BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| JERRY HAYES,<br><br>Claimant,<br><br>vs.<br><br>CHRISTIAN RETIREMENT HOMES, INC., d/b/a RIDGECREST VILLAGE SENIOR LIVING CENTER,<br><br>Employer,<br><br>and<br><br>WEST BEND MUTUAL INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | File No. 21014161.02<br><br>ARBITRATION DECISION<br><br>Headnote Nos: 1108, 1800 |

STATEMENT OF THE CASE

Claimant, Jerry Hayes, filed a petition for workers' compensation benefits against Christian Retirement Homes, Inc., d/b/a Ridgecrest Village Senior Living Center, employer, and West Bend Mutual Insurance Company, insurance carrier, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner the hearing was held on May 16, 2023, via Zoom. The case was considered fully submitted on June 13, 2023, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-10, Claimant's Exhibits 1-9, Defendants' Exhibits A-K, along with the testimony of the claimant.

ISSUES

1. Whether claimant is entitled to healing period benefits from July 14, 2022, to March 12, 2023;

2. The extent of claimant's permanent disability;

3. Whether claimant is entitled to permanent total disability under the odd-lot doctrine;

4. The commencement date of PPD benefits;

5. Whether claimant is entitled to alternate medical care including the designation of claimant's back surgeon, Michael Dolphin, D.O., as an authorized provider;

6. Whether claimant is entitled to payment and/or reimbursement of medical bills itemized in Claimant's Exhibit 8;

7. Whether claimant is entitled to an IME reimbursement pursuant to Iowa Code section 85.39;

8. The award of costs.

## STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties agree claimant sustained an injury arising out of and in the course of his employment on or about September 12, 2021. They further agree that the injury was the cause of a temporary disability during a period of recovery and that the injury was industrial in nature.

At the time of the injury, claimant's gross earnings were the statutory minimum of $351.00 per week. He was single and entitled to 1 exemption. Based on the foregoing, the weekly benefit rate is $237.77.

## FINDINGS OF FACT

Claimant, Jerry Hayes, was a 68-year-old person at the time of the hearing. His relevant work history includes working at a tire factory, owning a cleaning business, and being employed as a dishwasher for Marycrest College.

He was unemployed from 2020 up through July 29, 2021, due to being laid off from Marycrest during the Covid pandemic. He began working for defendant employer on July 29, 2021, as a dishwasher.

At the time he was hired by defendant employer, claimant was under a 20-pound work restriction imposed by Dr. Crome. He did not share this work restriction with defendants prior to his hire and it is the defendants' argument that they would not have hired him had they known of this work restriction. Claimant testified that he passed a pre-employment physical prior to starting work for defendant employer. Prior to the work injury, claimant did not request nor did he perform any modified duties or work with accommodations. He testified without rebuttal that he was able to carry out all the essential duties of his job without aid prior to his injury of September 12, 2021.

Claimant's past medical history is significant for chronic back pain, neck pain, and knee pain.

On March 6, 2003, claimant was seen by Kristi Roe, LMSW, for chronic pain and life stressors. (Joint Exhibit 1:3) "The patient states that at this time he is unsure of the course of treatment regarding his back pain and leg pain." Id. Claimant was angry and frustrated and very tearful about his status including his pain but also problems with his social security disability claim and his employment challenges. Id.

On May 20, 2003, claimant returned to counselor Roe to discuss his physical limitations related to his chronic back pain. (JE 1:4)

On February 13, 2014, claimant presented to Christopher Crome, M.D., for complaints of neck stiffness, low back pain, left pinky pain and left buttock pain following an MVA on February 10, 2014. (JE 1:6) He was a restrained driver of a car that was hit on the driver side by a F150 with a plow. Id. He was prescribed medications and discharged. Id. His past medical history included a diagnosis of chronic pain. Id.

On January 5, 2015, claimant was seen at Genesis Health System after falling on apartment stairs on January 2, 2015. (JE 1:8) He injured his bilateral posterior back and lower extremities. Id. He related having pain shooting down his left leg. Id. One of the modifying factors identified was chronic back pain. Id.

On March 4, 2015, claimant was seen at the emergency room after a slip and fall on ice. (JE 2:35; 3:80) He denied loss of consciousness but complained of headaches. Id. On examination, he had palpable tenderness in the left trapezius muscle. (JE 2:37) A CT of the head was ordered that showed posterior scalp swelling but no intracranial hemorrhage. (JE 2:38) A lumbar CT was also conducted, and a comparison was made with a study from 2/13/2014. (JE 2:39) The 2015 CT showed degenerative disk and facet changes with anterolisthesis without change. Id.

On March 17, 2015, claimant was seen by Christopher Boon, M.D., for a follow-up. (JE 1:9-10) He complained of headaches, occasional lightheadedness, mental fog, continued neck and back pain. (JE 1:9) Claimant was sent for physical therapy which he began on March 20, 2015. (JE 2:42)

On November 17, 2016, claimant presented for a disability examination complaining of left knee pain, low back pain, and history of heart disease. (JE 1:12) He stated that the pain in his knee kept him awake at night. In the records review of Irving Wolfe, D.O., it was noted claimant was receiving cortisone injections in the right knee. (See Claimant's Exhibit 5:20) He was only able to walk about a block due to his low back pain. He used to be on disability due to a history of a learning disability and back pain. He also had pain in his right shoulder from an AC separation. Id.

On July 7, 2017, claimant presented to Alyssa Donahue, DNP, with complaints of neck pain and low back pain after a car accident. (JE 1:13) In the history section it was noted that claimant had previous surgery on his neck. Id. In the records review of Dr. Wolfe, claimant was advised that he would eventually need a knee replacement on the left. (CE 5:21)

On September 11, 2017, claimant returned to Dr. Crome for follow-up of persistent neck and low back pain since the July 2017 MVA. (JE 2:48) It was noted claimant had been going to PT for low back pain and right leg sciatica and that the therapy was helping. Id. Claimant's mood was down and he had been having some frustration with chronic pain. Id. He was working part-time.

On October 11, 2017, claimant was seen by Dr. Crome for acute bilateral low back pain with bilateral sciatica. (JE 1:16)

On January 27, 2018 claimant was seen by Michael D. Craddick, D.O., following a motor vehicle collision. (JE 1:17) He complained of mild low back pain, stiff shoulder, and left periorbital region swelling but denied double vision. Id. CT of the low back was conducted which showed:

- Abnormal to severe disc space narrowing and degenerative L4 anterolisthesis with severe spinal stenosis at L4 – 5.

- Disc bulging and bilateral facet arthritis with moderate to severe spinal stenosis at L3 – 4.

- Mild spinal stenosis and disc bulging with facet arthritis at L2 – 3.

(JE 1:19)

On March 21, 2018, claimant was seen by Dr. Crome for follow up of the MVA. (JE 2:52) Since the last visit, claimant had continued problems with concentration and memory. He had been seeing an occupational therapist as well as a physical therapist. In the past month he had a pacer/defibrillation unit placed. He had been having some right hip pain that worsened with walking. He had been working 2 to 4 hours three days a week washing dishes. On examination he had bruising over the left shoulder where his seatbelt restrained him and bruising over the medial right knee. (JE 2:55) Dr. Crome

ordered claimant to continue with physical therapy and occupational therapy, restrict work hours and to watch for potential arthritis in the hip. (JE 2:56)

On August 21, 2018 claimant was seen at a pain clinic by Kerry Panozzo, M.D., for evaluation of neck and lower back pain, right greater than left, and left knee pain. (JE 4:90) Claimant referenced the January 28, 2018, motor vehicle collision as a significant inciting event. Id. At this visit he reported bilateral pain that was aching, sharp and stabbing. Id. The pain was aggravated by sitting, standing, running, and walking. Id. On examination his cervical spine range of motion was normal, muscle strength testing was five out of five, spinal curves were normal. (JE 4:92) He had some positive tenderness in the neck and upper thoracic region. Id. Examination of his lumbar spine revealed normal range of motion, normal strength, and no tenderness. Id. Compression test, Femoral Shear Test, Patrick Test, and Gaenslen's Sign were positive bilaterally. Id. He had full range of motion and full strength in both upper and lower extremities with some pain over the left knee. Id. His gait was normal. Id. Dr. Panozzo administered steroid injections in the bilateral sacroiliac joints. (JE 4:96) Claimant reported a 50 percent overall improvement and a second bilateral sacroiliac joint steroid injection was administered on September 11, 2018. (JE 4:99-100) After the second injection, he reported a 60 percent improvement. (JE 4:102) A third injection was administered on October 9, 2018. (JE 4:104)

On December 7, 2018, claimant was seen by Dr. Crome for a recheck of chronic pain. (JE 2:57) Work activities such as moving tables worsened claimant's pain. Id. Dr. Crome gave a permanent restriction of no lifting more than 20 pounds. (JE 2:58; Defendants' Exhibit A)

On March 8, 2019, claimant was seen by Ryan Taylor, D.O., at the referral of Dr. Crome for low back and left knee pain radiating down the left leg to the knee. (JE 1:20; 5:106) Claimant reported his low back pain existed for a long time, possibly related to a lumbar surgery in the late 1990s. Id. He attributed his left knee pain to a car accident in January 2018. Id. Dr. Taylor administered a USGI on March 26, 2019, which claimant reported gave him 40 percent relief. (JE 1:23) However, his pain returned. Id.

A CT of claimant's low back was conducted on March 27, 2019 using the January 27, 2018, CT scan for comparison. (JE 3:88; JE 5:109) The impressions included:

- Abnormal severe disc space narrowing and degenerative L4 anterolisthesis with severe spinal stenosis at L4 – 5.
- Disc bulging and bilateral facet arthritis with moderate to severe spinal stenosis at L3 – 4.
- Mild spinal stenosis and disc bulging with facet arthritis at L2 – 3.

(JE 3:88)

During the examination at the follow-up appointment on April 11, 2019, claimant continued to have tenderness to palpation along the medial and lateral joint line of the left knee. (JE 1:23) Hyperflexion was painful but improved. There was trace effusion. He also continued to have tenderness to palpation in the left lumbar paraspinal and SI region. Extension of the lumber spine as well as extension and side bending reproduced low back pain as well as buttock pain and some radicular symptoms on the left. Id.

On May 29, 2019, claimant was seen for individual cognitive behavior therapy in connection with a post-traumatic stress disorder he had been experiencing since the January 2018 motor vehicle collision. (JE 6:161) He was preoccupied with the accident and the residual effects on him. Id. He also continued to struggle at work and was experiencing issues related to a civil rights complaint. Id. He was also continuing to have chronic pain with respect to his knee but reported that he was planning to see a pain management physician. Id.

Claimant underwent a total left knee arthroplasty on August 12, 2019. (CE 5:21)

On November 21, 2019, claimant presented to Dr. Crome to discuss his ongoing chronic low back pain. (JE 2:60) He was taking tramadol 50 mg which was helping him work. Id. Dr. Crome prescribed another dose of tramadol 50 mg in the evening. Id.

On September 11, 2020, claimant presented to Dr. Crome for a flu shot. (JE 2:63) In the history section, it was noted that claimant had chronic back pain with left-sided radiculopathy and was planning to see an orthopedist for carpal tunnel syndrome. He had recently had a cortisone injection in his right knee due to bone-on-bone arthritis. Back pain was daily. Celebrex and tramadol allowed him to be more active.

On March 12, 2021, claimant presented for a recheck of anxiety, coronary artery disease, cardiomyopathy, chronic back pain, hypertension, hyperlipidemia, and hyperglycemia. (JE 2:66) He had been taking tramadol daily for the back pain and had been referred to an orthopedist for right hand pain and fourth digit triggering. Id.

On June 24, 2021, claimant followed up with P.A. Schulze who aspirated the right knee and injected Synvisc One. (CE 5:22)

On or about July 29, 2021, claimant began working for defendant employer as a part-time dishwasher working approximately 22-23 hours per week. (CE 7:46; DE C:7) The duties of a dishwasher included routine work with his hands, lifting and carrying regularly up to 25 pounds and 50 pounds occasionally, routinely moving through the building, and occasionally stooping and kneeling. (CE 1:4)

On September 2, 2021, claimant was seen by Dr. Hoffman for ongoing right knee pain. (CE 5:22)

On September 12, 2021, claimant tripped over a piece of metal sticking up from the ground and fell to the cement, striking his head and back. (CE 1:1) In the accident report he filled out, he indicated he hurt his low back, leg and ankle on the right. Id.

On September 20, 2021 claimant was seen by Daniel S. Kinker, D.O., for back pain radiating into the right leg which he stated started the day prior. (JE 1:24, 25) He also attributed his back pain to the trip and fall at work eight days prior. (JE 1:24) He did not have pain initially but after the fall the pain worsened in the days following. Id. During the examination he was nontender in the back with normal range of motion. (JE 1:26) He had right gluteal and paraspinal tenderness. Id. Straight leg raise test was positive but he had normal range of motion, normal strength and no tenderness. Id. Claimant denied any urinary or bowel incontinence. Id. Dr. Kinker diagnosed claimant with right-sided sciatic nerve distribution radicular pain. Id. He was given Toradol and a Lidoderm patch. Id.

On September 23, 2021, claimant presented to Occupational Medicine Clinic and was seen by Jane Anderson, PA-C, for pain in the lower back stemming from the September 12, 2021, incident. (JE 7:162) He explained the mechanism of injury was tripping over a metal bar outside. Id. He fell backward and since then had pain in the lower back, greater on the right than the left with occasional radiating pain into the pelvis and upper thighs. Id. At times the radicular pain traveled down the right leg to the foot. Id. He walked with a limp. Id. Claimant described the pain as constant, sharp and shooting. Id. His pain level was 8 on a 10 scale and aggravated by bending, sitting, and walking. Id. He noted prior back injury from an MVA in 2018. Id. PA-C Anderson diagnosed claimant with lumbago with sciatica on the right side and sprained ligaments of the lumbar spine. (JE 7:163) Claimant was continued on tramadol, Naproxen, Flexeril, and recommended Lidoderm patches over-the-counter. Id.

On September 28, 2021, claimant was interviewed by a representative of defendants regarding the fall. (DE C:4) He said he tripped and fell landing on his back. (DE C:9) At the time of the interview, his primary pain complaints were in the back radiating down the side of his leg. Id. When questioned about prior back pain, claimant stated that he had a car accident in 2018 or 2019 which resulted in back pain. (DE C:14) He was treated with medications, therapy, ice and heat as well as a shot. Id.

On October 1, 2021, claimant returned for follow up and was seen by Camilla J. Frederick, M.D. (JE 7:164) Claimant had low back pain since 2019 unrelated to his fall. Id. During the examination, his lumbar spine was very tender to palpation, and he had pain with extension and lateral bending. Id. Range of motion was impacted by pain. Id. Dr. Frederick noted that the cause of the claimant's lumbago with right-sided sciatica "appears to be, in part, related to work activities." (JE 7:165) Dr. Frederick recommended work restrictions of no more than 20 pounds lifting, pulling and pushing, rare squatting and no kneeling, crawling or climbing ladders. Id. Claimant was sent to physical therapy in addition to continuation of his previously prescribed medications of Flexeril, Naproxen and tramadol. Id.

On October 4, 2021, claimant started therapy at Genesis Physical Therapy and Sports Medicine for the right-sided low back pain. (JE 5:110) In the history section, claimant attributed the injury to a fall on September 12, 2021, while he was at work. Id. At the second visit on October 6, 2021, claimant was late and the subjective assessment took up a lot of the session time. (JE 5:111) Neurological screen was significant for myotomal weakness throughout the L4 and L5 myotomes. Id. He also had loss of sensation throughout the L4 and L5 dermatomes in the anterior shank and dorsum of the foot as well. Id. Reflexes were absent throughout the lower extremity but it was symmetrical bilaterally. Id. At the October 6, 2021, visit, claimant reported frequent falls and difficulty voiding his bladder. (JE 5:112) The therapist noted that issues regarding his bladder had been denied at the intake on October 4, 2021, but that the claimant had been on his phone the entire session and perhaps not paying attention to the therapist's questions. Id. Concerns regarding nerve damage at L4 and L5 were passed on to Dr. Frederick. Id.

On October 6, 2021, claimant called Dr. Frederick's office and passed along his frequent falls and trouble with urination and constipation. (JE 7:166) Dr. Frederick's office noted that he needed a referral to a neurosurgeon as soon as possible and recommended claimant use a cane while ambulating. Id.

A CT was conducted which showed severe degeneration at L4-L5 with severe disc disease and bulging, severe facet arthropathy, grade 2 anterolisthesis and severe spinal canal stenosis and multi-level bilateral neural foraminal narrowing most notable at L4-L5. (JE 8:172) There were also degenerative changes at L3-L4 with significant narrowing of the spinal canal. Id.

On October 25, 2021, claimant returned to Dr. Frederick for ongoing lower back pain. (JE 7:167) His pain was 7 on a 10 scale. Id. He was experiencing falls at work. Id. He had not yet seen a neurologist nor an orthopedic surgeon. Id. His bowel and bladder were functioning normally. Id. His pain was on the right side, radiating down the leg to the foot with numbness in the big toe. Id. Dr. Frederick revised the work restrictions from 20 pounds maximum lift, pull and push to 5 pounds. (JE 7:168) Gabapentin was added to his prescription regimen. (JE 7:169)

On November 10, 2021, claimant was seen by Michael Dolphin, D.O., for an orthopedic consult. (JE 9:175) Claimant reported diffuse lumbar pain that radiated down the right leg with numbness into his foot. Id. Dr. Dolphin diagnosed claimant with drop foot on the right, low back pain, other intervertebral disc degeneration lumbar region, radiculopathy lumbar region, spinal stenosis lumbar region with neurogenic claudication, and spondylolisthesis. (JE 9:176) He recommended a lumbar CT myelogram. (JE 9:176) Dr. Dolphin also took claimant off work until after the CT. (JE 9:178) On November 18, 2021, Dr. Dolphin revised claimant's work restrictions to sedentary work with a lifting restriction of 10 pounds maximum, occasionally lifting small objects.(JE 9:181) This work restriction was scaled back to no work on November 23, 2021, after claimant reported exacerbated symptoms and muscle weakness. (JE 9:182)

In a personal note, he wrote that when he came to work, he still had pain in his back and leg. (CE 1:2) He was upset and felt that no one was taking his injury seriously. Id.

A CT of claimant's back was conducted on December 16, 2021. The impressions were as follows:

> 1. Unilateral spondylolysis on the left with grade 1 spondylolisthesis of L4 on L5. This, coupled with the large disc osteophyte complex, is resulting in severe central canal stenosis with nerve root compression.
>
> 2. Broad-based disc osteophyte complex with hypertrophy of the ligamentum flavum at the L3-L4 level resulting in severe central canal stenosis.
>
> 3. Clumping of the nerve roots above the L3-4 level secondary to the stenosis at the L3-4 and L4-5 level.

(JE 1:29; JE 8:173-174)

On December 28, 2021, claimant reviewed the CT results with Dr. Dolphin who recommended that based on the presence of nerve impingement and spinal stenosis at L3-L4 and L4-L5 with the spondylolisthesis at L4-L5, surgical intervention was advisable. (JE 9:187)

There was a protracted period of time during which claimant's request for surgery was not authorized. On March 22, 2023, Irving L. Wolfe, D.O., conducted an IME (CE 5) In addition to the medical records pertaining to the low back treatment following claimant's September 12, 2021, slip and fall, Dr. Wolfe reviewed records from 2011 through January 23, 2023. (CE 5:19, 25) Those records covered claimant's past left and right knee pain and the left knee arthroplasty and lumbar pain including traumas suffered from motor vehicle collisions in 2015 and 2018. (CE 5:27, 30)

Dr. Wolfe concluded that claimant sustained a severe lumbar injury as a result of the September 12, 2021, trip and fall which necessitated the surgery performed by Dr. Dolphin. (CE 5:39) Because of the injury and subsequent treatment, claimant sustained a 23 percent whole person impairment. (CE 5:40) Dr. Wolfe added an additional 3 percent due to chronic pain for a 25 percent whole person impairment. Id. He agreed claimant had a chronic anatomical lumbar condition prior to the September 12, 2021, fall but that because claimant was not receiving treatment for his lumbar condition in the two years between the lumbar laminectomy in 1999 and the lumbar epidural steroid injection following the 2019 MVA and he had no work restrictions or accommodations, that it was more likely than not that claimant's September 12, 2021, injury aggravated claimant's underlying chronic condition. (CE 5:40-41) Dr. Wolfe did not believe claimant was at MMI and recommended claimant be sent to a pain specialist. (CE 5:42)

On March 30, 2022, attorney for the defendants wrote to claimant's counsel stating that defendants wanted claimant to undergo an IME with Cassim Igram, M.D. (DE E) The IME took place on April 27, 2022. (DE F)

Prior to the IME with Dr. Igram, Dr. Dolphin provided an opinion at the request of the claimant on April 14, 2022. (CE 4:14-15) Dr. Dolphin repeated the recommendation for the back surgery and re-affirmed that the work injury of September 12, 2021, more likely than not represented a substantial causal, contributing, or aggravating factor in claimant's severe low back pain and radiculopathy which necessitated the surgery. Id. Dr. Dolphin anticipated that the future impairment following surgery would be in the 20-23 percent range. Id. Dr. Dolphin expressed concern over the delay in surgery as the longer that the nerve is compressed the more permanent the damage can be. (CE 4:15)

Dr. Igram reviewed past medical records and performed his own examination. (DE F) During the examination, claimant exhibited mild tenderness to palpation through the lumbosacral spine, tenderness in the right hamstring musculature, and significant range of motion limitations in all directions. (DE F:44) There was no evidence of drop foot, but he did have difficulty moving from seated to standing and had difficulty lying down on the examination table. Id.

In reviewing the 2019 and 2021 CTs of the lumbar spine, Dr. Igram noted claimant had degenerative findings but no major changes from 2019 to 2021. (DE F:45-46) Dr. Igram diagnosed claimant with chronic low back pain with underlying spinal stenosis. (DE F:46) Claimant's degenerative spondylolisthesis at L4-L5 had been present at least since 2019 based on imaging, if not longer. Id. The injury of September 12, 2021, did not cause the spondylolisthesis nor did it increase his deformity. Id. The underlying stenosis was also present prior to the injury. Id. The mechanism of injury likely was a back strain which was temporary in nature. Id. It was the opinion of Dr. Igram that claimant did not need additional treatment arising from the back strain caused by the September 12, 2021, injury. (DE F: 46) Dr. Igram set claimant's MMI as of April 27, 2022, with no ratable impairment. Id.

On May 17, 2022, defendant insurer stated that the surgical request of Dr. Dolphin was still under review. (CE 3:10) However, email exchanges from the defendants' counsel indicated that the claim was initially denied due to an IME from Dr. Igram rebutting the causal connection between claimant's work injury and his need for surgery. (CE 3:8) Claimant's counsel obtained a letter from Dr. Dolphin stating it was connected which triggered a further investigation from defendants. Id.

The letter of Dr. Dolphin is dated April 14, 2022, and authored by counsel for the claimant but signed by Dr. Dolphin. (CE 4:14) In the letter, Dr. Dolphin agreed that despite claimant's past medical issues including a prior lumbar surgery and motor vehicle collision in 2018, Dr. Dolphin believed that the claimant's current low back pain and right foot drop were substantially caused by his fall on September 12, 2021. (CE 4:15)

On June 8, 2022, Dr. Igram re-iterated his opinion that the claimant sustained a back strain due to the fall on September 12, 2021, and no further treatment was necessary for the back strain. (DE F:48-49)

On June 14, 2022, the defendants officially denied the claim based on the opinions of Dr. Igram and the surgery did not go through. (CE 3:12)

On June 14, 2022, claimant returned to Dr. Frederick for the back and hip pain. (JE 7:170) Dr. Frederick stopped his Naproxen, continued prescriptions for Flexeril and gabapentin and advised claimant to use the cane at all times. (JE 7:171) Claimant was also encouraged to return to physical therapy. Id.

On June 28, 2022, claimant was seen by Dr. Dolphin. (JE 9:188) Claimant's quality of life was suffering due to pain in the low back and into the right lower extremity and right foot. Id. Due to the denial of his claim by defendants, claimant wanted to pursue surgery under his personal insurance. (JE 9:188)

On August 8, 2022, claimant was seen by Robert D. Padgett, M.D., for a preop history and physical. (JE 2:69) The lumbar fusion and laminectomy surgery took place on September 12, 2022. (JE 10:201-203)

On August 10, 2022, claimant was fitted for an LSO brace to reduce pain both pre- and post-surgery. (JE 9:190)

On September 26, 2022, claimant was seen by Dr. Padgett for a face-to-face meeting following his discharge from the hospital. (JE 2:71)

On September 23, 2022, claimant reported left-sided lumbar pain, left-sided groin pain and testicular pain following surgery. (JE 9:191) He rated his pain an 8 on a 10 scale. Id. He was sent to physical therapy on October 21, 2022. (JE 9:193)

Upon the referral of Dr. Dolphin, on October 27, 2022, claimant was seen at Genesis Physical Therapy and Sports Medicine by Alyssa Gillund, PT, who had treated claimant back in 2021. (JE 5:155) In the subjective portion, claimant attributed his injury to tripping and falling on September 12, 2021. Id. His pain was in the left leg radiating into his foot. He also had pain, numbness and tingling in the left hand. (JE 5:156) His pain was 7 to 9 on a 10 scale. Id.

On January 12, 2023, claimant presented for follow up after the surgery. (JE 9:194) He denied recent falls but complained of numbness in the right foot with sharp pains in the bilateral legs along with neck pain, left arm pain, and numbness and tingling. Id. He attributed the cervical pain to his September 12, 2021, work injury. Id. Dr. Dolphin ordered a cervical CT myelogram and EMG for the left-sided pain complaints. (JE 9:196)

By January 19, 2023, claimant had completed 28 sessions of physical therapy. (JE 5:133) His pain was 5 on a 10 scale. Id. He had recently visited with Dr. Dolphin who felt claimant was healing well. Id. Claimant was concerned about his neck. Id. He continued to see therapist Gillund for treatment. (See infra JE 5:115-132, note the records are out of date order) At the February 16, 2023, visit, claimant admitted to doing his home exercise plan around 70 percent of the time. (JE 5:123) He was late to the session and reported no change in his pain which he rated 5 on a 10 scale. Id. Therapist Gillund counseled claimant on arriving to the session timely and being consistent with the HEP. Id. He tolerated the session well and demonstrated good effort. Id. Following the March 6, 2023, visit, claimant canceled several appointments and returned on March 16, 2023, but stated he did not feel like doing therapy. (JE 5:116)

On January 3, 2023, claimant was seen by Brittany Sue Dalton, D.O., to establish care. (JE 2:74) Regarding his degenerative disease, he related that after a fall at work there was a significant worsening of his back pain. (JE 2:75) His previous physician, Dr. Padgett had prescribed fentanyl patches, but claimant was concerned about using them due to risk of addiction. After a referral to a spine specialist, claimant underwent spinal fusion and laminectomy which resulted in significant improvement in his back pain. Currently he was taking tramadol 50 mg and Tylenol for breakthrough pain. (JE 2:75) For his left knee, he medicated with Celebrex 200 mg daily. There were no changes in his medications as it related to his back or left knee pain.

On January 17, 2023, claimant was seen at Orthopaedic Specialists, the office of Dr. Dolphin, by John Hoffman, M.D., for a right knee cortisone injection. (JE 9:197) The record notes that he had previously received a right knee cortisone injection on August 8, 2022, which provided 40-50 percent relief lasting 3 months. Id. Claimant also shared that the unloading brace he had been using at the January 18, 2022, visit did not provide relief. Id.

On April 7, 2023, claimant returned to see Dr. Dolphin for follow up of his back surgery. (JE 9:199) Claimant had pain radiating down the left leg with numbness in the right foot. Id. He maintained he still had right foot drop symptoms as well. Id. His pain was 5 to 7 on a 10 scale. Id. Dr. Dolphin reviewed the x-rays with claimant and discussed that they looked stable and that there was a near complete resolution of the weakness with respect to dorsiflexion. (JE 9:200)

On April 11, 2023, Dr. Dolphin signed off on a letter agreeing that he stood by the opinions he gave on April 20, 2022. (CE 4:16-17) He opined claimant had reached MMI as of April 7, 2023, and assigned a 23 percent body as a whole impairment. (CE 4:16)

On April 12, 2023, Dr. Igram signed off on a checklist type opinion letter prepared by counsel for defendants. (DE F:50-53) He agreed that claimant's employment duties and/or the September 12, 2021, incident did not change claimant's underlying condition. (DE F:51) The Genesis ER films taken on September 20, 2021, showed no acute findings. Id. The lack of acute findings supports the opinion that the work incident was

not a substantial or material aggravation of claimant's underlying condition. Id. Dr. Igram further agreed that Dr. Dolphin's diagnoses were not caused by the work injury, that claimant was taking tramadol prior to the work injury, and that the surgery was for claimant's pre-existing condition. (DE F:51)

Claimant has incurred $200,428.73 in medical bills with $62,038.19 paid for by personal health insurance, $45.00 out of pocket, and $1,999.05 outstanding. (CE 8:51)

Claimant paid $103.00 for the filing fee, $250.00 for the April 20, 2022, report of Dr. Dolphin, $500.00 for the April 11, 2023 report of Dr. Dolphin, and $2,950.00 for the IME of Dr. Wolfe. (CE 9:74)

## 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 R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy

of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The primary thrust of the defense is that claimant lacks credibility in his subjective complaints and medical history he related to his treating physicians and the independent medical experts. Defendants further claim that the claimant concealed his true medical condition when he was hired by the defendants, and that had they known of his permanent work restrictions of no lifting more than 20 pounds, he would not have been hired. For all of those reasons, defendants urge reliance on the medical opinion of Dr. Igram. Defendants further request the claimant not be rewarded for intentionally concealing his physical condition but provide no legal support for that position.

The undersigned agrees that there were places in which claimant was not consistent or forthcoming regarding his past medical history. The claimant was not forthcoming regarding his health history when he was hired by the defendant employer, stating he only had a little back pain and did not disclose he was taking tramadol three times a day. Defendants have an issue with the claimant's assertion early on in the case that he had injured his head and neck in the September 12, 2021 injury; however, claimant has since withdrawn that claim. Pleading alternate theories of recovery that are later retracted as evidence did not fully support are a legitimate legal strategy. Those alternate claims are permitted under the law and are not a credibility issue.

In his deposition testimony, claimant maintained that the tramadol was for his arthritis and his neck problems, but not his back, but he did not deny taking tramadol. In

his deposition he also denied having any episodes of back pain before September 12, 2021. He stated that if he had back pain, he would not have been able to do the job he was doing. (DE I:76) This statement was the one lacking the most credibility given claimant's consistent treatment for his chronic low back condition. He also disclaimed any treatment for back pain after he was released from his back surgery in 1999. (DE I:80)

At hearing, the claimant appeared credible. He answered questions asked of him without much equivocation and did not engage in any overt shifting of his body that was unrelated to his pain, and his recall was largely consistent.

On the overall issue of credibility, the undersigned finds the claimant's testimony troubling. He acknowledged neck pain and previous neck injury but denied back pain following the 1999 surgery despite nearly annual treatment including injections to his low back in 2018. He was taking up to three tramadol a day for what he describes as arthritic pain. He recalls suffering the motor vehicle collision of 2018 but does not attribute any back pain to that incident despite extensive treatment for it. Claimant's report of loss of bladder control and/or problems defecating were also not consistent. At the October 8, 2021, physical therapy visit claimant reported frequent falls and difficulty voiding his bladder, but four days prior claimant had denied any bladder issues. On October 25, 2021, claimant reported to Dr. Frederick that his bowel and bladder were functioning normally. Bladder and bowel issues were not noted in any of Dr. Dolphin's medical records. He did not disclose being on pain medication when applying for his position with defendant employer. Where his personal testimony deviates from the medical records or contemporaneous documentation such as recorded statements, greater weight is afforded to the written documentation.

The past medical records show the claimant had significant back pain that was identified as chronic, and that he had received treatment for the chronic back pain dating all the way back to 1999.

However, the medical opinions of Dr. Dolphin and Dr. Wolfe both acknowledge claimant's history of lumbar surgery in 1999 and the motor vehicle collision in 2018. Both Dr. Dolphin and Dr. Wolfe acknowledge claimant had a pre-existing condition; however, the two opine that the claimant's pre-existing condition was lit up or aggravated by his fall on September 12, 2021.

Defendants point out that Dr. Dolphin's opinions did not reveal that he was aware of the scope of claimant's history of back problems, nor did Dr. Dolphin appear to compare the pre-injury CT and the post-injury CT. In the medical record that establishes care between Dr. Dolphin and claimant, the only history claimant provided of back pain was lumbar surgery in 1999. (JE 9:175) While claimant's motor vehicle collision of January 2018 was noted in the medical history, it was not related to claimant's history of lumbar pain, but instead listed alongside claimant's history of heart attack. Id. Claimant's personal account of his medical condition did not alert Dr. Dolphin to claimant's chronic back pain and there are no notations in Dr. Dolphin's opinions, which were authored by the claimant's counsel, that revealed Dr. Dolphin had reviewed the

extensive medical records of claimant. In the first opinion letter Dr. Dolphin signed, counsel for claimant raised the issue of claimant's bladder issues and referenced one medical record which was attached which was a therapy record from October 6, 2021. Dr. Dolphin signed off on this despite his records showing no complaints of bladder or bowel issues. Further, it does not appear he was aware of claimant's denial of bladder or bowel issues in later therapy notes or to Dr. Frederick. Dr. Dolphin's opinions are given lower weight as he did not show he was aware of claimant's past medical history and adopted the history provided to him by claimant's counsel.

Dr. Wolfe was aware of claimant's extensive medical history. His report had 17 pages detailing claimant's past medical history. Defendants' argument as it related to Dr. Wolfe's opinion was that he did not provide enough explanation for his causation opinion and did not perform any comparison between the pre- and post-injury CT.

The most compelling evidence that claimant's condition was lit up by the September 12, 2021, fall was that he was medically cleared to do the job for the defendants and that he was able to do this job in a similar position held prior to 2021 without accommodation. Prior to the injury of September 12, 2021, claimant did not experience footdrop, use of a cane, or need for a leg brace. These are symptoms or ambulatory aids that he acquired following the September 12, 2021 injury.

On the other hand, Dr. Igram noted there was no structural change in the pre-injury CT dated April 11, 2019, and the post-injury CT. Claimant had been receiving ongoing treatment for his back pain for a significant amount of time. In 2015, claimant was seen for back and bilateral leg pain. At that time, he was taking tramadol for treatment. In 2016 claimant was seen for a disability examination for his low back pain. His ability to stand, move about and walk was diminished. He could not lift or carry with any frequency. In 2017, he sustained a motor vehicle collision which resulted in low back pain. In 2018 claimant was seen for another motor vehicle collision after which he complained of mild low back pain. He began pain management treatment in August 2018 primarily for his low back pain. He received at least two bilateral SI joint injections. In December 2018 claimant was given a note for a lifting restriction of 20 pounds. On March 8, 2019, claimant was seen for bilateral low back pain greater on the left than the right. The pain radiated down his posterior left leg to his knee and posterior right leg to his thigh. His 2019 CT scan showed severe disc space narrowing and degenerative changes at L3–L4.

In 2021 claimant was taking tramadol daily for his chronic back pain. Emergency department notes indicate the claimant was taking tramadol three times a day leading up to the September 12, 2021 fall.

In weighing the opinions between Dr. Igram and Dr. Wolfe, both of whom had full knowledge of claimant's medical history, Dr. Igram's opinion is more reliable. He compared both pre- and post-injury CTs which showed no structural difference. The large disk herniation at L4-L5 was present on both pre- and post-September 12, 2021, CT scans. It was the disk herniation that necessitated the surgery. (See CE 4:14) Dr.

Igram diagnosed claimant with chronic back pain with underlying degenerative disease and set claimant's MMI date as of April 27, 2022, with no ratable injury.

Given that defendants have disclaimed responsibility for the ongoing back injury, reimbursement cannot be ordered. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 194 (Iowa 1980).

Further as claimant has not prevailed, costs will not be awarded.

Based on Dr. Igram's opinion, the remainder of the issues are moot.

ORDER

THEREFORE IT IS ORDERED, claimant shall take nothing.

Each party shall bear their own costs.

Signed and filed this 6th day of December, 2023.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nicholas Shaull (via WCES)

Michael Roling (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, 10A) 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.