

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD KLINDT,

Claimant,

vs.

XPO LOGISTICS FREIGHT,

Employer,

and

INDEMNITY INSURANCE COMPANY  
OF NORTH AMERICA,

Insurance Carrier,  
Defendants.

File No. 1662268.01

ARBITRATION DECISION

Head Notes: 1800; 1804; 2500; 2501;  
2700; 3000; 3001; 3002; 4100

**STATEMENT OF THE CASE**

The claimant, Donald Klindt, filed a petition for arbitration seeking workers' compensation benefits from employer XPO Logistics ("XPO"), and their insurer, Indemnity Insurance Company of North America. Laura Pattermann appeared on behalf of the claimant. Tiernan Siems appeared on behalf of the defendants.

The matter came on for hearing on February 16, 2023, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner, the hearing occurred electronically via Zoom. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-9, Claimant's Exhibits 1-6 and 8-10, and Defendants' Exhibits A-G and I-K. The defendants' proposed exhibits exceeded the 50-page guideline for hearing exhibits. An oral motion was granted at the hearing for the defendants to exceed the guidelines.

Prior to the hearing, the claimant timely filed an objection regarding defendants' proposed exhibit H. This was a statement provided in June of 2019 by an individual named Frank Saddlemire. The claimant indicated that the statement was not timely disclosed, and that the claimant should be afforded the opportunity to cross-examine the witness. The defendants argued that the objection was untimely, and that there was no prejudice against the claimant by admitting the proposed exhibit. I noted that the defendants were twice asked to supplement discovery between the time the statement

was produced and the time of the hearing. This prejudiced the claimant, and defendants' proposed exhibit H was excluded from the record.

The claimant testified on his own behalf. Kristi Miller was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted after the parties submitted post-hearing briefing on May 1, 2023.

### **STIPULATIONS**

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

1. There was an employer-employee relationship at the time of the alleged injury.
2. That the claimant sustained an injury, which arose out of and in the course of employment, on March 20, 2019.
3. That the alleged injury is a cause of temporary disability during a period of recovery.
4. That the alleged injury is a cause of permanent disability.
5. That the permanent disability is an industrial disability.
6. That the commencement date for permanent partial disability benefits, if any are awarded, is January 25, 2022.
7. That, at the time of the alleged injury, the claimant was single and entitled to three exemptions.

Entitlement to temporary disability and/or healing period benefits was no longer in dispute. The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

### **ISSUES**

The parties submitted the following issues for determination:

1. The extent of permanent disability benefits, if any are awarded.
2. Whether the claimant is permanently and totally disabled.
3. The proper calculation of the claimant's gross earnings and resulting weekly rate of compensation.

4. Whether the claimant is entitled to reimbursement for outstanding medical expenses.
5. Whether the claimant is entitled to reimbursement for an independent medical examination (“IME”) pursuant to Iowa Code section 85.39.
6. Whether the claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27.
7. Whether the defendants are entitled to a credit for permanent partial disability benefits, and the extent of that credit.
8. Whether the claimant is entitled to a taxation of costs.

### **FINDINGS OF FACT**

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

Donald Klindt, the claimant, resides in Atlantic, Iowa, with his young son. (Testimony). He also has several grown children. (Testimony). At the time of his work injury, his youngest daughter was a minor and also lived with him on a part-time basis. (Testimony). At the time of the hearing, Mr. Klindt was 52 years old. (Testimony).

Mr. Klindt was born and raised on a farm in western Iowa. (Testimony). He repeated the first grade. (Testimony). He then attended high school in Avoca, Iowa, and graduated in 1989. (Testimony). He took a mechanic class through “Western” during high school, but he did not receive a certificate or any kind of memento of his completion of this. (Testimony). Mr. Klindt holds a CDL with a number of endorsements, including: double and triple trailers, tankers, and air brakes. (Testimony).

While he was in high school, the claimant started working evenings and summers at a mail sorting operation in Harlan, Iowa. (Testimony). He tore open mail, sorted mail, and moved mail carts. (Testimony). He would have to move mail containers weighing between 25 and “several hundred” pounds. (Testimony). Pushing, pulling, twisting, lifting, and bending were continuous parts of his job. (Testimony). Mr. Klindt left this job when he graduated from high school. (Testimony). He never suffered any injuries at this job. (Testimony).

Mr. Klindt moved to a full-time position with Empire, Inc., a cleaning company in Omaha, Nebraska, following his graduation from high school. (Testimony). At Empire, Inc., he was a route driver. (Testimony). He drove around to various customers and replaced and serviced linens for shop towels, restaurants, door mats, and rugs on a weekly or biweekly basis. (Testimony). The job required lifting, bending, twisting, pushing, and pulling. (Testimony). The amount of work required varied between each customer. (Testimony). Mr. Klindt did not suffer any injuries while working at Empire, Inc., nor did he have any issues with his left hip or low back. (Testimony). He worked

there for about three months before he had some family issues that required him to leave. (Testimony).

The claimant then moved back to Atlantic, Iowa, and took a job with Firestone Tire. (Testimony). He changed tires, fixed vehicle brakes, and performed light mechanic work. (Testimony). He also worked on a farm service truck, which involved changing large tractor and farm implement tires. (Testimony). This job required him to get down onto the ground, handle heavy products, and perform a lot of bending and lifting. (Testimony). He worked on a full-time basis and had no injuries or problems with his left hip or low back while working there. (Testimony).

Mr. Klindt took a job with Central Western Fabrication. (Testimony). They are a large steel welding business that fills custom welding orders for customers across the country. (Testimony). The claimant welded, fabricated steel, stocked steel, worked on bridge rails and supports, and worked on beams. (Testimony). The steel was, obviously, quite heavy, so Mr. Klindt used a crane to move some of it. (Testimony). The most physically demanding portions of this job involved welding, grinding, cutting, and drilling steel. (Testimony). The job required him to also do a great deal of heavy lifting. (Testimony). He worked full-time and had no injuries while working at Central Western Fabrication. (Testimony). He decided to leave because he wanted "better pay," and a "cleaner environment." (Testimony).

The claimant testified that his goal was to obtain employment with a bearing plant owned by Mahle. (Testimony). However, he applied and was not selected during an initial round of hiring. (Testimony). Since he needed a job, he worked full-time for a railroad replacing railroad ties between Council Bluffs, Iowa, and Des Moines, Iowa. (Testimony). He lifted "hundreds of pounds" while working this job and had to do a great deal of bending over, picking up railroad ties, and using sledgehammers to knock certain anchors off of railroad ties. (Testimony). He did not have any injuries or issues with his left hip or lower back while working for the railroad. (Testimony). This job came to an end, and he was offered a position at Mahle. (Testimony).

At Mahle, Mr. Klindt participated in the manufacturing process of engine bearings and bushings. (Testimony). He also made crank shaft and cam shaft bearings. (Testimony). He ran a line that consisted of several, linked machines. (Testimony). He fed certain machines with raw coil metal. (Testimony). The machines would fashion the metal into the various bearings, which he then finished before moving them down the line. (Testimony). He testified that he had to keep up with the pace of the machine in order to keep up with his tasks. (Testimony). It required him to lift pans of bearings weighing upwards of 150 pounds. (Testimony). He also had to do a lot of twisting and stood on concrete floors for the entire day. (Testimony). He generally worked 10-hour days at Mahle. (Testimony). He testified that he had no issues with his left hip and lower back, nor did he have any injuries while working there. (Testimony). He worked there for 11 years before deciding to leave so that he could spend more time with his family. (Testimony).

After leaving Mahle, Mr. Klindt obtained a job as a roller molder with Plastic Professionals in Adair, Iowa, and Atlantic, Iowa. (Testimony). They used roller molds to

make things like plastic coolers, plastic bass boats, plastic boat docks, and seats for Disney parks and rides. (Testimony). This position required him to mount molds of various sizes and weights, fill them with powdered resin, clean certain lines, remove the molds from an oven, and trim the finished products. (Testimony). The job also necessitated him “getting down on the floor” and crawling underneath items. (Testimony). He described the job as physically demanding.” (Testimony). He did not have any work injuries while employed with Plastic Professionals, and worked full-time. (Testimony). He remained employed with Plastic Professionals for three to four years before leaving. (Testimony).

Mr. Klindt next worked for Schildberg Construction as a heavy equipment operator. (Testimony). He drove articulating dump trucks, bulldozers, and track hoes at rock quarries. (Testimony). This required riding over rough ground. (Testimony). He worked full-time with some overtime. (Testimony). While working at Schildberg Construction, he fractured his left leg below the knee while dismounting a bulldozer. (Testimony). He had a workers’ compensation claim from this injury, but did not receive any sort of settlement. (Testimony). He healed well from his leg injury. (Testimony). He did not have any issues with his left hip or lower back while working for this employer. (Testimony). Mr. Klindt left Schildberg Construction because the job sites moved around, and some of them were too far from his home. (Testimony).

The claimant next took a job with Hoyer’s Trucking, where he obtained his CDL. (Testimony). He described this as “basically a big farm operation where they had a grain elevator . . . and livestock. . .” (Testimony). He hauled bulk cattle feed to other cattle farms, corn for the farming operation, or livestock, in a semi-truck and trailer. (Testimony). He testified that he would have to loosen some of the grain payloads in his trailer during the winter because the moisture in the grain would freeze in cold temperatures. (Testimony). This required him to climb into the trailer with a shovel or broom. (Testimony). He also testified that he had to round-up cattle and load and unload them from the trailer. (Testimony). He had no issues with his left hip or lower back while at Hoyer’s. (Testimony). He worked there for two to three years before leaving due to the schedule. (Testimony). Mr. Klindt was awarded full physical custody of his children following divorce proceedings. (Testimony). He needed to be closer to his home and have a more consistent schedule so that he could parent his children. (Testimony).

Mr. Klindt returned to Mahle and performed the same tasks as his prior stint at the bearing plant. (Testimony). He had no issues with his left hip or lower back while at Mahle. (Testimony). He had no issues with his lower back or left hip while he worked at Mahle the second time. (Testimony). He worked there for “just a little over two years,” before leaving due to an increase in workload and being required to work seven days per week. (Testimony).

The claimant then took a job with Panama Transfer, in Panama, Iowa, as a freight delivery driver. (Testimony). He worked on designated freight lines where he would take full trailers of freight and manually unload them at customers. (Testimony). This required him to stand, bend, lift, and twist. (Testimony). He had no issues with his left hip or lower back while at Panama Transfer. (Testimony). He worked full-time and

earned about sixteen and 00/100 dollars (\$16.00) per hour. (Testimony). He left this job after “two to three years” for a job “closer to home.” (Testimony).

Mr. Klindt moved to Conway Freight, which eventually became XPO. (Testimony). He testified that, when he started working at XPO, he had no issues with his left hip or low back. (Testimony). He also completed a pre-employment physical before he was hired by XPO. (Testimony). At XPO, Mr. Klindt was a freight hauler. (Testimony). He loaded and unloaded freight from tractor-trailers and drove them between destinations. (Testimony). He testified that this job required a great deal of lifting, bending, twisting, and climbing. (Testimony). He described the job as “very physical.” (Testimony). He lifted “on average” 50 or more pounds.” (Testimony). He worked 40 or more hours per week, and earned “27 and some change” per hour. (Testimony).

The claimant provided a job demands analysis in their exhibits. (Claimant’s Exhibit 10:102-107). This job demands analysis applied to a driver for Con-Way Freight, which is the predecessor to XPO, as noted above. (CE 10:102). A driver “[t]ransports and deliver[s] freight in LTL trailers by driving diesel powered tractor-trailer combinations.” (CE 10:102). The hours included 11 hours of driving, 14 consecutive hours “on-duty” and 10 hours off-duty. (CE 10:102). The job required entering and exiting a cab of a truck, performing pre and post trip inspections, driving, cranking dollies, pulling a fifth wheel, opening and closing a hood of a tractor, and entering and exiting trailers. (CE 10:102). The job also required a number of other duties. (CE 10:102). The analysis also concluded that a driver continuously did the following: reaching below/at/above the shoulder, sitting, gross manipulation, simple grasping, repetitive hand/wrist activities, and driving a car or truck. (CE 10:104). A driver would frequently be expected to: push, pull, walk, stand, firmly grasp items, operate hand controls and foot controls, carry between 10 and 50 pounds, and lift or lower between 10 and 50 pounds. (CE 10:104). A driver would also be expected to occasionally do the following: twist, bend, squat, stoop, crouch, climb stairs, balance, pinch, repetitively key or mouse, carry 0 to 10 pounds, lift and lower 0 to 10 pounds, and operate a forklift or skid mover. (CE 10:104). The driver would rarely kneel or crawl, and never climbed ladders. (CE 10:104).

On March 20, 2019, Mr. Klindt was working for XPO delivering 55-gallon drums to a car wash. (Testimony). He lowered the hydraulic lift-gate on his truck, and pulled a pallet-jack containing drums onto the customer parking lot. (Testimony). He unloaded at least one pallet. (Testimony). He returned to the truck to unload more freight. (Testimony). He testified that it was difficult to move the pallet-jack across the parking lot due to the presence of residual sand or grit. (Testimony). As he pushed the pallet jack, he felt a sharp pain in his back. (Testimony). He continued to push the pallet jack and unload the freight until he could no longer move it across the parking lot. (Testimony). As it was the last stop of the day, he called in his injury to XPO and informed a dispatcher. (Testimony). XPO directed Mr. Klindt to return to the XPO terminal. (Testimony).

Upon returning to the XPO terminal, Mr. Klindt spoke to the plant manager. (Testimony). The manager directed the claimant to “call it in.” (Testimony). He told the

person that he called that he needed to go to the doctor. (Testimony). XPO sent Mr. Klindt to a doctor for treatment. (Testimony).

On March 21, 2019, Mr. Klindt reported to the Cass County Health System with complaints of a back injury sustained when he “twisted wrong loading freight [*sic*].” (Joint Exhibit 1:1-4). Stacey Bean, PA-C, examined the claimant for his lower back pain. (JE 1:2). The claimant noted that his initial pain was in the center of his low back, but it then radiated up the back and into the posterior legs. (JE 1:2). He also had mild tingling in his legs caused by certain positions. (JE 1:2). Upon examination, Ms. Bean found Mr. Klindt to have tenderness over the central L3-5 area with no muscle spasms. (JE 1:4). Mr. Klindt also displayed reduced range of motion in his lumbar spine. (JE 1:4). Ms. Bean diagnosed the claimant with a lumbar strain and bilateral lumbar radiculopathy. (JE 1:4). She provided him with limitations, recommended that he begin to alternate ice and heat, take certain prescriptions, and stretch four times per day or more. (JE 1:4).

Ms. Bean examined Mr. Klindt again on March 29, 2019, as a follow-up of his lower back pain. (JE 1:5-8). He took Aleve, which provided him with some relief from the pain. (JE 1:5). He told Ms. Bean that stretching did not help him very much. (JE 1:5). He denied having pain into his legs, and rated his back pain 3 out of 10. (JE 1:5). The record says, “[s]tates is much better.” (JE 1:5). Ms. Bean found Mr. Klindt’s lumbar spine to be unremarkable upon examination, with no spasms or tenderness. (JE 1:6). He also displayed a normal range of motion in his lumbar spine. (JE 1:6). Ms. Bean opined that the radiculopathy had resolved and that the “lumbar strain [was] all but resolved.” (JE 1:7). She recommended some additional days of rest and stretching before Mr. Klindt could return to unrestricted work on April 1, 2019. (JE 1:7). She noted that if his back began to flare up while working full duty, he should inform his supervisor to contact her, and she would modify his work duties. (JE 1:7). She requested that Mr. Klindt return to visit her office on an as-needed basis. (JE 1:7).

On April 10, 2019, Mr. Klindt returned to Ms. Bean’s office complaining of severe lower back pain with “a lot” of associated pressure in the area. (JE 1:8). He also noted numbness in his legs, and told Ms. Bean that returning to work made his condition “worse and worse . . . after light duty.” (JE 1:8). Ms. Bean noted that Mr. Klindt had a gait problem and that his toes were catching when he walked. (JE 1:8). He also had numbness and weakness in his legs on an intermittent basis. (JE 1:8). She observed tenderness at the L4-S1 posterior intervertebral spaces and muscle spasms at the left paraspinal muscles at L5. (JE 1:10). Ms. Bean also noted that both of Mr. Klindt’s hips caused him to have low back pain with internal rotation. (JE 1:10). Ms. Bean ordered an x-ray of the lumbar spine. (JE 1:11). The x-ray showed no acute fractures, but did show moderate facet arthropathy in the lower lumbar spine along with degenerative disc disease at T12-L1 and at L3-4. (JE 1:11). She diagnosed him with lumbar back pain with radiculopathy affecting the lower extremity. (JE 1:10). She recommended that he continue to use heat and pain relievers. (JE 1:10-11). She further requested that he return in seven days for additional evaluation. (JE 1:11). She ordered an MRI due to the pain and numbness in the claimant’s legs. (JE 1:11). Ms. Bean also provided work restrictions that limited the claimant’s lifting, pushing, and pulling to no more than 20

pounds, prohibited the claimant from stooping or sweeping, limited the claimant's bending to his knees only, and required that the claimant be allowed to sit, stand, and walk on an alternating basis every 15-20 minutes "to stay limber." (JE 1:12).

Mr. Klindt had an MRI of his lumbar spine on April 18, 2019. (JE 1:14-16). The MRI showed degenerative disc and joint disease at several levels, along with a posterior annular fissure at L4-5, and moderate neural foraminal stenosis on the right at L4-5 and on the left at L5-S1. (JE 1:15). Ms. Bean requested that Mr. Klindt be notified that the posterior annular fissure was "consistent of where the original pain was with injury." (JE 1:16). Based upon the results of the MRI, she recommended a neurosurgical consultation. (JE 1:16).

Following the MRI exam on April 18, 2019, Mr. Klindt called Ms. Bean's office and requested the results of the MRI examination. (JE 1:12). He was told that Ms. Bean was out of the office for the week. (JE 1:12). In response to this, the claimant demanded the results "before Monday." (JE 1:12).

A neurosurgical consult was approved by XPO on April 22, 2019. (JE 1:17).

On May 8, 2019, Jordan Lacy, M.D., examined the claimant in Omaha, Nebraska. (JE 2:31-32). Mr. Klindt recounted how his injury occurred, and told the doctor that he experienced "nearly constant pain in the midline of his low lumbar region." (JE 2:31). Any sort of prolonged standing, sitting, bending, and/or twisting of the low back aggravated this pain. (JE 2:31). Mr. Klindt appeared with a "nonspastic gait," but showed pain on palpation to the lower back. (JE 2:31). Dr. Lacy diagnosed Mr. Klindt with low back pain, a muscle strain, and an annular disc tear. (JE 2:31). He opined that Mr. Klindt would improve with conservative therapy and time, and that people who perform heavy activities for a living "can see accelerated arthritis" in the lumbar spine. (JE 2:31). He also prescribed physical therapy for the claimant's lumbar spine. (JE 2:31). Dr. Lacy concluded that, if therapy failed, Mr. Klindt may benefit from an epidural steroid injection. (JE 2:32).

Mr. Klindt had his first therapy evaluation at ATI Physical Therapy ("ATI") on May 14, 2019. (JE 3:38-40). He recounted how his injury occurred. (JE 3:38). The claimant showed limitations with his range of motion. (JE 3:38). The therapist opined that the claimant would benefit from therapy. (JE 3:38-39).

On May 15, 2019, Mr. Klindt had another therapy visit. (JE 3:41). Mr. Klindt presented with increased tension and pain in his lower back. (JE 3:41). He rated his pain 9 out of 10 at the beginning of therapy. (JE 3:41).

Mr. Klindt had his third physical therapy visit on May 17, 2019, at ATI. (JE 3:42). He rated his pain 8 out of 10. (JE 3:42). His pain was lower during the day, but he opined that it returned at the end of the day and that he ended up "really sore." (JE 3:42). The therapist found Mr. Klindt to have increased pain and muscle tension in his lower back. (JE 3:42).

On May 20, 2019, Mr. Klindt visited ATI for another therapy session. (JE 3:43). He rated his pain 8 out of 10, and opined that he was "not any better overall." (JE 3:43).

The therapist found Mr. Klindt to be “very limited” with active range of motion due to pain. (JE 3:43).

Mr. Klindt had another therapy visit at ATI on May 21, 2019. (JE 3:44). He felt “the same,” and rated his pain 7 out of 10. (JE 3:44). The therapist noted that Mr. Klindt did not tolerate his therapy as well during this particular session. (JE 3:44).

The claimant returned for a sixth therapy visit at ATI on May 23, 2019. (JE 3:45). He noted that his pain never got better than 6 to 7 out of 10. (JE 3:45). He felt better for about two hours at a time, but then becomes sore. (JE 3:45). He took Aleve to help reduce his pain. (JE 3:45).

On May 28, 2019, during Mr. Klindt’s seventh therapy visit at ATI, he noted that his pain was 10 out of 10. (JE 3:46). He expressed great frustration that he was not improving. (JE 3:46). The therapist found that Mr. Klindt struggled with most exercises, but that his pain decreased to 8 out of 10 after he did his exercises. (JE 3:46).

By May 29, 2019, Dr. Lacy referred Mr. Klindt for a lumbar epidural steroid injection due to a strain of the muscle, fascia and tendon in the lower back. (JE 2:37). On the same date, Mr. Klindt had a repeat therapy visit at ATI. (JE 3:49). He indicated that he felt the same with continued strong low back pain. (JE 3:49). He rated his pain 8 out of 10. (JE 3:49).

Mr. Klindt returned to ATI for continued physical therapy on May 31, 2019. (JE 3:50). He told the therapist that he felt worse than his previous visit, and that he has to lean to one side in order to alleviate his pain. (JE 3:50). He also complained of difficulty with sleeping due to his pain. (JE 3:50).

On June 3, 2019, Mr. Klindt had his tenth therapy visit at ATI. (JE 3:51). He told the therapist that he felt “the same” as his previous visits, and had no difference in his pain. (JE 3:51). The therapist observed that Mr. Klindt experienced increased pain with most therapeutic activities. (JE 3:51).

The claimant attended another physical therapy session on June 5, 2019. (JE 3:52). He, again, told the therapist that he felt the same and had no improvement. (JE 3:52). By the end of his therapy visit, he rated his pain 9 out of 10. (JE 3:52).

During a June 6, 2019, physical therapy visit at ATI, Mr. Klindt again reported feeling worse. (JE 3:53). Mr. Klindt especially noted increased pain following a trial of mechanical traction. (JE 3:53). His pain was so severe that he did not report to work. (JE 3:53). The therapist gave Mr. Klindt a pass to the YMCA so that he could experiment with aquatic therapy. (JE 3:53).

On June 10, 2019, Mr. Klindt returned to ATI for another attempt at physical therapy. (JE 3:54). Mr. Klindt reported feeling better, and less sore than his previous visit. (JE 3:54). Certain activities made Mr. Klindt’s pain “much worse.” (JE 3:54). The therapist observed that stretching and other therapy modalities helped alleviate the claimant’s pain. (JE 3:54).

Mr. Klindt reported worsening pain again during his June 13, 2019, visit at ATI. (JE 3:55). He indicated that during the prior day, he could not find any comfortable position with either sitting or standing while at work. (JE 3:55).

On June 17, 2019, Mr. Klindt felt the same as his previous visit. (JE 3:56). He reported that his pain was 8 out of 10, and that he had a lot of trouble walking. (JE 3:56).

Mr. Klindt had his first lumbar epidural steroid injection on June 20, 2019, with Peter Piperis, M.D. (JE 4:86-95). The claimant indicated that he had continuous, shooting, aching, throbbing, and sharp pain across his lower back. (JE 4:86, 91). At his best, he rated his pain 7 out of 10. (JE 4:86). At his worst, he rated his pain 10 out of 10. (JE 4:86). Resting, sitting, and lying down improved his pain. (JE 4:86). Standing, bending, walking, working, lifting, and being in a prolonged position worsened his pain. (JE 4:86). He also experienced numbness, tingling, and weakness. (JE 4:86). Dr. Piperis mentions reviewing the results of the MRI. (JE 4:91). Dr. Piperis mentions that Mr. Klindt had significant low back pain exacerbated by "any type of movement" along with radicular symptoms into both lower extremities; however, Dr. Piperis found no objective neurologic deficits on a physical examination. (JE 4:94). Based upon Mr. Klindt's symptoms and his previous treatment, Dr. Piperis determined to proceed with a lumbar epidural steroid injection. (JE 4:95). Dr. Piperis provided the claimant with restrictions as follows: 20 pound limit for lifting, 20 pound limit for pushing and pulling, allowing only occasional walking during his work shift, rarely bending, rarely squatting, rarely kneeling, and rarely twisting. (JE 4:95).

After having the injection from Dr. Piperis, the claimant testified that he was in "so much pain" that he could not even work on the day after the injection. (Testimony). At that time, he expressed that he did not want to see Dr. Piperis anymore. (Testimony). Thus, he sought out his own medical care with Dr. Jensen because he "wanted some answers." (Testimony). Mr. Klindt felt that doctors were simply putting band-aids on his pain and not attempting to find the issue. (Testimony).

On June 26, 2019, Mr. Klindt returned to Dr. Piperis' office for another lumbar epidural steroid injection. (JE 4:96-97; 5:102).

The claimant saw Dr. Piperis again on July 10, 2019, as a follow-up of the June 26, 2019, epidural steroid injection. (JE 4:98-101). Mr. Klindt had no significant relief following his previous injection. (JE 4:98). He said that 80 percent of his pain was located in the low back and 20 percent of his pain was in his legs. (JE 4:98). He described the pain as throbbing, pinching, and stinging. (JE 4:98). He rated his pain 7 to 8 out of 10. (JE 4:98). Standing, walking, and bending over aggravated his pain. (JE 4:98). Sitting and changing positions helped alleviate his pain. (JE 4:98). Dr. Piperis noted that the claimant's MRI showed "mild to moderate facet arthritis at multiple levels along with degenerative disc disease, especially at L4-5 with annular tear and mild to moderate foraminal stenosis." (JE 4:98). Upon physical examination, the claimant displayed tenderness over his bilateral lumbar paravertebral muscles. (JE 4:100). Dr. Piperis recommended medial branch blocks for both diagnostic and

therapeutic reasons. (JE 4:100). Dr. Piperis made no changes to the previously provided restrictions. (JE 4:100).

Ric Jensen, M.D., examined Mr. Klindt at his office at Neurosurgical Associates of Nebraska, on July 24, 2019. (JE 6:103-110). Mr. Klindt noted that his symptoms were the same over the previous one to two months. (JE 6:103). He had aching, sharp, and stabbing pain on both the right and left side. (JE 6:103). Standing, laying down, and walking worsened his pain. (JE 6:103). Mr. Klindt checked a box indicating that he had back pain only, along with back pain which flowed into his buttocks and thighs. (JE 6:103). Dr. Jensen provided Mr. Klindt with a return to work note allowing him to return to work on July 25, 2019. (JE 6:110). There was no indication of any work restrictions in the note. (JE 6:110).

Dr. Jensen wrote a letter to Ms. Bean dated July 25, 2019, recounting his examination of, and opinions regarding, Mr. Klindt's condition at the time. (JE 6:111-113). Dr. Jensen reviewed the claimant's history, and treatment to date. (JE 6:111-113). He noted that the claimant continued to work light duty, and that prolonged standing, lying down and walking exacerbated his pain. (JE 6:111). He found that his pain radiated across his lower lumbosacral paraspinal musculature. (JE 6:111). Dr. Jensen noted that examination revealed reduced range of motion in the lumbosacral spine, especially on extension and left lateral rotation or flexion. (JE 6:111). Dr. Jensen also found "palpable tenderness over the mid-to-lower lumbosacral paraspinal musculature..." (JE 6:111). There were no sensory issues found in the lower extremities. (JE 6:111-112). Mr. Klindt could walk a tandem gait with mild difficulty, and he could walk a heel-toe walk without significant difficulty. (JE 6:112). Dr. Jensen then reviewed the results of the MRI. (JE 6:112). Dr. Jensen opined that the claimant's symptoms correlated with "discogenic back pain secondary to an annular disc wall tear centered at the L4-5 lumbar segment. Associated degenerative changes at the L3-4 and L5-S1 lumbosacral segment (in association with facet arthropathy) also remain of some concern..." (JE 6:112). Dr. Jensen also noted that Mr. Klindt's activities of daily living were "significantly impacted" by his current back pain. (JE 6:112). Dr. Jensen opined that the claimant's treatment options were lingering. (JE 6:112). The doctor prescribed a course of oral muscle relaxant, and told Mr. Klindt that he may require a surgery to alleviate his symptoms. (JE 6:112-113). He also recommended a lumbar discogram. (JE 6:113).

William Boulden, M.D., F.A.A.O.S., of Capital Orthopaedics & Sports Medicine, issued an IME report on August 22, 2019. (Defendants' Exhibit E:1-6). Mr. Klindt told Dr. Boulden that his complaints were 90 percent low back pain and 10 percent leg symptoms. (DE E:1). His symptoms varied from "pain, numbness, and throbbing," which were worse on the left than the right. (DE E:1). Dr. Boulden then outlined the incident of March 20, 2019, and the claimant's subsequent treatment. (DE E:1-2). Mr. Klindt told Dr. Boulden that coughing, sneezing, standing too long, walking too much, and sitting for too long aggravated his pain. (DE E:2).

Dr. Boulden reviewed the claimant's imaging results. (DE E:3-4). He noted that Mr. Klindt's MRI from April of 2019 showed degenerative disc disease at L3-4 and L5-S1 with early degenerative changes at L2-3. (DE E:4). Dr. Boulden also observed mild

neural foraminal stenosis at L5-S1 with no nerve entrapment. (DE E:4). The MRI also showed a small annular tear “central to the right, not concentric...” which was more radial in nature at L4-5 on the right. (DE E:4). Dr. Boulden opined, “...this was all pre-existing pathological changes even though Dr. Jensen feels the annular disc tear was caused by the alleged injury.” (DE E:4).

Dr. Boulden continued by conducting a physical examination of the claimant. (DE E:3). He observed that Mr. Klindt had decreased range of motion with flexion, extension, lateral bending, and rotation “secondary to pain.” (DE E:3). Mr. Klindt admitted to Dr. Boulden that his motion “could be better,” but that pain limited him. (DE E:3). Dr. Boulden did not find the claimant to have any radicular pain. (DE E:3). Mr. Klindt displayed normal strength in his legs with no signs of weakness. (DE E:3).

Dr. Boulden provided his impressions in response to some questions posed by ExamWorks. (DE E:4-6). Dr. Boulden opined that Mr. Klindt had an aggravation of pre-existing pathology caused by his March 20, 2019, work incident, which resulted in mechanical back pain without radicular pain. (DE E:4). Dr. Boulden continued by opining that Mr. Klindt had a degenerative annular tear, as evidenced by significant degenerative changes that pre-existed the injury. (DE E:4). Dr. Boulden further opined that the claimant would not benefit from surgery. (DE E:5). Dr. Boulden continued, “[i]t is also a well-known fact that degenerative back pain will get better with time; therefore, it may be best for this gentleman to be taught proper back exercises, get him to vocational rehabilitation, and seek different occupation.” (DE E:5). Among these proper exercises, Dr. Boulden recommended a “well-structured German stabilization exercise program.” (DE E:6). Dr. Boulden recommended that the claimant avoid bending, lifting, or twisting, and that he should use his upper and lower extremities for physical activities. (DE E:5). Dr. Boulden concluded his report by opining that he could not provide a permanent disability rating based upon the objective findings in this case. (DE E:6).

Dr. Boulden wrote an addendum to his report on August 22, 2019. (DE E:7). In his addendum, he mentions a surveillance tape. (DE E:7). This tape, or footage therefrom, is not in evidence in this case. (DE E:7). Dr. Boulden apparently observed the claimant riding a lawnmower and walking. (DE E:7). Dr. Boulden saw “no issues” with the activities undertaken by the claimant. (DE E:7).

On September 10, 2019, Dr. Jensen wrote another letter, this time addressed to the claimant’s attorney. (JE 6:114-115). Dr. Jensen opined that Mr. Klindt had “significant back pain syndrome secondary to a combination of factors.” (JE 6:114). These factors included a tear of the annular disc wall at L4-5, and an aggravation of pre-existing pathology within his lumbosacral spine. (JE 6:114). Dr. Jensen further opined that the claimant’s conditions were related to his work injury. (JE 6:115). Dr. Jensen noted that Mr. Klindt achieved a “maximum functional capacity,” and that he operated under a medium level of physical or functional activity. This required restrictions of maximum lifting of 30 pounds on a consistent basis, no constant lifting, no repetitive bending, stooping, lifting, or twisting, and avoiding prolonged sitting or standing for longer than 30 minutes at a time. (JE 6:114). Dr. Jensen opined that the claimant achieved maximum medical improvement (“MMI”) related to conservative

treatments on September 20, 2019. (JE 6:114). Based upon his examination and the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Jensen provided the claimant with a 22 percent whole person impairment rating. (JE 6:114). Of note, Dr. Jensen did not elaborate on how he came to this conclusion, or what parts of the Guides he used to evaluate the claimant. (JE 6:114).

Mr. Klindt next treated with Nebraska Spine and Pain Center on October 10, 2019. (JE 7:116-127). Timothy Burd, M.D. examined the claimant. (JE 7:116-127). Mr. Klindt noted how his injury occurred, including a statement to the doctor that he was moving 3,700 pounds "total" when his injury occurred. (JE 7:116, 120). Mr. Klindt circled portions of an intake form indicating that he continued to have constant aching, throbbing, burning, shooting, and pressure symptoms across his lower back. (JE 7:116). Standing and walking made his pain much worse. (JE 7:116). Sitting helped alleviate his pain for short periods of time. (JE 7:120). He rated his pain 8 out of 10, and noted his pain at best was 6 out of 10, and at worst 10 out of 10. (JE 7:116). Mr. Klindt also checked a box indicating that he had leg numbness. (JE 7:119). He told Dr. Burd that his pain was worse in his back than his legs, but that the pain in the legs was worse in the left than the right. (JE 7:120).

Dr. Burd observed that the claimant did not appear uncomfortable or to be in acute distress. (JE 7:122). Upon examination, Mr. Klindt displayed lumbosacral tenderness on palpation at L4-S1, as well as tenderness in the posterior and superior iliac spines. (JE 7:122). Modified straight leg raising tests of the right and left leg were negative. (JE 7:122). Dr. Burd also reviewed the results of the prior imaging examinations. (JE 7:123). He ordered additional x-rays, and noted that they showed decreased disc height from L3 to S1, retrolisthesis of L3 on L4 in flexion, and sclerosis within the bilateral SI joints. (JE 7:123-124).

Based upon his examination and the history provided by the claimant, Dr. Burd diagnosed the claimant with lumbar disc degeneration at L3-4 and L4-5, a bulging disc at L4-5 and L5-S1, and osseous and sUBLuxation stenosis of intervertebral foramina of the lumbar region. (JE 7:124). Dr. Burd provided the claimant with work restrictions of no lifting over 20 pounds, no excessive or repetitive bending, twisting or stooping, and that the claimant should be able to change positions as needed for comfort. (JE 7:124). Dr. Burd recommended that the claimant have a CT scan and an EMG, and advised him to return to Dr. Burd's office following these tests. (JE 7:124).

Mr. Klindt returned to Nebraska Spine and Pain Center on November 1, 2019, to have his EMG and CT as ordered by Dr. Burd. (JE 7:128-132). The CT scan showed a chronic appearing right defect at L5 with "no evidence of associated spondylolisthesis," and multilevel degenerative changes to the discs and facets which do not result in "significant stenosis," along with multilevel bilateral neural foraminal stenosis at L5-S1 "where there is compression on the exiting left L5 nerve root." (JE 7:129-130). The results of the EMG were noted to be abnormal. (JE 7:131-132). Specifically, the results were consistent with chronic mildly active left L4 radiculopathy, chronic inactive right L4 radiculopathy, and chronic inactive left L5 radiculopathy. (JE 7:132). Mr. Klindt was told to follow-up with Dr. Burd regarding the implications of the results. (JE 7:132).

The claimant recalled the EMG as “very painful.” (Testimony). He believed that the EMG revealed that he had severe damage in his nerves to his legs. (Testimony).

On November 7, 2019, the claimant returned to Dr. Burd’s office. (JE 7:133-138). Mr. Klindt continued to have low back pain with left leg pain and “rare right leg pain.” (JE 7:133). He rated his pain 7 out of 10. (JE 7:133). Walking worsened his pain, and he noted that he could not walk more than a block without taking a break. (JE 7:133). Upon examination, Dr. Burd observed that Mr. Klindt was “visibly uncomfortable.” (JE 7:137). Dr. Burd noted the results of the CT and the EMG. (JE 7:136). Dr. Burd offered the claimant a transforaminal lumbar interbody fusion at L4-S1. (JE 7:137). Dr. Burd did not change any of the previously provided restrictions. (JE 7:138).

Dr. Boulden saw Mr. Klindt for another IME on December 17, 2019. (DE E:9-12). Dr. Boulden issued another report, in which he outlined Mr. Klindt’s treatment since his previous IME. (DE E:9-10). Dr. Boulden noted that Mr. Klindt’s symptoms and location of his pain had not changed since his previous visit. (DE E:9). Dr. Boulden opined that the claimant had mild to moderate foraminal stenosis on the left. (DE E:9). After reviewing the EMG report, Dr. Boulden opined that he was unsure as to how Dr. Burd arrived at some of his conclusions. (DE E:9). Specifically, Dr. Boulden did not see Mr. Klindt as experiencing active L5 nerve problems. (DE E:9). Dr. Boulden was critical of Dr. Burd’s surgical recommendation and noted that Dr. Burd was not planning to address the claimant’s degenerative disc disease at L3-4. (DE E:10). Dr. Boulden also observed that the claimant had not begun the previously recommended German stabilization program. (DE E:10). Dr. Boulden’s physical examination of the claimant was unchanged from the previous IME. (DE E:10).

Dr. Boulden again responded to unknown and unlisted questions. (DE E:11). Dr. Boulden continued to opine that the claimant had mechanical back pain, and that he may have occasional mild radicular symptoms. (DE E:11). Dr. Boulden opined that this was not caused by the alleged injury, and that it was an aggravation of pre-existing pathologies. (DE E:11). Dr. Boulden also noted that the MRI findings can cause symptoms described by Mr. Klindt. (DE E:11). Dr. Boulden again noted his disagreement with Dr. Burd’s opinions as they relate to the findings of the MRI and EMG. (DE E:11). Dr. Boulden also disagreed with Dr. Burd’s recommendation to perform a two-level fusion, as it would be a “setup for continued problems with [Mr. Klindt’s] back from adjacent fusion stress issues.” (DE E:11). Dr. Boulden reiterated that his recommendation of a “good physical therapy program.” (DE E:11). He also recommended that Mr. Klindt pursue a comprehensive pain management program including mental health treatment, physical treatment, and coping skills for back pain. (DE E:11). Dr. Boulden noted that Mr. Klindt would require permanent restrictions, and that Mr. Klindt should not stress his back. (DE E:12). Dr. Boulden again declined to provide a permanent impairment rating, although this time it was because he did not believe Mr. Klindt achieved maximum medical improvement (“MMI”). (DE E:12). Dr. Boulden concluded that Mr. Klindt should not return to his previous occupation because of his pre-existing spine condition, and that Mr. Klindt would require vocational rehabilitation. (DE E:12).

Noah Porter, M.D., examined the claimant on April 15, 2020, at Ortho Nebraska due to complaints of low back pain and bilateral lower extremity radiculopathy. (JE 8:190-193). Mr. Klindt noted his medical history to date, including his current symptoms. (JE 8:190). He noted lower back pain and bilateral lower extremity radiculopathy that courses down his bilateral buttocks, thighs, and lower legs, into his ankles. (JE 8:190). Mr. Klindt could not walk, stand, lie down, or sit for long periods of time due to pain in his back and bilateral lower extremities. (JE 8:190). Mr. Klindt could not walk more than one block without needing to sit down. (JE 8:190). Mr. Klindt outlined his previous treatment and further told Dr. Porter that none of this treatment helped alleviate his issues. (JE 8:190). Dr. Porter ordered x-rays, which showed congenital stenosis due to shortening of the spinal pedicles along with moderate to severe facet arthropathy at L3-4, L4-5, and L5-S1. (JE 8:191). There was also moderate disc space narrowing at L3-4, L5-S1, and mild disc space narrowing at L4-5. (JE 8:191). Dr. Porter did not recommend that the claimant have surgery, as he felt that it would result in a prolonged recovery. (JE 8:192). Instead, Dr. Porter recommended additional physical therapy for “global body kinematics with some focus directed away from his lumbar spine in order to improve his lumbar symptoms.” (JE 8:192).

Mr. Klindt began physical therapy at Athletico on April 22, 2020, based upon orders by Dr. Porter. (JE 9:230-242). Mr. Klindt noted his constant ongoing pain due to a March of 2019, work incident, which he described to the therapist. (JE 9:230, 237-238). He indicated on a pain diagram that his pain ran across his lower back and down both of his legs. (JE 9:233). The tenderness and pain in particular were located “with central PA of L4-5.” (JE 9:230). The claimant rated his pain 8 out of 10 during therapy, and 10 out of 10 at its worst. (JE 9:234). Mr. Klindt also recounted his course of treatment for the therapist. (JE 9:230). The objective of the therapy included improvement of range of motion, strength, function, and decreased pain. (JE 9:230). The therapist observed that Mr. Klindt showed decreased range of motion, decreased activity tolerance, muscle guarding, an abnormal gait, and certain functional limitations. (JE 9:232).

Mr. Klindt had his second physical therapy visit with Athletico on April 24, 2020. (JE 9:243-244). He complained of increased pain in his lower back following his last session, which included difficulty sleeping due to pain. (JE 9:243). He rated his pain 8 out of 10. (JE 9:243). The therapist noted that Mr. Klindt was progressing slowly and still had decreased range of motion, weakness, pain, and functional limitations. (JE 9:244).

On April 28, 2020, Mr. Klindt returned to Athletico for another session of physical therapy. (JE 9:245-246). Mr. Klindt again noted difficulty sleeping and a feeling that his back pain would not improve. (JE 9:245). The therapist opined that Mr. Klindt was progressing well, but continued to have issues that required therapy. (JE 9:246).

Mr. Klindt failed to attend a scheduled physical therapy appointment on April 30, 2020, due to childcare issues. (JE 9:247). This appointment was not rescheduled. (JE 9:247).

On May 5, 2020, Mr. Klindt had another physical therapy visit with Athletico. (JE 9:248-249). Mr. Klindt rated his pain 6 out of 10, but noted that the previous Saturday night was "one of his worst nights," as he sat for some time on an unpadded chair. (JE 9:248). After sitting on this chair, his low back pain increased and proceeded to radiate down his left leg. (JE 9:248). Mr. Klindt continued to show improvement with physical therapy, but displayed guarding with "transitional movement." (JE 9:248). The therapist also observed that Mr. Klindt walked with an antalgic gait. (JE 9:248). The therapist opined that the claimant was progressing poorly and not tolerating his therapy very well. (JE 9:249).

Mr. Klindt told Athletico on May 7, 2020, that he had not noticed much improvement since beginning therapy, and that some of the exercises aggravated his pain. (JE 9:250-255). He rated his pain 7 out of 10 during the visit, and 10 out of 10 at its worst. (JE 9:250). He noted increased difficulty with walking more than one block, standing for more than five minutes, or sitting for more than five minutes. (JE 9:250). The therapist observed that the claimant demonstrated improvement in activity tolerance; however, he was progressing slowly with increasing reports of pain issues. (JE 9:250, 253).

On May 12, 2020, the claimant continued his physical therapy at Athletico. (JE 9:256-257). He complained that his back felt the same and that he had no improvement in his symptoms. (JE 9:256). The therapist observed that Mr. Klindt showed pain behaviors during certain maneuvers. (JE 9:256). The therapist again opined that the claimant was slowly improving and presenting with "decreased ROM, weakness, pain, and functional limitations." (JE 9:257).

Athletico provided the claimant's seventh physical therapy session on May 14, 2020. (JE 9:258-259). The claimant told the therapist that he continued to feel the same without much improvement. (JE 9:258). The therapist opined that the claimant was progressing well, despite his decreased range of motion, weakness, pain, and functional limitations. (JE 9:259). The therapist noted that the therapy would progress as tolerated. (JE 9:259).

Mr. Klindt had his eighth physical therapy visit with Athletico on May 19, 2020. (JE 9:260-261). He noted that his back continued to feel "the same," and that he had difficulty sleeping that evening. (JE 9:260). The therapist observed that the claimant walked with an antalgic gait with decreased stance time on the left leg. (JE 9:260). The therapist also observed that Mr. Klindt changed positions frequently during the therapy session. (JE 9:260). The therapist again opined that Mr. Klindt progressed slowly. (JE 9:261).

On May 21, 2020, Mr. Klindt attended his ninth physical therapy at Athletico. (JE 9:262-267). He rated his pain 7 out of 10 at the time of the visit, and 10 out of 10 at its worst. (JE 9:262). The claimant continued to have difficulty with low back pain, range of motion, strength, daily functions, sitting for more than 30 minutes, standing for more than 5 minutes, and radicular pain down both legs. (JE 9:262). Mr. Klindt continued to progress slowly and presented with "weakness, decreased ROM, fear of movement,

pain, and functional limitations.” (JE 9:263). The therapist opined that Mr. Klindt was reporting “30% return to PLOF.” (JE 9:265).

Mr. Klindt had another visit on May 26, 2020, for physical therapy with Athletico. (JE 9:268-269). He again told the therapist that he had not noticed much improvement since he began therapy. (JE 9:268). Mr. Klindt continued to ambulate with an antalgic gait. (JE 9:268). The therapist also observed that Mr. Klindt seemed fatigued. (JE 9:268). The therapist concluded again that Mr. Klindt progressed slowly. (JE 9:269).

On May 27, 2020, Mr. Klindt returned to Dr. Porter’s office following several weeks of physical therapy at Athletico. (JE 8:194-195). Mr. Klindt continued to report significant pain in his lower back and told Dr. Porter that therapy provided him with no benefit. (JE 8:194). Dr. Porter observed the claimant walking with a mildly antalgic gait with “shortened stance phase on the left.” (JE 8:194). Dr. Porter also found the claimant to have tenderness to palpation over his lower back. (JE 8:194). Dr. Porter order x-rays of the claimant’s pelvis and left hip. (JE 8:194). The x-rays showed moderate to severe arthrosis within the right hip, and severe arthrosis in the left hip. (JE 8:194). There also was obliteration of the weight-bearing surface, subchondral sclerosis and cyst formation on the left side. (JE 8:194). Dr. Porter recommended the claimant see a hip specialist and an additional injection care provider. (JE 8:195). Dr. Porter again recommended against any surgery for the lumbar spine. (JE 8:195). Dr. Porter observed that Mr. Klindt was “visibly frustrated” by the doctor’s recommendation against surgery. (JE 8:195). Mr. Klindt told the doctor that he was suffering and “not living” due to his pain. (JE 8:195).

Mr. Klindt was examined by Matthew Hahn, M.D., on June 10, 2020. (JE 8:196-200). Mr. Klindt recounted his issues and treatment to date. (JE 8:196). He described his pain as sharp, achy, burning, and stiff. (JE 8:196). Dr. Hahn reviewed all of the imaging completed to date. (JE 8:198-199). Dr. Hahn diagnosed Mr. Klindt with low back pain, and lower extremity radicular pain. (JE 8:196). Dr. Hahn provided the claimant with a right L4-5 transforaminal epidural steroid injection, and a left L5-S1 transforaminal epidural steroid injection. (JE 8:201-203).

On July 2, 2020, Dr. Hahn saw Mr. Klindt again. (JE 8:204-207). Mr. Klindt told Dr. Hahn that the previously provided injections provided no relief of his lower back or lower extremity pain. (JE 8:204). Mr. Klindt also stopped the home exercise plan provided by physical therapy because “the exercises exacerbated [his] pain.” (JE 8:204). He rated his pain 8 out of 10. (JE 8:204). Dr. Hahn consulted with Dr. Porter, who again declined to offer surgery to the claimant. (JE 8:207). Mr. Klindt expressed a desire to return to a prior surgeon that offered him a surgical option. (JE 8:207).

Athletico discharged Mr. Klindt from therapy on July 15, 2020. (JE 9:270-272).

Mr. Klindt saw Dr. Porter again on July 29, 2020. (JE 8:208). Mr. Klindt reiterated his ongoing lumbar complaints and that the injections did not provide him with any relief. (JE 8:208). Because of Mr. Klindt’s pain being axial in nature and the fact that the injections did not provide him with any relief, Dr. Porter continued to recommend against surgery. (JE 8:208). Dr. Porter continued to recommend non-operative pain management, including evaluation by a hip specialist. (JE 8:208).

However, Dr. Porter supported Mr. Klindt seeking care from a previous provider. (JE 8:208).

On August 11, 2020, Sayfe Jassim, M.D. examined Mr. Klindt at OrthoNebraska, in order to evaluate his left hip issues. (JE 8:209-211). Mr. Klindt complained of pain in his left hip that radiated to his knee. (JE 8:209). This pain began after his work incident. (JE 8:209). Dr. Jassim diagnosed Mr. Klindt with severe degenerative joint disease of the left hip. (JE 8:210). Dr. Jassim recommended surgical intervention to assist the claimant with his left hip condition. (JE 8:210).

Dr. Jassim drafted a response to questions from Sedgwick regarding the claimant's left hip. (JE 8:212-213). Dr. Jassim recounted his visit with Mr. Klindt, along with his recommendation for a total arthroplasty of the left hip due to the claimant's degenerative issues. (JE 8:212). Dr. Jassim noted that, while the claimant had degenerative joint disease in the left hip, it did not become symptomatic until after his work incident. (JE 8:212). Therefore, Dr. Jassim noted, "...it is reasonable to assume that the treatment of left total hip arthroplasty is a treatment for pain that is present in the left hip that was sustained in a work-related injury on March 20, 2019." (JE 8:213).

On September 20, 2020, Dr. Hahn replied to a check-box letter from claimant's counsel. (JE 8:214). Dr. Hahn checked "yes" and signed the letter indicating his agreement that it was his recommendation that Mr. Klindt should return to treatment for recommended surgical intervention with Dr. Burd. (JE 8:214).

Dr. Jassim performed a total hip arthroplasty via a direct anterior approach to the claimant's left hip on October 8, 2020. (JE 8:215-216). Dr. Jassim found Mr. Klindt's left hip to have "full thickness chondral loss superolateral femoral head and acetabulum, synovitis." (JE 8:215). Mr. Klindt was also diagnosed with degenerative joint disease of the left hip. (JE 8:215). Following the surgery, Mr. Klindt was moved into the recovery unit. (JE 8:216).

Mr. Klindt had his first post-surgical follow-up visit via TeleHealth with Dr. Jassim on October 23, 2020. (JE 8:217-218). Mr. Klindt told Dr. Jassim that he was doing well with no complaints. (JE 8:217). Mr. Klindt was told he could continue with physical therapy exercises. (JE 8:217). Dr. Jassim requested that Mr. Klindt return in one month for additional follow-up. (JE 8:217). Dr. Jassim issued a note during this visit indicating that the claimant is to remain off work until his re-evaluation. (JE 8:218).

Dr. Jassim visited with Mr. Klindt for an additional post-surgical evaluation on November 24, 2020. (JE 8:220-221). This follow-up occurred six weeks after his surgery, and Mr. Klindt told Dr. Jassim that he was doing well overall with no complaints. (JE 8:220). Mr. Klindt's pain was also under control. (JE 8:220). X-rays were performed which showed a stable fixation of the hip replacement parts. (JE 8:220). Dr. Jassim also observed that the claimant had symmetrical leg length and offset with no complications. (JE 8:220). Dr. Jassim noted that Mr. Klindt could continue to progress his activities and that he had no restrictions; however, Dr. Jassim issued a note that Mr. Klindt was to continue being off work until his next re-evaluation. (JE 8:220-221).

On December 1, 2020, the claimant began another session of physical therapy -- with ATI. (JE 3:57-58). Mr. Klindt had left hip pain, left pelvic pain, and lumbar weakness. (JE 3:57). He also had gait issues along with range of motion issues. (JE 3:57).

ATI issued a therapy progress note on December 10, 2020. (JE 3:59-60). Mr. Klindt noted that his hip was doing better, but that he was "very limited in activities he can perform at therapy" due to his increased lower back pain. (JE 3:59). Mr. Klindt could not lie supine, and had increased lower back pain when he was lying down. (JE 3:59).

On January 4, 2021, Mr. Klindt had his tenth visit for this round of physical therapy. (JE 3:61-62). He was re-evaluated during this visit. (JE 3:61). Mr. Klindt told the therapist that he experienced severe pain in his lower back, which he rated between 7 and 10 out of 10. (JE 3:61). He also had discomfort anterior to his hip when he initially sat and stood and when he initiated his gait. (JE 3:61).

Dr. Jassim saw Mr. Klindt again on January 6, 2021, for a three-month post-operative follow-up. (JE 8:222-225). Mr. Klindt had no complaints about his left hip, and told the doctor that his left hip pain had completely resolved. (JE 8:222). Mr. Klindt had some lateral sided leg pain which extended past the knee along with central low back pain. (JE 8:222). Mr. Klindt told Dr. Jassim that he felt that "his severe limitations are secondary to his low back and not to his hip." (JE 8:222). Dr. Jassim opined that some of the claimant's pain was caused by iliotibial band syndrome, and he recommended that the claimant perform some stretching exercises for this. (JE 8:222). Dr. Jassim expressed a concern that Mr. Klindt could compensate for his pain in his low back causing him to reinjure his hip. (JE 8:223). Dr. Jassim agreed that a FCE would be beneficial in order to ascertain Mr. Klindt's capabilities. (JE 8:223). Mr. Klindt expressed apprehension about proceeding to a FCE, as he continued to have back pain with surgical recommendations. (JE 8:223). Dr. Jassim kept Mr. Klindt off work until his next follow-up, and prescribed physical therapy. (JE 8:224-225).

Mr. Klindt was discharged from physical therapy at ATI on January 7, 2021. (JE 3:63-64). The therapist noted that Mr. Klindt's hip was "doing good," but that his lower back caused him extreme pain and limited his activities. (JE 3:63).

On January 28, 2021, Mr. Klindt reported to Athletico for a FCE, as requested by Dr. Jassim. (JE 9:273-276). Mr. Klindt noted that he would push or pull between 3,000 and 5,000 pounds, and that he would carry 80 to 150 pounds without assistance. (JE 9:276). He also had to perform a number of physical tasks, and lift items from waist to shoulder height 101 to 500 times per day. (JE 9:276). Mr. Klindt testified that his opinion was that this FCE was only for his hip. (Testimony). He testified that at the time of the FCE, he had only been released from care related to his left hip. (Testimony). He felt that he was still being treated and "under ... restrictions..." on his back due to his continued pain. (Testimony). He relayed this belief to the FCE examiner. (Testimony). He testified that he did not want to hurt himself further by participating in the FCE. (Testimony). The examiner instructed Mr. Klindt in the expectations of the FCE, which included that Mr. Klindt would provide his best effort. (JE 9:273). Mr. Klindt told the

examiner that he still had back pain and that he was on a 20-pound lifting restriction due to his lower back issues. (JE 9:273). The examiner asked the claimant if he would participate in the FCE if they stayed within the 20-pound lifting limit. (JE 9:273). At that time, Mr. Klindt noted his restrictions regarding bending, stooping, standing, and walking. (JE 9:273). The examiner questioned who imposed the restrictions, and Mr. Klindt indicated it was “the first physician that he had seen after his injury, and the restrictions had never been changed.” (JE 9:273). The examiner wrote, “I tried to explain to Don that it would be safe to suspend those restrictions for the sake of trying to get an accurate evaluation of the outcome of his left hip surgery.” (JE 9:273). The claimant reiterated that he refused to exceed any restrictions that he provided to the examiner. (JE 9:273). At that time, the FCE was concluded without any participation from the claimant. (JE 9:273).

Dr. Jassim examined Mr. Klindt again on February 16, 2021, for additional left hip evaluation. (JE 8:226-228). Mr. Klindt continued to do well with his left hip despite “some lateral sided hip pain” which did not bother the claimant much. (JE 8:227). Mr. Klindt told Dr. Jassim that he had severe low back pain which also caused him to have issues with ambulation. (JE 8:227). Mr. Klindt noted that he could not participate in the FCE, as he was not willing to “violate restrictions that were applied to him prior to his total hip arthroplasty.” (JE 8:227). Dr. Jassim opined that Mr. Klindt achieved maximum medical improvement (“MMI”) for his left hip, and that he required no restrictions regarding the same. (JE 8:227). Dr. Jassim continued by noting that Mr. Klindt was unable to work due to his lower back pain, and requested that he return in one year. (JE 8:227).

On April 2, 2021, Seann Atkinson, D.O., issued a letter advising that Mr. Klindt should be “off of work indefinitely due to his ongoing lower back pain due to work injury sustained on 3/20/2019 with XPO Logistics.” (JE 1:19). Dr. Atkinson also opined that Mr. Klindt should seek short-term disability prior to his back surgery, as Mr. Klindt could not work until his back issue was “improved/resolved.” (JE 1:19).

Dr. Burd examined the claimant again on June 18, 2021, for continued lower back and leg pain. (JE 7:139-143). Dr. Burd observed that Mr. Klindt was “somewhat pleasant but a bit irked secondary to the length of time is [sic] taken to get [to] this point to see me.” (JE 7:141). Mr. Klindt complained of constant lower back numbness and tingling, along with dull, aching pain, which he rated 6 out of 10. (JE 7:139). He noted that bending and walking worsened his pain. (JE 7:139). Mr. Klindt told the doctor that he lacked desire to have any further injections. (JE 7:139). He had his left hip replaced in October of 2020, which he hoped would ease his pain, however the surgery only helped his left hip pain and not his back or leg symptoms. (JE 7:139). Dr. Burd ordered additional x-rays, which showed multilevel degenerative disease in the lumbar spine. (JE 7:141). Dr. Burd also observed coxarthrosis to the right hip with a focal deformity in the coronal plane at L4-5. (JE 7:141). Dr. Burd took Mr. Klindt off work until after a planned transforaminal lumbar interbody fusion at L4-S1. (JE 7:141-142). Dr. Burd also recommended a follow-up MRI prior to surgical intervention. (JE 7:142).

On July 15, 2021, George Starlin, PA-C, examined the claimant for a preoperative physical examination. (JE 1:20-24). Mr. Klindt was set to have a spinal

surgery on July 22, 2021, performed by Dr. Burd. (JE 1:20). When Mr. Klindt reported for his visit, he was “not in acute distress.” (JE 1:21). X-rays were taken and blood was drawn from the claimant. (JE 1:20-24). Some concerning findings were noted on the imaging, along with a recommendation for the claimant to follow-up on some previous unrelated concerns. (JE 1:24).

Mr. Klindt reported to Nebraska Spine Hospital on July 22, 2021, in order to have a surgical procedure by Dr. Burd. (JE 7:147-148). Dr. Burd noted both pre-operative and post-operative diagnoses of severe spinal stenosis with intractable pain from L4-5 and L5-S1. (JE 7:147). In order to treat these conditions, Dr. Burd performed the following procedures:

1. Posterior spinal fusion with instrumentation, NuVasive Armada pedicle screws, L4-S1 bilaterally.
2. Interbody device placement x2, L4-5, L5-S1.
3. Stealth image-guided surgical navigation.
4. Ponte osteotomies, L4-5, L5-S1.
5. Autogenous bone graft harvested through same incision.
6. Allograft bone, BMP, small kit with 15 cc of crushed cancellous bone graft.
7. Iliac crest bone marrow aspirate, left iliac crest, to enhance fusion.

(JE 7:147). Mr. Klindt tolerated these procedures well. (JE 7:147-148).

Dr. Burd fitted Mr. Klindt for an offloading brace on July 23, 2021. (JE 7:149).

On July 25, 2021, Mr. Klindt reported to the Cass County Health Emergency Room with complaints of abdominal cramping following his surgery. (JE 1:25-30). He indicated that he was constipated since July 21, 2021. (JE 1:25). He also had urine retention. (JE 1:25). He was provided with Miralax and Flomax to resolve his issues. (JE 1:25-30).

Mr. Klindt called Dr. Burd’s office on July 27, 2021, seeking advice on weaning off certain opioid medications. (JE 7:151). Dr. Burd advised him not to “rush off” the medications despite the claimant indicating that he felt worse overall when taking them. (JE 7:151).

On July 30, 2021, Mr. Klindt again called Dr. Burd’s office seeking permission to drive. (JE 7:152). Dr. Burd indicated that the claimant should not drive for two weeks after surgery and he should also be off narcotic medications. (JE 7:152).

Mr. Klindt had a call with Dr. Burd on August 11, 2021, as a follow-up to the July surgery. (JE 7:153). Mr. Klindt told the doctor that he was “[d]oing great. Surgery has made a world of difference.” (JE 7:153). He also noted that his back pain and leg pain were resolved, and that his only remaining pain was at his incision site. (JE 7:153).

Dr. Jassim wrote a letter to Sedgwick dated August 31, 2021. (JE 8:229). Dr. Jassim reiterated that Mr. Klindt achieved MMI on February 16, 2021, for his left hip issues. (JE 8:229). Based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Jassim provided the claimant with a 37 percent left lower

extremity impairment rating, which translated to a 15 percent whole person impairment. (JE 8:229). Dr. Jassim concluded that Mr. Klindt required no further care for his left hip and required no work restrictions for the left hip. (JE 8:229).

On September 2, 2021, Mr. Klindt had another visit with Dr. Burd. (JE 7:154-160). He rated his pain 3 out of 10 at the time of the appointment. (JE 7:154). X-rays showed "well-positioned instrumentation" at L4-S1 with no loosening. (JE 7:156, 160). Mr. Klindt was "very pleased" with his results, and told Dr. Burd that his preoperative pain was "completely gone" and that he felt like a new man. (JE 7:156). Dr. Burd provided the claimant with light duty restrictions, and referred him for work hardening therapy. (JE 7:156, 159).

Mr. Klindt began work hardening physical therapy at Nebraska Spine Center on September 2, 2021. (JE 7:161-165). Mr. Klindt again rated his pain 3 out of 10. (JE 7:161). He noted to the therapist that his lower back was "much better, unless he accidentally bends." (JE 7:161). He also was sleeping much better. (JE 7:161). He still had "some" discomfort in his left thigh. (JE 7:161). Mr. Klindt reported not wearing his back brace due to it irritating his incision site. (JE 7:161). The therapist observed that the claimant had limited lower extremity flexibility, neural tension, poor core stability awareness, and limited posture awareness. (JE 7:164).

On October 28, 2021, Mr. Klindt returned to Dr. Burd's office for further post-surgical examination and follow-up. (JE 7:166-171). He described his pain as intermittent, and again rated his pain 3 out of 10. (JE 7:166). He also told Dr. Burd that he was doing better than before surgery. (JE 7:166). Dr. Burd noted that the claimant's low back pain was "slightly increased today with forward flexion and extension of the lumbar spine." (JE 7:168). Dr. Burd found no tenderness to the lower back upon palpation. (JE 7:168). Dr. Burd ordered another CT scan and continued work hardening. (JE 7:168). Dr. Burd believed that Mr. Klindt would drive again; however, Dr. Burd opined that Mr. Klindt would likely never return to his previous level of physical activity. (JE 7:169). Dr. Burd recommended a FCE to determine the claimant's physical capabilities. (JE 7:169). The restrictions provided by Dr. Burd were: "...[n]o lifting over 10 lbs. No excessive or repetitive bending, twisting, or stooping. Ability to change positions as needed for comfort." (JE 7:171).

Mr. Klindt had another physical therapy visit as referred by Dr. Burd on October 28, 2021. (JE 7:172-175). Mr. Klindt was generally pleased with his surgical results, but noted frustration over slow progress during the previous six weeks. (JE 7:172).

On November 10, 2021, a new physical therapy order was issued by Dr. Burd's office. (JE 7:177). The order included an order for work conditioning for five weeks. (JE 7:177).

Mr. Klindt began his third round of physical therapy with ATI on November 22, 2021. (JE 3:65-66). Mr. Klindt complained of lumbar radiculopathy, reduced range of motion in the lower back, and increased pain. (JE 3:65).

The claimant was re-evaluated by ATI on December 7, 2021, during which his progress was evaluated by the therapist. (JE 3:69-70). The therapist identified

improvement with the claimant's lumbar mobility, but noted that he continued to have moderate pain with floor to waist lifting. (JE 3:69). The therapist evaluated Mr. Klindt's tolerance of various functional capabilities. (JE 3:69).

After 10 visits of physical therapy at ATI, the claimant was discharged on December 15, 2021. (JE 3:71-72). Mr. Klindt was transitioned to work conditioning and work hardening "to address functional strength and activity tolerance to allow for safe return to full duty work." (JE 3:71). Mr. Klindt could lift 22 pounds from the floor to the waist, 25 pounds above the shoulder, and he could carry 20 pounds on the right and left for 20 feet. (JE 3:71). He also tolerated frequent sitting, occasional standing and walking, and seldom reaching above the shoulder and stair climbing. (JE 3:71). He rated his pain 7 out of 10 before and during therapy. (JE 3:71).

Mr. Klindt had a CT scan performed at Nebraska Spine and Pain Center on January 3, 2022. (JE 7:179-180). The CT showed "[e]xpected postoperative changes from L4-S1" with an intact fusion, and multilevel degenerative disc and facet changes along with multilevel neural foraminal stenosis at L5-S1. (JE 7:180).

Mr. Klindt moved to a work hardening therapy program at ATI, and his progress was again evaluated on January 4, 2022. (JE 3:73-74). Mr. Klindt continued to report lumbar pain. (JE 3:73). The therapist noted that Mr. Klindt made "some gains" with his strength, but that he continued to have increased difficulty with lifting from the floor. (JE 3:73). Mr. Klindt could frequently stand. (JE 3:73). The remainder of his activity tolerances remained the same as his December 15, 2021, visit. (JE 3:73). At rest, he rated his pain 1 out of 10. (JE 3:73). While participating in activities, Mr. Klindt rated his pain 5 out of 10. (JE 3:73).

A case manager called Dr. Burd's office on January 10, 2022, indicating that a therapist opined that Mr. Klindt would not return to his regular job. (JE 7:181). The case manager requested an order for a FCE. (JE 7:181). Mr. Klindt was called, and he concurred that he felt he could not return to his regular job. (JE 7:181). In response to this phone call, Dr. Burd ordered that the claimant complete a FCE. (JE 7:182).

On January 13, 2022, Mr. Klindt was discharged from ATI after 22 total visits. (JE 3:75-76). The therapist opined that Mr. Klindt had improved mobility and strength; however, he had moderate to severe difficulty with floor to waist lifting. (JE 3:75). Mr. Klindt indicated that his pain was 1 out of 10 while resting, and 5 out of 10 while performing activities. (JE 3:75). The therapist noted that Mr. Klindt would have a functional capacity evaluation in order to establish his current physical demand level and ability to return to work. (JE 3:75).

Mr. Klindt had a functional capacity assessment ("FCA") at ATI on January 17, 2022. (JE 3:77-85). The examiner determined that the claimant provided a full effort and that the results of the exam were valid. (JE 3:85). The examiner opined that Mr. Klindt's job as a truck driver and/or freight deliverer was in the "very heavy" category of occupation. (JE 3:77). Mr. Klindt reported that he continued to have lumbar pain with "a significant reduction in radicular symptoms" since his lumbar surgery. (JE 3:77). During the examination, the examiner opined that the claimant demonstrated certain deficits and increased lumbar pain. (JE 3:77). The examiner reviewed a number of

different tolerances for the claimant, including lifting certain weights. (JE 3:79). Mr. Klindt demonstrated the ability to work five to six hours per day, sitting for 45 minutes at a time during a four-hour period, and standing for 20 minutes at a time for one to two hours. (JE 3:78). Mr. Klindt could also only minimally occasionally bend, stoop, and crouch. (JE 3:78). Mr. Klindt demonstrated an ability to work in a light to medium physical demand level job based upon his examination. (JE 3:77). Therefore, the claimant was not capable of returning to full duty as a truck driver, according to the examiner. (JE 3:77).

On January 25, 2022, Mr. Klindt saw Dr. Burd again following the FCE. (JE 7:183-187). Mr. Klindt rated his pain 2 out of 10 at the outset of the visit. (JE 7:183). At worst over the previous seven days, his pain was 7 out of 10. (JE 7:183). He told Dr. Burd that his pain was aching, throbbing, dull, and constant. (JE 7:183). Sitting helped relieve his pain, and Mr. Klindt reiterated his belief that he could not return to his previous position. (JE 7:183). X-rays were taken, which showed no loosening of the fusion hardware. (JE 7:185). Dr. Burd reviewed the results of the FCE and noted that Mr. Klindt could return to work with the permanent restrictions provided by the FCE. (JE 7:185). Dr. Burd placed the claimant at MMI and requested that he come back on an as-needed basis. (JE 7:185).

Dr. Burd responded to a letter from claimant's counsel with a letter of his own on May 2, 2022. (JE 7:188-189). Dr. Burd noted his previous diagnoses of lumbar radiculopathy with bilateral foraminal stenosis at L4-5 and L5-S1. (JE 7:188). Dr. Burd reiterated that the work restrictions provided by the FCE were permanent, and that Mr. Klindt achieved MMI on January 13, 2022. (JE 7:188). Dr. Burd opined that the claimant may need further follow-up for his low back pain which could include over-the-counter medication. (JE 7:188). Despite some of the claimant's condition pre-dating his work incident, Dr. Burd opined that the claimant's condition was causally related to his work injury. (JE 7:188). This was due to the fact that the claimant had no symptoms prior to his work injury. (JE 7:188). Dr. Burd also provided a 23 percent whole person impairment rating to the claimant based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 7:188).

In a report dated June 16, 2022, Charles TAYLOR, M.D., F.A.A.N.S., outlined his findings following an IME. (Claimant's Exhibit 1:1-8). Dr. Taylor is a board certified neurosurgeon and professor of neurosurgery at Creighton University, in Omaha, Nebraska. (CE 1:7-8). As part of his IME report, Dr. Taylor reviewed a number of medical records. (CE 1:4-6). Mr. Klindt outlined his job duties for Dr. Taylor, as well as how he injured himself. (CE 1:1). He further outlined his treatment to date. (CE 1:1). He noted that his hip surgery helped take away 25 percent of his overall pain, and that his spine surgery helped remove 80 percent of the residual pain. (CE 1:1). At the time of the IME, he had no leg pain, and reported being very happy with the previous surgeries. (CE 1:1). Mr. Klindt told Dr. Taylor that he had "a degree of low back pain in the midline," which radiated bilaterally at the belt line. (CE 1:1-2). He also had occasional left leg pain above the knee. (CE 1:2).

Upon examination, Dr. Taylor found the claimant to have a stable gait. (CE 1:2). Mr. Klindt displayed a decreased range of motion in his lumbar spine, but no motor

abnormalities. (CE 1:2). Dr. Taylon opined that, as a result of his injury on March 20, 2019, Mr. Klindt aggravated a degenerative foraminal stenosis in the lumbar spine. (CE 1:4). Dr. Taylon placed the claimant at MMI, and agreed with the previously provided 23 percent whole person impairment rating provided by Dr. Burd. (CE 1:4). Dr. Taylon referenced Table “15s” from the Guides to the Evaluation of Permanent Impairment in agreeing to Dr. Burd’s impairment rating. (CE 1:4). Dr. Taylon provided the claimant with permanent restrictions including a 30-pound lifting restriction, opining that the claimant should avoid repetitive bending or twisting, and finally that the claimant should be allowed to change positions every two hours. (CE 1:4). Dr. Taylon concluded that the claimant’s overall prognosis was good as long as he stuck to his restrictions. (CE 1:4).

On June 17, 2022, Mr. Klindt had an IME with Thomas Atteberry, M.D. of Miller Orthopedic Specialists. (CE 2:9-12). Dr. Atteberry is an orthopedist. (CE 2:11-12). Dr. Atteberry diagnosed the claimant with low back pain, left lower extremity numbness, “[s]tatus post transforaminal lumbar interbody fusion at L4-5 and L5-S1,” and “[s]tatus post left hip total arthroplasty.” (CE 2:9). He connected Mr. Klindt’s injuries directly to the March 20, 2019, work injury. (CE 2:10). He also concluded that the work injury “lighted up” certain degenerative conditions. (CE 2:10). Dr. Atteberry opined that it was “highly unlikely” that Mr. Klindt would return to his previous employment “due to likely exacerbation of his symptoms.” (CE 2:9). Dr. Atteberry continued his report by stating, “[h]e would require job [*sic*] with minimal if any bending, stooping, lifting, pushing, or pulling.” (CE 2:9). He concluded that Mr. Klindt’s prognosis was “fair,” and that he had a 37 percent permanent impairment to his left hip, which equated to 15 percent of the whole person. (CE 2:9). Dr. Atteberry also provided the claimant with a 20 percent permanent impairment to the whole person for his lumbar injuries. (CE 2:9). Dr. Atteberry made no mention of the AMA Guides in his impairment ratings. (CE 2:9-10).

Patricia Conway, M.S., C.R.C., C.D.M.S., C.L.C.P., L.M.H.P., of Conway Rehabilitation Services, Inc., performed a loss of earning capacity analysis on Mr. Klindt following a vocational interview on June 28, 2022, and issued a report regarding the same on June 30, 2022. (CE 3:13-20). Ms. Conway holds a Master of Science degree from Wayne State College. (CE 3:20). She is also a licensed mental health practitioner, a certified life care planner, a certified rehabilitation counselor, a certified disability management specialist, and is certified by the Nebraska Workers’ Compensation Court as a “Vocational Rehabilitation Counselor and Job Placement Specialist.” (CE 3:20).

Ms. Conway began her report by reviewing Mr. Klindt’s injury and medical history. (CE 3:13-15). She reviewed the results of the FCE and Dr. Burd’s final reports. (CE 3:15). She also reviewed Mr. Klindt’s work history. (CE 3:16). Ms. Conway found Mr. Klindt to have transferable skills as a tractor trailer truck driver, a machine operator, and a grain truck driver. (CE 3:16). She further opined that Mr. Klindt performed labor intensive work within the medium heavy and very heavy work categories. (CE 3:17). Mr. Klindt was precluded from working in heavy and very heavy work categories, as well as “numerous jobs within the medium work category,” based upon Mr. Klindt’s FCE

restrictions as adopted by Dr. Burd. (CE 3:17). Ms. Conway also opined that Mr. Klindt was precluded from working full-time due to his restrictions limiting him to a five to six hour workday. (CE 3:17). She further wrote that Mr. Klindt did not have transferable skills to light or sedentary work, "so he qualifies to perform part-time unskilled and very low level semi-skilled jobs within the light and sedentary categories." (CE 3:17). Mr. Klindt could work medium work category jobs, but his non-material handling restrictions also limited his access to these positions. (CE 3:17). Ms. Conway concluded that Mr. Klindt had lost access to 100 percent of all jobs that require full time hours, and that he had an 80 percent loss of access to remaining part-time jobs due to his restrictions. (CE 3:17).

Ms. Conway then endeavored to outline potential positions for which Mr. Klindt may qualify. (CE 3:17). Specifically, she identified jobs such as a van driver or shuttle driver, and "some security jobs." (CE 3:17). Based upon wage data that Ms. Conway found for the Atlantic, Iowa, area, and the limitations placed upon Mr. Klindt by his restrictions, Ms. Conway opined that the claimant would have a wage loss of between 63 percent and 77 percent if he were to find employment in one of the other identified fields. (CE 3:17-18). Ms. Conway concluded her report by stating, "[i]n my professional opinion, Mr. Klindt's labor market is so severely limited that he is not reasonably competitively employable for suitable employment and is therefore an 'odd lot' worker." (CE 3:18).

Mr. Klindt opined that his limitations following his work injury would not allow him to perform the functions of any of his previously held jobs, such as his mail sorting job, his job with Empire, Inc., his job with Firestone Tire, his job with Central Western Fabrication, his job(s) with Mahle, his job with Plastic Professionals, his job with Schildberg Construction, his job with Hoye's Trucking, his job with Panama Transfer, and his job with XPO at the time of the hearing. (Testimony). Mr. Klindt did not believe that he could work a full-time job as of the time of the hearing. (Testimony). He noted that, prior to his injuries at XPO, he never left a job without having another job lined up. (Testimony).

He testified that the population of Atlantic, Iowa, is about 7,500 people, and that the next closest towns of the same size were "at least 30 miles" away. (Testimony). Mr. Klindt testified that he has applied for 12 to 15 jobs, but that "once they hear [his] restrictions, basically [he is] shot down right there, the conversation kind of stops." (Testimony). He did not specify any employers to which he applied, but noted applying at a temp agency in Atlantic, Iowa. (Testimony). After applying at the temp agency, he received a call in which someone from the temp agency told him, "[w]e don't [sic] have anything for you here." (Testimony). Mr. Klindt also noted that he is limiting his job search to only those within a 20-mile radius of his home. (Testimony). This is despite several of his prior jobs being outside of this radius, including his job with XPO. (Testimony). He claimed that he needed to be closer to home since he was the sole parent for his minor child. (Testimony). Mr. Klindt had not yet applied for Social Security Disability benefits, as he felt that "it's [sic] over then..." meaning that he would no longer be returning to work if he applied for those benefits. (Testimony).

Mr. Klindt worked light duty at XPO until September of 2019. (Testimony). This was six months. (Testimony). His light duties included office work and sorting papers. (Testimony). He testified that XPO had a policy to only provide light duty work to employees for six months. (Testimony). Mr. Klindt provided Dr. Burd's restrictions to a human resources representative at XPO. (Testimony). According to Mr. Klindt, XPO would not allow him to return to work there unless he was "coming back 100 percent." (Testimony).

At the time of the hearing, Mr. Klindt felt "[p]retty depressed" and down. (Testimony). He felt that he would still be "going full speed ahead." (Testimony). He testified that he could no longer throw the football or baseball with his son. (Testimony). He also testified that he did not want his son to "see his dad suffer." (Testimony). He no longer performs snow removal at his home and relies on his adult daughter and son-in-law for assistance. (Testimony). He also does not perform all of the lawn maintenance. (Testimony). He continued to do laundry in smaller loads. (Testimony). He still enjoys freshwater fishing with his son at various lakes and ponds. (Testimony). He also raises and feeds several cows for 4-H projects. (Testimony).

### **CONCLUSIONS OF LAW**

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

#### **Permanent Disability**

The parties stipulated that the injuries of March 20, 2019, are a cause of permanent disability. The claimant alleges that he is permanently and totally disabled under the common law odd-lot doctrine. The defendants allege that, in the alternative, the claimant should be compensated pursuant to an industrial disability analysis.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtin, 674 N.W.2d 123, 126 (Iowa 2004)(discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish that they are totally and permanently disabled if the claimant's medical impairment, taken together with nonmedical factors totals 100-percent. Id. The odd-lot doctrine applies when the claimant has established that the claimant sustained something less than 100-percent disability, but is so injured that the claimant is "unable to perform services other than 'those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.'" Id. (quoting Boley v. State, Indus. Special Indem. Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997)).

"Total disability does not mean a state of absolute helplessness." Walmart Stores, Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003)(quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to

perform.” IBP, Inc., 604 N.W.2d at 633. However, finding that the claimant could perform some work despite claimant’s physical and educational limitations does not foreclose a finding of permanent total disability. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Guyton v. Irving Jensen, Co., the Iowa Supreme Court formally adopted the “odd-lot doctrine.” 373 N.W.2d 101 (Iowa 1985). Under that doctrine, a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are “so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.” Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to provide evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, then the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include: the worker’s reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker’s physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker’s burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Mr. Klindt has a lengthy employment history working in what can best be described as manual labor type positions. He originally worked at a mail sorting operation while in high school. He then worked for a cleaning company wherein he drove a route and delivered linens and rugs to various establishments and businesses. He returned to Atlantic, Iowa and took a job with Firestone working on tires and farm implements. His next employment was working on steel at a welding operation. For a short time, he worked for the railroad replacing rail ties. He then worked at a bearing plant on an assembly line. For a time, he worked at a plastics facility, which required him to get on the floor and crawl underneath items.

The claimant then transitioned to working in trucking for a farming operation. While there is some discussion and debate about this job being “no touch,” the reality is that there are various meanings of this across the trucking industry. Mr. Klindt’s testimony as to his impressions of what no touch meant are persuasive despite some of their variation between his deposition and hearing testimony. Mr. Klindt left this position because he was awarded full custody of his children following divorce proceedings. He

testified that he needed to be closer to his family with more consistent work hours. Accordingly, Mr. Klindt returned to the bearing plant again. Once the hours began to increase at the bearing plant, Mr. Klindt sought a different job with Panama Transfer. He worked on dedicated freight lines where he performed short-haul trips for clients such as Hy-Vee. He had to unload freight at warehouses. He testified that this job was a bit far from his home, so he sought a new job with Conway Freight. Conway Freight eventually was bought by XPO. His job at XPO was similar to that with Panama in that he hauled freight.

All of the above jobs required Mr. Klindt to perform significant physical labor, including bending, twisting, and lifting. They also all appear to have been full time positions.

On March 20, 2019, Mr. Klindt delivered several 55-gallon drums to a car wash in the Omaha, Nebraska, area. As he attempted to push a pallet-jack across a parking lot, he felt a sharp pain in his back. Mr. Klindt returned to the XPO terminal and was referred to medical care with the Cass County Health System.

Mr. Klindt then treated with a physician assistant for several months. During this time, he had an MRI of his lumbar spine, which showed degenerative disc and joint disease at several levels, along with a posterior annular fissure at L4-5, and moderate neural foraminal stenosis on the right at L4-5 and on the left at L5-S1. The physician assistant opined that the annular fissure was “consistent of where the original pain was with [his] injury.” XPO sent Mr. Klindt to a neurosurgeon who diagnosed him with low back pain, a muscle strain, and an annular disc tear. The neurosurgeon prescribed physical therapy and discussed the possibility of an injection.

Since Mr. Klindt did not improve, and in fact reported worsening pain during his therapy appointments, he was referred for a lumbar epidural steroid injection in June of 2019. Mr. Klindt testified that the injection caused severe pain and refused additional injections at that time. Mr. Klindt also was frustrated with the care provided by XPO, so he sought out his own provider in Dr. Jensen in an effort to find “some answers.” Dr. Jensen opined that the claimant’s symptoms correlated with “discogenic back pain secondary to an annular disc wall tear centered at the L4-5 lumbar segment. Associated degenerative changes at the L3-4 and L5-S1 lumbosacral segment (in association with facet arthropathy) also remain of some concern...” He prescribed Mr. Klindt with a course of an oral muscle relaxant and told Mr. Klindt that surgery may be necessary to alleviate his symptoms.

XPO sent Mr. Klindt for an IME with Dr. Boulden in August of 2019. Dr. Boulden reviewed the previous MRI and opined that it showed degenerative disc disease at L3-4 and L5-S1, with early degenerative changes at L2-3. He also noted mild neural foraminal stenosis at L5-S1 with no nerve entrapment, and a small annular tear at L4-5 on the right. Dr. Boulden opined that these were pre-existing issues, but that the March 20, 2019, incident aggravated them. Dr. Boulden recommended a certain physical therapy program and opined that degenerative back pain would improve with time rather than surgery.

Dr. Jensen wrote a letter to the claimant's attorney opining that Mr. Klindt achieved "maximum functional capacity," and MMI related to conservative care. He also provided an impairment rating of 22 percent of the whole person based upon the Guides.

Mr. Klindt then had no treatment until October 10, 2019, when he saw Dr. Burd. Dr. Burd noted the claimant's symptoms at that time, examined him, and diagnosed him with lumbar disc degeneration at L3-4 and L4-5, a bulging disc at L4-5 and L5-S1, and osseous and subluxation stenosis of intervertebral foramina of the lumbar region. Dr. Burd provided the claimant with some restrictions at that time, and recommended a CT scan along with an EMG.

The CT scan showed continued issues in the claimant's lumbar spine. The EMG results were also abnormal, including chronic mildly active left L4 radiculopathy, chronic inactive right L4 radiculopathy, and chronic inactive left L5 radiculopathy. Based upon these results, by November of 2019, Dr. Burd recommended that the claimant have a transforaminal lumbar interbody fusion at L4-S1.

Again, the defendants had Dr. Boulden examine the claimant for an IME in December of 2019. Dr. Boulden again opined that the claimant should not have surgery, but should undertake a "good physical therapy program." Dr. Boulden opined in this report that the claimant should not return to his previous occupation with XPO due to his spine condition, and that he would likely require vocational rehabilitation.

It was not until April of 2020 that XPO sent Mr. Klindt to see Dr. Porter for his continued back issues. Dr. Porter did not recommend surgery, and instead prescribed additional physical therapy. Mr. Klindt then undertook this course of physical therapy. Again, Mr. Klindt saw little improvement during his physical therapy. During a follow-up visit with Dr. Porter in May of 2020, he again recommended against surgery. This caused the claimant to become "visibly frustrated," and elicited a comment from the claimant that he was suffering and "not living" due to his ongoing pain.

Dr. Porter ordered x-rays of the claimant's pelvis and left hip. The x-rays revealed moderate to severe arthrosis within the right hip, and severe arthrosis in the left hip. The left hip showed obliteration of the weight-bearing surface, subchondral sclerosis, and cyst formation.

Despite his earlier experience with injections, Mr. Klindt agreed to have an additional right L4-5 transforaminal epidural steroid injection and a left L5-S1 transforaminal epidural steroid injection in June of 2020. These produced no relief of his previous pain issues. During a July of 2020 follow-up with a provider, Mr. Klindt expressed a desire to return to Dr. Burd due to his surgical recommendation. Mr. Klindt restated this desire to Dr. Porter, who despite his continued recommendation against surgery, agreed that Mr. Klindt should follow-up with Dr. Burd. Dr. Hahn later also agreed with the recommendation that Mr. Klindt should return to treatment with Dr. Burd.

Because of his hip issues, Mr. Klindt also saw Dr. Jassim, who recommended surgical intervention for the left hip pain. Dr. Jassim also opined that the claimant had

pre-existing degenerative issues in his hip, but that they did not become symptomatic until after his March 20, 2019, work incident. On October 8, 2020, Dr. Jassim performed a total left hip arthroplasty. During the surgery, Dr. Jassim observed that the claimant had a “full thickness chondral loss superolateral femoral head and acetabulum, synovitis.”

By January of 2021, Mr. Klindt told Dr. Jassim that his left hip pain had completely resolved. However, he still experienced low back pain that caused him severe limitations. A therapist observed the same lower back issues upon his discharge from therapy at ATI. Dr. Jassim recommended that the claimant have a FCE. Mr. Klindt thought that the FCE was only to evaluate the condition of his hip and not any other part of his body. The FCE examiner was apparently tasked with performing a full FCE. Mr. Klindt was hesitant to perform some of the tasks expected of him during the FCE due to his belief that he was under restrictions for his back injuries. The examiner explained to Mr. Klindt that they could suspend the restrictions so that they could get an accurate evaluation of the outcome of the hip surgery, but Mr. Klindt refused. The FCE was ended without participation from Mr. Klindt.

In June of 2021, Mr. Klindt returned to Dr. Burd’s office for additional examination of his lower back. Dr. Burd ordered x-rays which showed multilevel degenerative disease in the lumbar spine. He then recommended a transforaminal lumbar interbody fusion at L4-S1. This surgery was performed on July 22, 2021, at Nebraska Spine Hospital. Mr. Klindt then had routine post-surgical examinations and physical therapy. By October of 2021, Dr. Burd opined that Mr. Klindt could likely drive again, but that he would likely never return to his previous level of physical activity. At that time, Dr. Burd recommended a FCE.

In January of 2022, Mr. Klindt had a FCA completed at ATI. The examiner determined that Mr. Klindt provided a full effort and therefore the results were deemed valid. As part of the FCA, the examiner opined that Mr. Klindt’s job with XPO was a “very heavy” occupation. Based upon the examination and various test results, the examiner opined that Mr. Klindt demonstrated an ability to work in a light to medium physical demand job. He further opined that the claimant should only work for five or six hours per day while limiting his sitting for 45 minutes at a time during a four hour period, and standing for 20 minutes at a time for one to two hours. Mr. Klindt could also occasionally bend, stoop, and crouch. Dr. Burd adopted the results of the FCA and noted that Mr. Klindt could return to work with the permanent restrictions in the FCA. Dr. Burd placed the claimant at MMI.

In a letter to claimant’s counsel, Dr. Burd confirmed that the restrictions from the FCA were permanent. He further confirmed that the claimant’s pre-existing condition was worsened by the work injury and that the claimant’s condition was worsened by the March 20, 2019, work injury. Dr. Burd noted that the claimant may need additional follow-up visits and over-the-counter medications. Dr. Burd concluded with an opinion that Mr. Klindt had a 23 percent permanent impairment to the whole person based upon the AMA Guides.

Dr. Taylon, a board certified neurosurgeon and professor of neurosurgery, conducted an IME on the claimant. Dr. Taylon agreed with the impairment rating provided by Dr. Burd. Dr. Taylon also provided the claimant with a 30-pound lifting restriction, and opined that the claimant should avoid repetitive bending or twisting, while being allowed to change positions every two hours.

Dr. Jassim opined that Mr. Klindt achieved MMI on February 16, 2021, for his left hip injuries. The doctor further opined that, based upon the AMA Guides, Mr. Klindt had a 37 percent left lower extremity impairment, or a 15 percent whole person impairment. Dr. Jassim concluded that Mr. Klindt required no further care or work restrictions for his left hip.

Dr. Atteberry conducted an IME of the claimant in June of 2022. He agreed with previous doctors on the issue of causation. He opined that it was “highly unlikely” that Mr. Klindt would return to his previous employment as it would likely cause an exacerbation of his symptoms. Dr. Atteberry further noted that Mr. Klindt required a job with minimal bending, stooping, lifting, pushing, or pulling. Dr. Atteberry agreed with Dr. Jassim’s permanent impairment assessment regarding Mr. Klindt’s left hip. Dr. Atteberry concluded that Mr. Klindt had a 20 percent whole person impairment due to his lumbar injuries.

Claimant’s counsel arranged for a loss of earning capacity analysis for Mr. Klindt. Patricia Conway, a certified rehabilitation counselor and certified disability management specialist, and proprietor of Conway Rehabilitation Services, Inc., drafted a report based upon her findings and opinions. As part of preparing her report, Ms. Conway performed a vocational interview with Mr. Klindt. She also reviewed his medical history. She opined that Mr. Klindt had transferable skills as a tractor trailer driver, a machine operator, and a grain truck driver. Mr. Klindt worked in medium heavy to very heavy work categories, along with a number of jobs within the medium work category. Ms. Conway noted Mr. Klindt’s restrictions of working only a five to six hour workday.

Ms. Conway opined that Mr. Klindt had no transferable skills to light or sedentary work occupations, “so he qualifies to perform part-time unskilled and very low level semi-skilled jobs within the light and sedentary categories.” Mr. Klindt had skills for medium work category jobs, but due to his non-material handling restrictions, his access to these positions was limited. Ms. Conway concluded, based upon her experience, her interview with Mr. Klindt, and her review of his capabilities, that Mr. Klindt lost access to 100 percent of all jobs requiring full time hours, and that he had an 80 percent loss of access to the remaining part-time jobs in his labor market due to his restrictions.

Ms. Conway outlined a few potential positions for Mr. Klindt, such as a van driver, shuttle driver, or certain security jobs. Ms. Conway reviewed wage data for the Atlantic, Iowa, area, and used the limitations placed upon Mr. Klindt to opine that Mr. Klindt had a wage loss between 63 percent and 77 percent if he were to find employment in one of the identified fields. Ms. Conway concluded that, “in [h]er professional opinion, Mr. Klindt’s labor market is so severely limited that he is not reasonably competitively employable for suitable employment and is therefore an ‘odd lot’ worker.”

At the time of the hearing, Mr. Klindt had custody of his minor son. He parented his son during the day, and relied on some of his adult children for help with tending to his lawn and driveway. He still did his family's laundry, but noted that it was in smaller loads in order to avoid carrying too much weight. He also testified that he could not do things like throw a football or baseball with his son because he did not want his son to see him suffer. He was still able to do some freshwater fishing with his son. He also was able to tend to, and raise, livestock for 4-H on his small acreage. He testified that he felt "[p]retty depressed," and down about his current life state.

Mr. Klindt testified that he contacted XPO after he was released with restrictions by Dr. Burd. He was told by an XPO human resources representative that they did not want him to return to work at XPO, unless he was "coming back 100 percent." In other words, XPO had no positions for the claimant within his restrictions, for which he was qualified.

As noted above, Mr. Klindt is a sole custodial parent for his young son. Since he needs to be close to home to be available to parent his son, Mr. Klindt limited his job search to within 20 miles of his home in Atlantic, Iowa. This is in contrast to previous jobs which he held that were outside of this radius. Mr. Klindt testified at the hearing that he applied for 12 to 15 jobs, but that once an employer is presented with his restrictions, "...the conversation kind of stops." Of note, Mr. Klindt did not present evidence of specific employers to which he presented applications. He recounted applying for work through a temp agency in Atlantic, Iowa. After applying and supplying them with his restrictions, he was told "[w]e don't [*sic*] have anything for you here." At the time of the hearing, Mr. Klindt had not yet applied for Social Security Disability benefits.

Mr. Klindt was 52 years old at the time of the hearing. He is a high school graduate. He has a CDL with some certifications, but has no other education. He is able to use a cell phone for texting, but does not possess a great chance for retraining. I am concerned by the thin evidence Mr. Klindt sustained injuries to his left hip and lower back as the result of a work injury on March 20, 2019, while in the course and scope of his employment with XPO. He underwent conservative care, but later had two surgeries. The first, a total hip arthroplasty, provided him with some improvement for his left hip issues. The second, a lumbar fusion, resulted in permanent restrictions and disability. Dr. Jassim opined that the claimant had a 15 percent whole person impairment, but required no further care or work restrictions related to his left hip. Dr. Atteberry agreed with Dr. Jassim's hip impairment rating.

Mr. Klindt had a FCA at ATI, which resulted in substantial limitations and restrictions. Specifically, Mr. Klindt could only work five or six hours per day, while limiting his sitting to 45 minutes at a time during a four hour period, and standing to 20 minutes at a time during a one to two hour period. These are substantial restrictions for someone with the employment history of Mr. Klindt. Dr. Burd adopted these restrictions, and opined that the claimant sustained a 23 percent permanent impairment to the body as a whole. Dr. Taylon, a board certified neurosurgeon, conducted an IME on the claimant and concurred with the impairment rating provided by Dr. Burd. Dr. Taylon also opined that the claimant should avoid repetitive bending or twisting, and be allowed

to change positions every two hours. Dr. Atteberry, another IME examiner, felt that it was “highly unlikely” that Mr. Klindt would return to his previous employment. He further held that Mr. Klindt required a job with minimal bending, stooping, lifting, pushing, or pulling. Dr. Atteberry provided the claimant with a 20 percent whole person impairment rating. While the impairment ratings provided by the physicians noted herein are not, in and of themselves, evidence of permanent and total disability under the odd-lot theory, they represent substantial evidence that the claimant requires significant restrictions in his occupation.

Most persuasive is the un rebutted report of Ms. Conway. Ms. Conway accurately noted that Mr. Klindt’s job history involved working in medium-heavy or heavy work categories. In reviewing the claimant’s occupational history above, it is apparent that his previous employment was in physically demanding fields. It is also important to note that, according to Mr. Klindt’s history and testimony, he never left a previous job without having another position arranged. Mr. Klindt also has an occupational history that dates back to working in a mail sorting operation while in high school. Ms. Conway opined that, because of Mr. Klindt’s restrictions and current capabilities, he lost access to 100 percent of all jobs requiring full time hours, and 80 percent of part-time jobs. He also would have a wage loss between 63 percent and 77 percent even if he found a job within the limited categories of part-time unskilled and very low level semi-skilled jobs within the light and sedentary categories. As noted in several prior cases, simply finding that Mr. Klindt can perform *some* work, does not foreclose a finding of permanent disability.

Mr. Klindt testified that he undertook a limited job search. Specifically, he noted that he applied for 12 to 15 jobs, but he neglected to specify which employer he applied with. Mr. Klindt also limited his job search to within 20 miles of his home in Atlantic, Iowa. Atlantic has a population around 7,500, which likely limits the job options available to the claimant considering his restrictions. Mr. Klindt also is the sole parent to a minor child. It is reasonable that he would search for employment within a short commute of his home so that he could be available to his minor child as needed. Even without taking into consideration Mr. Klindt’s status as a parent, it would be unreasonable to expect an injured worker to search for employment outside of a reasonable distance from their home.

The claimant has proven by a preponderance of the evidence and with substantial evidence that he is not employable in the competitive labor market. The burden thus shifts to the defendants to provide evidence showing the availability of suitable employment. The defendants present evidence of their own that contradicts the opinions of the medical providers. However, they presented no convincing evidence that contradicts the opinions of Ms. Conway. The defendants point to the deposition of Dr. Atteberry; however, he is not a vocational expert. Considering I found that Mr. Klindt is not employable in the competitive labor market, the defendants would need to produce evidence showing the availability of suitable employment. The defendants have failed to meet this burden. Based upon the foregoing, I find that the claimant is permanently and totally disabled under the odd-lot doctrine.

### Rate of Compensation

The parties dispute the proper average weekly wage for the claimant, and therefore the proper rate of compensation. There is no argument in the parties' post-hearing briefs as to their views on the proper average weekly wages and/or rate of compensation. It appears from reviewing the exhibits that the dispute is whether to include a bonus in the calculation of the claimant's average weekly wage.

The parties agree that the claimant was single and entitled to three exemptions at the time of the work injury. The claimant argues a proper average weekly wage of one thousand two hundred seventeen and 89/100 dollars (\$1,217.89) per week. The result would be a weekly compensation rate of seven hundred fifty-four and 30/100 dollars (\$754.30) per week. The defendants argue that the proper average weekly wage for the claimant is one thousand one hundred sixty-seven and 84/100 dollars (\$1,167.84) per week. The resulting weekly compensation rate would be seven hundred twenty-eight and 64/100 dollars (\$728.64) per week.

Iowa Code 85.36 states "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Weekly earnings are defined as the gross salary, wages, or earnings of an employee had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for work of employment. Id. The subsections of Iowa Code 85.36 set forth methods for computing weekly earnings depending upon the type of earnings and employment.

If an employee is paid on a daily, or hourly basis, or based upon output, weekly earnings are computed by dividing by thirteen (13) the earnings over the thirteen (13) week period immediately preceding the injury. However, any week that does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week that is a fair representation of the employee's customary earnings. See Iowa Code section 85.36(6). The calculation shall include shift differential pay, but not overtime or premium pay in the calendar weeks immediately preceding the injury. Id. If the employee was absent during the time period subject to calculation for personal reasons, the weekly earnings are the amount the employee would have earned had the employee worked when work was available to other employees in a similar occupation for the employer. Id.

As discussed above, the dispute amongst the parties appears to stem from the inclusion, or exclusion of a "bonus" from the calculation of gross earnings and thus compensation rate. Iowa Code section 85.61(3) defines gross earnings as: "recurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits."

The Court of Appeals considered whether a bonus was regular or irregular in Noel v. Rolscreen Co., 475 N.W.2d 666 (Iowa App. 1991). In Noel, the claimant argued that a Christmas bonus should have been considered in computing the weekly compensation benefit. Id. at 667. The amount of the bonus received by the claimant in

Noel varied from year to year. Id. The employer also required that employees meet a condition precedent in order to receive the bonus. Id. The employee handbook in Noel defined the bonus in question as an “anticipated bonus.” Id. The employer could discount the program for any reason. Id. The program could be changed in any manner or replaced at the employer’s discretion. Id. The Court determined that bonus was not regular, as it was of a varying amount, subject to a condition precedent, and not fixed in terms of entitlement or amount until late in the fiscal year. Id. at 668.

The Iowa Supreme Court examined the Noel decision in a subsequent case. The Court indicated that the Court of Appeals in Noel did not indicate that these factors are exclusive or exhaustive. Burton v. Hilltop Care Center, 813 N.W.2d 250, 266 (Iowa 2012). Accordingly, the Court indicated in Burton that: “. . . we do not feel a strict reading of Noel is appropriate.” Id. The Court further stated, “[s]ince no two cases present the same set of facts, we will not handcuff the agency by limiting its inquiry.” Id.

On July 12, 2017, the Commissioner issued a Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan (“the Order”) regarding several John Deere locations. The Order indicates that John Deere’s fiscal year runs from November 1 to October 31. Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan, Iowa Industrial Commissioner (July 12, 2017). Whether John Deere paid a profit sharing bonus, and the amount thereof, is determined in November of each year. Id. The profit sharing bonus is calculated based upon a number of factors including the employee’s average earnings and the overall profitability of John Deere. Id. In two of the 18 years predating the decision, bonuses were not paid. Id. Another incentive pay program also provided a bonus upon employees exceeding production goals. Id. This bonus is paid out quarterly based upon certain factors. Id. The Commissioner adopted the “common and ordinary meaning” of the words “recurring,” “irregular bonuses,” and “retroactive.” Id. Based upon the evidence provided to the Commissioner, the Commissioner determined that the profit sharing bonus paid by John Deere was not a recurring payment, but was “an irregular bonus dependent upon the overall profitability of Deere North America and Deere Worldwide for the prior fiscal year.” Id. Therefore, the Commissioner opined that the profit sharing bonus should be excluded from gross earnings when determining an employee’s weekly compensation rate. Id. The Commissioner concluded that the quarterly bonus was to be included in gross earnings because John Deere did not establish that the quarterly bonuses were retroactive. Id.

There was no evidence presented as to the nature of the “bonus” other than a line item in the claimant’s exhibits listing a payment amount as a “bonus,” and a line item for the same payment amount in the defendants’ exhibits. Neither item contains enough information to determine the nature of this bonus and how it comports with the established law. Additionally, no testimony was elicited as to this “bonus.” Based upon the information in the record, the “bonus” amount should not be included in calculating the claimant’s average weekly wage, or rate of compensation.

Therefore, the appropriate gross earnings are one thousand one hundred sixty-seven and 84/100 dollars (\$1,167.84) per week. The claimant is single and entitled to

three exemptions. This translates to a weekly compensation rate of seven hundred twenty-eight and 64/100 dollars (\$728.64) per week.

### **Payment of Medical Expenses**

The claimant seeks reimbursement for certain outstanding medical expenses. The defendants do not provide any argument in their post-hearing briefing as to this issue, but they did provide certain items showing payments for certain medical expenses.

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

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

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

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

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodward State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company, No. 1 Industrial Comm'r report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v. Veith Construction Corp., File No 5044438 (App. May 27, 2016)(Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v. Trinity Health, File No.

5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills)

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

The claimant seeks reimbursement for ATI therapy, and care with Nebraska Spine Hospital totaling one thousand three hundred twelve and 55/100 dollars (\$1,312.55). The claimant has proven that the medical care he sought on his own volition provided a more favorable outcome than the authorized care of the defendants. Therefore, it is appropriate for the defendants to pay the outstanding medical billing, if the bills as claimed remain unpaid. The defendants shall reimburse the providers, and not Mr. Klindt, for the outstanding balances.

#### **Alternate Care**

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

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

Iowa Code 85.27(4).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer’s right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

By challenging the employer's choice of treatment - and seeking alternate care - claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that care was unduly inconvenient for the claimant. Id. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id. Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgement of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

The claimant seeks an order of continuing care with Dr. Burd. Dr. Burd's final records indicate that the claimant *may* need further care, including over-the-counter medications. This is not sufficient to order alternate medical care. However, there is nothing about an arbitration decision that limits employer's liability to furnish reasonable medical care pursuant to Iowa Code section 85.27(1)(a). Therefore, the defendants remain liable for medical care should the claimant require further medical care for the compensable injury.

### **Reimbursement for IME pursuant to Iowa Code section 85.39**

Iowa Code 85.39(2) states:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

. . .

An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this

subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code section 85.39(2).

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). An opinion finding a lack of causation is tantamount to a zero percent impairment rating. Kern v. Fenchel, Doster & Buck, P.L.C., 2021 WL 3890603 (Iowa App. 2021).

The defendants sent the claimant for an IME with Dr. Boulden on August 22, 2019, and on December 17, 2019. During both of these appointments, Dr. Boulden declined to provide a permanent impairment rating. In the August 22, 2019, IME, Dr. Boulden opined that he could not provide a permanent disability due to the objective findings in the case. In the December 17, 2019, IME, Dr. Boulden opined that the claimant had not achieved MMI.

The claimant presents several reports, including an IME by Dr. Taylon, billed at two thousand five hundred and 00/100 dollars (\$2,500.00).

Dr. Boulden's finding that he could not rate any permanent partial disability at the time of the August 22, 2019, report triggers the provisions of Iowa Code section 85.39. The charges of Dr. Taylon are reasonable. The defendants shall reimburse the claimant two thousand five hundred and 00/100 dollars (\$2,500.00) for the costs of Dr. Taylon's IME.

### **Credit**

There is a dispute as to the credit to which the defendants may be entitled. The defendants claim a credit for 57 weeks and 5 days of permanent partial disability benefits equal to forty-four thousand two hundred ninety-six and 39/100 dollars (\$44,296.39). The claimant contends that the credit should only be for 50 weeks of permanent partial disability benefits at seven hundred seventy-one and 25/100 dollars (\$771.25) per week, which is the amount claimed to be the proper compensation rate by the claimant.

Iowa Code section 85.34(3)(b) provides that, "[i]n the event compensation has been paid to any person under any provision of this chapter, chapter 85A, or chapter 85B for an injury producing a permanent disability, any such amounts so payable shall be deducted from the total amount of compensation payable for permanent total disability."

The defendants paid the claimant permanent partial disability benefits from February 13, 2019, to March 24, 2023. Defendants' Exhibit B provides records of these payments in the amount of seven hundred seventy-one and 25/100 dollars (\$771.25) per week. The claimant did not provide any evidence to show a lack of payments. The burden to prove entitlement to a credit lies with the defendants. The defendants have

met their burden. Therefore, the defendants are entitled to a credit of forty-four thousand five hundred eleven and 92/100 dollars (\$44,511.92) ( $\$771.25 \times 57.714$  weeks = 44,511.92).

### Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibit 8. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code section 86.40. 876 Iowa Administrative Code 4.33(6) provides:

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

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

I previously assessed the costs of Dr. Taylor's IME pursuant to Iowa Code section 85.39. Therefore, I will not include that with the costs discussed herein.

The claimant seeks reimbursement for the filing fee of one hundred three and 00/100 dollars (\$103.00). Based upon my discretion, I award the claimant the costs of the filing fee. The claimant seeks thirteen and 80/100 dollars (\$13.80) for two certified mailings, which appear to be for serving the original notice and petition on the defendants. Based upon my discretion, I award the claimant these costs.

The claimant seeks three hundred sixty and 00/100 dollars (\$360.00) for the report of Dr. Hahn. The billing statement indicates that it is a "[f]ee for [m]edical

[r]eport...” Based upon my discretion, I award the claimant three hundred sixty and 00/100 dollars (\$360.00) for the fee for Dr. Hahn’s report. Dr. Burd provided an impairment rating report at the cost of eight hundred fifty and 00/100 dollars (\$850.00). In my discretion, I award the fees for Dr. Burd’s impairment rating report.

In total, the defendants shall reimburse the claimant one thousand three hundred twenty-six and 80/100 dollars (\$1,326.80) for costs.

### **ORDER**

THEREFORE, IT IS ORDERED:

That the defendants shall pay claimant permanent total disability benefits on a weekly basis from January 25, 2022, through the date of the hearing, and continuing into the future during the period of the claimant’s total disability.

That the claimant’s average weekly wage was one thousand one hundred sixty-seven and 84/100 dollars (\$1,167.84) per week, and that the claimant was single and entitled to three exemptions at the time of the alleged injury. Accordingly, all weekly benefits shall be paid at the rate of seven hundred twenty-eight and 64/100 dollars (\$728.64) per week.

That the defendants are entitled to credit for permanent partial disability benefits as noted herein.

That the defendants shall reimburse medical providers one thousand three hundred twelve and 55/100 dollars (\$1,312.55) for outstanding medical bills.

That the claimant’s request for alternate medical care is denied.

That the defendants shall reimburse the claimant two thousand five hundred and 00/100 dollars (\$2,500.00) for Dr. Taylor’s IME.

That the defendants shall reimburse the claimant one thousand three hundred twenty-six and 80/100 dollars (\$1,326.80) for costs.

That the defendants shall pay accrued weekly benefits in a lump sum together with interest. All interest on past due weekly compensation benefits shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this 3<sup>rd</sup> day of August, 2023.



ANDREW M. PHILLIPS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Laura Pattermann (via WCES)

Tiernan Siems (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.