BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVE SONGER, Claimant, vs. XPO LOGISTICS FREIGHT, INC., Employer, and INDEMNITY INS. CO. OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 21013046.01 A P P E A L D E C I S I O N Head Notes: 1402.20; 1402.40; 1803; 2206; 2501; 2502; 2907; 4000

Defendants XPO Logistics Freight, Inc., Employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on October 4, 2022. Claimant Steve Songer responds to the appeal. The case was heard on March 18, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 13, 2022.

In the arbitration decision, the deputy commissioner found claimant met his burden of proof to establish the stipulated October 23, 2019, work injury permanently aggravated and worsened claimant's underlying back condition. The deputy commissioner found because claimant's employment terminated with defendant-employer, claimant should receive industrial disability benefits, as opposed to functional disability benefits, and the deputy commissioner found claimant sustained 50 percent industrial disability, which entitles claimant to receive 250 weeks of permanent partial disability benefits commencing on December 27, 2021. The deputy commissioner found claimant is not entitled to receive penalty benefits. The deputy commissioner found defendants are responsible for all causally related medical expenses set forth in Exhibit 2. The deputy commissioner found, pursuant to the stipulation of the parties, under Iowa Code section 85.39, that claimant is entitled to reimbursement from defendants for the cost of the independent medical examination (IME) of claimant performed by Jacqueline Stoken, D.O. The deputy commissioner found that pursuant to rule 876 Iowa Administrative Code 4.33, claimant is entitled to reimbursement from defendants for the cost of the filing fee.

Defendants assert on appeal that the deputy commissioner erred in finding claimant proved the work injury permanently aggravated claimant's underlying back condition. In the alternative, defendants assert if claimant did sustain permanent impairment, the deputy commissioner erred in finding claimant is entitled to receive industrial disability benefits, and defendants assert claimant is only entitled to recover benefits for his functional impairment caused by the work injury. Defendants assert if claimant is entitled to receive industrial disability benefits, the award should be reduced substantially. Defendants assert the deputy commissioner erred in finding defendants are responsible for claimant's medical expenses set forth in Exhibit 2.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24, the arbitration decision filed on October 4, 2022, is affirmed as modified with the following additional analysis.

Without further analysis, I affirm the deputy commissioner's finding that claimant is entitled to industrial disability benefits and is not limited to his functional impairment. I affirm the deputy commissioner's finding December 27, 2021, is the commencement date for permanent partial disability benefits. I affirm the deputy commissioner's finding claimant is not entitled to penalty benefits. I affirm the deputy commissioner's finding defendants should reimburse claimant for the cost of Dr. Stoken's IME pursuant to the parties' stipulation under Iowa Code section 85.39, and I affirm the deputy commissioner's finding that pursuant to rule 876 Iowa Administrative Code 4.33, claimant is entitled to reimbursement from defendants for the cost of the filing fee.

With the following additional findings and analysis, I affirm the deputy commissioner's finding that the October 23, 2019, work injury permanently aggravated or worsened claimant's preexisting back condition, I modify the deputy commissioner's finding that claimant sustained 50 percent industrial disability, and I affirm the deputy commissioner's finding that defendants are responsible for the causally related medical expenses set forth in Exhibit 2.

On October 23, 2019, claimant was unloading pallets at work with a forklift. (Transcript p. 21) One of the pallets tipped and claimant could not move it with the forklift. (Id.) A coworker assisting claimant raised an empty pallet with a forklift and claimant climbed up on the pallet to transfer the boxes. (Id.) The boxes were very heavy, and claimant moved one box by himself. (Tr. p. 22) Another coworker climbed up to help claimant move the second box and, as claimant was moving the second box, claimant felt "a jolt of electricity" that went down through his legs. (Id.) Claimant stated he had never felt similar pain before. (Id.)

Claimant reported his work injury and defendants accepted the claim. Defendants directed claimant's care and sent him first to Christine Schmitt, NP with Concentra Occupational Health on October 24, 2019. (Joint Exhibit 3, p. 166) Claimant reported having constant aching pain from his lower back down into his right anterior thigh. (Id.) Schmitt noted x-rays revealed claimant had degenerative arthritis and degenerative disc disease with neural foraminal stenosis and anterior spondylolisthesis. (JE 3, p. 167) Schmitt assessed claimant with a lumbar strain, degenerative arthritis of the lumbar spine, and spondylolisthesis, ordered physical therapy, and imposed restrictions of no lifting, pushing, or pulling over 20 pounds, and no bending at the waist or kneeling. (JE 3, pp. 167-168)

The next day defendants sent claimant to Betsy Bolton, PA-C with Unity Point Health Des Moines Occupational Medicine. (JE 4, p. 170) Claimant complained of pain that occasionally shoots around from the posterior aspect of his right thigh into the front of his thigh that is sharp with certain movements, but does not go all the way to his knee. (Id.) Bolton examined claimant, assessed him with a low back strain on the right, directed claimant to take ibuprofen and alternate ice and heat, provided claimant with a handout with exercises, and released him to return to full duty without restrictions. (JE 4, p.171)

When claimant returned to Bolton on November 6, 2019, claimant reported he was doing better, but still having "occasional flares that cause pain." (JE 4, p.172) Bolton documented the following on exam:

> Patient has tenderness right at the midline over L5-S1. He has intact sensation equal bilaterally to dermatomes L2, L3, L5, and S1. Recall he has decreased sensation on the left L4 dermatome. This L4 dermatome is intact on the right. Patient has 5/5 strength equal bilaterally to the hip flexors, knee extension, plantar flexion, and ankle dorsiflexion. He has intact deep tendon reflexes to the patella and Achilles equally bilaterally. He has negative straight leg raise bilaterally.

(JE 4, p. 172)

On November 12, 2019, claimant slipped and fell on ice at home, and landed on his right hip and buttock. (JE 1, p. 41) Two days later, claimant sought treatment on his own with Preston Sereg, M.D. at Broadlawns Family Health Clinic, complaining of right hip pain that was severe and radiating down his right leg, and difficulty walking. (JE 1, p. 41) Dr. Sereg opined claimant sustained a deep contusion and ordered an x-ray of claimant's right hip and SI joint. (JE 1, p. 42) The reviewing radiologist listed an impression of no acute bony abnormality, but noted claimant had degenerative changes in the caudal SI joints and "L5-S1 spondylolisthesis with probable transitional vertebra at the lumbosacral junction." (JE 1, p. 43)

Claimant returned to Bolton on November 20, 2019, complaining of pain wrapping around the front of his right thigh and slightly into the left side of his buttocks. (JE 4, p. 173) On exam, Bolton observed:

> Upon inspection, no appreciated ecchymosis, erythema or gross deformities. Patient has upright posture, gait, and stance. With palpation, he is tender just below the belt line on the right side and at midline, roughly L4-5. He denies any specific tenderness into the buttocks bilaterally or greater trochanters bilaterally. He moves about the room with ease today. With sensation he has diminished to the L4 dermatome on the left due to prior injury. He has intact sensation bilaterally to dermatomes L2, L3, L5, and S1 as well as the right L4. He has 5/5 strength bilaterally to the hip flexors, knee extension, plantar flexion, and ankle dorsiflexion. He has intact and equal deep tendon reflexes to the patella and Achilles. He has negative straight leg raise bilaterally.

(JE 4, p. 173)

Bolton ordered physical therapy and released claimant to full duty. (JE 4, p. 173)

Claimant continued to treat with multiple providers at Broadlawns Medical Center following his fall at home. (JE 1, pp. 44-47) During an appointment on November 27, 2019, claimant complained of aching pain in his right hip and lower back that radiates to the side of his hip and lateral right side of his leg and occasionally radiates to the lateral side of his lower leg, and reporting his pain increases with walking. (JE 1, p. 48) The last record from Broadlawns Medical Center that mentions right hip pain is from November 27, 2019. (JE 1, pp. 48-51)

During an appointment with Bolton on December 10, 2019, claimant complained of right low back pain and pain into his hip. (JE 4, p. 174) Bolton ordered a lumbar spine MRI, which revealed Grade 1 anterolisthesis of L5 on S1 with severe spinal canal stenosis and severe facet arthropathy, moderate to severe right L5-S1 neural foraminal stenosis, moderate L4-L5 spinal canal stenosis, and mild L2-L3 and L3-L4 spinal canal stenosis. (JE 4, p. 179) During claimant's appointment on January 20, 2020, he complained of right-sided low back pain radiating into his right thigh. (JE 4, p. 180) There is no mention of right hip pain.

Defendants requested a causation opinion from Bolton. On February 3, 2020, Bolton sent a letter summarizing claimant's treatment and addressing causation. (JE 4, pp.181-184) Bolton stated claimant's symptoms were consistent with a right low back strain and degenerative changes, including severe spinal canal stenosis, foraminal stenosis, anterolisthesis, and facet arthropathy. (JE 4, p. 183) Bolton opined claimant's degenerative changes were likely causing the majority of his current symptoms, but she also found the muscular strain injury from October 23, 2019, could not be entirely excluded as a cause of claimant's symptoms, and noted a spine specialist would have

better insight on causation and chronicity. (JE 4, p. 183) Defendants did not send claimant to a spine specialist and refused to authorize additional medical treatment.

After defendants refused to provide additional medical care, claimant sought medical care on his own through Broadlawns Medical Center, complaining of right low back and buttock pain that radiates down his right leg, and is aggravated by lifting at work. (JE 1, pp. 62-64)

On referral from Dr. Sereg, claimant attended an appointment with John Piper, M.D., a neurosurgeon with the Iowa Clinic, on June 2, 2020. Claimant complained of back pain radiating in his thigh and burning in his left hip, leg and foot. (JE 6, p. 207; JE 1, p. 57) Dr. Piper found claimant's changes on imaging are consistent with a chronic underlying degenerative process that will probably wax and wane and deteriorate over time and he opined it "would be hard to attribute these to a specific work injury." (JE 6, p. 207) Dr. Piper noted any surgical intervention would be very complex and high risk and he referred claimant to pain management. (JE 6, p. 209) Claimant received epidural steroid injections through the Iowa Clinic, but the injections did not provide him with any pain relief. (JE 1, p. 65; JE 6, p. 215)

Claimant continued to complain of low back pain and radicular symptoms. (JE 1, pp. 65-109) During an appointment on August 6, 2020, at Broadlawns Medical Center claimant reported his pain had gotten to the point where he had to call in sick to work, and reported his pain was okay when sitting upright as a forklift operator, but worsens when he bends, lifts, or stands for long periods. (JE 1, p. 65) During an appointment on November 11, 2020, Dr. Sereg documented claimant's pain was primarily in the low back with radicular symptoms down his bilateral extremities, which was worse with movement, bending, and prolonged periods of standing, and he noted claimant's pain was poorly controlled despite conservative measures. (JE 1, p. 105)

Claimant's pain persisted and he sought a second opinion with Matthew Biggerstaff, D.O., a pain management specialist with Broadlawns Medical Center for his chronic low back and bilateral extremity pain. (JE 1, p. 110) Claimant described the pain as dull, aching, electric, and gnawing in nature, relaying he had very minor low back pain before the October 2019 work injury. (JE 1, p. 110) Dr. Biggerstaff recommended a trial spinal cord stimulator. (JE 1, p. 113) Dr. Biggerstaff implanted the trial spinal cord stimulator on March 29, 2021. (JE 1, pp.126-131) Claimant was restricted from working following the procedure. (Tr. p. 54) The trial resulted in a 100 percent reduction of claimant's pain. (JE 1, p. 132)

On April 27, 2021, Dr. Biggerstaff implanted a permanent spinal cord stimulator in claimant's back. (JE 1, pp. 136-139) Dr. Biggerstaff listed diagnoses of chronic pain syndrome, lumbosacral radiculopathy, and spinal stenosis. (JE 1, p. 136) During his next appointment on May 4, 2021, claimant reported he was happy with the results and he had just minimal soreness in his incision sites. (JE 1, p. 140)

During an appointment with Dr. Biggerstaff on June 8, 2021, claimant reported he had no pain with some episodic achiness and stated he wanted to return to work. (JE 1, p. 148) Dr. Biggerstaff released claimant to return to work with a 50-pound lifting restriction. (JE 1, p. 155) Defendant-employer could not accommodate claimant's lifting restriction and claimant eventually retired on September 1, 2021. (Tr. pp. 56-57; JE 8, p. 244)

Four experts provided opinions in this case, Dr. Biggerstaff, an anesthesiologist specializing in pain management, Dr. Piper, a treating neurosurgeon, Dr. Stoken, a physiatrist who performed an IME for claimant, and Joseph Chen, M.D., a physiatrist who performed an IME for defendants.

On December 27, 2021, Dr. Biggerstaff responded to a check-the-box letter from claimant's counsel. Dr. Biggerstaff signed the letter without providing any written comments. (JE 1, pp. 162-163) Dr. Biggerstaff agreed if the deputy commissioner found claimant occasionally had low back pain while performing manual labor, but never experienced any pain down his right or left leg before the October 23, 2019, work injury, and if he attempted to lift more than 100 pounds and experienced immediate and significant pain in his low back with sharp electrical sensations running down his right leg, he agreed the lifting event "constituted a material aggravation, lighting up or acceleration of his preexisting degenerative condition in his low back." (JE 1, p. 162) Dr. Biggerstaff further agreed the "material aggravation, lighting up or acceleration of the preexisting degenerative condition led to the necessity for [his] care and treatment" of claimant, including a spinal cord stimulator and that he is "confident in this opinion since the initiation of the radiculopathy was clearly the lifting event and your treatment did ameliorate this radiculopathy." (JE 1, p. 162)

On February 13, 2022, Dr. Piper responded to a check-the-box letter from defendant's counsel. Dr. Piper signed the letter without providing any written comments. (JE 6, pp. 218-220) Dr. Piper agreed he became involved with claimant's care in June 2020 and last saw claimant in September 2020. (JE 6, p. 218) Dr. Piper agreed claimant "did report to you a worsening of his back complaints stemming from an October of 2019 work injury, but the imaging, diagnostics and exams demonstrated to you longstanding issues of degeneration that were likely progressing over decades of time." (JE 6, p. 218) With respect to causation, Dr. Piper agreed with the following statement:

> Based upon your involvement with Mr. Songer's medical care, it is your opinion his back and leg complaints for which you treated him in 2020 could not be stated to a reasonable degree of medical certainty to be causally related, either directly or through a material aggravation, to the alleged October of 2019 work injury. The work injury may have caused a temporary flare of the condition, but the level of the degenerative condition was to a point Claimant would be expected to experience flare ups from time to time, and the actions that caused those flares cannot be viewed as

> being a substantial factor in bringing about the level of degeneration that was the reason for the need of any surgery or other medical care for Mr. Songer's back and leg complaints at that time. You noted at the time the lack of any acute injury being supported by the imaging and diagnostics obtained.

(JE 6, p. 219)

Dr. Chen, a physiatrist, conducted an IME for defendants on January 20, 2022, and issued his report on February 10, 2022. (JE 9) Dr. Chen reviewed claimant's medical records and examined him. (Id.) Dr. Chen diagnosed claimant with chronic back pain, degenerative arthritis and degenerative disc disease with neural foraminal stenosis and spondylolisthesis L5-S1, lumbar strain following the October 23, 2019, work incident, grade 1 degenerative lumbar spondylolisthesis L5-S1 with 6-7 mm anterior slippage with severe spinal canal stenosis, severe facet arthropathy and moderate neural foraminal stenosis, right sacroiliac joint pain, chronic lumbar degenerative processes, generalized body aches, right hip contusion of hip/SI joint after fall at home on November 14, 2019, and status post spinal cord stimulator implantation. (JE 9, p. 273)

With respect to causation, Dr. Chen opined,

> It is my medical opinion that only Mr. Songer's lumbar strain as noted by Christine Schmitt on October 24, 2019 is causally related to his October 2019 work injury. This minor soft-tissue injury around his lumbar spine/pelvis and led to a temporary exacerbation of his pre-existing degenerative condition. Mr. Songer's records indicate that by October 25, 2019, when he was seen by Betsy Bolton, PA-C that he felt he could still complete his full duties despite his injury only 2 days earlier. He was seen later on November 4, 2019 by his primary care physician Dr. Sereg for follow-up of hypertension and erectile dysfunction without any back pain complaints recorded. Mr. Songer was again seen by Betsy Bolton PA-C on November 6, 2019 who documented that his right low back strain was improving, and he continued full duty.
>
> It is my medical opinion that a substantial contributing factor to Mr. Songer's current chronic back pain, right hip/buttock pain, and sacroiliac region pain arose around November 12, 2019 when records indicate he slipped on ice and fell at home landing on his right buttock and hip. Mr. Songer was seen by Dr. Sereg on November 14, 2019 who was quite concerned about a deep right hip contusion or possibly a fracture and obtained additional imaging studies and even prescribed a short course of opioid medications for pain. When Mr. Songer was seen by Betsy Bolton, PA-C on November 20, 2019 it does not appear that she was aware that he had fallen in the interim. Mr. Songer told Ms. Bolton that his pain that

> wrapped around the front of his right thigh has been happening from the beginning. He was still tolerating full duty at that time.
>
> It is my medical opinion that all subsequent medical care following November 12, 2019 is more likely than not related to his fall at home on ice rather than his work injury of October 23, 2019. This fall at home may have led to a temporary exacerbation of his pre-existing underlying degenerative spondylolisthesis, and severe spinal stenosis. It is not evident that any of Mr. Songer's treating work comp providers were aware of his fall on November 12, 2019. Their opinions regarding causation appear to be based upon Mr. Songer's self-report that he attributed his symptoms to a work incident in October 2019.

(JE 9, p. 274)

Dr. Chen opined claimant reached maximum medical improvement on November 6, 2019. (JE 9, p. 274) Dr. Chen opined the changes present on claimant's imaging are consistent with chronic degenerative processes with periods of waxing and waning pain that are likely to gradually deteriorate and that his need for a spinal cord stimulator is not related to the October 23, 2019, work injury, but rather related to his preexisting degenerative lumbar spondylolisthesis. (JE 9, p. 275)

Dr. Chen found under the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), claimant may be ratable as having a five percent impairment of the whole person under Lumbar DRE II, but found the impairment is not "causally related to his 2019 work injury because he maintained ability to continue performing his full work duties from October 24, 2019 to November 12, 2019 when he reported slipping and falling at home. (JE 9, p. 275)

Dr. Stoken conducted an IME for claimant on January 25, 2022 and issued her report on February 7, 2022. (JE 8) While Dr. Stoken conducted her IME after Dr. Chen, she issued her report before Dr. Chen issued his report.

Dr. Stoken reviewed claimant's medical records and examined him. (JE 8) Dr. Stoken diagnosed claimant with lumbar degenerative disc disease, spinal stenosis of the lumbar region without neurogenic claudication, lumbar radiculopathy, and chronic low back pain and found the conditions are causally related to the October 23, 2019, work injury. (JE 8, p. 245). Using the AMA Guides, Dr. Stoken opined under Table 15-3, page 384, claimant fits into DRE Lumbar Category III and assigned 13 percent whole person impairment for claimant's lumbar injury with low back pain and persistent lower extremity radiculopathy managed with a spinal cord stimulator. (JE 8, p. 245) Dr. Stoken adopted the restrictions from the January 31, 2022, functional capacity evaluation, finding claimant falls in the light category of work. (JE 8, p. 245)

I. Nature of the Injury: Permanent Impairment

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

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

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

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-845 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Claimant had underlying problems with his lumbar spine at the time of the October 23, 2019, work injury. It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of

Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held:

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

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

Defendants assert the deputy commissioner erred in finding claimant sustained permanent impairment caused by the work injury by relying on the opinions of Dr. Stoken and Dr. Biggerstaff as opposed to the opinions of Dr. Chen and Dr. Piper. Defendants assert the deputy commissioner erred in finding Dr. Piper's opinion does not comply with the causation standard in Iowa. They further assert claimant's leg complaints from the work injury resolved or returned to baseline prior to the November 2019 slip and fall at home, which materially aggravated claimant's condition, which defendants assert is the cause of claimant's ongoing symptoms and need for care.

In the arbitration decision, the deputy commissioner found:

> . . . it does not appear as though Dr. Piper's causation opinion conforms to the causation standard for work injuries in the State of Iowa. Defendants' carefully worded, pre-written causation opinion does not address whether the work injury accelerated the degenerative condition. Instead, the pre-written opinion asks whether a flare-up could be viewed as a substantial factor in bringing about the level of degeneration in claimant's lumbar spine. Claimant is not asserting that the October 23, 2019, work injury caused his underlying, pre-existing degenerative spine condition. Rather, claimant is asserting the October 23, 2019, work injury accelerated the degenerative condition and need for medical intervention. The letter to Dr. Piper does not address such an assertion. (Arb. Dec., p. 10)

I disagree with the deputy commissioner's finding that Dr. Piper's opinion does not comply with the causation standard in Iowa. Dr. Piper signed the letter agreeing he could not state to a reasonable degree of medical certainty that claimant's back and leg complaints were materially aggravated or caused by the work injury. I do agree with the deputy commissioner that Dr. Piper's opinion is not persuasive and that the opinion of Dr. Stoken, as supported by the opinion of Dr. Biggerstaff, is most persuasive as discussed in more detail below.

Defendants challenge Dr. Stoken's opinion alleging she did not address claimant's November 12, 2019, slip and fall at home. Dr. Stoken summarized claimant's medical records. Her summary mentions the November 12, 2019, incident, and subsequent treatment. (JE 8, p. 241) Dr. Stoken opined the October 23, 2019, work injury is the cause of his symptoms and need for care. She did not find the November 12, 2019, was the cause of claimant's ongoing symptoms and need for care. Dr. Stoken's opinion is supported by Dr. Biggerstaff, the treating pain specialist who has implanted both a trial spinal cord stimulator and a permanent spinal cord stimulator in claimant's back. The only expert to opine the November 12, 2019, incident is the cause of claimant's symptoms and need for treatment is Dr. Chen.

Relying on Dr. Chen's opinion, defendants appear to assert the subsequent injury on November 12, 2019, broke the chain of causation. Defendants do not expressly argue the subsequent injury is a superseding cause or cite to any legal authority supporting their contention. I find their argument lacks merit.

A superseding cause is an act or force that intervenes to prevent a defendant from being liable for harm to "the plaintiff that the defendant's antecedent negligence is a substantial factor in bringing about." Clinkscales v. Nelson Sec., Inc., 697 N.W.2d 836, 843 (Iowa 2005). An intervening act or force is an act or force that "actively operates to produce harm to another after the actor's negligent act or omission has been committed." Rieger v. Jacques, 584 N.W.2d 247, 251 (Iowa 1998). Not all intervening acts or forces become superseding causes. Id. The Iowa Supreme Court has noted, "[t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about." Hollingsworth v. Schminkey, 553 N.W.2d 591, 597 (Iowa 1996) (quoting Restatement (Second) of Torts § 472 (1965)).

A force or act is a superseding cause if "the later-occurring event is such as to break the chain of causal events between the actor's [conduct] and the plaintiff's injury." Hayward v. P.D.A., 573 N.W.2d 29, 32 (Iowa 1997). "An intervening force which falls squarely within the scope of the original risk will not supersede the defendant's responsibility." Rieger v. Jacques, 584 N.W.2d at 252.

Dr. Chen opined the November 12, 2019, fall at home is a "substantial contributing factor to [claimant's] current chronic back pain, right hip/buttock pain, and sacroiliac region pain" and his subsequent medical care is more likely than not related to claimant's fall at home rather than the October 23, 2019, work injury (JE 9, p. 274) In support of his opinion Dr. Chen notes claimant reported he was doing better during his appointment with Bolton on November 6, 2019, and he was tolerating full-duty work. (JE 9, p. 274)

Claimant sought treatment at Broadlawns Medical Center following his fall on the ice at home on November 12, 2019. (JE 1, pp. 44-47) During an appointment on November 27, 2019, he complained of aching pain in his right hip and lower back that radiates to the side of his hip and lateral right side of his leg and occasionally radiates to the lateral side of his lower leg, and reporting his pain increases with walking. (JE 1, p. 48) The last record from Broadlawns Medical Center that mentions right hip pain is from November 27, 2019. (JE 1, pp. 48-51)

During his appointment with Bolton on November 20, 2019, claimant complained of pain wrapping around the front of his right thigh and slightly into the left side of his buttocks. (JE 4, p. 173) On exam, Bolton did not observe any problems with claimant's posture, gait, or stance, he was tender to palpation below the belt line on the right side and at the midline "roughly" at L4-L5. (JE 4, p. 173) During his appointment on November 6, 2019, Bolton documented claimant had tenderness at L5-S1 on exam. (JE 4, p. 172) The location of the pain on exam was in the same general area before and after the November 12, 2019, fall at home. And contrary to Dr. Chen's assertion, while claimant reported he was doing better during the November 6, 2019, appointment, Bolton documented claimant was still having "occasional flares that cause pain." (JE 4, p. 172)

While moving a heavy box on October 23, 2019, claimant felt a "jolt of electricity" that went down through his legs. (Tr. p. 22) Claimant testified he had never felt similar pain before. (Tr. p. 22) On October 24, 2019, defendants sent claimant to Schmitt and claimant reported having constant aching pain from his lower back down into his right anterior thigh. (JE 3, p. 166) The next day defendants sent claimant to Bolton and claimant complained of pain that occasionally shoots around from the posterior aspect of his right thigh into the front of his thigh that is sharp with certain movements, but does not go all the way to his knee. (JE 4, p. 170) Claimant continued to complain of right-sided low back pain radiating into this right thigh and leg following the November 12, 2019, fall. (JE 1, pp. 62, 64; JE 4, p. 180)

Bolton, the authorized treating provider opined claimant's degenerative changes were likely causing the majority of his current symptoms, but she also found the muscular strain injury from October 23, 2019, could not be entirely excluded as a cause of claimant's symptoms, and Bolton noted a spine specialist would have better insight on causation and chronicity. (JE 4, p. 183) Instead of sending claimant to a spine specialist, defendants refused to authorize additional treatment.

The record does not support Dr. Chen's assertion that claimant's condition was temporary and resolved at the time of the November 12, 2019, fall at home, or that the fall at home is the cause of claimant's ongoing complaints and need for medical care. The record does not support the assertion that the November 12, 2019, fall at home broke the chain of causation. Claimant continued to complain of low back and pain and right leg radicular symptoms following the fall at home.

While claimant's medical records document he had preexisting low back pain, his records do not mention any right thigh pain before the October 23, 2019, injury, or that the pain was intolerable and constant. Following the work injury, claimant developed right radicular pain and his pain became intolerable, resulting in his need for a spinal cord stimulator. Fortunately, the spinal cord stimulator has been successful in relieving claimant's pain. For these reasons I do not find the opinions of Dr. Piper or Dr. Chen persuasive and I find the opinion of Dr. Stoken, as supported by the opinion of Dr. Biggerstaff most persuasive. I also affirm the deputy commissioner's finding that claimant is capable of work in the light-to-medium category of work. Claimant has proven the October 23, 2019, work injury permanently aggravated, accelerated, worsened, or lighted up his preexisting low back condition and caused his right leg symptoms.

II. Extent of Disability

The deputy commissioner found considering claimant's age, educational background, employment history, permanent impairment rating and restrictions, lack of motivation to return to the workforce, his proximity to retirement, as well as the other factors of industrial disability, claimant had proven he sustained 50 percent loss of earning capacity. Defendants contend the deputy commissioner erred in finding claimant sustained a 50 percent industrial disability and contend the award should be reduced.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-138 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138. The determination of the reduction in an employee's earning capacity caused by the work injury "shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code § 85.34(2)(v).

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

At the time of the hearing claimant was 67 years old. (Tr. p. 12) Claimant graduated from high school and attended two semesters of community college. (Id.) Claimant has not obtained a college degree or other certificate. (Id.) Claimant briefly worked as a car salesman for less than a year and in retail. (Tr. pp. 12-13) The majority of his work has been in manual labor. (Tr. p. 12) Claimant routinely lifted boxes weighing 40 to 60 pounds at work before the work injury and he received help from a coworker with boxes weighing 80 to 100 pounds while working for defendant-employer. (Tr. pp.19-20) Following the work injury claimant is now capable of work in the light-to-medium category of work.

Dr. Stoken opined claimant sustained 13 percent permanent impairment as a result of the October 23, 2019, work injury, based on his radicular symptoms. Defendants were unable to accommodate the 50-pound lifting restriction imposed by Dr. Biggerstaff after implantation of the spinal cord stimulator into claimant's back, and claimant eventually retired on September 1, 2021. (Tr: pp. 36-37, 56-57; JE 8, p. 244) Claimant has not sought employment since Dr. Biggerstaff implanted the spinal cord stimulator. (Tr. pp. 56-57) I find claimant is not motivated to work. Claimant testified that at the time of the work injury his wife wanted him to retire and he was thinking of working another year or two. (Tr. pp. 60-61)

Considering all of the factors of industrial disability, including claimant's plan to work only one to two more years before the work injury, his retirement, and his lack of motivation to find work after Dr. Biggerstaff implanted the spinal cord stimulator, I find claimant has sustained 25 percent industrial disability as a result of the work injury, which entitles claimant to receive 125 weeks of permanent partial disability benefits.

III. Medical Care and Bills

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to

furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

Defendants denied liability for claimant's ongoing symptoms and stopped authorizing care after Bolton issued her February 3, 2020, letter and claimant sought treatment on his own. The deputy commissioner found the October 23, 2019, work injury permanently and materially aggravated or worsened claimant's underlying low back condition and the deputy commissioner found defendants liable for all causally related medical bills set forth in Exhibit 2. Defendants contend they are not responsible for medical bills after November 6, 2019, and defendants contend the deputy commissioner erred in finding defendants are responsible for the medical bills set forth in Exhibit 2 because he did not make a finding the treatment was reasonable and beneficial to claimant. On de novo review, I find the treatment claimant received, including the trial and permanent spinal cord stimulators, which have reduced claimant's pain, are reasonable and beneficial treatment for claimant. Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 206; Brewer-Strong v. HNI Corp. 913 N.W.2d 235 (Iowa 2018). As such, I find defendants are responsible for the causally related medical bills set forth in Exhibit 2.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on October 4, 2022, is affirmed as modified with my additional analysis.

Defendants shall pay claimant 150 weeks of permanent partial disability benefits at the rate of six hundred twenty-three and 50/100 dollars ($623.50) per week, commencing on December 27, 2021.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall pay directly to the medical providers, reimburse claimant for any out-of-pocket expenses, and hold claimant harmless, for all causally related medical expenses set forth in Exhibit 2.

Pursuant to Iowa Code section 85.39, defendants shall reimburse claimant in the amount of two thousand four hundred and 00/100 dollars ($2,400.00) for the cost of Dr. Stoken's IME.

Pursuant to rule 876 IAC 4.33, defendants shall reimburse claimant for the cost of the filing fee, and defendants shall pay the cost of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 24th day of January, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

John Dougherty (via WCES)

Patrick Waldron (via WCES)

Cory Abbas (via WCES)