BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KARL ESTERMANN, Claimant, vs. ALLEGIS GROUP, Employer, and INDEMNITY INS CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5065220.01 ARBITRATION DECISION Head Note Nos.: 1402.40, 1804

STATEMENT OF THE CASE

Claimant, Karl Estermann, filed a petition in arbitration seeking worker's compensation benefits against Allegis Group, employer, and Indemnity Insurance Company of North America, insurer, for an accepted work injury date of January 17, 2017. The case came before the undersigned for an arbitration hearing on January 24, 2022. The case proceeded to a live video hearing via Court Call, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

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

The evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through G.

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on January 24, 2022. The parties submitted post-hearing briefs on February 18, 2022, and the case was considered fully submitted on that date.

ISSUES

1. The extent of claimant's permanent industrial disability.

FINDINGS OF FACT

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

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

At the time of hearing, claimant was a 66-year-old person. (Hearing Transcript, p. 8) He is married with one dependent child. Claimant grew up in Des Moines, Iowa, and has lived in Norwalk since 1986. He attended high school through the first semester of eleventh grade, after which he left school. (Tr., pp. 8-9) He did not pursue a GED after leaving high school. (Tr., p. 9) Claimant joined the Marine Corps at age 17 after leaving school, and was in the motor pool working on vehicles. (Tr., p. 10) He was in the Marines for two years, after which he returned to Iowa.

Since leaving the Marines, claimant has worked a number of jobs. (Claimant's Exhibit 5, pp. 39-41) Claimant testified that none of his past jobs have been white-collar or light duty jobs. (Tr., p. 11) Claimant has worked at Great Plains Bag Company, stacking bundles of feed bags. He has worked as a hospital custodian, which involved cleaning nurses' stations, as well as the kitchen area, and disposing of garbage from those areas. (Tr., p. 13) He worked for about three years at Windsor Windows, building windows and doors. (Tr., p. 14) He then went to work at Parts Krafters, which manufactures parts for air-powered nail guns. (Tr., pp. 14-15) He worked on a lathe molding the raw materials down to the correct size. (Tr., p. 15) The job involved standing for eight hours a day.

In approximately 1989, claimant went to work for Jacobson Staffing, a temporary employment agency, and was assigned to do custodial work at the Des Moines airport. (Tr., p. 16) This work was similar to the hospital custodial work, but also included cleaning floors and restrooms. Claimant was there for about one year, and then went to work at Commercial Building Services in Des Moines doing commercial custodial work. The job included operating floor scrubbers and buffers, as well as carpet shampooers. (Tr., p. 16) Claimant was at that job for about seven years, until approximately 1997, when he was let go due to down-sizing. (Cl. Ex. 5, p. 40) He then returned to Parts Krafters, where he worked various jobs, including milling and grinding work. (Tr., p. 18) He also helped with unloading and stocking materials that would be delivered, which could weigh anywhere from 30 to 50 pounds. (Tr., pp. 17-18) Claimant stayed at Parts Crafters until the company closed in 2002. (Cl. Ex. 5, p. 40)

Claimant next worked for Herschel Corporation/Alamo Group as a machine operator fabricating parts for farm equipment. (Tr., p. 18) Claimant was let go in 2007, during a company restructuring. (Cl. Ex. 5, p. 40) He then worked for Manpower until 2011, which is another temporary agency. (Tr., p. 22) Claimant testified that each job he was assigned involved physical work, including machine operator work and custodial work. In 2011 when Manpower no longer had work for him, he went to work at Edgewater/Wesley Life as a kitchen assistant and dishwasher for about a year and a half. (Cl. Ex. 5, p. 40) In 2012, he began working for EFCO Forms as a machine operator. After about two years, in 2014, he started working at HandEra, a company that manufactures Intoxalock devices. He worked as a machine operator on an assembly line, which was a seated position. (Cl. Ex. 5, p. 40; Tr., p. 24) He worked there for about one year, and then went to work at Rose Acre Farms for a short time stacking egg cartons. (Tr., pp. 24-25)

In June 2016, claimant sought work through Allegis Group, another temporary employment agency. (Cl. Ex. 5, p. 41; Tr., p. 25) He was placed at Harvest in Indianola, which is a company that processes grain. He worked as a general production worker, which included operating processing equipment. Claimant testified that his job required climbing ladders, standing, lifting, twisting, bending, and lifting equipment and product of various weights and sizes. (Tr., pp. 25-26)

Claimant injured his low back while working at Harvest on January 17, 2017.[1] (Tr., p. 27) Prior to the work injury, claimant had experienced low back pain for several years. He has also sustained prior injuries to both his right and left legs. (Defendants' Exhibit B, p. 13) He has also had prior venous issues in his legs. (Joint Exhibit 1, pp. 1-4) In 2013, he was noted to have degenerative changes in his lumbar spine. (Jt. Ex. 2, p. 17) In 2016, he again complained of back pain, into his buttocks and down both legs with cramps. (Jt. Ex. 2, p. 18)

Claimant testified during his deposition that when the injury occurred, he was working in the milling department. (Def. Ex. G, p. 51; Deposition Transcript, p. 8) Claimant explained that he was working on a pulverizer, which is like a large blender that pulverizes the product to make it finer. He stated that the pulverizer contains three large blades that weigh about 80-pounds each, and are five or six feet in diameter. Claimant needed to change a blade, and the person training him said he should do it by himself since it was a job he would have to do again in the future. Claimant said the location of the pulverizer was awkward, as well as the body mechanics necessary in order to remove the blade. (Def. Ex. G, p. 51; Dep. Tr., pp. 8-9) While he was pulling the heavy blade out, in an awkward position, he felt a sharp pain in the left side of his low back and knew he had hurt himself. (Def. Ex. G, p. 51; Dep. Tr., p. 9) He reported it immediately, and as it happened toward the end of his shift, he was moved to finish his shift working on a stand-up forklift.

[1] Claimant was physically working at Harvest in Indianola at the time of the injury, but was an employee of defendant Allegis Group.

Claimant did not return to work the following day. (Def. Ex. G, p. 51; Dep. Tr., p. 10) On January 19, 2017, he saw Andrea Silvers, M.D.[2] (Def. Ex. B, p. 14) He reported recurrent low back pain radiating down the left leg since lifting heavy items at work two days prior. Dr. Silvers prescribed medication and discussed back exercises and possible physical therapy if he was not improving within ten days. Claimant was let go from Harvest on January 20, 2017. (Def. Ex. B, p. 14; Def. Ex. G, p. 51; Dep. Tr., p. 10)

Defendants sent claimant to a Doctors Now clinic on January 26, 2017. (Def. Ex. B, p. 14) He continued to report low back pain radiating into the buttocks with left leg numbness and tingling. He was instructed to continue with stretching, prescribed prednisone, and assigned light duty work restrictions. Claimant continued to receive conservative treatment, including physical therapy. (Def. Ex. B, pp. 14-15) As his symptoms were not improving, he was sent for an MRI of the lumbar spine, which took place on March 7, 2017. (Def. Ex. B, p. 15) The MRI showed diffuse degenerative changes contributing to variable amounts of central and neural foraminal compromise. He also had a degenerative disc bulge at L4-L5, with prominent posterior central disc protrusion and facet changes contributing to near complete obliteration of the spinal canal. Finally, he had moderate bilateral L4-L5 foraminal narrowing without compression of the exiting L4 nerve roots. (Def. Ex. B, p. 15)

Based on the results of the MRI, claimant was sent to Des Moines Orthopaedic Surgeons (DMOS), where he saw David Hatfield, M.D., for a surgery consultation. Dr. Hatfield gave claimant various treatment options, including injections and/or surgery. Claimant indicated that the insurance company wanted him to try injections first. Dr. Hatfield did not expect an injection to provide much relief, given the severe stenosis and listhesis. However, claimant had the injection, which was not successful in providing relief. On May 31, 2017, Dr. Hatfield recommended an L3-L5 decompression and L4-L5 fusion, and noted future intervention may be necessary at L1-L2. Claimant decided to think about it. Finally, on July 10, 2017, claimant agreed to proceed with surgery for his ongoing symptoms. (Def. Ex. B, pp. 15-16)

Claimant's surgery was originally scheduled for August 31, 2017, but later postponed due to unrelated personal health issues. (Def. Ex. B, p. 16; Jt. Ex. 3, pp. 29-31) On September 7, 2017, Dr. Hatfield performed L3-L5 decompression with foraminotomy and L3-L5 fusion with instrumentation and local bone autograft. The surgery was originally planned as an L4-L5 fusion, but during surgery Dr. Hatfield noted significant pathology at the L3-L4 facet joint as well, so he extended the fusion up one level. Following surgery, claimant initially reported continued back pain, and increased left leg pain. (Def. Ex. B, p. 16) However by September 14, 2017, he was starting to improve.

[2] Many of claimant's medical records were not submitted into evidence. However, both parties submitted Dr. Kuhnlein's IME report, which contains a summary of medical records and will be referenced when the actual medical records are not available. (See Cl. Ex. 4; Def. Ex. B) For brevity and clarity, only Defendants' Exhibit B will be cited to in this decision.

On September 19, 2017, claimant called Dr. Hatfield's office and reported increased tightness in his legs, left worse than right, and swelling. He was seen the next day, September 20, and Dr. Hatfield noted increased left leg swelling, although his back and radicular leg symptoms had improved. Dr. Hatfield ordered a bilateral lower extremity duplex study to rule out deep vein thrombosis (DVT). (Def. Ex. B, pp. 16-17) The testing showed no evidence of DVT in the right lower extremity, but there was an acute DVT in the left lower extremity. (Jt. Ex. 1, pp. 5-6) Claimant was sent to Methodist West Hospital to begin therapy for the DVT, which required an overnight stay. (Def. Ex. B, p. 17; Jt. Ex. 3, pp. 32-41)

Claimant followed up with Dr. Hatfield on November 1, 2017. (Def. Ex. B, p. 17) He still had swelling in his legs, but his lumbar X-rays did not show any hardware complications. He was told to continue wearing his back brace full-time until Christmas, and wean off the brace after that time. His work restrictions were continued. When claimant next followed up with Dr. Hatfield's office on February 15, 2018, he saw Betsy Bolton, PA-C. He continued to wear the brace at that time as he felt more comfortable in it. He also had ongoing minor weakness in his left ankle dorsiflexors and left hip flexors, in addition to edema. He complained of worse lower back pain, and felt he had a knot in the center of his back that bothered him while sitting on the couch. He was encouraged to continue walking and wean out of the brace, and prescribed medication to help with muscle spasms.

At his next follow up with PA-C Bolton on March 21, 2018, claimant reported problems with prolonged standing, but was out of the brace full-time. (Def. Ex. B, p. 18) He was pleased with his progress at that point, and was told to start physical therapy. Physical therapy records from April 5, 2018 note claimant reported little improvement, difficulty dressing, and moderate fatigue with light duty, restricted work. Poor compliance with his home exercise and stretching plan was also noted.

On May 9, 2018, Ms. Bolton noted that claimant was having difficulty transitioning back to work, despite doing a "very light duty" job. He continued to need multiple breaks with ongoing low back pain and occasional left leg numbness. He was not compliant with his home exercises, and was not doing much as far as walking or other rehabilitation after surgery. They discussed the implications of this and why he continued to struggle. X-rays showed a radiographically solid fusion. PA-C Bolton ordered a functional capacity evaluation (FCE).

Claimant testified that the light duty work he was doing was working at the Habitat for Humanity ReStore, which was arranged by the insurance carrier. (Tr., p. 29) His job there involved removing hardware and knobs from doors and drawers, removing faucets from sinks that came in, sweeping, and other light duty work. (Tr., p. 30) He was able to sit when needed due to his back and leg. He worked there for about three months, starting in April 2018, and the position ended. (Tr., pp. 30-31)

Claimant saw Dr. Silvers, on May 21, 2018, related to his left leg pain. Dr. Silvers noted ongoing complaints of left leg pain and swelling, as well as complaints of right leg swelling. After examination, she suspected compromised venous valves from the DVT, and ordered a left leg venous duplex study, which was performed the same day. The study showed chronic deep vein thrombosis involving the femoral vein, the popliteal vein, and the posterior tibial vein.

Claimant had an FCE at ARC Physical Therapy Services on June 6, 2018. The study was found to be valid, and placed claimant in the medium physical demand category. (Def. Ex. B, pp. 18-19; Jt. Ex. 4, p. 42) It was recommended that claimant is safely able to lift up to 28-pounds occasionally; carry up to 20-pounds occasionally; and frequently bend, squat, climb stairs, stand, and walk. (Jt. Ex. 4, p. 45)

Claimant testified that at some time after the FCE, he left ReStore and Allegis reassigned him to work at Gifford and Brown. (Tr., pp. 32-33) He described Gifford and Brown as a company that does wiring and builds equipment for 18-wheelers. (Tr., p. 33) His job involved working on the assembly line, harnessing motors and placing mounting plates on to them. Claimant stayed at that job for about nine months, until May of 2019. (Tr., p. 34) The job involved standing for eight hours per day, but the employer allowed him to take breaks as needed due to his work restrictions. Despite that, claimant testified that he did not feel he was physically capable of doing the job, although he was able to do it well enough to keep it for nine months. When the position was moved to Cedar Rapids, claimant asked Allegis for another placement, but none were offered. (Tr., p. 35) Claimant has not worked since the job at Gifford and Brown ended in May 2019.

Claimant saw vascular specialist Nicholas Southard, D.O., on June 18, 2018. (Def. Ex. B, p. 19; Jt. Ex. 1, p. 7) Dr. Southard noted complaints of bilateral left leg swelling and discomfort, left worse than right. After evaluation, Dr. Southard diagnosed chronic deep vein thrombosis of the femoral vein of the left lower extremity, with post-thrombotic syndrome and leg swelling. (Def. Ex. B, p. 19) He ordered additional duplex scans bilaterally, which were done the same day. The scans showed no evidence of right leg DVT, but there was deep and superficial venous insufficiency. With respect to the left leg, there was chronic nonocclusive DVT in the femoral and popliteal veins with deep and superficial venous insufficiency. He encouraged claimant to wear compression stockings to minimize his symptoms. (Jt. Ex. 1, p. 9)

Claimant returned to Dr. Southard on November 16, 2018, complaining of persistent leg cramps and discomfort, and numbness in both hands and feet. (Def. Ex. B, p. 19) Dr. Southard believed the leg discomfort and swelling were due to venous insufficiency, chronic DVT, and post-thrombotic syndrome. He felt claimant was a candidate for radiofrequency ablation of both greater saphenous veins and the left superficial saphenous vein. Claimant was to contact his office if he wished to proceed.

At some point, Dr. Hatfield retired. (Tr., p. 32) Defendants sought an impairment rating from Lynn Nelson, M.D., another physician at DMOS. Claimant testified that he has never seen Dr. Nelson. (Tr., p. 32) Dr. Nelson's letter indicates that he was unaware that he had "taken over treatment" of claimant, but reviewed his history and treatment records. (Cl. Ex. 1, p. 1) He opined that claimant reached maximum medical improvement on June 6, 2018. Using the AMA Guidelines to the Evaluation of Permanent Impairment, Fifth Edition, he assigned claimant an impairment rating of 20 percent of the body as a whole using Table 15-3, page 384. He recommended permanent restrictions of no lifting more than 35 pounds, and did not believe any additional medical treatment was indicated.

Claimant attended an independent medical evaluation (IME) at his attorney's request with Robert Rondinelli, M.D., Ph.D. (Cl. Ex. 3, p. 12) The IME took place on November 6, 2019. At that time, claimant was not working. (Cl. Ex. 3, p. 14) He continued to have complaints of tightness in his knee, calf, and foot on the left side; throbbing and tingling in his left toes and pain in the left foot and calf with provocation during activity. He had occasional low back pain, but his symptoms had improved considerably since surgery. (Cl. Ex. 3, pp. 14-15) He expressed difficulties with bending and other life and work activities, and limitations in his ability to squat and lift loads from the floor. (Cl. Ex. 3, p. 15) He described his symptoms as constant, but said ibuprofen helped somewhat. He estimated being able to walk about one block before becoming uncomfortable. He was able to climb the two flights of stairs to Dr. Rondinelli's office.

After physical examination, Dr. Rondinelli provided the following diagnoses relative to the work injury of January 17, 2017:

> 1) Pre-existing underlying multilevel degenerative spondylosis of the lumbar spine based on advanced degenerative changes evident on the March 7, 2017 MRI;
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> 2) Strain-type injury to his low back on January 17, 2017, with persisting lumbar pain and left-sided radicular complaints. Prominent posterior central disk protrusion with extrusion, and evidence of complete obliteration of the spinal canal in association with bilateral foraminal narrowing at L4-L5 without compression of the existing L4 nerves;
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> 3) Status post L3-L4 posterior decompression and instrumented fusion and L4-L5 posterolateral fusion with posterior lumbar instrumentation and fusion since September 7, 2017.

(Cl. Ex. 3, p. 17) In addition, he had a complication of bilateral deep venous thrombosis, and developed a residual post-phlebitic syndrome bilaterally, left worse than right.

Dr. Rondinelli opined that the work incident on January 17, 2017 either directly caused or materially aggravated the condition of his low back, resulting in the surgery on September 7, 2017. He noted that claimant's preexisting spondylosis was the source

of "a minor back problem," which only caused occasional and mild back pain. There is no medical record of severe or persisting back pain prior to claimant's work injury, and the fact that conservative treatment failed and claimant required surgery also supports the finding that the work injury caused or materially aggravated his underlying condition. With respect to the post-phlebitic syndrome, Dr. Rondinelli opined that the DVT that developed after surgery is a common postoperative complication, and the temporal association and medical context in which it occurred indicates a direct causal association with the September 7, 2017 surgery.

Dr. Rondinelli opined that claimant had reached MMI, and provided an impairment rating using the AMA Guides. (Cl. Ex. 3, p. 18) He provided a detailed explanation of how he reached his rating, and determined a value of 24 percent of the whole body for the lumbar spine injury. (Cl. Ex. 3, pp. 18-19) In addition, he determined claimant's residual bilateral post-phlebitic syndrome was ratable, and assigned 39 percent of the lower extremity for the left leg, and 9 percent lower extremity for the right leg. (Cl. Ex. 3, p. 19) After converting those ratings to whole person impairments and combining them, he assigned 19 percent of the whole person related to the bilateral lower extremities. Combined with the lumbar rating, claimant's total impairment came to 38 percent of the whole body.

With respect to future medical care, Dr. Rondinelli recommended claimant continue to use compression garments. He recommended restrictions consistent with the FCE, and added that claimant should be afforded the opportunity to sit and possibly elevate his legs if possible if he is on his feet for an hour or more. He should not stand for more than four hours per day, and will also require periodic rest breaks.

On January 11, 2020, claimant presented to the Methodist West emergency room with complaints of right lower extremity pain and swelling over the prior six weeks. (Def. Ex. B, p. 20) A CT scan of his right thigh was unremarkable, and he was diagnosed with acute right thigh pain and discharged. He followed up with Dr. Southard's office, who ordered a venous duplex ultrasound of both legs. Dr. Southard reviewed the results and noted that the right leg was unremarkable with no evidence of clotting, and the left leg showed normal venous flow in the left common femoral vein.

Claimant followed up with Dr. Silvers on January 23, 2020, and reported his right leg pain had not improved, and he continued to complain of consistent low back pain. Claimant and his wife requested an MRI, and Dr. Silvers recommended he return to DMOS for evaluation of his low back pain.

Claimant saw Mauricio Acebey, M.D., at DMOS on February 25, 2020. Claimant complained of increased low back pain and increasing right lateral thigh pain that started gradually in November 2019. His main complaint at that time was the right lateral thigh and groin pain. Plain films showed the intact hardware from his prior surgery, but Dr. Acebey thought claimant might have an L2-L3 disc herniation with possible right L2 or L3 radiculitis. (Def. Ex. B, pp. 20-21) He ordered a CT of the lumbar spine. (Def. Ex. B, p. 21) Claimant was sent for physical therapy pending approval of

the scan. He followed up with Dr. Silvers in the meantime. On July 2, 2020, Dr. Silvers noted that claimant's right low back symptoms had improved, but he still had right leg pain and had also developed new lateral left back pain radiating down the side of his left leg.

Claimant had a CT myelogram of the lumbar spine on August 7, 2020. The results showed multilevel degenerative disc disease and facet arthropathy and spondylolisthesis; mild to moderate spinal canal narrowing at L1-L2; mild spinal canal narrowing at L2-L3; moderate foraminal narrowing at L1-L2 and L2-L3 on the left; and the expected postoperative changes. Claimant returned to Dr. Acebey on December 22, 2020, and reported the right anterior thigh and groin pain were more noticeable than the low back pain, and he experienced a sense of right leg weakness. Dr. Acebey reviewed the CT scan, and noted possible central canal stenosis at L2-L3. He suggested an MRI and prescribed tramadol.

On January 18, 2021, defense counsel wrote to Dr. Southard to summarize a telephone conversation they had concerning claimant's medical condition. (Jt. Ex. 1, pp. 10-12) Dr. Southard responded to the letter on January 27, 2021. (Jt. Ex. 1, p. 11) He noted that when he saw claimant in 2018, he did have symptoms consistent with post thrombotic syndrome on the left, and both deep and superficial venous insufficiency on the right. (Jt. Ex. 1, p. 10) He stated that claimant's right leg symptoms were most likely related to venous insufficiency. With respect to claimant's left leg, his post-thrombotic symptoms were due to the DVT sustained after the September 7, 2017 surgery. (Jt. Ex. 1, p. 11) However, he does not have post-phlebetic symptoms in his left leg. Additionally, it appears Dr. Southard also opined that claimant's right leg symptoms are not related to the September 7, 2017 surgery. However, the way the question is written, it is somewhat unclear. Defense counsel wrote to Dr. Southard again on March 20, 2021, however, and those statements are more direct. (Jt. Ex. 1, p. 13) Dr. Southard agreed that claimant did not present with post-phlebetic symptoms in either leg; did present with post-thrombotic symptoms; and that the venous insufficiency in his right leg is not related to or aggravated by the left thrombotic incident after his 2017 surgery. With respect to his left leg, Dr. Southard stated that his symptoms are in part related to the thrombotic event after surgery, but he also has venous insufficiency that contributes to his symptoms. (Jt. Ex. 1, p. 14)

Claimant saw Dr. Acebey on November 1, 2021. (Cl. Ex. 1, p. 2) His record of that date notes claimant had a right-sided sacroiliac joint injection on October 8, 2021. He reported minimal pain for four days following the injection, but his pain had since returned to its original level. He also complained of increasing lower extremity pain and spasms that were worse with standing or walking and better if he can sit or lean on a shopping cart. Dr. Acebey notes that the lumbar MRI showed disk extrusions into the lateral recesses at L2-L3, left worse than right. Dr. Acebey recommended further surgical consultation, since the steroid injections had not provided significant relief.

Claimant saw Zachary Ries, M.D., on December 22, 2021, for surgical consultation. (Jt. Ex. 7, pp. 63-64) Dr. Ries noted claimant had had several injections that had not been helpful. (Jt. Ex. 7, p. 63) On exam, he reviewed the lumbar MRI and noted fairly severe adjacent segment disease at L2-L3 above his fusion. He also noted a left-sided disc herniation extending behind the L3 vertebral body, causing moderate to severe stenosis at L2-L3. Dr. Ries recommended an extension of his prior fusion up to L2-L3, with the goal of "cutting his back pain in half." He advised claimant that there was no guarantee it would work, and that he did not believe it would help his leg pain much as some of that is related to his vascular issues. Claimant and his wife wanted to think about the surgery, and were instructed to call if he decided to proceed with surgery.

At hearing, claimant testified that he had not yet had the additional surgery, as he was looking for other options. (Tr., p. 39) However, he said that he knows it will have to be done eventually. (Tr., pp. 39-40) He testified that his condition has gotten worse in the past year, and he no longer has the strength he used to in his legs and back. (Tr., pp. 49-50)

Claimant attended a defense IME with John Kuhnlein, D.O., on September 16, 2021. (Def. Ex. B) Dr. Kuhnlein's report is dated November 9, 2021. (Def. Ex. B, p. 1) Dr. Kuhnlein reviewed the medical records through December 22, 2020, and examined claimant. At the time of his examination, claimant reported constant waxing and waning activity-dependent low back pain that radiates to both legs, right more than left. (Def. Ex. B, p. 22) He also described weakness in the left leg, and pain and tingling in both feet. He complained of left leg swelling with activity, and said his calf can turn blue at times. He stated that sneezing and coughing increase his back pain. He expressed his belief that he was restricted from lifting and carrying more than 20 pounds on an occasional basis, and restricted from frequent bending, squatting, climbing stairs, standing, and walking.

Dr. Kuhnlein performed a physical evaluation, which is detailed in his report. (Def. Ex. B, pp. 23-24) After his examination, his diagnoses were lumbar spondylosis with L3-L5 stenosis and near complete obliteration of the spinal canal at L4-L5 with the 2017 surgery, followed by postoperative left deep vein thrombosis, with peripheral vascular disease, post-thrombotic syndrome, and venous insufficiency. (Def. Ex. B, pp. 24-25) With respect to causation, Dr. Kuhnlein opined that while claimant had episodic low back pain prior to the work incident, he sustained a material aggravation of his pre-existing degenerative lumbar spine condition due to the January 17, 2017 injury, which lead to Dr. Hatfield's surgery. (Def. Ex. B, p. 25) He developed left-sided DVT after the surgery, which is "sequela to the injury in the contest of probable previous peripheral vascular disease." However, the right-sided peripheral vascular disease is not related to the injury.

Dr. Kuhnlein noted that claimant may develop adjacent segment disease above or below the multilevel fusion, and should be evaluated if he develops radicular symptoms or objective radicular findings at those levels. He further suggested having one physician manage his pain medications due to his peripheral vascular disease, and

recommended Central States Medicine. With respect to his peripheral vascular disease, he recommended continuing to wear compression stockings, and changing from ibuprofen to Tylenol. He noted that diuresis may be necessary on occasion, and recommended activity modification and putting his legs up on the evenings. (Def. Ex. B, pp. 25-26)

Dr. Kuhnlein placed claimant at maximum medical improvement (MMI) on or about September 7, 2018, barring any other interventions for his lumbar spine. (Def. Ex. B, p. 26) For his peripheral vascular disease, he placed MMI on November 16, 2018, after his last visit with Dr. Southard.

Dr. Kuhnlein used the AMA Guides, Fifth Edition, to provide an impairment rating. He calculated 23 percent whole person impairment for the lumbar spine injury, and an additional 10 percent whole person impairment based on the peripheral vascular disease in the left lower extremity. Combined, Dr. Kuhnlein assigned 31 percent whole person impairment. He recommended restrictions of lifting 20-pounds occasionally from floor to waist; 20-pounds occasionally from waist to shoulder; and 15-pounds occasionally over the shoulder. He further recommended sitting, standing, and walking on an as-tolerated basis, occasional stooping and squatting, occasional bending, kneeling, crawling, climbing ladders, and working above shoulder height. (Def. Ex. B, pp. 26-27) Finally, he recommended claimant avoid operating foot-operated machinery with the left lower extremity. (Def. Ex. B, p. 27)

Each of the IME reports submitted into evidence by the parties contains credible information regarding claimant's condition at the time he was examined. However, given that Dr. Kuhnlein's examination took place most recently, I find it provides the most up-to-date and accurate picture of claimant's disability at the time of hearing. Additionally, claimant testified that he agrees with the restrictions set forth by Dr. Kuhnlein, and both parties submitted the report as an exhibit. (Tr., p. 40; Cl. Ex. 4; Def. Ex. B) As such, I adopt Dr. Kuhnlein's opinions regarding claimant's restrictions and permanent functional impairment rating.

Defendants hired a vocational consultant, Lana Sellner, MS, CRC, to work with claimant on his resume and securing job leads. Her report indicates that their initial conversation took place on November 23, 2020, at which time claimant was hesitant but agreed to participate. (Def. Ex. F, p. 46) Ms. Sellner's closure report, dated April 16, 2021, indicates that claimant was provided with a resume, and over 21 job leads were provided since the initial discussion, which ranged from delivery driving, Uber driving, machine operation, production work, forklift operator, housekeeping/cleaning, and entry-level sales. Ms. Sellner indicated that many of the positions encouraged older workers to apply, and provided flexibility in work hours so claimant could maintain his Social Security benefits.[3] Ms. Sellner also reported all the positions he provided were within

[3] Claimant testified that he was previously on Social Security Disability, but at some point it changed to regular Social Security Retirement benefits, which is what he was receiving at the time of hearing. (Tr., p. 64)

both Dr. Rondinelli's and Dr. Nelson's restrictions, with or without "self-modifications or accommodations."

In her report, Ms. Sellner indicated that she believes claimant is employable within the restrictions he had at that time. She expressed difficulty in providing vocational assistance as claimant's attorney did not allow direct communication with claimant, and she did not receive any follow-up or feedback from claimant or his attorney regarding the job leads she provided. (Def. Ex. F, pp. 46-47) As such, she concluded that claimant did not provide a "good faith" effort in applying for jobs, and did not appear to be motivated to return to work. (Def. Ex. F, p. 47) However, she also opined that claimant remained appropriate to receive vocational assistance, and if he had utilized her assistance, it may have resulted in a successful job placement.

Claimant testified regarding the resume that Ms. Sellner prepared for him, and submitted a copy as an exhibit. (Tr., p. 40; Cl. Ex. 6, p. 62) Claimant noted that the way the resume is written, it appears he graduated from high school, which is not accurate. (Tr., pp. 41; 53-54) He also testified that under the "summary of qualifications," several items are inaccurate or misleading. For example, he does not have any experience reading blueprints, has never worked in "quality assurance" or "quality inspection," and does not consider himself to have good communication skills. (Tr., pp. 41-42; 53-54) He also testified that he has no computer skills other than the ability to use Google. (Tr., p. 42)

With respect to the jobs leads Ms. Sellner sent to claimant, He testified that some require a high school diploma or computer skills, of which claimant possesses neither. (Tr., pp. 42-43) There were several delivery driver jobs, to which claimant testified he has an older pickup truck that would be difficult for him to get in and out of repeatedly as would be required. (Tr., p. 43) He also noted that driving for a long distance aggravates his back, and he would not be able to climb multiple stairs if needed while making deliveries. Claimant testified that he can only sit comfortably for about 10 to 15 minutes, and only stand in one spot for about 15 to 20 minutes. He does not believe he is capable of performing any of the work he has done in the past, especially since his condition has become worse. (Tr., pp. 43-44) Even work he thought he might be capable of at the time of his deposition, which took place on November 19, 2020, was no longer an option by the time of hearing on January 24, 2022. (See Def. Ex. G, pp. 48; 57-58, Dep. Tr., pp. 32-40; Tr., pp. 49-50)

Ms. Sellner's work took place prior to Dr. Kuhnlein's IME, and does not take claimant's worsening condition into account. Since Ms. Sellner interviewed claimant, he has been assigned more restrictive restrictions, and additional surgery has been recommended, supporting his testimony that his condition has changed and he is more limited in his physical abilities. Additionally, a review of the job leads she provided to claimant supports his testimony that many of the jobs were beyond his qualifications or physical abilities. (Cl. Ex. 6, pp. 42-61) As such, I do not find her statement that claimant is not motivated to return to work to be convincing. While there may be a few jobs that claimant is physically capable of performing, overall his work injury has left him unable

to perform work that his experience, training, education, and intelligence would otherwise have allowed him to perform.

Claimant did testify that he applied for two positions in 2020, one at Kreg Tool Company, and one at Vermeer Corporation. (Tr., p. 44) However, when defense counsel contacted those companies, there was no record found indicating claimant had ever applied. (Def. Ex. E, pp. 42-45) Claimant insisted, however, that he did complete online applications for positions with both companies in 2020. (Tr., pp. 45; 58-61) He further stated that when he was called to discuss interviews, he advised about his restrictions, and subsequently was not hired. (Tr., pp. 59-60) At the time of hearing, claimant had not applied for any additional positions since 2020. (Tr., pp. 61-62) I find claimant to be a credible witness and accept his testimony as true.

Taking into consideration claimant's age, education, qualifications, prior job experience, permanent impairment, motivation level, and permanent restrictions, I find the work injury he sustained on January 17, 2017 has left him permanently and totally disabled.

CONCLUSIONS OF LAW

This case involves an accepted injury that occurred on January 17, 2017. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535, effecting workers' compensation cases. See 2017 Iowa Acts chapter 23. This case involves an injury that occurred prior to the changes taking effect; therefore, the provisions of the new statute involving nature and extent of disability under Iowa Code section 85.34 do not apply to this case.

The only issue to determine is the extent of claimant's permanent disability. Claimant argues that he is permanently and totally disabled as a result of the work injury. Defendants disagree, and argue that claimant's permanent disability is less than 50 percent. Much of defendants' legal argument centers on case law involving the odd-lot theory of permanent disability, which claimant has not alleged. Rather, claimant argues he is permanently and totally disabled under the traditional analysis.

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

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

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

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

In assessing an unscheduled, whole body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat. Inc., 777 N.W.2d 387, 392 (Iowa 2009).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden, 288 N.W.2d at 192; Diederich, 258 N.W. at 902 (1935).

The focus for evaluating total disability is on the person's ability to earn a living. Diederich, 258 N.W. at 902. The question is whether the person is capable of performing a sufficient quantity and quality of work that an employer in a well-established branch of the labor market would employ the person on a continuing basis and pay the person sufficient wages to permit the person to be self-supporting. Tobin-Nichols v. Stacyville Community Nursing Home, File No. 1222209 (App. December 2003). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. 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). Industrial disability is determined by the effect the injury has on the employee's earning capacity. Bearce v. FMC Corp., 465 N.W.2d 531, 535 (Iowa 1991); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa App. 2003).

Another important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190,5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. January 22, 1993); see also Larson, Workers' Compensation Law, Section 57.61, pp. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F.Supp. 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer knows the demands that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

In this case, claimant is a 66-year-old person who did not graduate from high school or obtain a GED. He has no computer skills. His past work history involves physical work, including factory work and custodial work. Claimant testified that since the work injury, he would not be able to perform any of his prior jobs. (Tr., pp. 49-53) He

cannot lift as much due to his restrictions, and he is not able to go up and down stairs, stand, sit, bend, walk, or squat on a regular basis. Prior to the work injury, he was fully able to perform these duties. Claimant also noted that while he was able to return to work for about 9 months at Gifford and Brown, his restrictions were being accommodated, and he was allowed to sit down as needed. (Tr., pp, 50-51) Once that position ended, Allegis was not able to place him anywhere else. (Tr., p. 51) Defendants did not provide any alternate reason as to why claimant was unable to be placed. Additionally, claimant testified that his condition has worsened since he last worked, and his testimony is supported by the medical records and recent suggestion that he have additional surgery. (Cl. Ex. 7, p. 63)

With respect to claimant's motivation to work, when he received job leads from Ms. Sellner, he reviewed the job descriptions to see if he felt qualified for the position, and whether he physically thought he could do it. (Tr., pp. 55-56) Many, if not most of the leads she provided were for jobs claimant was not qualified for or he felt he would be unable to physically perform. (Tr., pp. 55-57) Finally, the positions for which claimant did apply, including Vermeer and Kreg Tool, were not interested in interviewing claimant after he explained his physical restrictions. (Tr., pp. 59-61) A claimant need not make efforts to work if those efforts would be futile. Nelson, 544 N.W. 2d at 267. Any other rule would require clearly unemployable claimants to go through the futile exercise of searching for nonexistent employment. Id.

Based on claimant's age, education, qualifications, prior job experience, permanent restrictions, and all other industrial disability factors outlined by the Iowa Supreme Court, I find that the January 17, 2017 work injury has left him wholly disabled from performing work that he would otherwise be qualified and capable of performing. I find that claimant has proven he is permanently and totally disabled as a result of the January 17, 2017 work injury.

Permanent total disability benefits are payable during the period of the employee's disability. Iowa Code section 85.34(3)(a). As a result, permanent total disability benefits generally commence on the date of injury. See Sandhu v. Nordstrom, Inc., File No. 5046628 (App. January 24, 2019). In this case, however, claimant did return to work for a period of time following surgery. It is not reasonable or logical to award permanent total disability benefits while claimant continued to work and earn wages with the employer. Miles v. City of Des Moines, File Nos. 5048896, 5048899 (Arb. September 30, 2020, aff'd on Appeal to Commissioner, March 1, 2021).

The parties stipulated that the commencement date for permanent partial disability benefits would be June 6, 2018. However, no such stipulation was provided for commencement of permanent total disability benefits. Claimant last worked at Gifford and Brown in May of 2019, but an exact date is not known. As such, I find permanent total disability benefits should commence on May 31, 2019.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent total disability benefits, commencing May 31, 2019, at the stipulated rate of three hundred forty-three and 96/100 dollars ($343.96), and continuing during the period of permanent total disability.

Defendants shall be entitled to credits as stipulated by the parties.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, 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)

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

Signed and filed this 18th day of May, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

David Drake (via WCES)

Robert Gainer (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.