BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HEATH HIGGINBOTHAM, Claimant, vs. MENARD, INC., Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	:	File No. 5066070.01 ARBITRATION DECISION Head Note Nos: 1108; 1108.50; 1402; 1403; 1702; 1703: 1800; 1803; 1806; 2206; 2501; 2907; 3000; 3001; 3002; 4000; 4000.2

STATEMENT OF THE CASE

The claimant, Heath Higginbotham, filed a petition for arbitration seeking workers' compensation benefits from Menard, Inc. ("Menards"), and its insurer XL Insurance America, Inc. Jenna Green appeared on behalf of the claimant. Charles Blades appeared on behalf of the defendants.

The matter came on for hearing on December 2, 2020, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. An order issued on March 13, 2020, and updated June 1, 2020, and August 14, 2020, by the Iowa Workers' Compensation Commissioner, In the Matter of Coronavirus/COVID-19 Impact on Hearings (Available online at: https://www.iowaworkcomp.gov/order-coronavirus-covid-19 (last viewed August 14, 2020)) amended the hearing assignment order in each case before the Commissioner scheduled for an in-person regular proceeding hearing between March 18, 2020, and March 19, 2021. The amendment makes it so that such hearings will be held by Internet-based video, using CourtCall. The parties appeared electronically, and the hearing proceeded without significant difficulties. The matter was fully submitted on January 8, 2021, after briefing by the parties.

The record in this case consists of Joint Exhibits 1-17, Claimant's Exhibits 1-11, and Defendants' Exhibits A-P. Testimony under oath was also taken from the claimant, Heath Higginbotham, and Menard's employee Doug Yeoman. Stephanie Cousins was appointed the official reporter and custodian of the notes of the proceeding.

STIPULATIONS

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

1. There was an employer-employee relationship at the time of the alleged injury.

2. The claimant sustained an injury to his back arising out of, and in the course of, employment on April 2, 2017.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. The alleged injury is a cause of permanent disability to the claimant's back.

5. The disability is an industrial disability.

6. The claimant was married, and entitled to four exemptions.

7. Prior to the hearing, the claimant was paid 40 weeks of permanent partial disability compensation at $569.06 per week.

8. With regard to disputed medical expenses:

    a. The fees or prices charged by providers are fair and reasonable.
    b. The treatment was reasonable and necessary.
    c. Although disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendants are not offering contrary evidence.

9. Prior to the hearing, the claimant was paid 20 weeks of compensation at the rate of four hundred fifty-one and 14/100 dollars ($451.14) per week.

10. Claimant was paid $13,763.52 in permanent partial disability benefits related to claimant's 2014 low back injury claim in Nebraska, which is equivalent to a 9 percent permanent partial disability rating.

11. The costs requested by the claimant have been paid.

Additionally, entitlement to temporary disability and/or healing period benefits is no longer in dispute. The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the claimant sustained a psychological or mental health injury arising out of, and in the course of employment on April 2, 2017.

2. Whether the alleged injury is a cause of permanent disability due to a psychological or mental health injury.

3. The extent of the claimant's disability, if any is awarded.

4. Whether the commencement date for permanent partial disability benefits, if any are awarded, is January 13, 2020, or April 1, 2020.

5. Whether the claimant's gross earnings were $628.98 per week, or $683.31 per week, and whether the weekly rate of compensation is $433.45 or $494.72.

6. Whether the claimant is entitled to payment of medical expenses as noted in Claimant's Exhibit 9.

    a. Whether the listed expenses are causally connected to the work injury.
    b. Whether, although the causal connection of the expenses to a work injury cannot be stipulated, the listed expenses are at least causally connected to the medical condition(s) upon which the claim of injury is based.
    c. Whether the requested expenses were authorized by the defendants.

7. Whether the claimant is entitled to reimbursement for an independent medical examination ("IME") pursuant to Iowa Code section 85.39.

8. Whether the defendants are entitled to a credit for claim payments related to the claimant's 2014 low back injury claim from Nebraska pursuant to Iowa Code 85.34(7)(b)(1).

9. Whether the defendants are entitled to a credit for overpayment of benefits for all weekly benefits paid by the defendants in excess of the rate claimed by defendants.

10. Whether penalty should be assessed against the defendants.

11. Whether the claimant is entitled to an assessment of costs.

FINDINGS OF FACT

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

Heath Higginbotham, the claimant, was 48 years old at the time of the hearing. (Testimony). He resides in Sigourney, Iowa, with his wife and two sons. (Testimony). Mr. Higginbotham graduated from Columbus High School in Nebraska in 1991. (Testimony). He subsequently attended three semesters of college at Midland Lutheran

College in Fremont, Nebraska. (Testimony). He studied elementary education. (Testimony; Defendants' Exhibit F:30).

After leaving Midland Lutheran College in 1992, Mr. Higginbotham worked in fast food restaurants, construction, manufacturing, and electronics. (Testimony; Claimant's Exhibit 4:2-3). In 1998, Mr. Higginbotham began his career with Menards. (Testimony). Since 1998, he worked at seven different Menards locations. (Testimony). He worked various positions at Menards. (CE 11:1). He worked the following positions prior to moving to his current location in Ottumwa, Iowa: Sales associate – wall coverings, first assistant manager, assistant wall coverings manager, wall coverings manager, sales associate – plumbing, assistant hardware manager, assistant millwork manager, and floor coverings manager. (CE 11:1; Testimony). He has worked in Ottumwa for four to five years. (Testimony). His current title is sales associate in the wall coverings department. (Testimony). As a sales associate, he assists guests, stocks freight, loads products for guests, merchandises products, and stocks products. (Testimony). Mr. Higginbotham testified that he spends the entire day on his feet, and lifts items ranging from 5 pounds to 80 pounds. (Testimony). He currently earns $14.55 per hour and works about 35 hours per week. (Testimony). He is scheduled to work 40 hours per week, but testified that he "physically can't do it," as his back pain interferes with his work. (Testimony). He testified in deposition that he worked 40 hours per week about ten times in the prior two years. (DE A:1). Despite his working less than 40 hours per week, Menards has never reprimanded or warned him about his performance. (Testimony). He also testified that he was never reprimanded for working less than 40 hours per week. (Testimony). Despite this, Mr. Higginbotham claimed that Menards was not accommodating him due to his back pain. (DE B:2). He further testified that he finds help when he needs to lift something above his restrictions. (DE B:2).

Prior to his work injury, Mr. Higginbotham worked as a manager in the wall coverings department. (Testimony). He supervised 15 associates. (Testimony). He scheduled employees, dealt with guest issues, and worked with stocking. (Testimony). He earned $14.00 per hour as a manager. (Testimony). As a manager, he received bonuses throughout the year. (Testimony). These bonuses included a "manager bonus" and "profit sharing." (Testimony). The "manager bonus" was dependent on profitability across departments, and was discretionary. (Testimony). Mr. Higginbotham claimed that he received a "manager bonus" every year that he was a manager. (Testimony). "Profit sharing" bonuses were also paid out to all employees. (Testimony).

Doug Yeoman testified on behalf of the defendant employer, Menards. (Testimony). He works at the Menards in Ottumwa, Iowa, as the general manager. (Testimony). He testified that he has been a general manager with Menards for over 25 years. (Testimony). He testified further that the "manager bonus" is discretionary. (Testimony). He also noted that he received no complaints or issues with Mr. Higginbotham's performance. (Testimony).

The parties submitted a number of records for injuries prior to those that allegedly occurred on April 2, 2017. I will briefly summarize those records prior to

discussing treatment on, and subsequent to, April 2, 2017. On May 20, 2003, Mr. Higginbotham reported to Concentra Medical Centers in Omaha, Nebraska, complaining of back pain. (Joint Exhibit 1:1). Mr. Higginbotham noted injuring his back at Menards while lifting five gallon buckets on May 19, 2003. (JE 1:1). He was diagnosed with a lumbar strain. (JE 1:2). The provider recommended physical therapy, modified activity, and medications. (JE 1:2).

On July 3, 2013, Mr. Higginbotham visited with Alicia Parks, PA-C, at Alegent Creighton regarding an anger issue. (JE 2:1-2). Mr. Higginbotham complained of anger issues for over one year, worsening over the last month. (JE 2:1). He indicated feelings of sadness, and noted that he felt as though he could no longer brush off his anger. (JE 2:1). Ms. Parks diagnosed Mr. Higginbotham with a mood disorder of unknown etiology. (JE 2:2). She prescribed medication and recommended therapy. (JE 2:2).

Mr. Higginbotham returned to Ms. Parks' office on September 3, 2013, for complaints of leg pain, insomnia, and chest pain. (JE 2:3-6). Muhammad Nawaz, M.D., also examined the claimant on this date. (JE 2:5-6). Mr. Higginbotham told Dr. Nawaz that he felt better with regards to impulse and anger disorder. (JE 2:6). The claimant noted feeling as though his weight issues contributed to his anxiety and anger issues. (JE 2:6).

On October 24, 2013, Abhishek Singla, M.D., examined Mr. Higginbotham as a follow up for "personality disorder." (JE 2:7-9). Dr. Singla noted that the claimant displayed features consistent with impulse control and symptoms such as insomnia, unstable mood, impulsiveness, and frequent anger. (JE 2:7). Mr. Higginbotham reported that his symptoms worsened, including an episode of road rage and an episode of aggression towards his foster child. (JE 2:7). These episodes began 5 years prior. (JE 2:7). Dr. Singla recommended that the claimant begin lithium and continue therapy. (JE 2:9).

Shalini Bichala, M.D. examined Mr. Higginbotham on January 16, 2014, for "health maintenance." (JE 2:10-12). Lithium improved his mood, but he noticed some side effects. (JE 2:10). Dr. Bichala told Mr. Higginbotham to continue taking lithium, and take NSAIDs for back pain. (JE 2:12).

Mr. Higginbotham had a prior work injury in August of 2014. (Testimony). He reported being on his knees, transferring bags of mortar from one pallet to another. (Testimony). He felt a pop in his back, walked 15 feet, and then could not move. (Testimony). He testified that his treatment eliminated any back pain, and that he was released to full duty work. (Testimony).

On September 15, 2014, Mr. Higginbotham reported to University of Nebraska Medical Center for physical therapy with Marcia Esola, P.T. (JE 3:1-3). Mr. Higginbotham reported pain in his left low back, left buttock, shooting down his posterior thigh and calf with intermittent tingling into the ball of his left foot. (JE 3:1). His symptoms began in August of 2014 with his work injury. (JE 3:1). He continued therapy through October of 2014. (JE 3:7).

On October 9, 2014, Mr. Higginbotham had a lumbar MRI. (JE 3:8-9). The MRI showed mild disc and joint degeneration with slight retrolisthesis of L5 on S1. (JE 3:8-9). The MRI also noted minimal degeneration elsewhere in the lumbar spine. (JE 3:8-9).

Mr. Higginbotham visited Omaha Neurological Clinic, Inc., for an EMG/nerve conduction study on November 12, 2014. (JE 4:1). The study showed abnormal results including evidence for a "subacute, actively denervating, left-sided L5 lumbosacral radiculopathy." (JE 4:1).

On December 2, 2014, Mr. Higginbotham had another MRI of his lumbar spine. (JE 5:1-2). The MRI showed a small left eccentric, subarticular and proximal foraminal disk protrusion at L4-5 that abuts and dorsally displaces the left L5 nerve root. (JE 5:1). The MRI also showed mild disk degenerative changes at L5-S1, and mild endplate degenerative changes at L5-S1 and T12-L1. (JE 5:1). Bradley Bowdino, M.D., followed up the MRI with a letter to Dr. Bichala indicating that he recommended an epidural steroid injection. (JE 6:1). If the injection provided no relief, then Dr. Bowdino recommended an L4-5 microendoscopic diskectomy on the left side. (JE 6:1). On March 2, 2015, Dr. Bowdino performed the surgery as recommended. (JE 7:1). Dr. Bowdino released Mr. Higginbotham to full duty work on May 22, 2015. (JE 6:2).

Mr. Higginbotham visited Robert Castro, M.D., for anger issues on January 5, 2016. (JE 8:1). Dr. Castro noted that the claimant requested a refill of his medications to "keep him going." (JE 8:1). Mr. Higginbotham returned to Dr. Castro's office on March 29, 2016, for the same reasons. (JE 8:2).

On October 29, 2016, Mr. Higginbotham reported to the emergency department of Ottumwa Regional Health Center with back pain radiating down his left leg. (JE 9:1-3). Mr. Higginbotham told the emergency physician that his pain began the previous day after lifting at work. (JE 9:1). The provider diagnosed Mr. Higginbotham with a lumbar strain, and discharged him with prescriptions for Flexeril, hydrocodone, and diclofenac sodium. (JE 9:2-3).

On April 2, 2017, Mr. Higginbotham pulled out a heavy rack of ceiling tile. (Testimony). He felt a sensation in his back and felt as though his leg was stuck to the floor. (Testimony). He asked his manager to get him a stool. (Testimony). He immediately felt an uncomfortable burning in his lower back. (Testimony). Menards called an ambulance, and Mr. Higginbotham boarded the ambulance on a stretcher. (Testimony). By the time the ambulance arrived at the hospital, Mr. Higginbotham felt pain into his legs. (Testimony).

Upon arrival at Ottumwa Regional Hospital, Mr. Higginbotham complained of intense, fiery pain, to his lower back. (JE 10:1-9). He noted that he had numbness and tingling down the back side of his right leg. (JE 10:1). Mr. Higginbotham reported that he pulled a heavy cart full of metal grid work, which caused acute lower back pain. (JE 10:1). He rated his pain 6 out of 10 after receiving fentanyl and Valium. (JE 10:1). He told the provider that he took citalopram and lithium. (JE 10:2). Upon examination, his back showed muscle spasms. (JE 10:3). He was given a prescription for Flexeril and

Percocet upon discharge. (JE 10:4). X-rays of the lumbar spine showed degenerative changes at T12-L1 and L1-L2. (JE 10:5). The examiner found no acute compression deformities or spondylolisthesis. (JE 10:5).

Mr. Higginbotham reported to Keokuk County Medical Clinic for complaints of pain in his lower back on April 3, 2017. (JE 11:1-2). He reported pulling out a grid rack, and felt an instantaneous burning in his lower back. (JE 11:1). His gait was abnormal due to back pain. (JE 11:2). He leaned to his right. (JE 11:2). Dr. Castro diagnosed him with lumbago with sciatica on the right side. (JE 11:2). He recommended an MRI of the lower back. (JE 11:2).

On April 3, 2017, Mr. Higginbotham returned to Ottumwa Regional Medical Center for an occupational medicine clinic appointment. (JE 10:10-13). The claimant complained of a burning pain in his low back. (JE 10:12). The examiner provided him with restrictions including: lifting/carrying limited to 20 pounds, no climbing ladders, avoiding driving, and avoiding operating heavy machinery. (JE 10:10). He was asked to return in one week. (JE 10:10).

On April 7, 2017, upon orders from Dr. Castro, Mr. Higginbotham had another MRI of his lumbar spine. (JE 10:14). The MRI showed a small left foraminal disc protrusion at L3-L5 with "moderate left foraminal encroachment at both levels." (JE 10:14).

Mr. Higginbotham returned to Dr. Castro's office on April 10, 2017, to review the results of his MRI. (JE 11:4). The claimant continued to complain of lower back muscle pain. (JE 11:4). He stated that his pain was 5 out of 10. (JE 11:4).

On April 18, 2017, Mr. Higginbotham returned to Dr. Castro's office for his ongoing lower back muscle pain. (JE 11:6). Dr. Castro discussed the MRI results with Mr. Higginbotham again and indicated that he would refer the claimant to an orthopedic doctor for further evaluation. (JE 11:5). Dr. Castro recommended that the claimant continue therapy and not return to work until cleared by the orthopedic doctor. (JE 11:5).

Dr. Castro examined Mr. Higginbotham again on April 18, 2017, for his continued lower back pain. (JE 11:6). He reported pain of 4 out of 10. (JE 11:6). He had not heard from the orthopedic doctor. (JE 11:6).

On April 28, 2017, Mr. Higginbotham reported to Steindler Orthopedic Clinic where Benjamin MacLennan, M.D., examined him. (JE 12:1-3). Mr. Higginbotham reported aching, burning pain over his low back and bilateral buttocks. (JE 12:1). He also described burning and aching pain in his thigh, with a pins and needles sensation over his left lower leg. (JE 12:1). His pain was constant. (JE 12:1). At the time of the examination, Mr. Higginbotham took lithium, oxycodone, and citalopram. (JE 12:1). He reported trouble sleeping due to the pain. (JE 12:1). Upon examination, Dr. MacLennan found mild pain with palpation to the low back lumbosacral junction. (JE 12:2). Dr. MacLennan also found numbness over the lateral aspect of Mr. Higginbotham's left calf into the top of his left foot. (JE 12:2). Dr. MacLennan also

noted that Mr. Higginbotham walked with a limp on his left side. (JE 12:2). X-rays showed "good overall alignment," mild to moderate spondylosis, and no gross instability. (JE 12:2). Dr. MacLennan diagnosed Mr. Higginbotham with low back pain, left leg radiculitis, depression, and obesity. (JE 12:3). Dr. MacLennan ordered an MRI in order to determine a course of treatment. (JE 12:3). He also reminded the claimant to remain active and "remember good spine mechanics." (JE 12:3).

Dr. MacLennan reviewed the MRI of the claimant's lumbar spine. (JE 12:5). Dr. MacLennan noted the MRI showed a disk protrusion left L5-S1 with lateral recess stenosis on the S1 nerve. (JE 12:5). Dr. MacLennan opined that the MRI results matched Mr. Higginbotham's symptoms. (JE 12:5). Dr. MacLennan sent a request for a left lumbar transforaminal nerve root block epidural steroid injection on May 11, 2017. (JE 12:4). Dr. MacLennan noted a diagnosis of lumbar degenerative disk protrusion left L5-S1 with lateral recess stenosis on the S1 nerve. (JE 12:4).

On May 15, 2017, Dr. MacLennan issued a status report. (JE 12:6). Dr. MacLennan indicated that Mr. Higginbotham could return to work immediately on light duty with no lifting over 10 pounds, and no constant or repetitive bending, twisting, or stooping at the waist. (JE 12:6). He also could not use ladders, and required the option to stand or sit. (JE 12:6).

Dr. MacLennan performed a left S1 epidural steroid injection on June 1, 2017. (JE 12:7).

Mr. Higginbotham returned to Dr. MacLennan's office on June 23, 2017, for his lower back pain and left leg pain. (JE 12:8-10). Mr. Higginbotham reported that the injection "did not help at all." (JE 12:8). He continued having severe pain over the left side of his lower back. (JE 12:8). He worked 40 hours on light duty and noted that "work is rough." (JE 12:8). Dr. MacLennan told Mr. Higginbotham that the MRI showed no severe stenosis. (JE 12:10). Dr. MacLennan stated that he would not recommend surgery. (JE 12:10). Based upon his examination, Dr. MacLennan recommended non-operative therapies. (JE 12:10). The claimant "did not want to do any physical therapy." (JE 12:10). Dr. MacLennan recommended pain management. (JE 12:10-11).

On July 24, 2017, Mr. Higginbotham saw Cheryl Quinn, D.O. (JE 11:8-10). The record noted continued lithium usage. (JE 11:8). Mr. Higginbotham requested a wellness checkup for a pre-employment physical form. (JE 11:8). Mr. Higginbotham continued to complain of chronic back pain with known degenerative disc disease. (JE 11:8). He reported the ability to cope and "mentally dull" the pain so that it becomes tolerable. (JE 11:8). His pain ranged from mild to severe. (JE 11:8). He indicated that he operated on a 10 pound lifting restriction until he returned to Steindler. (JE 11:8). He admitted to a history of depression and "anger issues," and noted that he continued to take citalopram and lithium. (JE 11:8). He further noted that he saw three therapists, and that counseling was not helpful. (JE 11:8). He expressed no desire to see a therapist. (JE 11:8). He also requested a sleep study and FMLA paperwork. (JE 11:10).

Mr. Higginbotham visited Mental Health Centers on July 28, 2017, for an intake psychiatric evaluation. (JE 13:1-3). Mr. Higginbotham's chief complaint was his need for a medication adjustment. (JE 13:1). He also requested removal of a reference to "anger issues" in previous medical records. (JE 13:1). He reported becoming angry easily after a 2010 closed head injury. (JE 13:2). He also indicated difficulties with short-term memory and verbal outbursts. (JE 13:2). The provider diagnosed him with a suspected personality change due to a traumatic brain injury, a suspected mild neurocognitive disorder with behavioral disturbance due to a closed head injury, and binge eating disorder. (JE 13:2).

Frederick Dery, M.D., examined Mr. Higginbotham for the first time on August 15, 2017. (JE 12:12-14). Mr. Higginbotham rated his pain 2-4 out of 10. (JE 12:12). He described his pain as aching, throbbing, shooting, and radiating. (JE 12:12). Mr. Higginbotham felt that his pain was adequately controlled by over-the-counter medications. (JE 12:12). Mr. Higginbotham displayed no tenderness to palpation of his lumbar spine. (JE 12:13). Dr. Dery found Mr. Higginbotham to walk with an antalgic gait. (JE 12:13). Dr. Dery reviewed the MRI, and noted that the MRI showed evidence of previous decompression with disc bulging and degeneration. (JE 12:14). The bulging and degeneration were most prominent at L4-5 and L5-S1. (JE 12:14). Dr. Dery also pointed out stenosis throughout the lower lumbar region. (JE 12:14). After discussion, Mr. Higginbotham concluded that he wanted to continue with over-the-counter medications. (JE 12:14). Dr. Dery also recommended a course of physical therapy. (JE 12:14; 16). Dr. Dery provided a work note indicating that Mr. Higginbotham should report to physical therapy, progress as tolerated with the goal of returning to work without restrictions. (JE 12:15). In the interim, Dr. Dery recommended that Mr. Higginbotham continue his current restrictions of light duty. (JE 12:15).

Mr. Higginbotham commenced physical therapy at the Keokuk County Health Center on September 1, 2017. (JE 11:11-16). During his initial evaluation, he noted lower back pain into the posterior left thigh. (JE 11:11). He reported being "fine" between his prior back injury and the injury in April of 2017. (JE 11:11).

On September 6, 2017, the claimant had another physical therapy appointment. (JE 11:17-18). Mr. Higginbotham felt more sore with exercise, and noted that he was working within restrictions. (JE 11:17).

Mr. Higginbotham returned to Mental Health Centers on September 8, 2017, for continued medication management. (JE 13:4-5). He noted that his angry verbal outbursts continued or worsened on new medication. (JE 13:4). His diagnoses remained unchanged. (JE 13:5). His dosage of lithium was increased. (JE 13:5). Other prescriptions were added to his medications. (JE 13:5).

Mr. Higginbotham had another physical therapy appointment on September 29, 2017. (JE 11:19-20). He reported having a bad day the previous week, which required him leaving work early. (JE 11:19). His symptoms stabilized and became more central. (JE 11:19).

On October 6, 2017, Mr. Higginbotham returned to physical therapy. (JE 11:21-22). Mr. Higginbotham reported constant pain down his left leg to the top of his foot. (JE 11:21). He could not sleep at night. (JE 11:21). He unloaded freight for three hours earlier in the week. (JE 11:21).

Mr. Higginbotham's physical therapy continued on October 26, 2017. (JE 11:23). His pain continued to be 5 out of 10. (JE 11:23). His pain intensified down his leg. (JE 11:23). His pain caused him to leave work early. (JE 11:23). Sensitivity in his buttock caused him to not want to sit on that side. (JE 11:23). The therapist noted, "[e]xacerbation continues subjectively worse with general intensity." (JE 11:23).

Dr. MacLennan examined Mr. Higginbotham again on November 3, 2017. (JE 12:18-20). Mr. Higginbotham reported progressively worsening pain. (JE 12:18). Mr. Higginbotham told Dr. MacLennan that the physical therapist told him he was worsening. (JE 12:18). He described the pain as a shooting pain that radiated down his left leg. (JE 12:18). He continued to work light duty. (JE 12:18). He reported fatigue due to pain interfering with his sleep. (JE 12:18). Dr. MacLennan recommended a new MRI of the lumbar spine to see if there were any changes that matched up with the claimant's symptoms. (JE 12:20). Dr. MacLennan would base any further treatment recommendations on the results of the MRI. (JE 12:20). Dr. MacLennan recommended that Mr. Higginbotham continue working light duty. (JE 12:20).

Mr. Higginbotham had another lumbar MRI on November 14, 2017. (JE 12:21-22). James Wiese, M.D., interpreted the results of the MRI. (JE 12:22). Dr. Wiese found postoperative changes at L4-5 including an unchanged small right paracentral disc protrusion and annular tear. (JE 12:22). Dr. Wiese also saw a small left lateral disc protrusion at L3-4 causing a mild degree of left-sided foraminal narrowing. (JE 12:22). Finally, Dr. Wiese noted annular bulging at L5-S1 crowding the proximal course of both S1 roots. (JE 12:22). This was unchanged from the previous MRI. (JE 12:22).

On November 30, 2017, Mr. Higginbotham returned to the Keokuk County Health Center where he was discharged from therapy. (JE 11:24-26). His pain continued to be 5 out of 10 including to his foot. (JE 11:24). He could still mitigate the pain. (JE 11:24). He continued to have difficulty sleeping and resting. (JE 11:24).

On November 30, 2017, Mr. Higginbotham also returned to Dr. Dery's office. (JE 12:23-25). Mr. Higginbotham reported that his pain was 4 to 8 out of 10. (JE 12:23). He tried to work light duty for 40 hours per week, but was "pretty miserable doing that." (JE 12:23). He informed Dr. Dery that his mood worsened due to his pain, and that he was "very frustrated with the entire situation." (JE 12:23). He asked Dr. Dery what treatments were available to him. (JE 12:23). Mr. Higginbotham reported continued use of lithium. (JE 12:23). Mr. Higginbotham continued to ambulate with an antalgic gait and favored his left leg. (JE 12:24). Dr. Dery opined that the new MRI showed no significant difference from the previous MRI. (JE 12:24). Dr. Dery diagnosed Mr. Higginbotham with postlaminectomy syndrome. (JE 12:24).

Dr. Dery indicated that he had an extensive discussion with Mr. Higginbotham and his wife regarding treatment options for Mr. Higginbotham's condition. (JE 12:24). Dr. Dery opined that treatment options included an injection at a different level than previously administered, a trial of Lyrica, or a spinal cord stimulator. (JE 12:24). After discussion, Mr. Higginbotham indicated that he wished to proceed with a trial of a spinal cord stimulator. (JE 12:24). Dr. Dery allowed Mr. Higginbotham to continue working at a light duty level. (JE 12:24). Dr. Dery told Mr. Higginbotham that his only option is to work through the pain and deal with it as best as he could. (JE 12:24).

Joseph J. Chen, M.D., examined Mr. Higginbotham on January 26, 2018, for evaluation of chronic low back pain. (JE 14:1-9). Dr. Chen noted that this was a second opinion examination as arranged by defendants' attorney. (JE 14:1). Dr. Chen noted reviewing medical records, including a previous recommendation of a spinal cord stimulator. (JE 14:1). Dr. Chen discussed and recommended that Mr. Higginbotham return for chronic pain education and rehabilitation sessions, as well as a visit with the Spine Rehab team. (JE 14:1). The claimant's wife felt that his depression worsened over the past nine months. (JE 14:2). Upon physical examination, Dr. Chen found diffuse tenderness to light tactile stimulation of the lumbar spine. (JE 14:3). Dr. Chen diagnosed Mr. Higginbotham with chronic left-sided low back pain without sciatica, a personal history of spine surgery, severe major depression, and an encounter related to a workers' compensation claim. (JE 14:4). Dr. Chen opined, in reviewing the MRI results of November 14, 2017, that Mr. Higginbotham lacked a specific, treatable nerve root abnormality or radiculopathy that would explain the extent and intensity of his pain. (JE 14:4). Dr. Chen allowed Mr. Higginbotham to return to work with temporary restrictions of lifting up to 25 pounds on an occasional basis, bending or twisting or stooping occasionally, and a full restriction from ladder work. (JE 14:9).

On February 1, 2018, Dr. Chen examined the claimant again. (JE 14:10-13). Mr. Higginbotham reported pain 8 out of 10. (JE 14:10). He told Dr. Chen that everything made his pain worse. (JE 14:10). Dr. Chen's diagnoses remained the same. (JE 14:12). Dr. Chen recommended that he remain on full duty work status. (JE 14:12). Dr. Chen recommended that Mr. Higginbotham engage in progressively more challenging physical activity programs. (JE 14:13). Dr. Chen also recommended that Mr. Higginbotham return to see the Spine Rehab team. (JE 14:13).

Valerie Keffala, Ph.D., examined the claimant on February 26, 2018, at the University of Iowa Spine Center. (JE 14:14-17). Mr. Higginbotham reported being irritable and sad. (JE 14:16). He also reported less motivation to do things since his injury. (JE 14:16). He indicated that he pushed himself to do more, but found that family and/or coworkers discouraged him out of fear that he will have increased pain. (JE 14:17). Dr. Keffala opined that Mr. Higginbotham "presented as a man who is interested in learning 'how to deal with the pain I have almost constantly.'" (JE 14:17). Dr. Keffala showed Mr. Higginbotham a breathing exercise for stress and pain management. (JE 14:17). Jeffrey Nicholson, P.T., also performed a physical therapy evaluation on February 26, 2018. (JE 14:18-20). Mr. Higginbotham expressed an interest in learning all that he can to manage his lower back pain. (JE 14:18). Mr.

Nicholson provided the claimant with an exercise plan to help his chronic pain. (JE 14:20).

Dr. Chen also visited with Mr. Higginbotham on February 26, 2018. (JE 14:21-25). Mr. Higginbotham reported to Dr. Chen that he was motivated to do more despite his pain. (JE 14:21). Dr. Chen opined that Mr. Higginbotham showed progress since his first visit. (JE 14:25). Dr. Chen recommended that Mr. Higginbotham pursue the Spine Rehab Program. (JE 14:25).

On March 1, 2018, Mr. Higginbotham followed up at Mental Health Centers for continued medication management. (JE 13:6-8). He reported that his mood was "about the same," and that he was "good." (JE 13:6). He continued taking lithium and Cymbalta. (JE 13:6).

The claimant continued care with Dr. Chen on April 6, 2018. (JE 14:26-28). Mr. Higginbotham reported that "workers' compensation" did not authorize a return to the Spine Rehab Program. (JE 14:26). Instead, he noted that "workers' compensation" scheduled an IME in mid-April. (JE 14:26). Dr. Chen observed frustration in the claimant over his slow progress. (JE 14:26). He continued to work on restrictions of no lifting more than 25 pounds. (JE 14:26). Dr. Chen continued to recommend enrollment in the Spine Rehab Program. (JE 14:28).

On April 17, 2018, William Boulden, M.D., F.A.A.O.S., performed an IME on Mr. Higginbotham. (DE C:3-7). Dr. Boulden is a board certified orthopedic surgeon. (DE C:10). Mr. Higginbotham told Dr. Boulden that his main complaints involved his left lower back and pain into his buttock and left posterolateral thigh and calf. (DE C:3). Dr. Boulden provided a summary of Mr. Higginbotham's medical care through the IME. (DE C:3-5). Mr. Higginbotham told Dr. Boulden that he worked 40 hours per week, but was on limited or light duty. (DE C:6). Dr. Boulden noted that the claimant walked with a slight limp on his left leg, and sat mainly on his right side. (DE C:6). Dr. Boulden requested the previous MRI results in order to complete the examination. (DE C:7). Dr. Boulden opined that Mr. Higginbotham could have aggravated his lower back problem while bent over pulling on a heavy rolling cart. (DE C:7).

Mr. Higginbotham returned to Mental Health Centers on June 15, 2018, for a medication review. (JE 13:9-11). The provider recommended that the claimant continue lithium and Cymbalta. (JE 13:9). They also recommended that he increase his Abilify. (JE 13:9). Mr. Higginbotham reported being "okay." (JE 13:9). His diagnoses remained the same as previous visits to Mental Health Centers. (JE 13:11).

Dr. Boulden received and reviewed MRI results and issued a supplemental report on June 26, 2018. (DE C:8-9). He opined that Mr. Higginbotham did not have a lateral disc protrusion at L3-4 on the left. (DE C:8). Based upon his review of the MRI, Dr. Boulden found no operative lesion. (DE C:8). Dr. Boulden opined that Mr. Higginbotham aggravated his pre-existing pathological changes. (DE C:8). Dr. Boulden found nothing on the MRI that was acute, and found no correlation between Mr. Higginbotham's symptoms and the MRI. (DE C:9). Additionally, Dr. Boulden noted that the diagnostic injections performed by Dr. Dery did not correlate to the chronic medical

findings on the MRI. (DE C:9). Dr. Boulden disagreed with Dr. Dery's recommendation of a dorsal column stimulator. (DE C:9). Dr. Boulden recommends no additional treatment. (DE C:9). Dr. Boulden concluded his report by opining that Mr. Higginbotham suffered no permanent impairment, and required no permanent restrictions. (DE C:9).

On August 23, 2018, Mr. Higginbotham attended an IME conducted by Sunil Bansal, M.D., M.P.H., at the request of claimant's counsel. (CE 10:1-12). Dr. Bansal is board certified in occupational medicine. (CE 10:33). Dr. Bansal reviewed Mr. Higginbotham's medical history and records up to the date of the IME. (CE 10:1-8). Mr. Higginbotham reported constant low back pain, radiating down his left leg to his ankle. (CE 10:8). He could lift to 25 pounds. (CE 10:9). Dr. Bansal found tenderness to palpation over the claimant's lower lumbar paraspinals. (CE 10:9). Dr. Bansal also found some loss of sensory discrimination over the posterolateral left lower leg. (CE 10:9). Dr. Bansal diagnosed Mr. Higginbotham with an L5-S1 disc protrusion with S1 nerve root impingement. (CE 10:10). He placed the claimant at maximum medical improvement ("MMI") for his back injury on April 6, 2018. (CE 10:10). Dr. Bansal also opined that Mr. Higginbotham's back injury was caused by his work at Menards. (CE 10:10). Based upon range of motion measurements, Dr. Bansal provided a 3 percent impairment of the body as a whole. (CE 10:11). Dr. Bansal provided a 10 percent whole person impairment rating for his prior surgery, and a 5 percent impairment for spinal nerve deficits. (CE 10:11-12). This equates to a 17 percent whole person impairment rating using the combined values chart. (CE 10:12). After apportioning 10 percent impairment due to the first injury, Dr. Bansal opined that Mr. Higginbotham sustained 7 percent whole person impairment due to the April 2, 2017 work injury. (CE 10:12). Dr. Bansal provided permanent restrictions of no lifting over 25 pounds, and no frequent bending or twisting. (CE 10:12). Dr. Bansal indicated that Mr. Higginbotham was a candidate for a spinal stimulator, and noted that if the claimant's radiculopathy worsened, Dr. Bansal would recommend surgical decompression. (CE 10:12).

Mr. Higginbotham returned to the Keokuk County Health Center on September 14, 2018, where Jin Zhou, N.P., examined him. (JE 11:27-28). The claimant complained of low back pain, and noted his lower back injury. (JE 11:27). He rated his pain 7 out of 10. (JE 11:27). He indicated worsening pain after putting away trim on a pallet. (JE 11:27). Hydrocodone reduced his pain. (JE 11:27). Mr. Higginbotham's diagnoses included low back pain, and lumbago with sciatica. (JE 11:28). Nurse Zhou recommended an x-ray of the lumbar spine. (JE 11:28).

On October 23, 2018, the claimant returned to the Keokuk County Medical Clinic for a follow-up of his lower back pain. (JE 11:29-30). Jeffrey Waddell, D.N.P., A.R.N.P., examined Mr. Higginbotham. (JE 11:29-30). The claimant worked 40 hours per week, and noted that tizanidine provided him with relief. (JE 11:29). He reported tenderness at the left lateral L4-5 level, but Mr. Waddell found no palpable deformity or edema. (JE 11:30).

Dr. Dery discussed the spinal cord stimulator device with Mr. Higginbotham again on December 12, 2017. (JE 12:28-32). If the trial was successful, Mr. Higginbotham

would be referred for permanent implantation of the spinal cord stimulator. (JE 12:28-29). Dr. Dery referred Mr. Higginbotham for a psychological pre-trial screening, and medical clearance from his primary care doctor closer to the trial date.

On October 22, 2018, Mr. Higginbotham returned to Dr. MacLennan's office for a follow-up visit. (JE 12:33-35). Mr. Higginbotham told Dr. MacLennan that workers' compensation wanted a reevaluation. (JE 12:33). He indicated that his pain had worsened since September 10, 2018. (JE 12:33). He re-aggravated his back on September 10, 2018, when he bent over to pick up cardboard off the floor at work. (JE 12:33). X-rays of the lumbar spine showed "good overall alignment." (JE 12:34). The x-rays also showed multilevel spondylosis that was worse at L5-S1. (JE 12:34-35). Dr. MacLennan ordered another MRI of the lumbar spine to see if there were any changes that matched up with Mr. Higginbotham's symptoms. (JE 12:35). Dr. MacLennan recommended that the claimant remain on light duty. (JE 12:35).

Mr. Higginbotham had a repeat MRI of his lumbar spine on October 29, 2018. (JE 12:36-38). Alex McNaughton, M.D., interpreted the results of the MRI. (JE 12:37). Dr. McNaughton's impressions included: "L5-S1 broad-based posterior disc protrusion with mild spinal stenosis and mild bilateral foraminal narrowing. The herniated disc material contacts the spinal segments of both S1 nerve roots," and L4-5 disc degeneration with a posterior annular tear. (JE 12:37). Dr. McNaughton also found very mild stenosis and mild left-sided foraminal narrowing. (JE 12:37).

On December 3, 2018, Dr. Dery provided Mr. Higginbotham with a left S1 epidural steroid injection. (JE 12:39).

Dr. MacLennan examined Mr. Higginbotham again on December 19, 2018. (JE 12:40-42). The claimant noted that the previous epidural steroid injection in early December provided no help for his pain. (JE 12:40). Mr. Higginbotham reported working 8 to 10 hours per day with a 25 pound lifting restriction. (JE 12:40). Dr. MacLennan reviewed the recent MRI and opined that it showed no significant stenosis. (JE 12:42). He further opined that surgery would not provide any relief. (JE 12:42). Dr. MacLennan recommend continued non-operative therapies. (JE 12:42).

On December 20, 2018, Dr. Dery re-examined Mr. Higginbotham for his continued lower back pain as the epidural steroid injection did not help. (JE 12: 43-45). The claimant expressed frustration in being sent to several physicians outside of Dr. Dery and Dr. MacLennan's care. (JE 12:43). He felt that "they" tried to find a doctor who would say that there was nothing wrong with him. (JE 12:43). His pain worsened with activities. (JE 12:43). His wife indicated that his pain caused increased irritability. (JE 12:44). Dr. Dery opined that the claimant did not need any more epidural steroid injections. (JE 12:45). Dr. Dery recommended a trial of Lyrica, and indicated that the best option for long-term relief was a spinal cord stimulator. (JE 12:45). The only other option would be a highly invasive intrathecal pain pump. (JE 12:45).

Dr. Dery examined Mr. Higginbotham again on January 23, 2019, for continued complaints of back and leg pain. (JE 12:46-47). Lyrica provided no benefit. (JE 12:46). He rated his pain 5 to 8 out of 10. (JE 12:46). He continued to display an antalgic gait.

(JE 12:47). Dr. Dery recommended doubling the Lyrica prescription. (JE 12:47). Dr. Dery also provided a psychological evaluation. (JE 12:47).

On March 6, 2019, John W. Rayburn, M.D., of Iowa Ortho, examined the claimant in order to provide a second opinion. (JE 15:1-3). Mr. Higginbotham complained of pain of 7 out of 10. (JE 15:1). He described his pain as sharp, aching, and numbness. (JE 15:1). Bending, standing, twisting, and turning aggravated his symptoms. (JE 15:1). Upon physical examination, Dr. Rayburn found that Mr. Higginbotham had pain with extension and rotation to the left. (JE 15:3). He also found tenderness over the claimant's facets and paraspinals. (JE 15:3). Dr. Rayburn diagnosed Mr. Higginbotham with low back pain at multiple sites, sacroiliitis, myalgia, other chronic pain, and spondylosis of the lumbar region without myelopathy or radiculopathy. (JE 15:3). Dr. Rayburn also opined that based upon his examination and Mr. Higginbotham's history, it appeared as though Mr. Higginbotham had significant sacroiliac and piriformis involvement, as well as positive facet loading on the left side. (JE 15:3). Dr. Rayburn noted that "[t]hese are also not very well treated with spinal cord stimulators." (JE 15:3). Dr. Rayburn recommended continued injections, including a left sacroiliac joint injection and a left piriformis injection. (JE 15:3).

Mr. Higginbotham returned to Dr. Rayburn's office on March 28, 2019, for a left sacroiliac joint and left piriformis injection. (JE 15:4-5). The injection proceeded with no issues. (JE 15:4-5).

On April 3, 3019, Dr. Rayburn re-examined Mr. Higginbotham for the claimant's chronic low back pain. (JE 15:7-9). Mr. Higginbotham complained of pain at 6 out of 10, which was improved. (JE 15:7). The injections provided "very little relief." (JE 15:7). Dr. Rayburn's diagnoses remained unchanged. (JE 15:9). Dr. Rayburn opined that the pain appeared to be more facetogenic. (JE 15:9). Dr. Rayburn indicated that the plan was a course of two rounds of medial branch blocks at L3-4, L4-5, and L5-S1. (JE 15:9). Dr. Rayburn mentioned the possibility of radiofrequency ablation depending on the results of the medial branch blocks. (JE 15:9).

On April 9, 2019, Dr. Dery consulted with the claimant regarding his ongoing lower back and leg pain. (JE 12:48-51). He indicated being forced to have another injection at an outside location, and noted that Lyrica was no longer authorized by workers' compensation. (JE 12:48). Dr. Dery indicated any failure to authorize medication or delay in a workup for a spinal cord stimulator trial was not acceptable from a medical standpoint. (JE 12:49). Dr. Dery opined that continuing delays were a "travesty." (JE 12:49). Dr. Dery allowed the claimant to continue working within his current restrictions. (JE 12:50-51).

Dr. Rayburn provided Mr. Higginbotham with medial branch block injections from L2-L5 on April 11, 2019. (JE 15:11-12). Prior to the procedure, Mr. Higginbotham reported pain of 8 out of 10. (JE 15:11). After the procedure, Mr. Higginbotham reported pain of 0 out of 10. (JE 15:11).

On April 18, 2019, Dr. Rayburn performed an L5-S1 transforaminal epidural steroid injection on Mr. Higginbotham. (JE 15:15-16). Mr. Higginbotham tolerated the procedure well. (JE 15:16). Dr. Rayburn provided no new restrictions. (JE 15:17).

Mr. Higginbotham returned to Dr. Rayburn's office on May 1, 2019, for a follow up of his lower back pain. (JE 15:18-20). Mr. Higginbotham's symptoms were stable. (JE 15:18-20). He reported not much relief from previous injections. (JE 15:18). Mr. Higginbotham confirmed "good relief from the MBBs rather than the TFESI." (JE 15:18). Dr. Rayburn recommended another round of medial branch blocks from L3 through S1. (JE 15:20).

On May 23, 2019, Dr. Rayburn performed another medial branch block injection on Mr. Higginbotham from left L3 through S1. (JE 15:21-22). Prior to the procedure, Mr. Higginbotham reported pain of 8 out of 10. (JE 15:21). After the procedure, Mr. Higginbotham reported pain of 4 out of 10. (JE 15:21). Dr. Rayburn provided no new restrictions. (JE 15:23). The day after the injection, Mr. Higginbotham called and indicated that his pain decreased for "about 48 minutes" and then returned to "9+" out of 10. (JE 15:24).

Mr. Higginbotham followed up with Dr. Rayburn's office on May 29, 2019, for his continued lower back pain. (JE 15:25-27). He rated his pain 7 out of 10. (JE 15:25). The pain was intermittent and fluctuated. (JE 15:25). Mr. Higginbotham requested to proceed with radiofrequency ablation. (JE 15:25). Dr. Rayburn agreed and noted a plan to proceed with the procedure. (JE 15:27).

On June 25, 2019, Mr. Higginbotham had a left lumbar medial branch radiofrequency ablation from L3 to S1. (JE 15:30).

Dr. Rayburn examined Mr. Higginbotham again on July 24, 2019, for worsening low back pain. (JE 15:31-33). Mr. Higginbotham told Dr. Rayburn that he did not receive much relief from the previous procedure. (JE 15:31). He indicated that his pain intensified after the procedure. (JE 15:31). Dr. Rayburn concluded that Mr. Higginbotham failed all other interventions, and thus recommended a trial of a spinal cord stimulator. (JE 15:33).

On September 11, 2019, Mr. Higginbotham returned to Dr. Rayburn's office at Iowa Ortho. (JE 15:35-37). The claimant reported improving pain of 5 out of 10. (JE 15:35). He had no radiation of pain. (JE 15:35). The spinal cord stimulator trial provided relief of his pain. (JE 15:35). Mr. Higginbotham indicated a desire to proceed with a permanent implant of the spinal cord stimulator. (JE 15:35). Dr. Rayburn agreed. (JE 15:37).

Todd Harbach, M.D., examined Mr. Higginbotham on September 20, 2019, for the claimant's continued complaints of lower back pain. (JE 15:38-40). Mr. Higginbotham continued to express an interest in proceeding with a spinal cord stimulator. (JE 15:38). Dr. Harbach scheduled a thoracic MRI in anticipation of scheduling a permanent implantation of a spinal cord stimulator. (JE 15:40).

On October 17, 2019, Kraig Holtorf, PA-C, examined Mr. Higginbotham for lower back pain. (JE 15:41-42). A previously conducted MRI of the thoracic spine showed no obvious canal stenosis nor any disc herniations. (JE 15:42). Mr. Holtorf opined that the MRI showed no issues that would complicate implantation of a spinal cord stimulator. (JE 15:42).

Dr. Harbach provided modified work restrictions on October 22, 2019. (JE 15:43). The temporary restrictions included a lifting restriction of 10 pounds. (JE 15:43). They also included avoidance of repetitive bending, twisting, and stretching. (JE 15:43). These restrictions stemmed from Dr. Harbach's placement of a spinal cord stimulator. (JE 16:1). Dr. Harbach also advised that Mr. Higginbotham should avoid bending or twisting for 30 days, but allowed him to return to work in 48 hours. (JE 16:1).

On November 7, 2019, Mr. Higginbotham had a postoperative visit with Dr. Harbach. (JE 15:44-45). The claimant's symptoms were mild. (JE 15:44). His surgical wounds were well healed. (JE 15:45).

Dr. Harbach examined Mr. Higginbotham again on November 14, 2019. (JE 15:46-48). Mr. Higginbotham's symptoms remained unchanged. (JE 15:46).

On December 4, 2019, Mr. Higginbotham returned to Dr. Rayburn's office for a postoperative follow-up. (JE 15:50-52). Mr. Higginbotham described pain in his lower back that radiated to the left calf and left thigh. (JE 15:50). The spinal cord stimulator improved his symptoms. (JE 15:50). Dr. Rayburn recommended physical therapy, and programming the spinal cord stimulator to maximize pain relief. (JE 15:52). Dr. Rayburn did not address any restrictions. (JE 15:53).

Mr. Higginbotham began another round of physical therapy on December 11, 2019, at the Keokuk County Health Center. (JE 11:32-36). He noted longstanding back pain starting in April of 2017. (JE 11:32). Eventually, symptoms moved into his left leg and became constant. (JE 11:32). He reported having a spinal cord stimulator implanted in October of 2019. (JE 11:32). He wanted to return to work, and was hopeful that the stimulator could assist with this process. (JE 11:32). The assessment was that Mr. Higginbotham had chronic back pain that failed physical therapy, epidural steroid injections, and ablation. (JE 11:33).

On December 20, 2019, Mr. Higginbotham had another visit to physical therapy. (JE 11:37). His pain remained 8 out of 10 during therapy. (JE 11:37). On December 23, 2019, Mr. Higginbotham continued his course of physical therapy. (JE 11:38-39). He reported that his new spinal stimulator program was not helping. (JE 11:38-39). On December 27, 2019, Mr. Higginbotham reported for another round of physical therapy. (JE 11:40-41). Mr. Higginbotham reported anxiety over a return to work. (JE 11:40). His pain increased 1 to 3 hours after his physical therapy session. (JE 11:40). He continued to be motivated to improve his strength and flexibility. (JE 11:40).

Dr. Rayburn examined Mr. Higginbotham again on January 13, 2020. (JE 15:55-57). Mr. Higginbotham complained of pain of 7 out of 10. (JE 15:55). His pain radiated to the left calf, left foot, and left thigh. (JE 15:55). He indicated that his pain was

relieved by physical therapy, but pain into his foot continued. (JE 15:55). Dr. Rayburn recommended continuing a home exercise program. (JE 15:57). Dr. Rayburn opined that Mr. Higginbotham reached maximum medical improvement ("MMI") for pain management complaints. (JE 15:57). Dr. Rayburn referred Mr. Higginbotham to occupational medicine or physical medicine and rehab to assume care. (JE 15:57).

On April 1, 2020, Mr. Higginbotham returned to Iowa Ortho where Kurt Smith, D.O., performed an impairment examination. (DE D:11-14). Dr. Smith is board certified in physical medicine and rehabilitation, including the subspecialty of spinal cord injury medicine. (DE D:15). Mr. Higginbotham reported persistent low back pain that fluctuated and radiated into his left lower extremity. (DE D:11). Mr. Higginbotham described his pain as aching, burning, and discomforting. (DE D:11). Dr. Smith found no strength or range of motion deficits in the claimant's left lower extremity. (DE D:13). He found limited range of motion in the claimant's lumbar spine. (DE D:13). Dr. Smith diagnosed Mr. Higginbotham with chronic pain syndrome, low back pain at multiple sites, and spondylosis of the lumbar region without myelopathy or radiculopathy. (DE D:14). Dr. Smith declared Mr. Higginbotham to have reached MMI. (DE D:14). Dr. Smith opined that Mr. Higginbotham sustained a 5 percent impairment to the whole person based upon an asymmetric loss of range of motion, muscle guarding, and non-verifiable radicular complaints. (DE D:14).

Mr. Higginbotham had a telehealth visit with the Keokuk County Health Center on April 24, 2020, where Stefanie Yearlan, A.R.N.P.-B.C., visited with him. (JE 11:42-47). Ms. Yearlan noted Mr. Higginbotham's diagnosis of "[m]ajor depressive disorder, single episode, severe without psychotic features." (JE 11:42). The claimant took Wellbutrin, Klonopin, desvenlafaxine succinate, nabumetone, and trazodone. (JE 11:43). Ms. Yearlan was to evaluate Mr. Higginbotham for anger and irritability. (JE 11:44). He reported that he sought help for the last seven years with modest progress. (JE 11:44). His anger caused distress in his life. (JE 11:44). He continued to have disrupted sleep due to his chronic back pain. (JE 11:44). Ms. Yearlan diagnosed Mr. Higginbotham with severe major depression. (JE 11:45).

Claimant's counsel wrote a letter to Dr. Rayburn dated April 30, 2020, recounting a conversation between claimant's counsel and Dr. Rayburn. (CE 2:1-3). The letter summarized Mr. Higginbotham's treatment with Dr. Rayburn. (CE 2:1-3). Dr. Rayburn signed the letter confirming that Mr. Higginbotham's low back pain radiating into his left lower extremity was caused by the April 2, 2017, work injury. (CE 2:3). Dr. Rayburn affirmed his recommendation of placement of a spinal cord stimulator, and noted that Mr. Higginbotham would need annual maintenance of the device. (CE 2:3).

On May 8, 2020, Mr. Higginbotham met with Ms. Yearlan again via Zoom. (JE 11:50-54). Mr. Higginbotham felt that he remained verbally abusive and irritable. (JE 11:52). Bad news increased his pain and depression. (JE 11:52). He continued on some of the previous medications. (JE 11:54).

Counsel for the claimant sent a letter to Dr. Dery dated May 13, 2020. (CE 1:3-6). In the letter, claimant's counsel requested Dr. Dery to address ten questions

concerning Mr. Higginbotham's medical care. (CE 1:5-6). Dr. Dery replied to the letter and indicated that Mr. Higginbotham sustained injuries while at work consistent with disc bulging and annular tearing at L3-4, L4-5, and L5-S1. (CE 1:1). Dr. Dery opined that, based upon the claimant's symptoms, it appeared that the L5-S1 disc contributed the most to the claimant's pain in the left S1 distribution. (CE 1:1). Dr. Dery noted that there were delays in treatment, including trial of a spinal cord stimulator device. (CE 1:1). These delays were not medically necessary or reasonable. (CE 1:1). Dr. Dery further opined that Mr. Higginbotham had not made a full recovery from his work injury. (CE 1:1).

Mr. Higginbotham had a routine follow-up with Ms. Yearlan via telehealth on May 22, 2020. (JE 11:55-59). He received a lot of bad news, which increased his pain and depression. (JE 11:57). He reported being verbally abusive. (JE 11:57). Mr. Higginbotham also reported decreased sleep due to his increased pain. (JE 11:57). Ms. Yearlan opined that Mr. Higginbotham's working diagnosis was severe depression and PTSD from his upbringing. (JE 11:59). Ms. Yearlan introduced the need for therapy, and continued pharmacological interventions. (JE 11:59).

Charles Mooney, M.D., M.P.H., conducted an IME of Mr. Higginbotham at the request of the defendants on June 11, 2020. (DE E:17-26). Dr. Mooney is board certified in occupational medicine. (DE E:28). Dr. Mooney reviewed pertinent medical records related to Mr. Higginbotham's medical care. (DE E:17-21). Mr. Higginbotham reported that he was working full time without restrictions. (DE E:21). He also reported that after a reprogramming of his spinal cord stimulator, it provided a 30 percent improvement in pain. (DE E:22). He complained of ongoing pain in his lower back at the beltline radiating down the left leg. (DE E:22). His pain increased upon lifting more than 50 pounds, or when he stood, walked, bore weight on his left leg, or bended repeatedly. (DE E:22). He rated his pain 7 out of 10, and sometimes up to 9 out of 10. (DE E:22). He told Dr. Mooney that he could participate in house cleaning, outside work, laundry care, and personal grooming. (DE E:22). Dr. Mooney found Mr. Higginbotham to have an antalgic gait favoring the left leg. (DE E:23). Dr. Mooney found no deficiencies in strength in Mr. Higginbotham's lower extremities. (DE E:24). Dr. Mooney assessed Mr. Higginbotham as follows:

1. Medical record evidence of post-laminectomy syndrome with chronic lumbar pain and complaints of left leg pain and paresthesia. He has had very poor response to any intervention provided, including the spinal cord stimulator placement.
2. Medical record evidence of additional comorbidities including mood disorder, hypertension, and obesity.

(DE E:24). Dr. Mooney opined that on April 2, 2017, the claimant sustained an aggravation of his underlying degenerative disc disease and previous lumbar discectomy with post-laminectomy syndrome. (DE E:24). Dr. Mooney opined that, based upon his examination and the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, prior to the April 2, 2017, date of injury, Mr. Higginbotham had a 10 percent impairment of the whole person. (DE E:24). Based upon Dr.

Mooney's examination of the claimant, he assessed Mr. Higginbotham with a 2 percent impairment due to a loss of extension, a 1 percent impairment due to a loss of left lateral bending, and a 1 percent impairment due to a loss of right lateral bending. (DE E:25). This equated to a 4 percent impairment of the whole person due to loss of range of motion. (DE E:25). When combining the previous 10 percent impairment rating with the 4 percent whole person impairment rating, he assessed a 14 percent whole person impairment rating. (DE E:25). Dr. Mooney opined further that Mr. Higginbotham's activities were consistent with a medium-duty work category, and that patients implanted with spinal cord stimulators generally are not recommended to work above the medium-duty category. (DE E:25). Dr. Mooney noted that the claimant's MMI date was consistent with Dr. Rayburn's release for a return to work on January 13, 2020. (DE E:25). Any future medical care would consist of maintenance by Dr. Rayburn of the spinal cord stimulator. (DE E:26). If the spinal cord stimulator failed, Dr. Mooney recommended medication management for pain treatment. (DE E:26). Finally, Dr. Mooney opined that there was no delay in placing a spinal cord stimulator trial, and no adverse impact to the claimant related to the timing of the trial of the spinal cord stimulator. (DE E:26).

On June 16, 2020, Dr. Bansal performed another IME on Mr. Higginbotham. (CE 10:14-28). Dr. Bansal reviewed medical records from March 4, 2010, through February 26, 2020. (CE 10:14-25). Dr. Bansal examined the claimant again. (CE 10:25-27). Mr. Higginbotham complained of continued low back pain radiating down his left leg. (CE 10:26). His pain worsened with lifting and bending. (CE 10:26). Three settings on the spinal cord stimulator helped his pain, but Mr. Higginbotham reported that this pain relief was due to overstimulation. (CE 10:25). Dr. Bansal found decreased range of motion in the lumbar spine. (CE 10:26). Dr. Bansal also found a loss of sensory discrimination over the left lower leg. (CE 10:26). Dr. Bansal altered his previous opinion and opined that Mr. Higginbotham reached MMI on April 1, 2020. (CE 10:27). Based upon the additional surgical procedure placing the spinal cord stimulator, Dr. Bansal added 1 percent whole person impairment to the previous 7 percent whole person impairment rating for an 8 percent whole person impairment rating. (CE 10:27). Dr. Bansal continued restrictions of no lifting over 25 pounds, and no frequent bending or twisting. (CE 10:27). Dr. Bansal recommended maintenance care with a pain specialist. (CE 10:27).

Dr. Bansal issued another letter on July 13, 2020, indicating he stood by his previous IME opinions. (CE 10:30-31).

On September 23, 2020, Mr. Higginbotham reported to River Hills Community Health Center where Vicky Duncan, L.I.S.W., met with him. (JE 17:1-9). Ms. Yearlan referred Mr. Higginbotham to Ms. Duncan for counseling. (JE 17:1). Mr. Higginbotham reported depressed mood, feeling paranoid, bizarre thoughts, anxiety, sexual difficulties, excessive worry, agitation, and violent thoughts. (JE 17:1). He indicated a desire to understand why he feels the way he does. (JE 17:1). He told Ms. Duncan that his issues started in October after a "worker's [sic] comp [sic] situation with his employment." (JE 17:1). Ms. Duncan diagnosed Mr. Higginbotham with persistent anxiety and depression. (JE 17:8).

After returning to Menards following his injury, Mr. Higginbotham worked as a delivery coordinator. (Testimony). As a delivery coordinator, he verified the accuracy of outgoing deliveries, filled out paperwork, and organized product. (Testimony). He lifted up to 10 pounds in this position due to doctor-prescribed restrictions. (Testimony). Menards then transferred him to a position as a sales associate in building materials. (Testimony). He took orders, stocked product, and loaded products. (Testimony). He dealt with lumber and boards. (Testimony). He lifted 25 to 50 pounds in this position. (Testimony). This position was more physically demanding than the delivery coordinator position. (Testimony). Menards then transferred him to a sales associate position in the millwork department. (Testimony). He sold special order doors and windows, loaded doors and windows, and stocked trim. (Testimony). This was an increasingly physically demanding position over the prior two positions. (Testimony). Doug Yeoman testified that Mr. Higginbotham's positions changed due to business need. (Testimony). Additionally, Mr. Yeoman testified that Mr. Higginbotham had an extensive background in wall coverings, so that is why he was moved there. (Testimony). Mr. Yeoman testified that, as far as he knew, Mr. Higginbotham performed his job adequately, and that Menards was trying to work with him and his back pain. (Testimony).

After implantation of the spinal cord stimulator, Mr. Higginbotham reported "zingers" of pain. (Testimony). When the spinal cord stimulator functioned properly, it slowed his pain. (Testimony). He testified that he experiences constant pain with some days worse than others. (Testimony). He described the pain as a shooting pain across his back, down the back of his left leg and into his left foot. (Testimony). He also noted cramping in his left thigh and calf. (Testimony). His pain averages 7 out of 10. (Testimony). At times, his pain can incapacitate him. (Testimony). His back and leg pain prevent him from riding a bike, playing basketball, helping in the yard, and doing other household tasks. (Testimony). Mr. Higginbotham still mows his lawn on occasion, but his wife does most of the work. (Testimony). He also testified as to difficulty sleeping, and difficulty riding in a car for long distances. (Testimony). He takes over-the-counter aspirin and ibuprofen to control his pain. (Testimony). He took Lyrica for a short time, which provided some relief. (Testimony).

Since his work injury, Mr. Higginbotham drove to Colorado with his wife for a vacation. (DE A). While in Colorado, he did some hiking. (DE A). He also traveled to Florida for a vacation. (DE A). Within the last 18 months, he flew to Florida for a three-day cruise to Mexico with his wife. (DE B). While on his cruise, he walked for several miles before experiencing back pain. (DE B).

Mr. Higginbotham testified that lifting more than 25 pounds aggravates his back pain. (Testimony). He further noted that he never asked Menards to accommodate his lifting restrictions because it is not in his work ethic to do so. (Testimony). He asks his manager or coworkers for assistance in lifting heavy objects. (Testimony). He testified that this makes him feel lesser of a person or employee. (Testimony).

Since his work injury, Mr. Higginbotham testified that his self-worth greatly declined. (Testimony). He feels as though he is not reliable, and snaps at people for no

reason. (Testimony). He treats with two mental health professionals for his ongoing depression. (Testimony). He takes three different medications for his depression. (Testimony). He admitted previous treatment for depression, including previous prescriptions for lithium. (Testimony). He also admitted to anger issues in the past. (Testimony).

CONCLUSIONS OF LAW

Causation of Mental Health Injury

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 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" referred 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 Electric 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 medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened, or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yaeger v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

The parties agree that Mr. Higginbotham suffered a compensable injury to his lower back arising out of, and in the course of his employment with the defendant employer. In this case, the claimant alleges that his pre-existing depression and mental health issues were aggravated, worsened, or lit up due to his work injury.

The court has found psychological problems developing from physical trauma to be compensable in certain circumstances. Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 733 (Iowa 1968) ("[W]hen there has been a compensable accident, and claimant's injury related disability is increased, or prolonged by a trauma connected neurosis or hysterical paralysis, all disability, including effects of any such nervous disorder, is compensable."). In these types of cases, the claimant still bears the burden of proving causation. Id. at 737. ("In that regard this court has consistently held, where an employee is afflicted with some known disease or infirmity which is aggravated, accelerated, worsened or 'lighted up' by an employment connected injury so as to result in a disability found to exist, the claimant is entitled to compensation accordingly.")

According to a visit with his medical providers in 2013, Mr. Higginbotham began experiencing anger issues in 2008. He eventually was prescribed lithium for these issues, which included lashing out at a foster child and a road rage incident. He continued treatment for "anger issues" into 2016 when he requested medication refills from Dr. Castro. This included a medication refill in March of 2016. In his intake form at Steindler Orthopedic Clinic, Mr. Higginbotham reported continued usage of lithium in April of 2017, shortly after his work incident. This differs some from his testimony. However, it was not until July 28, 2017, that Mr. Higginbotham had active treatment for his mental health issues again. At that time, he requested a medication adjustment, and reported becoming angry easily following a 2010 head injury. His diagnoses during this visit indicated that his mental health issues stemmed from the closed head injury. In November of 2017 Mr. Higginbotham reported worsening mood due to his pain, and increasing frustration with "the entire situation." He continued to express frustration with his progress to various medical providers throughout 2017 and 2018. He also continued to take medication in attempts to improve his mental health condition. In May of 2020 he reported that bad news increased his pain and depression. Mr. Higginbotham testified that he does not feel worthy as a person or employee because of the continued pain and physical limitations due to his work injury.

The mere existence of Mr. Higginbotham's depression at the time of his work injury is not a defense. The question is whether Mr. Higginbotham's mental health issues were materially aggravated, accelerated, worsened, or lighted up so that it results in disability. One provider opined that a previous head injury sustained by Mr.

Higginbotham was the cause of his mental health issues. Another opined that his mental health issues were due to a difficult upbringing or family issues. No medical provider made a causal connection between Mr. Higginbotham's mental health issues and his work injury. While no medical provider made an explicit connection between Mr. Higginbotham's worsening mental health struggles and his work injury, Mr. Higginbotham's medical records speak for themselves. I conclude that Mr. Higginbotham's preexisting mental health issues were aggravated, worsened, or lighted up by his employment-connected back injury. Mr. Higginbotham expressed increasing frustration, increasing depression, a lowering of his self-worth, and sought further care for his mental health as his physical condition failed to improve. Therefore, I conclude that Mr. Higginbotham satisfied his burden of proving that his mental health issues arose out of, and in the course of his employment relating to his lower back injury that occurred on April 2, 2017. For the foregoing reasons, I also conclude that Mr. Higginbotham's mental health issues are a cause of permanent disability.

Commencement Date for Permanent Disability Benefits

Iowa Code 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until: (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or, (3) the worker has achieved maximum medical recovery. The first of the three items to occur ends a healing period. See Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012); Evenson v. Winnebago Indus. Inc., 881 N.W.2d 360 (Iowa 2016); Crabtree v. Tri-City Elec. Co., File No. 5059572 (App., Mar. 20, 2020). The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Compensation for permanent partial disability shall begin at the termination of the healing period. Id.

The claimant argues that the commencement date for permanent partial disability benefits should be April 1, 2020, based upon the opinions of Dr. Smith and Dr. Bansal's agreement. The defendants allege that Dr. Rayburn released Mr. Higginbotham at maximum medical improvement on January 13, 2020, thus making this the operative date for commencement of permanent partial disability benefits. Dr. Mooney opined that Dr. Rayburn declared Mr. Higginbotham to have reached MMI on January 13, 2020.

Dr. Rayburn opined that Mr. Higginbotham reached MMI for pain management complaints. Dr. Rayburn referred Mr. Higginbotham to occupational medicine or physical medicine and rehab to assume care. Dr. Rayburn was not declaring Mr. Higginbotham to have reached MMI for all of his complaints; he simply addressed pain management complaints. On the other hand, Drs. Smith and Bansal agreed that Mr. Higginbotham reached MMI on April 1, 2020. They did not condition this date on additional treatment referral, as Dr. Rayburn did. I find Dr. Smith and Dr. Bansal's opinions more persuasive on this issue, as they did not condition their MMI date on a

referral for additional treatment. Therefore, the commencement date for benefits is April 1, 2020.

Extent of Permanent Disability

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss of use of a scheduled member under Iowa Code 85.34(2)(a)-(t) or for loss of earning capacity under Iowa Code 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in Iowa Code 85.34(a)–(t) are applied. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

In this case, the claimant sustained permanent disability to his lower back and related to mental health issues. Neither the lower back nor associated mental health issues are scheduled members pursuant to Iowa Code section 85.34(2)(a)-(t). Therefore, the claimant's impairment is considered to the body as a whole.

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., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "[i]t 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 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).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code section 85.34(2)(u).

Mr. Higginbotham was 48 years old at the time of the hearing. He graduated high school, and attended three semesters of college at Midland Lutheran College. He majored in elementary education. He worked for about six years in fast food, construction, manufacturing, and electronics. In about 1998, Mr. Higginbotham commenced employment with Menards. In the approximately 23 years that Mr. Higginbotham worked at Menards, he worked at several locations across the upper Midwest. He worked in a variety of positions at Menards from sales associate to assistant department manager to department manager across a variety of departments. Prior to his injury, Mr. Higginbotham earned $14.00 per hour, and received a discretionary manager's bonus and a discretionary profit sharing bonus. Since returning to Menards, Mr. Higginbotham earns more per hour at $14.55 per hour. However, he reported working less than 40 hours per week due to his lingering lower back issues. He testified working 40 hours or more no more than 10 times in the last two years. He also is no longer in management as Menards returned him to work in several sales associate roles. Menards could not, nor did they endeavor, to explain the reason for his effective demotion. Thus, he misses out on the discretionary manager's bonus.

Mr. Higginbotham suffered a nonsurgical injury to his lower back. He reports that the pain radiates down his left leg. Conservative treatment was unsuccessful, and implantation of a spinal cord stimulator provides minimal relief to his pain. He also alleges that his pain disrupts his ability to work. He alleges that his mental health issues, aggravated by his work injury, cause him to be short with others and manifest in anger towards others. No treating physician provided any permanent restrictions for Mr. Higginbotham. Dr. Rayburn provided some temporary restrictions. Dr. Mooney, who performed an IME on behalf of the defendants, opined that Mr. Higginbotham worked consistent with medium category work, but provided no permanent restrictions. Dr. Bansal, retained by the claimant to perform an IME, provided restrictions of no lifting over 25 pounds, and no frequent bending or twisting. While Mr. Higginbotham indicated Menards is not accommodating these restrictions, he admitted to not providing the restrictions to Menards. He also continues to work without restrictions, and seeks out assistance when needed for heavy lifting in his current position. While the claimant reports pain and difficulty with working, he still works nearly 40 hours per week at Menards. As a younger man, with some college education, and experience across a variety of retail operations, and responsibilities, including management, Mr. Higginbotham appears to be able to engage in employment. He also displayed intelligence that could allow for retraining. Mr. Higginbotham is very motivated to return to full duty, as evidenced by his working, or attempting to work, 40 hours per week at Menards. While I found Mr. Higginbotham's mental health condition and/or depression were a cause of permanent disability, I do not find his mental health condition to be a substantial factor in my determination of industrial disability, as his permanent impairment appears to be minimal.

Finally, we turn to the various impairment ratings provided. No impairment ratings were placed into evidence pertaining to Mr. Higginbotham's mental health condition. Mr. Higginbotham sustained a work injury in Nebraska in 2014. Several doctors provided an impairment rating inclusive of permanent impairment sustained as a result of the 2014 work injury. The defendants paid the claimant $13,763.52 at a weekly rate of $509.76 for his 2014 work injury. This is represented to be the equivalent of a 9 percent permanent partial disability rating under Nebraska Workers' Compensation law. The defendants argue that this represents previous compensation to the claimant, and that they are not responsible for industrial disability associated with effects from his 2014 injury. The claimant argues that no apportionment should be provided for previous injuries or disabilities. The claimant did not develop their argument in their posthearing briefing beyond a parenthetical stating "(although arguably that wasn't paid under Chapters 85, 85A, 85B, or 86)."

Effective July 1, 2017, the Iowa Legislature made significant changes to Iowa Code chapter 85. This included a change to Iowa Code section 85.34(7). While both parties discuss post-July 1, 2017, language in their posthearing briefs, the date of injury in this case is April 2, 2017. Therefore, the pre-July 1, 2017, statutory language applies. Iowa Code section 85.34(7)(b) provides guidance that applies to this case. Iowa Code section 85.34(7)(b) provides that if the preexisting disability was caused by an injury arising out of and in the course of employment with the same employer, and "the preexisting disability was compensable under the same paragraph of section 85.34, subsection 2, as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries." The combined disability is measured in relation to the employee's condition immediately prior to the first injury. Iowa Code section 85.34(7)(b). The statute continues, "[i]n this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer." Iowa Code section 85.34(7)(b).

The second clause of Iowa Code section 85.34(7)(b) states:

> If, however, an employer is liable to an employee for a combined disability that is payable under section 85.34, subsection 2, paragraph "u," and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

The arguments made by the parties pertain to statutory changes made in 2017. Prior to 2017, Iowa Code chapter 85.34(2)(u) pertained to what is commonly known as industrial disability, or a loss of earning capacity. In this case, Mr. Higginbotham was injured in 2014 while employed by Menards. Menards compensated him for a 9 percent permanent partial disability rating pursuant to Nebraska law, which equates to

$13,763.52. There is no evidence that Mr. Higginbotham's earnings were less at the time of the present injury than if the prior injury had not occurred. Therefore, based upon the language of the first clause of Iowa Code 85.34(7)(b), the employer's liability is partially satisfied to the extent of the percentage of disability for which Menards previously compensated Mr. Higginbotham. This is 9 percent based upon documentation in the record.

In this matter, Dr. Boulden examined Mr. Higginbotham on April 17, 2018, and opined that he suffered no permanent impairment. Dr. Boulden's examination and impairment rating are of little to no value in the instant proceeding, as they were conducted prior to much of the claimant's treatment. Dr. Bansal performed an IME on August 23, 2018, and opined that Mr. Higginbotham suffered a 17 percent impairment to the whole person. He attributed 10 percent of this impairment to the claimant's 2014 injury with Menards, and the remaining 7 percent attributable to Mr. Higginbotham's 2017 injury. Dr. Bansal later amended his decision in 2020, as discussed below. Therefore, I do not find Dr. Bansal's overall rating from 2018 persuasive.

On April 1, 2020, Dr. Smith examined Mr. Higginbotham for an impairment rating examination. This was not exactly an IME, but was simply an examination to provide an impairment rating. Dr. Smith assessed Mr. Higginbotham with a 5 percent impairment to the whole person. He was silent as to any impairment from any prior injuries. On June 11, 2020, the claimant presented to Dr. Mooney for an IME at the request of the defendants. Dr. Mooney attributed a 10 percent whole person impairment rating to Mr. Higginbotham's 2014 injury, and provided a 4 percent whole person impairment rating attributable to the 2017 injury. Upon combining these impairment ratings, Dr. Mooney arrived at a 14 percent whole person impairment rating.

Dr. Bansal conducted another IME at the request of the claimant on June 16, 2020. Dr. Bansal amended his previous impairment rating. He continued to opine that Mr. Higginbotham suffered a 10 percent whole person impairment attributable to the 2014 injury, but since Mr. Higginbotham had a spinal cord stimulator implanted, updated his rating to 8 percent due to the 2017 work injury. Utilizing the combined values chart on page 604 of the Fifth Edition of the AMA Guides to the Evaluation of Permanent Disability, this equates to a 17 percent whole person impairment rating.

In considering the whole person impairment ratings in conjunction with the language of Iowa Code 85.34(7)(b) discussed above, the whole person impairment rating by Dr. Bansal reduces by 9 percent to 1 percent attributable to the 2014 injury, based upon previous payments made by Menards, and 8 percent attributable to the 2017 injury. Using the combined values chart on page 604 of the Fifth Edition of the AMA Guides to the Evaluation of Permanent Disability, this equates to a 9 percent whole person disability. The whole person impairment rating of Dr. Mooney is reduced to 1 percent attributable to the 2014 injury, and 4 percent attributable to the 2017 injury. Using the combined values chart on page 604 of the Fifth Edition of the AMA Guides to the Evaluation of Permanent Disability, this equates to a 5 percent whole person impairment rating. Even if no reduction were made due to the statutory language, the ratings of Dr. Bansal and Dr. Mooney are relatively close at 18 percent and 14 percent.

Considering the foregoing factors, I find that Mr. Higginbotham suffered a 40 percent industrial disability. This represents 200 weeks (40 percent x 500 weeks = 200 weeks) commencing on April 1, 2020. The parties previously stipulated that the claimant was paid 20 weeks of compensation at the rate of four hundred fifty-one and 14/100 dollars ($451.14) per week. Therefore, the defendants are entitled to a credit for nine thousand twenty-two and 80/100 dollars ($9,022.80). The credit for the defendants' payments related to the 2014 Nebraska claim is applied to the disability rating, as allowed by statute.

Gross Earnings and Compensation Rate

The parties dispute the claimant's gross earnings, and thus the resulting compensation rate. The claimant contends that the rate should include management bonuses resulting in gross earnings of six hundred eighty-three and 31/100 dollars ($683.31) and a compensation rate of four hundred ninety-four and 72/100 dollars ($494.72). The defendants contend that the management bonus is discretionary and irregular, and should not be included in the claimant's gross earnings, nor his weekly compensation rate. The defendants contend that the gross earnings are six hundred twenty-eight and 98/100 dollars ($628.98) with a compensation rate of four hundred thirty-three and 45/100 dollars ($433.45).

Iowa Code section 85.36 states "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Weekly earnings are defined as the gross salary, wages, or earnings of an employee had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for work of employment. Id. The subsections of Iowa Code 85.36 set forth methods for computing weekly earnings depending upon the type of earnings and employment. If the employee is paid on a weekly pay period basis, the weekly gross earnings are the basis of compensation. Iowa Code section 85.36(1). If the employee is paid on a biweekly basis, the weekly earnings are one-half of the biweekly gross earnings. Iowa Code section 85.36(2).

As discussed above, the dispute amongst the parties appears to stem from the inclusion, or exclusion of a management bonus from the calculation of gross earnings and thus compensation rate. Iowa Code section 85.61(3) defines gross earnings as follows: "recurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." The defendants contend that the manager's bonus and profit sharing bonus were irregular and thus should not be considered in the calculation of the claimant's gross earnings.

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

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

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

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

Mr. Higginbotham received a management bonus and a profit sharing bonus. He testified that the profit sharing bonus was between 2.5 and 15 percent of annual earnings. He averaged about $5,000.00 annually in profit sharing bonuses. Mr. Higginbotham testified that the management bonus took payroll and department profitability into account. He testified that he received both bonuses on an annual basis. The bonuses were paid out once per year. When he left management, he was paid a portion of the management bonus. Both bonuses were discretionary, meaning Menards could withdraw them at any time, for any reason. Mr. Yeoman confirmed that Mr. Higginbotham's testimony was accurate. He indicated that the management bonus could vary based upon additional adjustments made by the company. Mr. Yeoman

testified that the program requirements have "basically been the same since they started." (Testimony). He further testified that the bonus is discretionary, that there are conditions precedent to receive the bonus (i.e. profitability), and that the manager must be a manager as of December 31. (Testimony).

Defendants' Exhibit P confirms that the management bonus is discretionary. (DE P). Further, the exhibit indicates that eligibility is contingent on employment as a manager on December 31 of the then fiscal year and that payment is discretionary and dependent upon year-end fiscal results. (DE P).

The defendants included in their exhibits portions of the Menards bonus program. While the claimant's argue that the documentation is copyrighted in 2019, and therefore not probative of the Menards bonus program, I disagree. I found Mr. Yeoman to be believable and truthful in his testimony. Based upon the information in the record, there is no indication that the Menards bonus program was materially different at the time of Mr. Higginbotham's work injury.

The management bonus in this case is akin to the profit sharing bonus in the 2017 Order. The management bonus is not retroactive pay. It is an extra payment over and above the claimant's hourly pay as an incentive or award. It is dependent on profitable contribution before overhead of a department. (DE P). It is issued before a certain date of the new fiscal year and is dependent on the results of the prior fiscal year. (DE P). A number of these factors are considered by the Commissioner in the 2017 Order. Additionally, while the factors in Noel are not controlling, they provide a framework of what constitutes an irregular bonus. Because the bonus is dependent on financial results of an individual department, it is inherently variable and erratic. It also is not fixed until the end of the fiscal year. It is subject to the condition precedent that the claimant be employed as a manager on December 31 of the current fiscal year. It is also variable depending on the profitability of the department in question. I conclude that the management bonus is irregular and not to be included in the claimant's gross earnings.

Therefore, the appropriate gross earnings are six hundred twenty-eight and 98/100 dollars ($628.98) per week. This translates to a weekly compensation rate of four hundred thirty-three and 45/100 dollars ($433.45) per week.

Payment of Medical Expenses and Mileage

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

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

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

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

The employee has the burden of proof in showing that treatment is related to the injury. Auxier v. Woodward State Hospital School, 266 N.W.2d 139 (Iowa 1978), Watson v. Hanes Border Company , No. 1 Industrial Comm'r report 356, 358 (1980) (claimant failed to prove medical charges were related to the injury where medical records contained nothing related to that injury) See also Bass v. Vieth Construction Corp., File No 5044438 (App. May 27, 2016) (Claimant failed to prove causal connection between injury and claimed medical expenses); Becirevic v. Trinity Health, File No. 5063498 (Arb. December 28, 2018) (Claimant failed to recover on unsupported medical bills.)

Iowa Code section 85.27(4) provides that the employee may choose their own care at the employer's expense in an emergency, if the employer's agent cannot be immediately reached. However, the duty of an employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, "even when the employee obtains unauthorized care." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010). The employee must still prove by a preponderance of the evidence that unauthorized care was reasonable and beneficial. Id. The Court in Bell concluded that unauthorized medical care is beneficial if it provides a "more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Id.

In this case, the claimant requests reimbursement for charges relating to a lien from The Rawlings Company. The defendants dispute these charges as either being unauthorized medical care, or unrelated to the work injury. Specifically, the mental health care is disputed as related to the work injury. Above, I determined that the work

injury aggravated or lit up Mr. Higginbotham's pre-injury depression and mental health issues. Therefore, reasonable and necessary medical care should be awarded. In reviewing claimant's exhibit 9:1-3, I find that the claimant and/or lienholder shall be reimbursed one thousand nine hundred sixty-four and 85/100 dollars ($1,964.85).

With regard to treatment claimed on September 14, 2018, and October 23, 2018, there is no indication that this treatment was necessitated by an emergency. The employer claims that it was not authorized. There is not a preponderance of the evidence that this care was reasonable and beneficial. Therefore, I decline to order reimbursement for these treatment dates.

With regard to treatment on October 14, 2019, February 18, 2020, and March 24, 2020, no medical documentation was provided in the record. Therefore, I cannot assess whether this treatment was reasonable and beneficial. I decline to order reimbursement for these treatment dates.

The claimant also requests reimbursement for certain out-of-pocket expenses relating to his medical care. The claimant requests reimbursement for eighty-five and 18/100 dollars ($85.18) in out-of-pocket costs for prescriptions, medical devices and copayments. The defendants concede liability for costs incurred in Claimant's Exhibit(s) 8:1, 8:2, 8:4, and 8:6, totaling sixty-nine and 47/100 dollars ($69.47). I agree and order the defendants to reimburse the claimant for these costs. However, the defendants dispute reimbursement for costs as outlined in Claimant's Exhibit(s) 8:3 and 8:5. These receipts do not specify what items were purchased with enough specificity to determine whether they were related to the work injury. Therefore, I decline to order reimbursement of those costs.

The claimant also seeks reimbursement for mileage. The claimant's mileage is set out in Claimant's Exhibit 7:1-5. The defendants argue in their posthearing brief that the only mileage still owed is listed in Claimant's Exhibit 7:5. The claimant simply argues for mileage reimbursement, and does not specify an amount claimed. I would note that Claimant's Exhibit 7:5 includes an e-mail from Litigation Paralegal Faylan Boettger dated September 4, 2020, indicating "[a]fter reviewing the attached payment log, it shows the last mileage request reimbursed to our client was for dates of service up to February 28, 2020. Our client is still owed for dates of service from March 1, 2020 to present." The defendants concede that they owe unpaid mileage for April 1, 2020, April 9, 2020, May 15, 2020, and June 11, 2020. This amounts to 594 miles, and at fifty-eight cents ($0.58) per mile is three hundred forty-four and 52/100 dollars ($344.52). I order the defendants to reimburse the claimant this amount for unpaid mileage.

Reimbursement for an IME pursuant to Iowa Code section 85.39

Iowa Code 85.39(2) states:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and

> upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

Iowa Code 85.39(2).

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Iowa Code 85.39 was amended in 2017. Iowa Code 85.39(2) added:

> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

Iowa Code 85.39(2) (2017).

The claimant requests reimbursement for both of Dr. Bansal's IMEs. The claimant submitted two IME invoices, Claimant's Exhibit 10:13 and 10:29. The defendants concede their liability for these invoices in their posthearing brief. Even if the defendants had not conceded this issue, the claimant met his burden to show entitlement to reimbursement for Dr. Bansal's IME fees. Therefore, I order the defendants to reimburse the claimant four thousand three hundred twenty-five and 00/100 dollars ($4,325.00) for Dr. Bansal's IME costs.

Entitlement to Credit for Overpayment of Weekly Rate

I previously found that the proper weekly compensation rate was four hundred thirty-three and 45/100 dollars ($433.45) per week. The defendants claim a credit for overpayment of healing period benefits should be applied to their liability for permanent partial disability benefits. The claimant does not pose a counterargument in their posthearing brief regarding this issue.

The burden of proving an entitlement to a credit falls on the employer seeking the credit. Albertsen v. Benco Manufacturing, File No. 5010764 (App. Dec. July 27, 2007)

(further citations omitted). This injury occurred prior to changes made to Iowa Law effective July 1, 2017. The applicable section of the Iowa Code states

> If an employee is paid weekly compensation benefits . . . for a healing period under section 85.34, subsection 1 . . . in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 86.34, subsection 2, provided that the employer has acted in good faith in determining and notifying an employee when the . . . healing period . . . benefits are terminated.

Iowa Code section 85.34(4) (2016). A prior decision indicated that defendants are allowed to take credit against any permanent partial disability benefits for all overpayments defendants made to the claimant in the form of healing period benefits. McBride v. Casey's Marketing Co., File No. 5037617 (Remand Feb. 9, 2015).

The defendants claim a credit for overpayment of healing period benefits from April 6, 2017 to April 10, 2017, from April 18, 2017 to May 15, 2017, from October 22, 2019 to December 18, 2019, and for 20 weeks of PPD benefits paid from January 13, 2020, to June 1, 2020. The parties already stipulated to a credit for 20 weeks of compensation at the rate of $451.14. Therefore, the credit for 20 weeks of PPD is not under consideration in this decision. As noted above, the employer must prove entitlement to a credit. The employer showed that they overpaid benefits during the time period in question; however, the statute states that the credit is due "provided that the employer has acted in good faith in determining and notifying an employee when the . . . healing period . . . benefits are terminated. Iowa Code section 85.34(4) (2016). The defendants did not show notification to the claimant that his healing period benefits would be terminated. The statute requires acting in good faith in both determination and notification. Without proof of notification of good faith notification of termination, I cannot provide a credit for the overpayment of benefits.

Penalty for Delayed Payments

Iowa Code 86.13(4) provides the basis for awarding penalties against an employer. Iowa Code 86.13(4) states:

> (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty present of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

(c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, Iowa Code 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is also not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001). An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If an employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50-percent of the amount unreasonably delayed or denied. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include: the length of the delay, the number of delays, the information available to the employer, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

For purposes of determining whether an employer has delayed in making payments, payments are considered "made" either (a) when the check addressed to a claimant is mailed, or (b) when the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235-236; Kiesecker, 528 N.W.2d at 112).

Penalty is not imposed for delayed interest payments. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008); Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa 1999).

Penalty may be imposed when an employer is informed that an employee has reached MMI and then the employer delays in seeking an impairment rating, or commencing payment. Davidson, 594 N.W.2d at 539.

The claimant alleges that the claimant is entitled to penalty benefits due to a delay in providing approval for a spinal cord stimulator, failing to pay healing period benefits for a time of October 22, 2019, to December 29, 2019, and delayed payment of 20 weeks of permanency benefits.

The defendants argue that the claimant was released to light duty work with a temporary lifting restriction. Dr. Harbach later released Mr. Higginbotham from his restrictions in early November of 2019. He was then released to his pain management physician. The defendants argue that there were no records or information indicating that the claimant was off work due to a work-related injury condition. The defendants' argument is not convincing.

On October 24, 2019, Mr. Yeoman e-mailed in-house counsel for Menards. He attached certain paperwork showing restrictions for Mr. Higginbotham. He noted, "I would prefer not to have him back with those restrictions. He wants me to give him something in writing saying he can take longer off. I will not do that . . . ." (CE 5:16). In-house counsel for Menards responded indicating "[i]f you cannot bring him back to provide productive work with the attached restrictions, have the TM submit updated restrictions as soon as he receives them." (CE 5:16). In-house counsel recommended not providing the claimant anything in writing, so that Mr. Higginbotham could not submit to the third party administrator Gallagher Bassett to receive compensation for time off.

Menards was authorizing medical care, including paying for a surgery implanting a spinal cord stimulator. While Mr. Higginbotham had restrictions and could return to light duty, Menards chose not to offer light duty to the claimant, as evidenced by Mr. Yeoman's e-mail, and his testimony that he did not want to return Mr. Higginbotham to work so that he would not be reinjured. While Mr. Yeoman is not a medical professional, he is a representative of the employer. He chose not to engage Mr. Higginbotham in even light duty work. Therefore, healing period of temporary partial disability benefits would have been owed to the claimant. Menards did not pay these benefits until a request from claimant's counsel on December 31, 2019. Menards knew that they were not returning the claimant to work based upon the information in Claimant's Exhibit 5:16. This entitles the claimant to penalty benefits, but not the 50 percent as the claimant urges. The time period in question represents nine weeks and

five days of benefits owed. At the rate determined above, the benefits owed total four thousand two hundred eight and 79/100 dollars ($4,208.79). This is calculated by 9.71 weeks x $433.45 = $4,208.79. Based upon the delay, I find an appropriate penalty for defendants' delay to be 20 percent of the delayed benefits. Therefore, the claimant is awarded eight hundred forty-one and 75/100 dollars ($841.75) for a delay in benefits payments.

On April 1, 2020, Dr. Smith provided an impairment rating. The parties disputed the appropriate date for maximum medical improvement as either being January 13, 2020, or April 1, 2020. Upon receiving the impairment rating from Dr. Smith, the defendants took no action. It was not until October 28, 2020, that the defendants issued a lump sum payment of nine thousand one hundred eighty-eight and 41/100 dollars ($9,188.41). The defendants indicate that they believed claimant reached MMI on January 13, 2020. Thus, they should have issued payment for Dr. Smith's rating sooner than October 28, 2020. It is unreasonable for the defendants to have waited over six months to issue payment for at least Dr. Smith's impairment rating. Penalty is appropriate. I find that a penalty of 30 percent is appropriate for this unreasonable delay. Therefore, the claimant is awarded two thousand seven hundred fifty-six and 52/100 dollars ($2,756.52) for a delay in permanent partial disability benefits payments.

The claimant is awarded a total of three thousand five hundred ninety-eight and 27/100 dollars ($3,598.27).

Costs

Claimant seeks the award of costs as outlined in Claimant's Exhibits 1, 2, 8, 9, and 10. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Code 4.33; Iowa Code 86.40. 876 Iowa Administrative Code 4.33(86) provides:

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

Pursuant to the holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015), only the report of an IME physician, and not the examination itself, can be taxed as a cost according to 876 IAC 4.33(86). The Iowa Supreme Court reasoned, "a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony," while "[t]he underlying

medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Id. (Noting additionally that "[i]n the context of the assessment of costs, the expenses of the underlying medical treatment and examination are not part of the costs of the report or deposition"). The commissioner has found this rationale applicable to expenses incurred by vocational experts. See Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec., December 17, 2018); Voshell v. Compass Group, USA, Inc., File No. 5056857 (App. Dec., September 27, 2019).

Claimant's Exhibit 1 includes an invoice for prepayment of a report from Dr. Dery of one thousand and 00/100 dollars ($1,000.00). There is no breakdown of the charge related to medical record review versus writing of a report. Therefore, I decline to award this cost.

Claimant's Exhibit 2 includes an invoice for a record review and dictated report from Iowa Ortho. It also contains an invoice for a conference with claimant's counsel. Neither of these indicate the amount attributed to drafting a report. Therefore, I decline to award the costs outlined in Claimant's Exhibit 2.

Claimant's Exhibit 8 includes expenses addressed elsewhere in the decision. These are not awarded as costs, as they pertain to medical equipment, prescriptions, or treatment. I decline to award any additional costs for items contained in Claimant's Exhibit 8.

Claimant's Exhibit 9 includes medical expenses addressed elsewhere in this decision. These are not awarded as costs, and have previously been addressed. I decline to award additional costs for items contained in Claimant's Exhibit 9.

Claimant's Exhibit 10 contains invoices for Dr. Bansal's IMEs. I previously awarded these pursuant to Iowa Code section 85.39. Therefore, awarding these expenses as costs is inappropriate, and I decline to do so.

Finally, the claimant requests an assessment of costs for the filing fee. I award the claimant costs for their filing fee of one hundred and 00/100 dollars ($100.00).

ORDER

THEREFORE, IT IS ORDERED:

The defendants are to pay unto claimant two hundred (200) weeks of permanent partial disability benefits at the rate of four hundred thirty-three and 45/100 dollars ($433.45) per week from the commencement date of April 1, 2020.

That defendants shall be given credit for nine thousand twenty-two and 80/100 dollars ($9,022.80) for 20 weeks of permanent partial disability benefits previously paid, as stipulated.

The defendants shall reimburse the claimant two thousand thirty-four and 32/100 dollars ($2,034.32) for outstanding medical bills and the claimant's out-of-pocket medical costs.

No credit is awarded for overpayment.

No credit is awarded for a 2014 claim made in Nebraska, except as applied to the impairment rating, as previously noted.

That the defendants shall reimburse the claimant three hundred forty-four and 52/100 dollars ($344.52) for mileage costs.

That the defendants shall reimburse the claimant four thousand three hundred twenty-five and 00/100 dollars ($4,325.00) for Dr. Bansal's two IMEs pursuant to Iowa Code section 85.39.

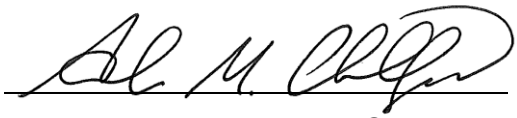
That the defendants shall pay the claimant a penalty of three thousand five hundred ninety-eight and 27/100 dollars ($3,598.27).

That the defendants shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee.

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).

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

Signed and filed this 13th day of April, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jenna Green (via WCES)

Charles Blades (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.