results showed mild degenerative changes of both the lumbar and cervical spine. (Jt. Ex. 6, pp. 127-128)

Claimant saw Dr. Anwar on November 3, 2020. (Jt. Ex. 5, p. 60) He reported his fall at work, and complained of a headache ever since, as well as pain in his lower back, neck, and tailbone. (Jt. Ex. 5, p. 61) Dr. Anwar told him to try lidocaine patches for the lower back pain, and ordered a CT scan of the head to rule out brain hemorrhage and mass due to the new headaches and neck pain. (Jt. Ex. 5, p. 63) The head CT was normal. (Jt. Ex. 6, p. 129) He returned to Dr. Mathew’s office on November 24, 2020, for injection therapy. (Jt. Ex. 6, pp. 130-132) At that time he also reported chronic shoulder pain. (Jt. Ex. 6, p. 130) Claimant testified that the reference to his shoulders is a result of the muscles around his neck tightening up, causing pain to go into his shoulders. (Tr., pp. 55-56)

Claimant continued to follow up with both Dr. Mathew and Dr. Anwar. He saw Dr. Mathew on January 12, 2021, at which time his impression was worsening neck and mid-back pain after a fall; cervical and thoracic radiculopathy; sacroiliitis/trochanteric bursitis; enthesopathy of the cervical and thoracic spine; subdeltoid bursitis; and degenerative changes at T12. (Jt. Ex. 6, pp. 134-135) Claimant saw Dr. Anwar on January 25, 2021, who recorded worsening neck pain causing tremors and shaking in the bilateral upper extremities, as well as chronic back pain. (Jt. Ex. 5, p. 66) Dr. Anwar ordered a cervical MRI and neurology consult, and said to consider physical therapy. (Jt. Ex. 5, p. 68)

The cervical MRI took place on February 8, 2021, and showed straightening of normal cervical lordosis, which can be seen with muscle spasm; mild diffuse disc bulges at C5-C6 and C6-7, with no significant spinal canal stenosis or neural foraminal narrowing; and no acute osseous findings. (Jt. Ex. 6, p. 139) Claimant saw Dr. Mathew on February 23, 2021, who noted severe cervical and thoracic pain. (Jt. Ex. 6, p. 143) He provided injection therapy, and referred claimant to physical therapy. (Jt. Ex. 6, pp. 145-146)

Claimant returned to Dr. Kline on March 16, 2021, for a cervical epidural steroid injection and trigger point injections. (Jt. Ex. 6, pp. 154-155) Dr. Kline's note indicates claimant complained of neck pain radiating into his upper thoracic region and bilaterally into his upper extremities. (Jt. Ex. 6, p. 155) He then followed up with Dr. Mathew on April 13, 2021, for his first round of Botox injections. (Jt. Ex. 6, p. 160) He saw Dr. Anwar on April 26, 2021, and reported his neck pain and headaches had improved with the Botox and trigger point injections. (Jt. Ex. 5, p. 69) He also felt his lower back pain had been doing well at that point.

Claimant continued to follow up with Dr. Mathew's office and receive regular injection therapy. (Jt. Ex. 6, pp. 164-170) His next Botox injection was July 13, 2021. (Jt. Ex. 6, p. 171) He reported an excellent response from his first round of Botox. At his next appointment on July 27, 2021, he reported that despite some relief he was still sore in his neck and shoulders, with occasional numbness and tingling in his fingers and hands. (Jt. Ex. 6, p. 175) A repeat EMG was ordered. (Jt. Ex. 6, p. 177)

On August 24, 2021, claimant returned to Dr. Kline for a second cervical epidural injection and trigger point injections. (Jt. Ex. 6, p. 179) He told Dr. Kline that the first injection results in 90 percent symptom relief for about three months. He continued working at Menard in the building material section, and his lifting restriction had been increased from 20 pounds to 70 pounds. At his next follow up with Dr. Mathew on August 31, 2021, he reported the cervical epidural had been very effective, but he still had some numbness in both shoulders. (Jt. Ex. 6, p. 182) Dr. Mathew provided another injection. (Jt. Ex. 6, p. 184)

Claimant saw Dr. Anwar for a complete physical on September 28, 2021. (Jt. Ex. 5, p. 73) He reported his back pain and neck pain had been stable. Later the same day he had a follow up with Dr. Mathew, who provided injections. (Jt. Ex. 6, p. 187) His next

Botox injections took place on October 12, 2021. (Jt. Ex. 6, p. 190) At his follow up on October 26, 2021, he reported some right arm weakness following his last Botox treatment. (Jt. Ex. 6, p. 191) This continued to his next appointment on November 23, 2021, when he also noted difficulty fully lifting his arms. (Jt. Ex. 6, pp. 194-195) At his next appointment on December 21, 2021, he still had some weakness in the bilateral arms, and said it felt like there was a weight on his shoulders. (Jt. Ex. 6, p. 199) He also reported a shooting pain coming from his neck, along with numbness and tingling in both arms. A cervical spine MRI was ordered. (Jt. Ex. 6, p. 201)

Claimant had a cervical MRI on January 4, 2022. (Jt. Ex. 6, p. 202) The results were “near normal,” with “tiny disc bulges at C5-C7.” Claimant then started a round of physical therapy on January 10, 2022. (Jt. Ex. 6, p. 203) The therapist noted complaints at that time included worsening neck and upper back pain radiating to the bilateral shoulders, with more heaviness and pain in the right upper extremity than the left. (Jt. Ex. 6, p. 204)

Claimant attended an IME with Dr. Mathew on January 20, 2022. (Cl. Ex. 2, p. 5) Dr. Mathew’s report is dated January 29, 2022. Dr. Mathew reviewed the medical records, including his own, as well as Dr. Manshadi’s prior IME report. (Cl. Ex. 2, pp. 5-7) At the time of his examination, claimant reported that his neck and midback pain had improved with the addition of epidural and Botox injection therapies and trigger point injection therapies. (Cl. Ex. 2, p. 7) He continued to have significant low back pain. He rated his pain at a level 6 of 10 in the low back; 4 of 10 in the midback; and 3 of 10 in the neck. He indicated his pain was generally aggravated by activity and made better with rest.

On physical examination, Dr. Mathew noted tenderness to the cervical, thoracic, and lumbar paraspinals and bilateral SI joints. (Cl. Ex. 2, p. 7) He also noted diminished range of motion with pain in the cervical spine, as well as pain on manipulation of the bilateral SI joints. (Cl. Ex. 2, pp. 7-8) Dr. Mathew’s impression was chronic neck pain, cervical dystonia, thoracic dystonia, subdeltoid bursitis, enthesopathy of the cervical, thoracic, and lumbar spine, sacroiliitis, trochanteric bursitis, SI joint dysfunction, chronic pain syndrome, chronic pain related depression and anxiety, T12 compression fracture, and gait and balance dysfunction. (Cl. Ex. 2, p. 8)

Dr. Mathew responded to some questions posed by claimant’s attorney. With respect to the December 29, 2018 injury, Dr. Mathew opined that claimant’s injuries from that date include injuries to his neck and midback as described under “impression,” including enthesopathy of the cervical and thoracic spine, cervical and thoracic dystonia, and chronic pain. He opined that the work injury was a substantial contributing factor in bringing about claimant’s present cervical and thoracic pain.

Dr. Mathew also used the fifth edition of the AMA Guides to provide an impairment rating. He provided a 5 percent rating for the cervical spine, and a 6 percent rating for the thoracic spine injuries, including the T12 compression fracture. He opined that the care claimant received in his office and with Dr. Kline had been reasonable,

medically necessary, and a direct result of the work injury. With respect to future medical care, he opined that claimant would continue to benefit from medication management, injection therapies, oversight of physical therapy, chiropractic care, chronic pain psychology to deal with pain-related depression, and ongoing follow up with interventional pain management. (Cl. Ex. 2, p. 9) He noted that claimant's symptoms were gradually improving, overall improving his quality of life as he continued to work full time. Finally, with respect to restrictions, Dr. Mathew stated that he "would not place any activity restrictions" except that claimant "will have good days and bad days," and he should avoid overhead activities, pushing, pulling, and lifting more than 40 pounds on bad days as pain may be aggravated.

With respect to the October 9, 2020 injury, Dr. Mathew opined that that incident caused injuries, most significantly to claimant's low back, and aggravated some of his prior injuries to his neck and midback. Using the AMA Guides, he provided a 5 percent whole person impairment rating with respect to claimant's lumbar spine. He opined that the work injury was a substantial contributing factor to the medical care claimant had received from his office, including injection therapies to the lumbar spine, oversight of physical therapy, and medication management. With respect to future medical care, he felt claimant should continue chronic pain management, including medication management, injection therapy, oversight of physical therapy, pain psychology, and chiropractic care. He did not place any additional restrictions but reiterated that on bad days claimant would have difficulty with walking, bending, pushing and pulling, and lifting more than 40 pounds. (Cl. Ex. 2, p. 9)

Claimant continued to follow up with Dr. Mathew's office for injection therapy and participate in physical therapy. (Jt. Ex. 6, pp. 205-221) On March 14, 2022, Dr. Mathew issued a letter indicating claimant was able to work light duty no more than 8 hours per day, with no repetitive lifting over 20 pounds and no repetitive bending. (Jt. Ex. 6, p. 222) On March 21, 2022, he issued another letter that states "I do support work restrictions of no working more than 8 hours a day." (Jt. Ex. 6, p. 223)

On March 23, 2022, claimant had an IME with Jonathon Fields, M.D., at defendants' request. (Def. Ex. A, p. 1) Dr. Fields' report is dated April 1, 2022. Dr. Fields reviewed the medical records and interviewed claimant. (Def. Ex. A, pp. 1-5) Claimant reported at the time of Dr. Fields' exam that he had "numbing/tingling pain" at a level 5 of 10 located between his shoulder blades and going down his spine once he gets out of bed in the morning. (Def. Ex. A, p. 4) He was also experiencing dizziness when getting out of bed or tilting his head certain directions, as well as headaches three to four times per week that last four to five hours. He also complained of numbness and tremors/shakes in his bilateral arms when he gets a headache lasting a long period of time. He described his neck/shoulder and back pain as "pretty constant," and also described a numb feeling as well as pain in the left lumbar spine. Finally, he said that both hands were numb all the time, and the numbness gets worse when his hands are above his head. (Def. Ex. A, p. 4)

On physical examination, Dr. Fields noted several areas of tenderness to palpation, including claimant's bilateral upper trapezius, neck, between his shoulder blades, and midline spine. (Def. Ex. A, p. 6) He then provided answers to defense counsel's questions. With respect to the December 28, 2018 injury, Dr. Fields opined that claimant sustained a mild anterior wedge compression fracture of the T12 vertebral body, for which he was treated appropriately with bracing. (Def. Ex. A, p. 7) With respect to the upper trapezius and cervical pain, Dr. Fields opined it was unrelated to the work injury, and was "most consistent with a diagnosis of fibromyalgia." He noted that claimant's thoracic spine CT from December 29, 2018 showed the compression fracture at T12, but also noted degenerative changes throughout the mid and lower thoracic spine. He further noted claimant's cervical spine x-ray from January 2020 was unremarkable. Additionally, he noted that the MRI of claimant's thoracic spine from February 6, 2020 demonstrated mild multilevel degenerative disc disease. As such, he opined the objective imaging indicated a chronic degenerative condition.

With respect to the ongoing numbness in claimant's bilateral hands and feet, Dr. Fields opined it was not related to his work injury. He felt that his examination demonstrated some elements of bilateral thoracic outlet syndrome with respect to his upper extremities, and noted that the EMG performed by Dr. Mathew was normal. He then notes portions of the physical therapy records that mention leg numbness, and Dr. Igram's opinion that while the symptoms warrant investigation, he could not connect the headaches or numbness to the work injury. Finally, Dr. Fields opined that claimant's headache symptoms were consistent with tension-type headaches.

Dr. Fields opined that claimant's ongoing neck and back symptoms were not causally related to the work injury. Rather, he stated that his medical opinion was that claimant's ongoing neck and back symptoms were consistent with a more generalized chronic pain, and appear to meet the criteria for fibromyalgia. Likewise, he did not believe claimant's headaches were related to the work injury, but rather tension-type headaches associated with stress and mental tension. (Def. Ex. A, p. 7) With respect to future treatment, Dr. Fields stated that the compression fracture had healed, and no further treatment was necessary. (Def. Ex. A, p. 8) He recommended claimant follow up with his primary care provider for "any ongoing personal medical conditions," which would include chronic pain syndromes or evaluation and management of suspected fibromyalgia. He placed claimant at MMI on April 11, 2019, when he was discharged from physical therapy. He provided a 5 percent permanent impairment rating related to the T12 compression fracture, and did not believe claimant required any permanent work restrictions.

With respect to the October 9, 2020 injury, Dr. Fields opined that claimant sustained a contusion to his tailbone when he fell. He noted that claimant's lumbar spine x-ray taken October 13, 2020 showed "only mild degenerative changes and no acute changes." He again opined that claimant's ongoing symptomology is consistent with fibromyalgia. (Def. Ex. A, p. 9) He opined that claimant had a temporary increase in his symptoms as a result of the tailbone contusion, but his chronic pain condition was not permanently or materially aggravated, accelerated, or lit up by the October 9, 2020

injury. He did not recommend any future treatment regarding the tailbone contusion, and placed claimant at MMI on October 16, 2020, one week after the date of injury when claimant returned to work. Finally, he opined that claimant sustained zero percent impairment related to the October 9, 2020, date of injury, and required no work restrictions. (Def. Ex. A, p. 10)

Claimant continued with physical therapy until May 3, 2022. (Jt. Ex. 6, pp. 204-233) He also continued to receive injection therapy with Dr. Mathew's office during that time, including another round of Botox injections on April 26, 2022. (Jt. Ex. 6, pp. 228-229)

Claimant's attorney provided a copy of Dr. Fields' IME report to Dr. Mathew, and discussed his opinions regarding same via telephone on April 26, 2022. (Cl. Ex. 3, p. 11) He then wrote Dr. Mathew a letter dated May 4, 2022, asking him to confirm his opinions by agreeing or disagreeing with statements he provided. Dr. Mathew provided his responses to the "agree/disagree" statements, and signed his response on May 7, 2022. (Cl. Ex. 3, pp. 12-13)

With respect to the December 29, 2018 injury, Dr. Mathew agreed that his opinions regarding the first five questions addressed in his initial report had not changed. (Cl. Ex. 3, p. 12) Regarding restrictions, Dr. Mathew agreed he would add limiting work to 8 hours per day, and on bad days, he should limit lifting to no greater than 20 pounds. Finally, he agreed that claimant's clinical symptoms and presentation were consistent with the traumatic injury of December 29, 2018, involving the cervical, thoracic, and lumbar spine, and the posterior head, with the associated symptoms primarily on the posterior side where the trauma occurred.

With respect to the October 9, 2020 injury, Dr. Mathew agreed that his responses to the first four questions on his initial report were unchanged. (Cl. Ex. 3, p. 13) With respect to restrictions, he agreed he would add the 8-hour limit and 20-pound lifting restriction on bad days, the same as for the prior injury. And finally, he agreed that claimant's clinical symptoms and presentation were consistent with the traumatic injury of October 9, 2020, involving primarily the lumbar spine, with some reaggravation of the neck and midback, with symptoms primarily on the posterior side where the trauma occurred.

I find Dr. Mathew's opinions to be the most convincing. Dr. Mathew has been providing claimant with treatment since February 2020. He is intimately familiar with claimant's symptoms and treatment. He also reviewed Dr. Fields' report, which did not change his opinions. Dr. Fields only saw claimant one time, for purposes of an IME. He is the only medical professional who has mentioned fibromyalgia. Similarly, Dr. Igram only saw claimant on one occasion. Their opinions that claimant's ongoing symptoms must be related to a personal condition do not explain why claimant had no symptoms prior to the work injuries.

The physicians who have examined and treated claimant on more than one occasion support Dr. Mathew's opinions. Dr. Eck, claimant's first authorized treating physician, recommended claimant see a pain management specialist for potential injection therapy. (Jt. Ex. 2, p. 19) Rather than following that recommendation, defendants sent claimant to Dr. Igram for an IME, and discontinued treatment. Claimant then sought out treatment on his own, through Dr. Anwar and Dr. Mathew. The only doctors who have opined that claimant's ongoing symptoms and treatment are not related to the work injuries performed one-time examinations at defendants' request. Dr. Mathew's opinion is more credible given his extensive experience with claimant's treatment, and is supported by the remainder of the medical records in evidence. As such, I find that claimant sustained permanent injuries to his cervical, thoracic, and lumbar spine, consistent with Dr. Mathew's opinions. Additionally, I find the treatment claimant has received from Dr. Anwar and Dr. Mathew was reasonable and necessary treatment that was causally connected to the work injuries.

Claimant had a follow up with Dr. Mathew's office on May 25, 2022, at which time he indicated the Botox had been very effective to improve range of motion and decrease pain, but the last round wore off after about three weeks. (Jt. Ex. 6, p. 234) He stated he was interested in trying a higher dose of Botox. Claimant continued follow up with Dr. Mathew's office at the time of hearing, and testified that he received his most recent round of Botox injections the week of the hearing. (Tr., p. 55)

In addition to Dr. Mathew's office, claimant also saw Casey DeVries, D.C., for periodic chiropractic adjustments between September 4, 2020 and March 1, 2022. (Jt. Ex. 7, pp. 240-273) Claimant testified that of all the treatments he has had, Dr. Mathew's have been most beneficial. (Tr., p. 56) At hearing, he testified that he continues to have numbness in his hands, pain across his back at the T12 area, and pain from the base of his neck down into his shoulders. (Tr., pp. 56-57) He also continues to experience lumbar pain occasionally, especially if he leans over. (Tr. p. 57) He tries to avoid activities and movements that irritate his neck and back. (Tr., pp. 58-59)

Claimant testified that while he continues to work at Menard, he tries not to perform tasks that cause pain, such as stocking items or bending. (Tr., pp. 61-62) He stated that he mainly does "little things" that no one else wants to do, like computer work and following up on estimates. (Tr., p. 62) He said he usually stays at the desk. Claimant testified that he is currently working under the restrictions Dr. Mathew provided of no more than 8 hours per day, and no lifting more than 20 pounds or frequent bending. (Tr., p. 76) Menard is accommodating those restrictions.

With respect to claimant's job at Menard, prior to his October 9, 2020 injury, he was a second assistant general manager, and earned \$18.15 per hour, which included a "management bump" of \$3.60 per hour. (Cl. Ex. 5, p. 19) After his demotion to sales associate, he earned \$14.55 per hour, with no pay bump. Shortly thereafter, he applied for and received a new job as second assistant building materials manager. (Tr., p. 51)

On November 15, 2020, his rate of pay changed to \$15.90 per hour, which included a management bump of \$1.35 per hour. (Cl. Ex. 5, p. 20)

Claimant testified that as a general manager, he received a larger bonus as well. (Tr., p. 49) The bonus is paid out the following year, so claimant received his 2019 bonus in 2020, and his 2020 bonus in 2021. (Tr., p. 49) Claimant's wage records indicate that in 2020, he received \$10,440.89 in bonus money. (Cl. Ex. 6, p. 25) Claimant testified that this amount was based on his 2019 contract. (Tr., p. 52) In 2021, his bonus pay was \$14,319.21, which reflects bonuses based on his 2020 contract. (Cl. Ex. 6, p. 27) As of June 10, 2022, claimant's bonus amounted to \$2,726.81, which reflects the lower bonus scale claimant receives since being demoted. (Cl. Ex. 6, p. 28; Tr., p. 53)

At the time of hearing, claimant continued to work for Menard as a second assistant building materials manager. However, he had received a pay increase, and was earning \$20.90 per hour. (Cl. Ex. 6, p. 28; Tr., p. 54) Claimant testified that the sharp increase in his hourly wage was due to a pay incentive becoming permanent at some point in the year prior. (Tr., p. 54) He testified that there used to be an extra \$3.00 or \$4.00 pay incentive that was added to all hourly wages across the company. (Tr., pp. 54-55) As a result, he believes if he had continued in the assistant general manager position, he would be making around \$22.00 per hour. (Tr., p. 55) He testified that there was a bulletin that indicated the incentive was going to be rolled into hourly pay for all employees, and he believes this included general managers. (Tr., p. 81)

### **CONCLUSIONS OF LAW**

Claimant argues that he has sustained permanent partial disability from both the December 29, 2018 injury and the October 9, 2020 injury. Claimant further argues that he is entitled to industrial disability, pursuant to Iowa Code section 85.34(2)(v), because he is earning less than he was prior to the injuries due to his decreased bonus structure. Defendants argue that claimant sustained no more than five percent permanent partial disability related to the 2018 injury, which has been paid, and that the 2020 injury did not result in any permanent disability. Defendants further argue that claimant's reduced management bonuses cannot be used as the basis for awarding industrial disability under section 85.34(2)(v).

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).



The question of 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).

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 which 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. Id.; see also Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

With respect to the December 29, 2018 injury, the parties stipulated that claimant sustained permanent partial disability. Defendants previously paid 25 weeks of benefits based on Dr. Igram's five percent rating. (See Hearing Report) Defendants further argue that the proper date for commencement of benefits is April 9, 2019, and that medical treatment claimant received after that date is not related to the stipulated work injury.

I previously found Dr. Mathew's opinion to be more credible, and entitled to greater weight. Therefore, I adopt Dr. Mathew's functional impairment ratings related to the December 29, 2018 injury. Dr. Mathew provided a 5 percent whole body rating for the cervical spine, and a 6 percent whole body rating for the thoracic spine injuries, including the T12 compression fracture. Using the combined values chart in the AMA Guides, this comes to an 11 percent functional impairment.

With respect to the October 9, 2020 injury, the parties dispute whether the injury was the cause of permanent disability. Again, I found Dr. Mathew's opinion to be more credible, and adopt his functional impairment rating of 5 percent of the body as a whole related to the lumbar spine.

The next issue to determine is whether claimant is entitled to industrial disability. The legislature made amendments to Iowa Code section 85.34 that went into effect on July 1, 2017. Prior to that date, unscheduled injuries were automatically compensated in relation to a claimant's reduction in earning capacity through an evaluation of industrial disability. See Iowa Code section 85.34(2)(u) (pre-July 1, 2017). Effective July 1, 2017,

however, the legislature introduced a prerequisite before industrial disability is to be considered:

If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code section 85.34(2)(v).

The Commissioner has determined that a claimant's hourly wage, considered in isolation, is not sufficient to limit a claimant's compensation to functional disability. McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021); Vogt v. XPO Logistics Freight, File No. 5064694.01 (App. June 11, 2021). As the Commissioner explained in McCoy:

Iowa Code section 85.34(2)(v) states that the employee's compensation is limited when the employee "receives or would receive the same or greater salary, wages or earnings." Iowa Code section 85.34(2)(v) (emphasis added). This provision says nothing about hourly rates, and the use of the word "receive" implies a comparison of what the claimant was actually paid or offered to be paid both before and after the injury. See "Receive," <https://www.merriam-webster.com/dictionary/receive> (last visited on April 5, 2021) (defining "receive" as "to come into possession of"). Thus, I conclude a claimant's hourly wage must also be considered in tandem with the actual hours worked by that claimant or offered by the employer when comparing pre- and post-injury wages and earnings under section 85.34(2)(v).

Applying the same logic, in this case, claimant's hours are essentially the same, and his hourly wage is greater than it was at the time of injury, despite his demotion. However, he is subject to a reduced bonus structure with the result that his overall compensation has decreased. Defendants admit that claimant's bonuses are lower in his current position than he earned as an assistant general manager. However, defendants argue that because the bonuses were not guaranteed income, they should not be considered when determining whether claimant is earning the same or greater salary, wages, or earnings as he was at the time of the injury. Defendants point to case law regarding the exclusion of irregular bonuses in the calculation of the weekly benefit rate under Iowa Code section 85.36. However, the basis for the exclusion of irregular bonuses from the rate calculation is statutory. See Iowa Code section 85.61(3). In this situation, while amount of the bonus may vary based on many factors, it is the offer of a particular bonus structure that is at issue. He is no longer being offered the higher bonus structure available to an assistant general manager.

In this case, when claimant initially returned to work after his injury, he returned to his regular wages and bonus structure, and regular hours. Additionally, at the time of the hearing, claimant's hourly wage was higher than it was at the time of the injury. However, when claimant was demoted in October 2020, he lost the ability to earn the same level of management bonuses. The bonus structure he was subject to at the time of hearing starts at a much lower base than the bonus available to an assistant general manager. Claimant is not being offered work for which he "receives or would receive the same or greater salary, wages, or earnings" as he received at the time of the injury. As such, he is entitled to an evaluation 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). At the time of hearing, claimant continued working for Menard, although in a different position than he held at the time of injury. While he was subject to a demotion, there is no evidence that the demotion was a direct result of claimant's injuries. Claimant has restrictions limiting him to an 8-hour day, and advising him not to lift over 20 pounds on "bad days" and limit repetitive bending. Menard continues to accommodate claimant's restrictions. Claimant testified that he likes working for Menard, and plans to continue working there. (Tr., p. 59) While his bonuses have decreased due to his demotion, his hourly wage has increased. Again, there is no evidence that the demotion was related to the work injuries. As such, it is not a factor in considering the amount of industrial disability to be awarded. Claimant is educated and has management experience. He was able to secure a promotion to a management position shortly after his transfer to the Iowa City store.

Considering all the factors of industrial disability, I find claimant has sustained 15 percent permanent partial disability to the body as a whole related to the December 29, 2018 injury. This entitles him to 75 weeks of benefits. Claimant did not miss any work following the injury. Defendants argue that the commencement date for benefits is April 9, 2019, when Dr. Eck released claimant from care. However, claimant obtained additional care on his own after that date, as Dr. Eck recommended on May 30, 2019. (Jt. Ex. 2, pp. 18-19) Claimant contends the proper date for commencement of benefits is July 16, 2020, which is the date of Dr. Manshadi's IME.

Iowa Code section 85.34(2) states that compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement has been reached, and that the extent of loss or percentage of permanent impairment can be determined by use of the AMA Guides. As Dr. Manshadi provided an impairment rating on July 16, 2020, which was later adopted by Dr. Mathew, I find that the proper date for commencement of permanent partial disability benefits for the December 29, 2019 injury is July 16, 2020.

With respect to the October 9, 2020 injury, considering all of the factors of industrial disability, I find that claimant sustained 5 percent permanent partial disability to the body as a whole. This entitles him to 25 weeks of benefits. Defendants argue the proper commencement date for benefits is January 13, 2021, after claimant had completed imaging testing and was no longer reporting tailbone symptoms. Claimant argues the proper date is January 20, 2022, the date of Dr. Mathew's IME and the first time an impairment rating was issued for this date of injury. For the same reasons stated above, I find the proper date for commencement of permanent partial disability benefits for the October 9, 2020 injury is January 20, 2022.

The next issue to determine is payment of medical expenses. Claimant seeks reimbursement for out-of-pocket expenses related to unauthorized medical care received from Unity Point Health, Care Chiropractic, Linn County Emergency Medicine,

Radiology Consultants of Iowa, Dr. Stanley Mathew, P.L.L.C., CVS Pharmacy, and Walgreens Pharmacy. (Cl. Ex. 9, pp. 54-57)

Iowa Code section 85.27(4) provides the employer with the statutory right to choose the employee's medical care for work related injuries, with limited exceptions. However, the employer's statutory right to choose medical care for the employee's compensable injuries does not prohibit the employee from seeking his or her own medical care, at his or her own expense, when the employer denies compensability for the injury or the employee "abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Bell Bros. Heating and Air Cond. v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). In Bell Bros., the Iowa Supreme Court held that an employer's duty to furnish reasonable medical care includes unauthorized care if the employee can prove "by a preponderance of the evidence that such care was reasonable and beneficial" under the totality of the circumstances. Id. at 206. "[U]nauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id. This burden of proof honors the employer's statutory right to choose the injured employee's medical care under Iowa Code section 85.27(4), yet provides the employee with reimbursement for unauthorized medical care when he or she can show by a preponderance of the evidence that the care was reasonable and beneficial. Id. (See also Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 247–48 (Iowa 2018). It also aligns with the balance Iowa Code section 85.27(4) seeks to maintain between the employer's right to control medical care, and the medical needs of the employee. Id.

In this case, at the time claimant sought the unauthorized care, the employer had stopped providing any authorized treatment. Therefore, the care claimant received on his own was more beneficial than the care authorized by the employer, which was none. Claimant is entitled to reimbursement of his out-of-pocket expenses for the unauthorized care he received after defendants stopped providing treatment related to his injuries. Additionally, defendants shall hold claimant harmless with respect to the medical expenses paid by his personal health insurance, and reimburse any lien for related expenses as required. (Cl. Ex. 9, pp. 49-53)

Finally, claimant seeks costs. He claims \$103.00 for the filing fee of each petition; \$14.66 for service of notice and the petitions; \$101.20 for the court reporter transcript for claimant's deposition; and \$2,380.80 for Dr. Mathew's January 29, 2022 report, for a total of \$2,702.66. (Cl. Ex. 9, p. 48) Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. As claimant was generally successful in his claim, I use my discretion and award claimant costs in the total amount of \$2,702.66.

## **ORDER**

THEREFORE, IT IS ORDERED:

**For File No. 1660829.01 (Date of Injury December 29, 2018):**

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits, commencing July 16, 2020, at the stipulated rate of five hundred fifty-four and 36/100 dollars (\$554.36).

Defendants shall be entitled to a credit for all permanent partial disability benefits previously paid.

Defendants 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.

Defendants 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.

**For File No. 21700895.01 (Date of Injury October 9, 2020):**

Defendants shall pay claimant twenty-five (25) weeks of permanent partial disability benefits, commencing January 20, 2022, at the stipulated rate of five hundred eighty and 02/100 dollars (\$580.02).

Defendants 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.

Defendants 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.

**For both files:**

Defendants shall reimburse claimant for out-of-pocket medical expenses in the amount of seventeen thousand thirty-one and 21/100 dollars (\$17,031.21) and shall hold claimant harmless for any medical expenses paid by claimant's personal health insurance/reimburse any lien as required by the health insurance company.

Defendants shall reimburse claimant's costs in the total amount of two thousand seven hundred two and 66/100 dollars (\$2,702.66) as reflected in this decision

Signed and filed this 13<sup>th</sup> day of February, 2023.



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JESSICA L. CLEEREMAN  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Robert Legislador (via WCES)

Kent Smith (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.