

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUSTIN LOEW,

Claimant,

vs.

MENARD, INC.,

Employer,

and

XL INSURANCE AMERICA,

Insurance Carrier,  
Defendants.File Nos. 1652966.01  
20700736.01

## ARBITRATION DECISION

Head Note Nos.: 1108, 1402.30, 1402.40,  
1803, 1806, 2209, 2907

Claimant Justin Loew filed a petition in arbitration on January 23, 2017, File Number 5057482, alleging he sustained an injury to his back while working for Menard, Inc. ("Menards") on March 19, 2015. Loew later alleged he sustained an injury while attending physical therapy for the March 2015 injury. Menards and its then insurer, Praetorian Insurance Company ("Praetorian") admitted Loew sustained a work injury, but denied Loew reinjured his back while attending physical therapy. The matter proceeded to an arbitration hearing in January 2018, before Deputy Workers' Compensation Commissioner Michelle McGovern. The parties stipulated Loew sustained a permanent disability as a result of the March 2015 injury, but disputed the cause of his need for a second surgery. On October 30, 2018, Deputy McGovern, issued an arbitration decision finding the physical therapy treatment ordered by the treating physician was a substantial factor in causing Loew to sustain a herniated disc at L4-L5, resulting in the need for a second surgery. Deputy McGovern determined Loew sustained a 30 percent industrial disability and awarded him 150 weeks of permanent partial disability benefits, in addition to other relief. Workers' Compensation Commissioner Joseph Cortese, II, affirmed the arbitration decision in its entirety on appeal and the decision became final agency action.

Loew filed two new petitions in arbitration, File Number 1652966.01 on July 8, 2020, and File Number 20700736.01, on August 19, 2020. In File Number 1652966.01, Loew alleges he sustained an injury to his low back and body as a whole while working for Menards on August 13, 2018. In File Number 20700736.01, Loew alleges he sustained a cumulative injury to his low back, right leg, and right foot on March 13, 2019, while working for Menards. Menards and its insurer, XL Insurance America ("XL") filed answers to both petitions, denying Loew sustained a work injury.

An arbitration hearing was held *via* CourtCall video conference on August 26, 2021. Attorney Paul Thune represented Loew. Loew appeared and testified. Attorney Rachel Neff represented Menards. Brian Arndt, corporate legal counsel for Menards appeared. Brian Sampson appeared and testified on behalf of Menards. Joint Exhibits (“JE”) 1 through 7, and Exhibits 1 through 7 and A through K were admitted into the record. The record was held open through September 13, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

The parties submitted Hearing Reports, listing stipulations and issues to be decided. The Hearing Reports were approved at the conclusion of the hearing. Menards waived all affirmative defenses.

### **FILE NUMBER 1652966.01**

### **STIPULATIONS**

1. An employer-employee relationship existed between Menards and Loew at the time of the alleged injury.
2. Temporary benefits are no longer in dispute.
3. If the alleged injury is found to be a cause of permanent disability, the disability is an industrial disability.
4. If the alleged injury is found to be a cause of permanent disability, Loew is only entitled to recover the functional impairment rating since he returned to work at the same or greater salary, wages, or earnings he received at the time of the alleged injury.
5. If the alleged injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is March 27, 2019.
6. At the time of the alleged injury, Loew’s gross earnings were \$795.29 per week, he was married and entitled to two exemptions, and the parties believe the weekly rate is \$525.74.
7. Medical benefits are no longer in dispute.
8. Prior to the hearing Menards paid Loew 30 percent industrial disability for a prior work-related low back injury pursuant to an earlier arbitration decision.
9. Costs set forth in Exhibit 8 have been paid.

### **ISSUES**

1. Did Loew sustain an injury, which arose out of and in the course of his employment with Menards on August 13, 2018?

2. Is the alleged injury a cause of permanent disability?
3. If the alleged injury is a cause of permanent disability, what is the extent of disability?
4. Is Menards entitled to a credit against any new injuries for the prior 30 percent industrial disability award?
5. Should costs be assessed against either party?

**FILE NUMBER 20700736.01**

**STIPULATIONS**

1. An employer-employee relationship existed between Menards and Loew at the time of the alleged injury.
2. Temporary benefits are no longer in dispute.
3. If the alleged injury is found to be a cause of permanent disability, the disability is an industrial disability.
4. If the alleged injury is found to be a cause of permanent disability, Loew is only entitled to recover the functional impairment rating since he returned to work at the same or greater salary, wages, or earnings he received at the time of the alleged injury.
5. If the alleged injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is February 10, 2020.
6. At the time of the alleged injury, Loew's gross earnings were \$802.50 per week, he was married and entitled to two exemptions, and the parties believe the weekly rate is \$530.50.
7. Medical benefits are no longer in dispute.
8. Prior to the hearing Menards paid Loew 30 percent industrial disability for a prior work-related low back injury pursuant to an earlier arbitration decision.
9. Costs set forth in Exhibit 8 have been paid.

**ISSUES**

1. Did Loew sustain an injury, which arose out of and in the course of his employment on March 13, 2019?
2. Is the alleged injury a cause of permanent disability?

3. If the alleged injury is a cause of permanent disability, what is the extent of disability?
4. Is Menards entitled to a credit against any new injuries for the prior 30 percent industrial disability award?
5. Should costs be assessed against either party?

### **FINDINGS OF FACT**

Loew is single and lives in Waterloo, Iowa. (Transcript, page 16) At the time of the hearing he was 32. (Tr., p. 16)

Loew graduated from high school in 2007. (Exhibit D, p. 19; Tr., p. 16) In 2010, Loew earned an associate of applied science degree from Iowa Western Community College. (Ex. D, p. 19; Tr., p. 16) Loew studied electrical engineering technologies at the University of Northern Iowa from 2011 through 2015, but he has not earned a degree. (Ex. D, p. 19; Tr., p. 16)

Loew commenced employment with Menards on April 17, 2008. (Ex. H, p. 40; Tr., p. 17) Loew has worked for Menards in Waterloo, Shelby, and Council Bluffs. (Ex. D, p. 20) At the time of the hearing Loew was working full-time for Menards as the order pickup and delivery manager in Waterloo. (Tr., pp. 16-18) Loew has worked as the order pickup and delivery manager since July 2020. (Tr., p. 17) Loew supervises six to seven employees. (Tr., p. 17) Sampson, the general manager of the Waterloo store, is Loew's direct supervisor. (Tr., pp. 18, 63)

Loew's department is responsible for locating and pulling items purchased online for customers, conducting deliveries, and loading products from the store into customers vehicles. (Tr., p. 18) The items Loew works with range from grocery items to safes, doors, windows, appliances, and furniture. (Tr., pp. 18-19) Loew uses forklifts to move some items and he carries other items. (Tr., p. 19)

On March 19, 2015, Loew sustained an injury to his lower back when he was unloading patio chairs from the back of a truck while working for Menards. (Ex. I, p. 45; Tr., p. 20) Loew received medical treatment. (Ex. I; Tr., p. 20)

On April 28, 2015, Loew underwent lumbar spine magnetic resonance imaging. (JE 7, p. 1) The reviewing radiologist listed an impression of:

Left paracentral disc protrusion at L5-S1 with possible impingement on left S1 nerve root.

Central disc protrusion at L3-L4 and L4-L5.

Congenital spinal stenosis secondary to short pedicles.

(JE 7, pp. 1-2; Ex. I, p. 46)

In late January 2016, Loew was referred to Loren Mouw, M.D., a neurosurgeon, for treatment. (Ex. I, p. 46) Loew complained of low back pain, paresthesias in the left leg, left leg weakness, and left leg pain. (Ex. I, p. 46) Pursuant to an order from Dr. Mouw, Loew underwent additional magnetic resonance imaging on February 18, 2016. (JE 7, p. 3) The reviewing radiologist listed an impression of:

1. Disc protrusions at L3-L4, L4-L5 and L5-S1 . . .
2. Mild canal stenosis at L3-L4 and mild to moderate at L4-L5
3. Mild left foraminal stenosis at L4-L5.

(JE 7, p. 3)

On April 20, 2016, Dr. Mouw performed a left L5-S1 discectomy on Loew. (Ex. I, p. 46) Dr. Mouw ordered physical therapy for Loew following surgery. (Ex. I, p. 46; JE 1, p. 1) During physical therapy Loew reported his right side started hurting after the physical therapist increased the weight he was lifting and he requested the therapist use lighter weight during physical therapy. (Ex. I, p. 47)

During an appointment with Dr. Mouw on June 28, 2016, Loew relayed his left leg pain had resolved, but he reported he had increased low back pain with physical therapy over the prior week and he had developed right-sided back pain. (Ex. I, p. 47) Loew received additional therapy and work hardening. (Ex. I, p. 47) On discharge, the physical therapist noted Loew was concerned about the pain in his right low back area. (Ex. I, p. 47)

On September 27, 2016, Loew returned to Dr. Moew complaining of low back pain, and paresthesias, pain, and weakness in his right leg. (Ex. I, p. 47) Dr. Mouw documented Loew could not recall a specific incident that caused his additional discomfort and he ordered additional magnetic resonance imaging. (Ex. I, p. 47)

On October 7, 2016, Loew underwent lumbar spine magnetic resonance imaging. (JE 7, p. 4) The reviewing radiologist listed an impression of “[m]ultilevel degenerative changes of the lumbar spine worst at L4-L5 where there is a right paracentral disc extrusion causing moderate canal stenosis and mass-effect on the descending non exited right L5 nerve root.” (JE 7, p. 5)

Dr. Mouw performed a right L4-L5 minimally invasive discectomy on February 1, 2017. (Ex. I, p. 48; JE 1, p. 1) Loew returned to work at Menards following both of his surgeries. (Tr., p. 23)

Dr. Mouw later opined while the physical therapy Loew received “may not have been the sole cause of Mr. Loew’s disc herniation or even the major cause of his disc herniation,” he believed it was a substantial contributing factor. (JE 5, p. 1) Using Table

15-3 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) (“AMA Guides”), Dr. Mouw found Loew had a Category II impairment, and he assigned Loew a 10 percent impairment of the whole person. (JE 5, p. 1) Loew testified at the time of his last appointment with Dr. Mouw he was feeling better, but he still had some residual pain in his low back. (Tr., p. 23)

Sunil Bansal, M.D., an occupational medicine physician, performed an independent medical examination for Loew on September 26, 2017, and issued his report on November 15, 2017. (JE 6) Dr. Bansal found the March 2015 work injury caused Loew to develop pain in his back that radiated down his left leg into his foot and the work injury caused him to undergo a L5-S1 discectomy followed by physical therapy. (JE 6, p. 9) Dr. Bansal noted after lifting boxes during physical therapy Loew reported he developed pain on the right side radiating down his right leg to his knee and numbness and tingling in his right leg, which caused him to need a second surgery. (JE 6, p. 9) Dr. Bansal opined the physical therapy and work hardening were substantial contributing factors to Loew’s right-sided disc herniation, requiring surgery and noted following the second surgery Loew reported his right-sided pain had improved, but he continued to complain of frequent, constant, left-sided low back pain radiating down his left leg to his ankle. (JE 6, pp. 10, 12)

Menards and Praetorian obtained an opinion from Dr. Broghammer. (JE 6, p. 13) Dr. Broghammer opined “the October 7, 2016 MRI represents a natural progression of Mr. Loew’s lumbar spondylosis,” and that “Loew’s pre-existing lumbar spondylosis and the natural progression of this disease is the sole contributing factor to his disc herniation on the right side.” (JE 6, p. 13) Dr. Bansal opined,

I respectfully disagree with Dr. Broghammer. In fact, careful scrutiny indicates that the initial MRI taken after his March 19, 2015 injury showed an L4-L5 central disc protrusion with an annular tear. This indicates that the covering of the disc sac (annulus) was torn. Under this condition, the threshold for a disc herniation is markedly lower. The performance of the lifting activities in his physical therapy/work hardening was then a significant contributing factor for the extravasation of the right-sided disc material, given the backdrop of the lowered threshold.

(JE 6, p. 13)

Using Table 15-7 of the AMA Guides, Dr. Bansal assigned a zero percent rating for range of motion, a 10 percent whole person impairment for disc surgery and an additional one percent for two levels and an additional two percent for two surgeries, for a total of 13 percent, and for spinal nerve deficits under Tables 15-5, 15-16, and 15-18, he found a “20% sensory and motor of L5 =  $42 \times 20\% = 8\%$ ,” and assigned a total impairment of 20 percent to the body as a whole using the combined values chart. (JE 6, p. 14)

On January 25, 2018, four days before the arbitration hearing with Deputy McGovern, Menard's Waterloo promoted Loew from a full-time delivery scheduler to a first assistant department manager. (Ex. H, p. 40) Loew testified the new position was more physically demanding because he had to pull appliances, fencing material, garage packages, house packages, and other building supplies for deliveries for customers, which required more lifting. (Tr., pp. 24-25, 28) Loew would move appliances on a dolly and lift the appliances from the dolly into the customer's vehicle with another employee. (Tr., pp. 25-26) Loew typically lifted items weighing 80 to 100 pounds by himself a few times per day. (Tr., p. 26) He also lifted appliances weighing 200 pounds with another employee. (Tr., p. 27)

Loew testified on August 13, 2018, he bent over to wrap plastic around product to secure the product to a pallet and he felt "shooting pain" in his back that went down his left leg. (Tr., p. 28-29) Loew testified he also experienced pain in his left side, but his left side was worse than the right. (Tr., pp. 29-30)

On August 22, 2018, Loew attended an appointment with David Kinkle, D.O., reporting on August 13, 2018, he was bent over wrapping a pallet when he felt sharp pain in his low back, and he went home for the rest of the day. (JE 1, p. 1) Dr. Kinkle noted Loew had pain in his low back and left leg, which he described as throbbing and aching and numbness in his left foot. (JE 1, p. 1) Dr. Kinkle examined Loew, noted his injury was work-related, diagnosed him with a strain of the ligaments of the lumbar spine, ordered magnetic resonance imaging, and prescribed Celebrex and cyclobenzaprine. (JE 1, p. 2) Dr. Kinkle imposed restrictions of bending up to five minutes per hour, twisting up to five minutes per hour, no carrying or lifting above 10 pounds, no pushing or pulling over 15 pounds, and alternating between standing, sitting, and walking, as tolerated. (JE 1, pp. 2, 4) Loew did not miss any time from work due to the August 2018 injury. (Tr., p. 30)

On August 27, 2018, Loew underwent lumbar spine magnetic resonance imaging. (JE 7, p. 6) The reviewing radiologist listed an impression of degenerative changes of the lumbar spine, "[l]eft lateralizing disc bulge at L5-S1 level results in subarticular recess narrowing with disc contacting the descending S1 nerve root" and "[m]oderate left neural foraminal narrowing at L4-L5 and L5-S1 levels." (JE 7, p. 7)

Loew returned to Dr. Kinkle on August 29, 2018, complaining of throbbing, constant pain in his low back that is worse with bending and numbness in his left leg. (JE 1, p. 5) Loew relayed the pain was worse in the morning. (JE 1, p. 5) Dr. Kinkle examined Loew, noted magnetic resonance imaging showed "L5-S1 – bulging to the Left. L5-S1 coming in contact with the S1 nerve root. – Degenerative Changes." (JE 1, p. 6) Dr. Kinkle referred Loew to pain management, and continued his medication and restrictions. (JE 1, p. 6)

On September 14, 2018, Loew attended an appointment with Justin Elwood, M.D., for pain management, complaining of low back and left lower extremity pain. (JE 2, p. 1) Dr. Elwood examined Loew, assessed him with lumbar radiculopathy and

lumbar degenerative disc disease, and recommended a trial left sided L5 transforaminal epidural steroid injection. (JE 2, pp. 4-5)

Loew attended a follow-up appointment with Dr. Elwood on November 14, 2018, following a left sided L5-S1 transforaminal epidural steroid injection on October 9, 2018. (JE 2, p. 6) Loew relayed his pain improved 50 percent after the injection, but reported he continued to experience numbness in the posterior aspect of his left lower extremity with weakness. (JE 2, pp. 6, 10) Dr. Elwood recommended a repeat injection. (JE 2, p. 10)

On January 25, 2019, Loew returned to Dr. Elwood, reporting he believed the second injection he received in December 2018 was more beneficial than the first injection, but he continued to complain of low back pain and numbness in his left foot and some mild numbness traveling down his leg, and higher pain in the morning and with prolonged sitting. (JE 2, p. 11) Dr. Elwood recommended a repeat injection. (JE 1, p. 14)

Loew attended an appointment with Dr. Elwood on March 27, 2019. (JE 2, p. 16) Dr. Elwood documented Loew's left-sided pain had dramatically improved with the three injections and was manageable on the left side, but noted,

in the past couple weeks he has again been experiencing pain on the right side. This pain starts in the right buttock, then travels down the posterolateral thigh, the lateral calf, and into the top of the foot, primarily affecting the first and second toes. He states that it feels like his right foot frequently "falls asleep." He denies any recent accidents or obvious causes of this pain. He also experiences weakness in his right leg.

(JE 2, p. 16) Dr. Elwood recommended a right-sided L5-S1 transforaminal epidural steroid injection and prescribed hydrocodone-acetaminophen and cyclobenzaprine to use as needed during a trip to Jamaica. (JE 2, p. 18)

Loew testified that between August 2018 and March 2019 his job duties did not change and he continued to work in order pickup and delivery. (Tr., p. 31) Loew relayed that between August 2018 and March 2019 most of his pain was in the left side of his low back and left leg and at the beginning of the year the pain in the right side of his low back and right leg started getting worse and worse and he started having problems walking. (Tr., pp. 31-32) Loew admitted there was no specific incident at work that triggered his right-sided low back pain and noted the pain he was experiencing was similar to the pain he felt after his 2015 injury and reinjury during physical therapy. (Tr., pp. 46-47)

On March 28, 2019, Loew presented to the Grundy County Hospital Emergency Department, complaining of low back pain he had been dealing with over the past several years, noting the pain had increased to a point where he could not get up off the floor and he called an ambulance. (JE 3, p. 2) David Hagedorn, D.O., examined Loew,

noted he had tenderness in the right lumbar region and buttocks, decreased sensation in his right great toe, slightly weaker dorsiflexion of the right great toe than the left great toe, his reflexes in the lower extremities were a two out of four and equal, and straight leg raise on the right caused pain in the right lumbar region. (JE 3, p. 4) Dr. Hagedorn administered orphenadrine, dexamethasone, and morphine injections, listed an impression of lumbosacral radiculopathy at L5 and low back pain radiating to the right lower extremity, prescribed diazepam and a prednisone taper, and discharged him. (JE 3, pp. 4-5)

Loew testified the day he went to the emergency room he worked a normal workday and he performed his normal duties. (Tr., pp. 33-34) After he arrived home he put heat on his back. (Tr., p. 33) When Loew tried to get up after putting the heat on his back he fell to the floor and he could not move. (Tr., p. 33) Loew testified he was lying on the floor for several hours before his ex-wife came home and found him and called the ambulance. (Tr., p. 33) Loew denied doing anything at home to reinjure his back. (Tr., p. 33)

Around the same time as the above incident, Loew went on a trip to Jamaica with his ex-wife. (Tr., p. 34) Loew reported the six-day trip was nonrefundable. (Tr., p. 35) Loew testified the trip was painful and that Dr. Elwood prescribed painkillers and muscle relaxers for him before he left. (Tr., p. 35) Loew stated he sat on the beach on vacation and he did not engage in any recreational activities. (Tr., pp. 35-36) After his vacation Loew returned to work. (Tr., p. 36)

On May 23, 2019, Todd Harbach, M.D., an orthopedic surgeon, performed an independent medical examination records review for Menards and XL and responded to questions from the attorney for Menards and XL. (Ex. B) Dr. Harbach reviewed Loew's medical records, and noted he had not been provided with the radiographs, including the magnetic resonance imaging, to review and that he trusts his own reading much more than that of another physician. (Ex. B, p. 2)

Dr. Harbach opined Loew "aggravated a pre-existing degenerative condition/condition caused by previous surgery for work-related injury," when he was bending and wrapping a pallet. (Ex. B, p. 2) Dr. Harbach found the aggravation "should be temporary in nature and should resolve within a reasonable amount of time (3 months). Although I do not have the MRI to review, it does not sound as though there is significant neural compression. I am not sure whether or not the MRI was done with or without contrast which would show old scar tissue from previous surgery at this level." (Ex. B, p. 2) Dr. Harbach opined the injections were reasonably necessary and causally related to the August 2018 work injury and that Loew reached maximum medical improvement on March 27, 2019, when he returned to Dr. Elwood and reported he had a dramatic improvement after receiving injections. (Ex. B, p. 3) Dr. Harbach did not assign Loew an additional impairment rating and recommended no permanent restrictions or treatment. (Ex. B, p. 3) Dr. Harbach noted any patient who has undergone a discectomy should recover as long as the patient avoids bending and heavy lifting activities and continues to work on core exercises, nerve gliding exercises

and use nonsteroidal anti-inflammatory medication. (Ex. B, pp. 3-4) Dr. Harbach stated that personal, non-work-related factors that could lead to a need for medical care include "any activity at home including work around the yard or cleaning the home," but noted he was not aware of any personal factors at the time of his opinion. (Ex. B, p. 4)

In response to the last question from counsel for Menard and XL, Dr. Harbach explained:

**Question #7: *With regard to any changes in the condition of the claimant's low back/lumbar spine subsequent to the claimant February 1, 2017, surgery whether shown by subsequent MRI or objective finding, or through claimant's subject reporting, would such changes be a natural and expected consequence of the condition of the claimant's low back/lumbar spine as existed immediately before his initial March 19, 2015, work injury?***

**Answer:** That is a very convoluted question, but in essence, I agree with what it is suggesting which is that the natural progression of somebody with a very degenerative back such as this patient with 3 levels of degenerative disk disease with annual tears and bulging disks at all 3 levels and a congenitally-narrow spinal canal due to the short pedicles, further bulging of the disk can certainly be a consequence of normal aging. If, however, there is a specific date and time or injury either at work or in his rehabilitation for work hardening after his surgery that can be identified, then that could be the cause of the new herniated disks that he had at L4-L5. If such an incident or event cannot be easily delineated, then it is hard to state that his new herniation at L4-L5 was caused by his rehab after his first surgery.

(Ex. B, p. 4)

Loew underwent lumbar spine magnetic resonance imaging on November 13, 2019. (JE 7, p. 8) The reviewing radiologist listed an impression of an L3-L4 level right posterior disc herniation. (JE 7, p. 9)

On November 19, 2019, Loew attended an appointment with Dr. Mouw, complaining of low back pain and paresthesias/pain in his right leg that was new since his previous visit. (JE 5, p. 2) Loew described the pain as having an aching and dull quality, radiating into the right posterior thigh, posterior leg, dorsum of the foot, buttocks, and great toe. (JE 5, p. 2) Dr. Mouw noted the paresthesias in the right leg are a new symptom and are localized in the right inner foot and Loew had back pain with paresthesias involving the medial right foot that developed 13 months ago when he was wrapping a pallet. (JE 5, p. 2) Dr. Mouw examined Loew, assessed him with lumbar spondylosis, lumbosacral radiculopathy, degeneration of lumbar intervertebral disc with acute herniation, and other intervertebral disc degeneration in the lumbar region, discussed the risks and benefits of surgery versus other conservative treatment, and

noted at the time of his examination Loew had no significant right lower extremity symptoms or findings and minimal back pain. (JE 5, p. 4)

Loew attended 48 sessions of physical therapy between April 26, 2019 and February 10, 2020, when he was discharged. (JE 4) Loew testified the physical therapy alleviated some of his right-sided pain in his back and leg, but he still has issues with it from time to time and it has never gone away. (Tr., p. 37) Loew reported he has continued to have numbness along the left side of his right foot and he does not have 100 percent feeling in his right big toe. (Tr., p. 37) During his deposition Loew was not able to describe any difference in his pain in 2015 from his pain after the August 2018 work injury. (Tr., p. 46) Loew had right-sided and left sided low back and leg pain prior to the August 2018 work injury. (Tr., pp. 45-46)

On November 18, 2019, Loew's attorney sent Dr. Mouw a letter, asking him the following questions:

Question No. 1: Do you agree that Justin sustained an injury to his lower back as a result of attempting to lift a pallet while working for Menards on August 13, 2018?

ANSWER: YES \_\_\_\_\_ NO \_\_\_\_\_

Question No. 2: Does the 2019 MRI show a change from prior studies?

ANSWER: YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer is "yes," what are these changes and are they related to the August 2018 injury or are they a progression from the 2015 injury and subsequent surgeries?

ANSWER:

Question No. 3: Are the left sided symptoms reported by Justin related to the August 2018 injury or are they related to the 2015 injury?

ANSWER:

Question No. 4: The medical records indicate that Justin reported right sided pain and numbness in March 2019. Is this condition related to his August 2018 injury, or is it related to his 2015 injury which required surgery at L4-L5 on the right on February 1, 2017?

ANSWER:

Question No. 5: What medical treatment do you recommend for Justin?

ANSWER:

(Ex. 4, p. 3)

On March 5, 2020, Dr. Mouw responded to Loew's counsel's letter, as follows:

1. Yes.
2. Yes. The changes in the MRI dated 11/13/2019 are new compared to previous MRI's. He now has a new HVD at L3-4 on the right.
3. Mr. Loew did not have any left-sided complaints on 11/19/2019.
4. It appears that his right-sided symptoms reported in March 2019 are related to his injury in August 2018. By my records, he was symptom free as of 5/16/2017 from his 2015 injury.
5. On the 11/19/2019 visit, his symptoms were fairly well tolerated. I instructed him to return if he noticed worsening symptoms.

(Ex. 3, p. 1)

Loew testified he discussed surgery with Dr. Mouw and Dr. Mouw did not believe he needed surgery at this time. (Tr., p. 38) Loew reported he has not missed any work due to his most recent work injuries. (Tr., p. 39)

On May 20, 2020, Loew received a pay increase from Menards from \$16.30 per hour to \$17.35 per hour. (Ex. H, p. 41) On July 5, 2020, he received an additional pay increase from \$17.35 per hour to \$17.70 per hour when Menards moved him from a first assistant manager to an OPD manager position. (Ex. H, p. 42) Loew's job duties have remained much the same since his promotion. (Tr., p. 39) Loew has not asked for any work restrictions from Dr. Mouw or any other medical provider. (Tr., p. 39) Loew testified bending affects him the most. (Tr., p. 40)

On February 18, 2021, Dr. Bansal conducted an independent medical examination for Loew concerning the August 2018 and March 2019 injury dates and issued his report on May 10, 2021. (Ex. 1) Dr. Bansal reviewed Loew's medical records and examined him. (Ex. 1)

Dr. Bansal opined Loew aggravated his L3-L4 disc protrusion on August 13, 2018, while bending forward and wrapping a pallet. (Ex. 1, p. 7) In support of his conclusion, Dr. Bansal noted "[t]he August 27, 2018 MRI I reviewed is significant for advancement of his disc protrusion as noted in the October 2016 MRI. After the August

13, 2018 incident, the disc has advanced, encroaching to the inferior aspect of the neural foramina.” (Ex. 1, p. 7)

Using Table 15-7 of the AMA Guides, Dr. Bansal assigned a zero percent rating for range of motion, a 10 percent whole person impairment for disc surgery and an additional three percent for three levels and an additional two percent for two surgeries, for a total of 15 percent, and for spinal nerve deficits under Tables 15-5, 15-16, and 15-18, he found a “20% sensory and motor of L5 =  $42 \times 20\% = 8\%$ ,” and “20% sensory and motor of L4 =  $39 \times 20\% = 8\%$ ” and assigned a total impairment of 28 percent to the body as a whole using the combined values chart. (Ex. 1, p. 8) Dr. Bansal noted, “[i]mplicit within the range of motion method is apportioning prior impairment. As Mr. Loew has had a prior impairment of 20% to his lumbar spine, the apportioned amount attributable to the August 13, 2018 injury would be  $28 - 20 = 8\%$  whole person impairment.” (Ex. 1, p. 8)

Dr. Bansal also opined “[a]gainst the backdrop of the August 13, 2018 injury that led to the advancement and migration of the L3-L4 disc protrusion, Mr. Loew continued to perform lifting at Menards that most likely contributed to the continued extravasation of the L3-L4 disc, resulting in the disc herniation noted on the November 13, 2019 MRI.” (Ex. 1, pp. 8-9) Dr. Bansal did not assign any additional impairment rating for the 2019 injury. (Ex. 1, p. 9) Dr. Bansal also opined “the clinically significant disc pathology from the March 2015 injury was to the L4-L5 and L4-S1 levels. The August 13, 2018 injury resulted in clinically significant L3-L4 disc pathology.” (Ex. 1, p. 9)

On June 15, 2021, Trevor Schmitz, M.D., an orthopedic spine surgeon, conducted an independent medical examination of Loew for Menards and XL, and issued his report on July 27, 2021. (Ex. C) Dr. Schmitz examined Loew and reviewed his medical records and responded to questions from the attorney for Menards and XL. (Ex. C)

Dr. Schmitz opined,

I would state, at this time, that the existing condition of the claimant’s low back is materially different as it existed on January 29, 2018. At this time, Mr. Loew has primarily been experiencing low back pain along with some right big toe numbness. He no longer has any significant left leg pain and as such, I would state that his overall symptoms had changed. In addition, he has a new acute-appearing right L3-L4 disc herniation on MRI, in addition to his longstanding congenital lumbar stenosis. This is new on his November 13, 2019, MRI and is different than his MRI on August 27, 2018.

(Ex. C, p. 12) Dr. Schmitz found there had not been a material worsening of Loew’s work-related back condition since January 29, 2019, and he assigned him no additional impairment from the impairment that existed as of January 2018. (Ex. C, p. 12) Dr. Schmitz opined, “I do not feel as though his current disc herniation at L3-L4 is related to

his March 19, 2015, injury,” and he recommended no permanent restrictions for Loew’s low back related to the March 19, 2015, injury. (Ex. C, p. 12)

When questioned about whether there had been any intervening events or personal conditions not related to the work injuries that had intervened or otherwise caused a material change in the condition of Loew’s lower back since January 2018, Dr. Schmitz responded,

I would state that Mr. Loew has congenital lumbar stenosis. This means he was born with less space available for his spinal cord than the average individual. He is extremely predisposed to having low back issues because of this. In essence, a minor disc bulge with otherwise normal related change in Mr. Loew’s back is going to cause him significantly more issues as he is already starting with less space available for his spinal cord and nerves. Given this, I would anticipate Mr. Loew having significant low back conditions regardless of his work or other activities. Lastly, he notes that his most recent symptoms were right-sided low back pain with right leg radiculopathy. It appeared to have started around March 27, 2019, and he denied any recent accidents or significant inciting events at a visit on March 27, 2019, with Dr. Elwood. I would relate his current condition to his congenital lumbar stenosis and new onset right L3-L4 disc herniation, which I do not think had any relation to any alleged work activity.

(Ex. C, p. 13) Dr. Schmitz further explained Loew’s low back has materially worsened and that he did not believe the worsening “is in any way related to his work activities or rather is related to his new onset right L3-L4 disc herniation, which, per the records, cannot really be attributed to any work-related activity and is certainly different than any alleged 2018 or 2019 injuries.” (Ex. C, p. 13) Dr. Schmitz did not recommend any additional treatment for Loew or modification of Dr. Harbach’s prior opinion. (Ex. C, p. 13)

Dr. Schmitz noted that when Loew reported having right-sided low back pain to Dr. Elwood within a couple of weeks prior to his March 27, 2019, appointment, Loew denied any recent accidents, and when he received emergency medical treatment the next day, he reported he began experiencing back pain at work earlier that day with no new injury or incident. (Ex. C, pp. 13-14) Dr. Schmitz opined, “[g]iven this and the fact that he is predisposed to lumbar spinal issues given his lumbar congenital lumbar spinal stenosis, I would state that the records are relatively clear that there was not a significant aggravating factor or injury at this time. I could not with any reasonable degree of medical certainty state for certain, or more likely than not, that his work materially aggravated or caused a new injury to his back and given this.” (Ex. C, p. 14)

Dr. Schmitz opined the new acute-appearing right L3-L4 disc herniation is different than his previous work injuries and because there was no inciting event or injury that occurred in March 2019, he “would state that this is likely a personal

underlying health condition related to his chronic multilevel lumbar degenerative changes and congenital lumbar stenosis, more so than any work-related injury.” (Ex. C, p. 14) Dr. Schmitz assigned no permanent impairment rating under the AMA Guides, recommended no additional medical care or restrictions related to the alleged March 2019 injury, and he placed Loew at maximum medical improvement on February 10, 2020, after 10 months of physical therapy sessions, again finding the condition is not related to any alleged work injury. (Ex. C, p. 14)

Loew testified he does not have any issues performing his daily life activities as a result of his work injuries. (Tr., pp. 52-53) Loew is able to lift between 100 and 150 pounds. (Tr., p. 53) Loew reported he experiences intermittent left leg pain once every couple of weeks and that his right side has been more of a problem. (Tr., p. 52) At the time of his deposition Loew reported he was having right leg pain once per month. (Tr., p. 52) At hearing Loew relayed that he had been having some pain in his right leg during the past couple of weeks, noting the pain is similar to the pain he has had in the past. (Tr., pp. 52-53)

## **CONCLUSIONS OF LAW**

### **I. Applicable Law**

These cases involve the issues of nature and extent of disability, successive disabilities, and entitlement to costs under Iowa Code sections 85.34 and 86.40. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers’ compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. These cases involve a injuries occurring after July 1, 2017, therefore, the provisions of the new statute involving extent of disability under Iowa Code section 85.34 apply to these cases.

The calculation of interest is governed by Deciga-Sanchez v. Tyson Foods, File No. 5052008 (Ruling on Defendant’s Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Again, given these cases concern injuries occurring after July 1, 2017, the new provision on interest applies to these cases.

## **II. Arising Out of and in the Course of Employment**

Loew alleges he sustained a traumatic injury to his low back on August 13, 2018, and a cumulative injury to his low back, which manifested on March 13, 2019. Menards and XL reject his assertion, averring his low back condition was not materially aggravated, accelerated, or lit up by his work at Menards on August 13, 2018, and March 13, 2019, and is rather the natural consequence of his preexisting low back condition. Menards and its two insurers have raised the same argument in multiple proceedings, arguing Loew's low back problems are due to his congenital condition, and not to injuries he has sustained while working for Menards.

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

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

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which

bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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

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

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

A cumulative injury is an occupational disease that develops over time, resulting from cumulative trauma in the workplace. Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 681 (Iowa 2015); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 851 (Iowa 2009); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 372-74 (Iowa 1985). “A cumulative injury is deemed to have occurred when it manifests – and ‘manifestation’ is that point in time when ‘both the fact of the injury and the causal relationship of the injury to the claimant’s employment would have become plainly apparent to a reasonable person.’” Baker, 872 N.W.2d at 681. The Iowa Supreme Court has held:

a cumulative injury is manifested when the claimant, as a reasonable person, would be plainly aware (1) that he or she suffers from a condition or injury, and (2) that this condition or injury was caused by the claimant’s employment. Upon the occurrence of these two circumstances, the injury is deemed to have occurred.

Herrera v. IBP, Inc., 633 N.W.2d 284, 288 (Iowa 2001).

Four physicians have given opinions on causation in this case, Dr. Harbach, an orthopedic surgeon who performed a records review independent medical examination for Menards and XL, Dr. Mouw, a treating neurosurgeon, Dr. Bansal, an occupational medicine physician who performed an independent medical examination for Loew, and Dr. Schmitz, an orthopedic spine surgeon who performed an independent medical examination for Menards and XL. I find Dr. Bansal’s opinion, as supported by Dr. Mouw’s opinion to be the most persuasive.

Dr. Harbach opined Loew aggravated a pre-existing degenerative condition caused by previous surgery for a work-related injury when he was bending and wrapping a pallet on August 13, 2018. (Ex. B, p. 2) Dr. Harbach then opined the aggravation “should be temporary in nature and should resolve within a reasonable amount of time (3 months),” noting he did not have the magnetic resonance imaging to review himself. (Ex. B, p. 2) Dr. Harbach opined the injections Dr. Elwood administered were reasonably necessary and causally related to the August 2018 work injury and found Loew reached maximum medical improvement on March 27, 2019. (Ex. B, p. 3) Dr. Harbach agreed the changes to Loew’s spine subsequent to the February 1, 2017 surgery could be due to the natural progression of his three levels of degenerative disc disease with a congenitally-narrow spinal canal with short pedicles, and that bulging discs can be a consequence of normal aging, but noted if a specific date and time of injury could be identified, then that could be the cause of the new herniated discs he had at L4-L5, but without such an incident or event it is hard to determine the cause of the new herniation. (Ex. B, p. 4) Dr. Harbach’s opinion is equivocal. He did not personally review Loew’s imaging or examine him and indicated the aggravation he experienced “should be temporary.” He also did not address the imaging findings at L3-L4.

Dr. Mouw has treated Loew over time since his first work injury and performed surgery on him. Dr. Mouw agreed Loew sustained an injury to his back as a result of attempting to lift a pallet while working for Menards on August 13, 2018. (Exs. 3, p. 1; 4, p. 3) Dr. Mouw found Loew did not have any left-sided complaints on November 19, 2019, and that the right-sided symptoms from March 2019 are related to the August 2018 work injury because he was symptom free as of May 16, 2017, from the 2015 injury. (Exs. 3, p. 1; 4, p. 3)

Dr. Bansal has conducted two independent medical examinations for Loew, after his 2015 injury and 2016 reinjury, and after the August 2018 injury. As with Dr. Mouw, Dr. Bansal opined Loew aggravated his L3-L4 disc protrusion on August 13, 2018, while bending forward and wrapping a pallet. (Ex. 1, p. 7) In support of his conclusion, Dr. Bansal noted “[t]he August 27, 2018 MRI I reviewed is significant for advancement of his disc protrusion as noted in the October 2016 MRI. After the August 13, 2018 incident, the disc has advanced, encroaching to the inferior aspect of the neural foramina.” (Ex. 1, p. 7) Dr. Bansal also opined “[a]gainst the backdrop of the August 13, 2018 injury that led to the advancement and migration of the L3-L4 disc protrusion, Mr. Loew continued to perform lifting at Menards that most likely contributed to the continued extravasation of the L3-L4 disc, resulting in the disc herniation noted on the November 13, 2019 MRI.” (Ex. 1, pp. 8-9) Dr. Bansal noted, “the clinically significant disc pathology from the March 2015 injury was to the L4-L5 and L4-S1 levels. The August 13, 2018 injury resulted in clinically significant L3-L4 disc pathology.” (Ex. 1, p. 9)

Dr. Schmitz conducted one independent medical examination of Loew for Menards and XL. Dr. Schmitz opined Loew’s low back condition is materially different as it existed on January 29, 2018, noting Loew has been primarily experiencing low

back pain with some right big toe numbness, and he no longer has any significant left leg pain, noting his overall symptoms had changed. (Ex. C, p. 12) Dr. Schmitz further noted Loew has a new acute-appearing right L3-L4 disc herniation on his magnetic resonance imaging from November 2019, in addition to his longstanding congenital lumbar stenosis, which is different from his August 27, 2018 magnetic resonance imaging. (Ex. C, p. 12) Dr. Schmitz then found there had not been a material worsening of Loew's work-related back condition since January 29, 2019, and opined he did not believe the current disc herniation at L3-L4 is related to the March 2015 injury. (Ex. C, p. 12) Dr. Schmitz noted Loew denied having any recent incidents or accidents prior to his appointment with Dr. Elwood on March 27, 2019, and related his current condition with the L3-L4 disc herniation to his congenital lumbar stenosis. (Ex. C, pp. 13-14) Dr. Schmitz did not address Dr. Bansal's opinion concerning changes on imaging, address Dr. Mouw's opinion, or cite to any published authority supporting his contentions. I do not find his opinion persuasive.

Drs. Bansal and Mouw have both opined Loew's work injury in August 2018 caused the L3-L4 disc pathology. Dr. Bansal also found that Loew's continued lifting after the August 2018 injury led to the advancement and migration of the L3-L4 disc protrusion. This is supported by Loew's testimony and his medical records.

Loew testified his condition worsened in early 2019 while he was performing his normal duties for Menards and that no particular incident triggered his right-sided symptoms. Loew testified the day he went to the emergency room he worked a normal workday and he performed his normal duties. (Tr., pp. 33-34) After he arrived home he put heat on his back. (Tr., p. 33) When Loew tried to get up after putting the heat on his back he fell to the floor and he could not move. (Tr., p. 33) Loew testified he was lying on the floor for several hours before his ex-wife came home and found him and called the ambulance. (Tr., p. 33) Loew denied doing anything at home to reinjure his back. (Tr., p. 33) This testimony raises an issue of credibility.

During the hearing I assessed Loew's credibility by considering whether his testimony was reasonable and consistent with other evidence I believe, whether he had made inconsistent statements, his "appearance, conduct, memory and knowledge of the facts," and his interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Loew has an obvious interest in the outcome of this case. I had the opportunity to observe Loew testify under oath. During his testimony he engaged in direct eye contact, his rate of speech was appropriate, and he did not engage in any furtive movements. Loew's memory was clear and consistent. Menards and XL raised Loew's trip to Jamaica, his ability to lift 100 to 150 pounds, and the fact he has not missed work due to his injuries as evidence he has not sustained a permanent impairment. Loew's own supervisor testified he believes Loew is a trustworthy individual. Loew has worked for Menards for many years and he is a dependable employee. I find Loew's testimony reasonable and consistent with the other evidence I believe. Based on my personal observations at hearing, I found Loew to be a credible witness.

Loew's testimony is also supported by the medical records from his trip to the emergency room in late March 2019. On examination, the emergency room physician noted he had tenderness in the right lumbar region and buttocks, decreased sensation in his right great toe, slightly weaker dorsiflexion of the right great toe than the left great toe, his reflexes in the lower extremities were a two out of four and equal, and straight leg raise on the right caused pain in the right lumbar region. (JE 3, p. 4) The emergency room physician administered orphenadrine, dexamethasone, and morphine injections, listed an impression of lumbosacral radiculopathy at L5 and low back pain radiating to the right lower extremity, prescribed diazepam and a prednisone taper, and discharged Loew. (JE 3, pp. 4-5)

Loew has continued to experience intermittent issues with his right low back and right lower extremity since March 2019. While he had pain and symptoms in his right and left low back and left and right lower extremities following the 2015 work injury and 2016 reinjury, the symptoms he presented with following the August 2018 and March 2019 work injuries are not the same, as supported by his medical records. I find Loew has established he sustained an injury arising out of and in the course of his employment with Menards on August 13, 2018, and a cumulative injury which manifested on March 13, 2019. I also find he sustained a permanent impairment caused by his work injuries, as supported by Dr. Bansal's opinion.

### **III. Extent of Disability and Credit**

Loew has continued to work for Menards following the August 2018 and March 2019 work injuries, and he has received pay increases since both work injuries. Loew correctly agreed, under the statute, he is only entitled to the functional loss for his injuries in relation to 500 weeks. Iowa Code § 85.34(2)(v). Under the statute,

[i]f 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 rating resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement of benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Id. The statute also provides,

[i]n all cases of permanent partial disability described in paragraph “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity, the extent or loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers’ compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of impairment pursuant to paragraphs “a” through “u”, or paragraph “v” when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(x). The Workers’ Compensation Commissioner has adopted the AMA Guides 5th Edition. 876 IAC 2.4.

Dr. Bansal is the only physician who has provided an opinion on functional loss in this case. Dr. Bansal assigned Loew a 28 percent permanent partial impairment to his lumbar spine, apportioning 20 percent to his prior work injury and eight percent to the August 2018 work injury. (Ex. 1, p. 8) Dr. Bansal did not find Loew sustained any additional functional loss attributable to the March 2019 work injury.

Menards and XL aver Loew is not entitled to any additional benefits in this case because they are entitled to a credit for the prior 30 percent industrial disability award of 150 weeks of permanent partial disability benefits they paid to Loew for the 2015 work injury and his functional loss is less than the prior 30 percent award. Loew avers the credit Menards and XL seek applied to the old law before the 2017 changes to the statute which created functional loss for industrial cases where the employee has returned to work or has been 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.

Iowa Code section 85.34(7) provides,

[a]n employer is liable for compensating only that portion of an employee’s disability that arises out of and in the course of the employee’s employment with the employer and that relates to the injury that serves as the basis for the employee’s claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee’s preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee’s preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. . . .

The Legislature did not modify the language of Iowa Code section 85.34(7) in 2017.

This case involves a new injury Loew sustained to his lumbar spine at the L3-L4 level while working for Menards. Under the 2017 changes to the statute, Loew is only entitled to functional loss in this case because he remains employed by Menards and he is earning greater wages than he did at the time of the 2018 injury. Loew's total functional loss for his combined injuries while working for Menards is 28 percent, which is less than the prior 30 percent award he received of 150 weeks of permanent partial disability benefits following the 2015 work injury. Under the plain meaning of Iowa Code section 85.34(7), Menards is entitled to a credit for the prior award and Loew is entitled to no additional benefits for the 2018 work injury at this time.

#### **IV. Medical Treatment**

Loew has not received a bill for any medical treatment he has received, and he believed Menards and XL were covering all of his medical expenses related to his work injury. Loew points to the fact that Exhibit G does not show Menards and XL have made any medical payments since August 13, 2018. Menards and XL did not address medical bills and treatment in their post-hearing brief.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

I find the care Loew received from Dr. Kirkle, Grundy County Hospital, Dr. Elwood, Agape Therapy, and Dr. Mouw related to his work injuries beneficial, reasonable, and necessary. Menards and XL remain responsible for all causally connected medical treatment, and all future causally connected medical treatment.

**V. Costs**

Loew seeks to recover the \$300.00 cost of obtaining Dr. Mouw's report. Defendants aver Loew is not entitled to recover the cost because there is no reference that the fee is for his report. Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers' compensation commissioner for: (1) the attendance of a certificated shorthand reporter for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioner's deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes.

The \$300.00 charge is listed as a prepayment for a telephone conference with Dr. Mouw on August 24, 2020. (Ex. 7) The parties did not produce a report from Dr. Mouw after he responded to Loew's counsel by letter on March 5, 2020. The charge does not indicate it is for the March 5, 2020 report. The administrative rule does not allow for recovery of the cost of a telephone conference. I find Loew is not entitled to recover the \$300.00 cost of the telephone conference with Dr. Mouw from August 2020.

**ORDER**


IT IS THEREFORE ORDERED, THAT:

Claimant shall take nothing further.

Defendants are responsible for all causally connected medical bills and all causally connected future medical care.

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

Signed and filed this 15<sup>th</sup> day of December, 2021.

  
\_\_\_\_\_  
HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Paul Thune (via WCES)

Rachel Neff (via WCES)

Charles Blades (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.