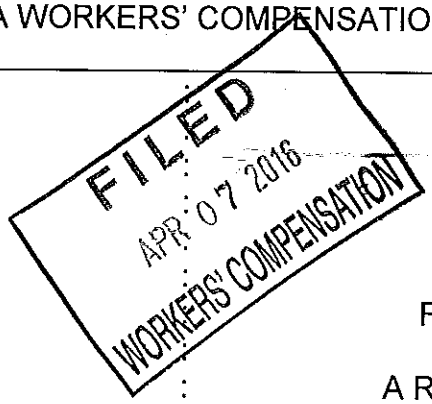
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER




JEFFREY MCDONALD,

Claimant,

vs.

SEDONA STAFFING,

Employer,

and

ACE AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5041080

ARBITRATION

DECISION

Head Note Nos.: 1801.1, 1803

## STATEMENT OF THE CASE

Claimant, Jeffrey McDonald, filed a petition in arbitration seeking workers' compensation benefits from Sedona Staffing, employer, and Ace American Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on March 23, 2012. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on May 22, 2015, in Des Moines, Iowa. The record in this case consists of joint exhibits 1 through 15, claimant's exhibits 16 and 17, defendants' exhibits A through F, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on June 19, 2015.

## ISSUES

The parties submitted the following issues for determination:

1. Whether claimant is entitled to temporary partial disability benefits during the period of June 4, 2012 through October 21, 2012;

2. The extent of claimant's industrial disability; and

3. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

## FINDINGS OF FACT

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

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

Claimant was 48 years of age at the time of hearing. He resides in Hopkinton, Iowa. Claimant attended high school through the 9th grade; thereafter, he dropped out of school. He ultimately obtained his GED in 1996. Claimant has also obtained a welding certification in approximately 1997 or 1998, as well as his CDL in October 2014. While incarcerated from 2002 through 2009, claimant earned college credits in business courses, but did not secure a degree. Claimant is 5'8" tall and weighs approximately 230 pounds. (Claimant's testimony)

Claimant's work history consists initially of bartending and laborer positions in the construction and farming sectors. (Claimant's testimony) In 1998, claimant began work as a welder for a manufacturing company. He remained in this position until the year 2000. During his employ, claimant earned $10.00 per hour and worked 40 to 50 hours per week. (Claimant's testimony; Exhibit E, page 5) From 2000 to 2001, claimant worked as a laborer building log homes. This work required claimant to handle logs weighing 50 to 100 pounds each. He earned $8.00 per hour and worked an average of 40 hours per week. (Claimant's testimony; Ex. E, p. 4) From 2001 to 2002, claimant worked as a heavy equipment mechanic and concrete construction laborer. His duties were heavy in nature, requiring lifting of 50 to 75 pounds. Claimant earned $12.00 per hour and worked 40 hours per week. (Claimant's testimony; Ex. E, p. 4) From 2009 to 2012, claimant worked at Permeate Refining, an ethanol plant. Claimant worked in maintenance and also operated a forklift. He earned $16.75 per hour and worked 60 to 80 hours per week. Claimant testified he ultimately left employment at Permeate Refining in order to find a position which required fewer hours. (Claimant's testimony; Ex. E, p. 4)

In July 2000, claimant sustained a low back injury while in the employ of the manufacturing company. (Claimant's testimony) He received care of his complaints, including with David Durand, D.O. and Martin Roach, M.D. On September 13, 2000, claimant complained of back pain with radiation to the left lower extremity. Dr. Durand noted claimant had undergone an MRI which revealed mild degenerative changes. Dr. Durand assessed low back pain and prescribed Lodine. Dr. Durand ordered a course of physical therapy and released claimant to return to work on light duty. (Ex. 12, p. 1) On September 16, 2000, Dr. Roach assessed a lumbosacral sprain due to overload syndrome. He prescribed Ultram and ordered a course of work hardening. (Ex. 15, p. 2) At recheck on September 22, 2000, Dr. Durand assessed low back pain

with what appeared to be some symptom magnification. He discontinued therapy, released claimant to light duty work, and recommended use of ibuprofen. (Ex. 12, p. 2)

The final medical note in evidence regarding the July 2000 back injury was authored by Dr. Roach following an appointment on December 5, 2000. At that time, Dr. Roach noted claimant had made good progress with physical therapy. Accordingly, Dr. Roach recommended continued therapy and expressed belief claimant could return to work full duty in 3 weeks' time. Dr. Roach encouraged claimant to return to work in order to determine if he could manage his strenuous work as a welder. If claimant was unable to do so, Dr. Roach recommended claimant consider another job which did not place as much strain on the low back. He released claimant from care, to return as needed. (Ex. 15, p. 3)

Dr. Roach authored a letter on January 19, 2001, directed to Iowa Workforce Development. By the letter, Dr. Roach identified claimant's diagnosis as a lumbosacral sprain with overload syndrome. Dr. Roach indicated he did not advise claimant to quit his employment; rather, Dr. Roach wrote he encouraged claimant to attempt to return to work. In the event claimant proved unable to perform his duties, Dr. Roach indicated he believed claimant would be medically discharged from his employment. (Ex. 15, p. 4)

Claimant testified he recovered fully from the July 2000 back injury and received a full duty work release in early 2001. (Claimant's testimony)

On February 13, 2012, claimant applied for work at defendant-employer, a temporary staffing agency. (Ex. A, p. 1) Claimant explained he desired a position at XL Specialty Trailers, who contracted their initial hires through defendant-employer. Following a six-week placement through defendant-employer, XL Specialty Trailers had the option to hire these placed workers directly. (Claimant's testimony) Defendant-employer hired claimant and placed him in an assignment at XL Specialty Trailers. Claimant worked as a welder and was required to handle objects which could weigh 50 to 70 pounds. Although he possessed a prior welding certificate, claimant was also required to pass welding tests to work at XL Specialty Trailers. Claimant worked full time, earning $16.00 per hour. In the event claimant were hired at XL Specialty Trailers, his earnings would have been $17.00 or $18.00 per hour for 40 hours per week, plus 1 ½ time for 10 to 15 overtime hours per week. (Claimant's testimony; Ex. E, p. 4)

While at work at XL Specialty Trailers on March 23, 2012, claimant was retrieving parts to weld from a tote when he turned and felt a popping sensation in his back. Claimant testified he believed he pulled a muscle, so he continued working and completed his shift. The following morning, claimant testified he was unable to rise from his bed. The following Monday, claimant attempted to return to work, but was unable to complete his duties. He then reported the incident to the plant safety director; the safety director informed defendant-employer of the incident. (Claimant's testimony)

Defendants arranged for claimant to be evaluated on March 26, 2012 by Dan Meyer, PA-C. At that time, claimant complained of back pain with radiation to the

right buttocks. He disclosed a history of low back pain in 2000 and a recent motor vehicle accident that "messed up his back," but from which he improved. (Ex. 10, p. 1) Mr. Meyer assessed a lumbar strain, excused claimant from work pending follow up, and recommended use of prednisone and Lortab. (Ex. 10, pp. 2-3)

Claimant returned to Mr. Meyer on March 28, 2012 and reported a lack of improvement. Claimant disclosed he had dropped a motorcycle on Monday, doing some damage to the vehicle. Mr. Meyer recommended continued medications and ordered a course of physical therapy. He also imposed restrictions of no lifting greater than 5 pounds, no repetitive activities, and no prolonged sitting or standing. (Ex. 10, pp. 4-6)

At the referral of defendants, on April 3, 2012, claimant presented to Medical Associates for evaluation by Joseph Snyder, D.O. Claimant underwent x-rays which the radiologist read as revealing mild multilevel lumbar hypertrophic spurring. (Ex. 4, p. 5) Following evaluation, Dr. Snyder assessed low back pain with radiation to the right buttocks. He recommended continued physical therapy, use of Flexeril, Lortab, and ibuprofen, and work restrictions. (Ex. 4, p. 1)

On April 11, 2012, claimant returned to Medical Associates. On this occasion, claimant was evaluated by Thomas Miner, D.O. Following evaluation, Dr. Miner assessed a lumbosacral strain and sacroiliitis; he recommended continued physical therapy. (Ex. 4, p. 8)

Claimant returned to Dr. Snyder for evaluation on April 20, 2012. Following evaluation, Dr. Snyder assessed back pain with radiation and sacroiliac (SI) joint dysfunction. He recommended physical therapy, issued a prescription for Prednisone, and released claimant to return to work under restrictions of lift, carry, push or pull of up to two pounds, and kneeling, crawling, climbing, squatting, and jumping as limited by comfort. (Ex. 4, pp. 9-10)

Due to lack of improvement, on May 3, 2012, Dr. Snyder ordered an MRI. (Ex. 4, p. 11) Claimant underwent a lumbar spine MRI on May 9, 2012. The radiologist read the results as revealing central through right extraforaminal level disc protrusion at L4-L5, impacting the L5 nerve root. (Ex. 9, p. 2)

On May 11, 2012, claimant presented to Dr. Snyder for examination and review of MRI results. Dr. Snyder opined claimant's MRI revealed significant impingement at L4-L5. He assessed discogenic back pain with nerve impingement on the right due to a protruding disc. Dr. Snyder referred claimant to the physical medicine department for a possible epidural steroid injection (ESI). (Ex. 4, p. 13)

Claimant returned to Dr. Snyder on June 19, 2012. Dr. Snyder noted claimant had completed the recommended course of physical therapy, but his back remained painful. Claimant requested treatment to control his pain. Dr. Snyder recommended use of ibuprofen and rest; he again recommended a referral to the physical medicine

department for an ESI. Dr. Snyder altered claimant's work restrictions to allow for a lift, carry, push or pull of up to five pounds, and kneeling, crawling, climbing, squatting, and jumping as limited by comfort. (Ex. 4, pp. 14-15)

On July 18, 2012, claimant was evaluated by Dr. Miner. Dr. Miner's notes indicate claimant received an epidural injection from Margaret "Peggy" Mulderig, M.D., on July 11, 2012. Claimant reported continued back pain after the ESI, but improvement of leg pain. Dr. Miner added a work restriction limiting claimant to chest-level work and advised claimant to follow up with Dr. Snyder. (Ex. 4, pp. 16-17)

Dr. Snyder evaluated claimant on July 23, 2012. At that time, claimant reported improvement of right leg symptoms with the ESI, but continued low back discomfort. Dr. Snyder recommended a repeat ESI and continued claimant's work restrictions. (Ex. 4, pp. 18-19)

At follow up with Dr. Snyder on August 6, 2012, claimant reported resolution of leg pain but some residual back pain. Dr. Snyder continued claimant's work restrictions and recommended use of Tramadol, ibuprofen, and Cyclobenzaprine. (Ex. 4, p. 20)

Claimant returned to Dr. Snyder on August 20, 2012. He described continued lumbar pain with activities, but no radicular symptoms. Dr. Snyder informed claimant he would continue to improve with time. Dr. Snyder lessened claimant's work restrictions to allow for a maximum lift, carry, push or pull of up to 15 pounds; kneeling, crawling, climbing, squatting, and jumping as limited by comfort; and limited bending, lifting and twisting of the back. (Ex. 4, pp. 21-22)

While under work restrictions, defendant-employer placed claimant in a light duty assignment at the Delaware County Fairgrounds. Claimant testified he worked at the fairgrounds for several months, performing several tasks such as manning a job fair booth for defendant-employer, mowing, cleaning buildings, and running lights for a concert. (Claimant's testimony) Defendant-employer's records reveal the rate of pay for this assignment was $8.00 per hour. (Ex. 16, p. 4) On August 30, 2012, claimant received a written warning from defendant-employer regarding claimant's choice to repeatedly bring his dog on light duty work assignments. The warning indicated claimant had brought his dog to work on August 17, August 20, August 22, and August 29, 2012. The warning indicated any additional violations might result in the termination of claimant's assignment and his placement in future assignments. (Ex. A, p. 5) Claimant testified after this warning, he never brought his dog to work with him again. (Claimant's testimony)

At the referral of personal medical provider, Catherine "Katie" Book, PA-C, claimant presented to David Segal, M.D. of Eastern Iowa Brain and Spine Surgery on September 6, 2012. Claimant complained of pain of the mid and low back, with radiation to his right thigh. Dr. Segal localized the pain primarily to the right side at L4-L5, down into the SI notch. (Ex. 5, p. 1) Dr. Segal reviewed claimant's MRI and opined it revealed a large disc herniation at L4-L5, which was causing nerve root impingement.

He assessed right L5 radiculopathy and pain from the herniated disc. Dr. Segal recommended a microlumbar discectomy at right L4-L5. (Ex. 5, p. 4) Claimant admits he sought evaluation by Dr. Segal by his own accord and without authorization from defendants. (Claimant's testimony)

Claimant returned to Dr. Snyder for evaluation on September 10, 2012. Claimant reported continued low back pain, but resolution of radicular symptoms following the ESI. Dr. Snyder reviewed claimant's MRI and opined it revealed degenerative changes throughout and some disc protrusion at L4-L5 with mild effacement of the nerve root. Dr. Snyder assessed persistent back pain without radicular symptoms or radiation. He recommended claimant seek a second opinion prior to proceeding with surgery as recommended by Dr. Segal, especially given his lack of radicular symptoms. Dr. Snyder recommended further conservative treatment, including returning to a course of physical therapy of the back with core strengthening and a return to Dr. Mulderig or a pain clinic for consideration of facet injections. Dr. Snyder left claimant's work restrictions in place. (Ex. 4, pp. 23-24)

A representative of defendant-insurance carrier authored a letter to Dr. Snyder dated September 20, 2012, asking Dr. Snyder to review and comment on Dr. Segal's report. Dr. Snyder indicated he did not agree with Dr. Segal's surgical recommendation because claimant was not suffering with "disc/radicular" symptoms. Dr. Snyder expressed belief claimant was non-surgical at that time and indicated Douglas Sedlacek, M.D., may consider performing facet injections, radiofrequency ablation, or an ESI. (Ex. 4, p. 25)

On September 26, 2012, claimant underwent facet joint injections at right L4-L5 and L5-S1, as performed by Dr. Sedlacek. (Ex. 3, pp. 1-3)

Although defendants denied further care or evaluation with Dr. Segal, defendants arranged for evaluation by board certified neurosurgeon, Chad Abernathey, M.D. on October 12, 2012. (Claimant's testimony; Ex. 6, p. 1) Dr. Abernathey's medical notes of the evaluation indicate claimant complained of low back pain with radiation to the right lower extremity, dating to the work injury of March 23, 2012. Dr. Abernathey opined claimant's MRI showed a right L4-L5 disc extrusion, and claimant clinically demonstrated right L5 radiculopathy secondary to the right L4-L5 disc extrusion. Dr. Abernathey recommended surgical intervention. (Ex. 6, p. 5)

Following evaluation, Dr. Abernathey authored a letter to defendants. By the letter, Dr. Abernathey opined claimant suffered from an L4-L5 disc extrusion, with the extrusion consistent with work injury of March 23, 2012. Dr. Abernathey opined claimant did not suffer from a preexisting back condition. Dr. Abernathey indicated claimant's treatment to date had been reasonable and necessary, but further nonsurgical treatment would not be of benefit to claimant. Accordingly, he recommended surgical intervention. Dr. Abernathey expressed belief claimant's current work restrictions were reasonable, and he anticipated claimant would return to work full

duty approximately six weeks post-surgery. He expected claimant to achieve maximum medical improvement (MMI) six months post-surgery. (Ex. 6, p. 4)

On October 26, 2012, Dr. Abernathey performed surgery consisting of a right L4-L5 partial hemilaminectomy and discectomy. (Ex. 6, p. 9; Ex. 7, p. 1) Post-surgery, claimant was removed from work. Additional treatment included prescribed medications, physical therapy, and a TENS unit. Dr. Abernathey released claimant to return to work on December 18, 2012. (Ex. 6, pp. 9, 11)

Claimant testified after Dr. Abernathey released him to return to work, he approached defendant-employer regarding placements. When defendant-employer did not find claimant a job assignment, claimant sought work with a former employer. Claimant also applied directly with XL Specialty Trailers for a welding position, but was told there were no such positions available. (Claimant's testimony)

In January 2013, claimant returned to work at a prior employer, Permeate Refining. Claimant approached the owner and asked if he could return to his prior job under limitations against heavy lifting and repetitive bending. Claimant was hired as head of the maintenance department and also trained maintenance staff. His duties required light welding, as well as repair and assembly work. Claimant distinguished his then-employment at Permeate Refining from his prior work with that employer by highlighting the availability of assistance to him. While claimant previously performed all the heavy labor during his prior employment, during this second period, claimant was able to delegate such tasks or assign an assistant to help. Claimant worked full time and earned $16.75 per hour. (Claimant's testimony; Ex. E, p. 4)

On February 17, 2013, claimant was rear-ended in a motor vehicle accident. Claimant testified his vehicle was entirely stopped when he was struck behind by a car going approximately 60 miles per hour. Claimant testified his airbags deployed and the car that struck him caught on fire. Claimant testified the accident caused whiplash of his neck and caused increased back pain. (Claimant's testimony)

Later that date, claimant presented to Regional Medical Center Emergency Room. Claimant complained of head, neck, and low back pain which had worsened over the course of the day following the motor vehicle accident. Claimant indicated the motor vehicle accident involved claimant's pickup being rear-ended by a small car at speeds of approximately 60-65 miles per hour. At impact, claimant's airbag deployed, but he was struck in the back of the head by a box that had been placed in his backseat. Claimant reported he had previously undergone back surgery on October 26, 2012, but indicated he had done "fine" since surgery. (Ex. 11, p. 1)

Claimant underwent CT scans of the cervical spine and head. The cervical spine CT showed no evidence of acute findings or traumatic malalignment; the head CT showed no hemorrhage or fracture. X-rays of the lumbar spine were also normal. The evaluating provider assessed a cervical sprain and indications of a closed head injury with concussive syndrome. Claimant received an injection of pain medications and was

advised to use Tylenol and Flexeril for mild to moderate pain and Lortab for severe pain. (Ex. 11, p. 2)

On February 20, 2013, claimant began a course of physical therapy precipitated by the motor vehicle accident. The course of therapy ultimately involved 29 sessions of care. (Ex. 13, p. 4) Claimant testified his back pain resolved to pre-injury levels. (Claimant's testimony)

On February 20, 2013, claimant telephoned Dr. Abernathey's office and advised he had been rear-ended in a motor vehicle accident. Claimant admitted to developing low back pain following the accident, but represented those symptoms had since "dissipated." (Ex. 6, p. 9)

Claimant presented to his personal provider, Ms. Book, on April 10, 2013. Claimant reported he had been involved in a motor vehicle accident on February 17, 2013. He expressed complaints of difficulty turning his neck, decreased range of motion, and stiffness of the neck at the limits of his range of motion. Claimant reported some relief with physical therapy and near resolution of prior headache complaints. Ms. Book assessed a cervical sprain, improving, but with some limited range of motion. She recommended continued physical therapy and a home exercise program. (Ex. 10, pp. 9-10)

On April 12, 2013, claimant returned to Dr. Abernathey for purposes of a permanent impairment evaluation. Dr. Abernathey noted claimant received excellent relief of his preoperative symptoms, with "only modest" residual low back pain and lower extremity paresthesias. (Ex. 6, p. 9) Dr. Abernathey opined claimant achieved MMI as of April 12, 2013. Based upon guidance found in the AMA Guides to the Evaluation of Permanent Impairment with respect to chronic pain, decreased range of motion, and previous disc extrusion with surgical intervention, Dr. Abernathey opined claimant sustained a permanent impairment of 7 percent whole person. (Ex. 6, pp. 9-10, 12)

At the arranging of claimant's attorney, on May 23, 2013, claimant presented for independent medical evaluation (IME) with Richard Neiman, M.D. Dr. Neiman issued a report containing his findings and opinions that same date. Dr. Neiman noted claimant's history of a lumbosacral strain on July 11, 2000, from which claimant was discharged to full activity after two months of light duty. Dr. Neiman also noted claimant's history of motor vehicle accident on February 17, 2013 where claimant's vehicle was rear-ended at a speed of 65 miles per hour, resulting in a slight concussion and a minor whiplash injury to his neck. Dr. Neiman noted the accident resulted in no change with respect to claimant's back. (Ex. 1, pp. 1-3)

Dr. Neiman noted claimant reported sustaining a work injury on March 23, 2012 and completed a medical records review and history. Dr. Neiman noted claimant was evaluated by Mr. Meyer on March 26, 2012, who noted claimant reported suffering with prior back problems in 2000 and involvement in a motor vehicle accident that "messed up his back" but from which claimant improved. Dr. Neiman also noted claimant was

involved in an event where claimant "dropped his motorcycle" after failing to secure the kick stand. Dr. Neiman noted the motorcycle then "went on its side and that hurt [claimant's] back." (Ex. 1, p. 2) Dr. Neiman examined claimant and noted claimant utilized ibuprofen daily to treat continued back discomfort. (Ex. 1, pp. 1, 3-4) Following records review, interview, and examination, Dr. Neiman opined although claimant had a history of prior back difficulties, those conditions "seem to have resolved." He also opined claimant did not sustain a low back injury as a result of the motor vehicle accident of February 17, 2013. (Ex. 1, p. 5)

Dr. Neiman opined claimant received reasonably good results from surgery; however, given claimant's continued complaints and symptoms, Dr. Neiman recommended a repeat MRI of the lumbosacral spine. (Ex. 1, pp. 4, 5) With respect to the extent of claimant's permanent disability as a result of the March 23, 2012 work injury, Dr. Neiman opined Dr. Abernathey's rating of 7 percent whole person seemed "inadequate." By Dr. Neiman's opinion, claimant sustained a permanent impairment of 10 percent whole person utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Table 15-7. He based this rating upon claimant's surgically treated disc lesion with residual medically-documented pain and rigidity. Dr. Neiman opined claimant also warranted an additional 4 percent whole person impairment due to loss of motor strength. He combined these two ratings for a total impairment of 14 percent whole person. (Ex. 1, p. 4) As a result of the work injury, Dr. Neiman recommended permanent restrictions of: avoidance of excessive flexion, extension and lateral flexion of the lumbosacral spine; a maximum lift of 50 pounds no more than 4 times per hour; limit repetitive lifting to 10 to 15 pounds; and the ability to change positions between sitting and standing. (Ex. 1, p. 5)

Dr. Neiman counseled claimant to discontinue smoking. Dr. Neiman also advised claimant to lose weight, as in Dr. Neiman's estimation, claimant carried 30 pounds of excessive abdominal fat which placed additional stress on one's back. He recommended claimant complete an exercise program and utilize a Whirlpool and the TENS unit to reduce discomfort. (Ex. 1, p. 5)

From June 8 through July 13, 2013, claimant received a series of massages. (Ex. 14, pp. 1, 6) Claimant testified he finished treating for his conditions stemming from the motor vehicle accident in summer of 2013. (Claimant's testimony)

On July 8, 2013, defendants' counsel authored a letter to Dr. Abernathey, providing Dr. Abernathey with a copy of Dr. Neiman's IME for review. Counsel asked Dr. Abernathey to explain why he provided claimant a full duty work release on December 18, 2012, while Dr. Neiman recommended permanent restrictions. Counsel also asked if any of the information presented by Dr. Neiman changed Dr. Abernathey's opinions. (Ex. 6, p. 13) Dr. Abernathey issued responses to counsel's letter on July 15, 2013. Dr. Abernathey stood by his release of claimant to full duty, stating he had "literally thousands" of patients undergo the same surgery and return to full duty work. He further indicated his opinions remained unchanged by the content of Dr. Neiman's IME. (Ex. 6, p. 15)

In July 2013, the Permeate Refining plant closed and claimant was laid off from his maintenance position. Claimant collected unemployment for a time thereafter. (Claimant's testimony; Ex. E, p. 4)

At arranging of claimant's attorney, on November 11, 2013, claimant presented for a functional capacity evaluation (FCE) with Mark Blankespoor, PT. Mr. Blankespoor found claimant demonstrated maximum, consistent effort and performance, yielding valid results for purposes of determining claimant's functional abilities. (Ex. 2, p. 1) Through the FCE, Mr. Blankespoor noted claimant demonstrated significant deficits in lifting and carrying; pushing and pulling; stair and step ladder climbing; and positional tasks such as elevated work, forward bending, trunk rotation, kneeling, crouching, squatting and crawling. (Ex. 2, p. 2) Mr. Blankespoor found claimant limited to rare performance of standing forward bend, crawling, crouching, or step ladder use. He also found claimant limited to occasional elevated work, standing trunk rotation, kneeling, squatting or stair use. (Ex. 2, pp. 3-4) Mr. Blankespoor opined the capabilities claimant demonstrated on the FCE placed him in the light physical demand level, including lifting up to 35 pounds rarely, 20 pounds occasionally, and 10 pounds frequently with the front carry task. (Ex. 2, pp. 2-3)

On February 7, 2014, claimant returned to Dr. Abernathey for evaluation. Dr. Abernathey opined claimant suffered from chronic low back pain and intermittent lower extremity paresthesias. Due to continued symptoms, Dr. Abernathey recommended a repeat MRI of the lumbosacral spine. (Ex. 6, p. 10)

Following an MRI, claimant returned to Dr. Abernathey on February 14, 2014. Dr. Abernathey opined claimant's MRI revealed post-surgical change without recurrent disc extrusion, and decompression of the neural elements. Accordingly, Dr. Abernathey recommended conservative treatment over aggressive neurosurgical care. (Ex. 6, p. 10)

On May 7, 2014, claimant's counsel authored a letter to Dr. Abernathey in followup of a telephone conference. Counsel requested Dr. Abernathey confirm certain statements. Dr. Abernathey agreed he recommended claimant follow up for his ongoing symptoms with a pain management physician or a physical medicine specialist. Dr. Abernathey confirmed his release for claimant to return to work full duty was issued from a structural standpoint, i.e. that claimant would not cause further structural injury to his spine by working without restrictions. He further agreed that the question of whether claimant could functionally work without restrictions was outside the province of his medical practice. Accordingly, Dr. Abernathey agreed claimant's need for functional restrictions should be determined by an occupational health physician, physical medicine specialist, or neurologist. (Ex. 6, p. 17)

On May 21, 2014, Dr. Abernathey authored a letter to defendants' counsel opining claimant may benefit from followup with Tri State Occupational Medicine for "further management and work assessment as well as addressing any restriction issues." (Ex. 6, p. 18)

Claimant returned to Dr. Snyder on June 24, 2014 for reevaluation of back pain. Claimant reported improved radicular leg symptoms following surgery, but continued sharp low back pain. Claimant also expressed suffering with a sensation of "clicking or snapping" of the back, which also caused sharp pains. Dr. Snyder assessed low back pain and continued SI joint pain. Dr. Snyder referred claimant to the physical medicine department for evaluation. (Ex. 4, p. 26)

At Dr. Snyder's referral, claimant presented to Dr. Mulderig. (Claimant's testimony) X-rays of claimant's back taken on September 5, 2014 were unremarkable. (Ex., 4, p. 27) On September 18, 2014, Dr. Mulderig ordered additional physical therapy. (Ex. 4, p. 28)

In September 2014, claimant was hired as an employee of RCZ Enterprises (RCZ). Claimant performs mechanical work on modified race cars and drives the race car hauler. Prior to being hired as an employee, claimant performed similar work for RCZ as an independent contractor. Claimant's hours vary from 10 to 30 hours per week; he earns $16.00 per hour. (Claimant's testimony)

In October 2014, claimant began work at Mormann Farms as a cattle hauler. In order to drive the semi, claimant successfully obtained his CDL license. Claimant testified he desired a new profession which was less physically demanding; he described his work for Mormann Farms as the lightest in his job history. To perform his duties, claimant is required to open and close gates, persuade cattle into and out of the trailer, and drive. His route is regional, with driving limited to those states surrounding Iowa. Claimant earns based on the particular load hauled; he estimated earning approximately $1,000.00 per week. (Claimant's testimony; Ex. E, p. 3)

On October 6, 2014, claimant returned to Dr. Mulderig with complaints of continued low back pain. He denied relief with physical therapy, but admitted to receiving some relief with use of an SI belt. Dr. Mulderig assessed low back pain, with a provisional diagnosis of right SI dysfunction. She recommended a repeat MRI of the lumbosacral spine. (Ex. 4, p. 29)

Claimant underwent repeat lumbar spine MRI on November 4, 2014. The radiologist read the results as revealing mild lower lumbar degenerative disc disease, principally involving L4-L5 and L5-S1. (Ex. 8, p. 1)

Following MRI, claimant returned to Dr. Mulderig on November 11, 2014. Dr. Mulderig reviewed claimant's MRI and opined it revealed a broad-based posterior annular disc bulge, reduced since surgery, as well as degenerative facet hypertrophy at L4-L5 and L5-S1. Claimant reported suffering with increased pain when he leaned to the right and the need to stop every 1 ½ to 2 hours while driving a semi. Claimant reported receiving some relief with use of a TENS unit. Dr. Mulderig assessed degeneration of the lumbar intervertebral discs and recommended medial branch blocks at the right L4, L5, and S1 levels. (Ex. 4, p. 30) She released claimant to return to work

on "light duty only." Additionally, Dr. Mulderig referred claimant to Dr. Chapman for a second opinion and surgical consultation. (Ex. 4, p. 31)

Notes from Dr. Mulderig's office dated November 25, 2014 indicate a claim adjuster from defendant-insurance carrier telephoned the office and issued a denial of Dr. Mulderig's referral to Dr. Chapman. The adjuster indicated further investigation was required into claimant's job duties with his new employer and, in the event a referral to a surgeon was needed, it would be as a return to Dr. Abernathey. (Ex. 4, p. 32) Dr. Mulderig's office telephoned claimant and notified him of the content of this conversation. (Ex. 4, p. 33)

On December 22, 2014, claimant telephoned Dr. Mulderig's office and stated Dr. Chapman had refused to see him. (Ex. 4, p. 34) Claimant testified he had learned of Dr. Chapman's refusal from his attorney. (Claimant's testimony) Claimant indicated he did not want to return to Dr. Abernathey. Accordingly, Dr. Mulderig referred claimant to the University of Iowa Pain Clinic for a second opinion. (Ex. 4, p. 34)

On January 5, 2015, Dr. Mulderig's office contacted claimant and advised him defendants had authorized the medial branch blocks she had recommended in November 2014. The notes completed by Dr. Mulderig's staff note claimant expressed confusion regarding this authorization, as he desired a second opinion prior to undergoing additional invasive treatment. Claimant declined to schedule the injections at that time, pending discussion with his nurse case manager. (Ex. 4, p. 35)

Claimant ultimately underwent medial branch blocks at the right L4, L5, and S1 levels as performed by Dr. Mulderig on February 5, 2015. (Ex. 4, p. 36) The following day, February 6, 2015, claimant reported an increase of pain after the medial branch blocks. Claimant informed Dr. Mulderig he wanted to see Dr. Segal for an evaluation. (Ex. 4, p. 37) Claimant testified he took a copy of his most recent MRI to Dr. Segal's office for review. Claimant indicated he scheduled an appointment to review the MRI findings with Dr. Segal, but this visit was scheduled after the date of evidentiary hearing. (Claimant's testimony)

Dr. Abernathey authored a letter dated February 23, 2015, by which he diagnosed claimant with a chronic subjective lumbosacral strain. He opined claimant's current MRI findings were unremarkable and demonstrated only degenerative and post-surgical changes, without acute findings. Dr. Abernathey opined claimant had failed medical management thus far and accordingly, he did not recommend additional medical management. Dr. Abernathey opined neither additional medical or surgical treatment were warranted at that time and opined claimant achieved MMI as of April 12, 2013. (Ex. 6, p. 19)

At the time of evidentiary hearing, claimant remained employed by Mormann Farms and RCZ Enterprises. (Ex. E, pp. 3-4) Claimant's earnings with both employers vary. He estimated working approximately 40 hours per week between the two employers, as some weeks he has fewer loads at Mormann Farms and some weeks he

is needed for fewer hours by RCZ. Claimant estimated earning approximately $1,000.00 per week at Mormann Farms. While working at RCZ, he earns $16.00 per hour. (Claimant's testimony) Tax records reveal claimant earned $66,523.00 in 2011, $20,564.00 in 2012, $17,408.00 in 2013, and $11,390.01 in 2014. (Ex. D, pp. 1, 3, 5-7)

Claimant testified he continues to suffer with low back pain, as well as difficulty performing bending, lifting, or prolonged walking or sitting. He described his back pain as nearly constant, present at the same level throughout the day. Claimant testified he is unable to sit still for extended periods without developing a sharp pain in his low back. As a result, claimant testified he generally pulls over his semi every 1 or 1 ½ hours while driving in order to stretch his back. Claimant testified his employer pays claimant by the load, thus eliminating some of the potential for disputes regarding his timeliness at work. He admitted he has refused certain long haul jobs at Mormann Farms when those hauls have set delivery times. Claimant testified he also purchased different cushions for his truck seats. He reported use of a TENS unit is helpful in dulling his pain. Claimant testified he uses a TENS unit to decrease his pain and allow him to fall asleep; however, he testified he wakes a few hours later. Claimant testified he is capable of lifting 30 to 40 pounds, but not repetitively or for prolonged periods. (Claimant's testimony)

Claimant testified his symptoms and limitations have impacted his continued employment. Claimant testified as part of his employment with RCZ, he is required to change vehicle tires occasionally and is required to bend over engine compartments. Claimant indicated he has difficulty with prolonged bending, bending accompanied by twisting, or lifting. He attempts to avoid such tasks entirely and at the very least, limit the amount of time he participates in such activities. Claimant testifies he frequently uses equipment to assist with offending activities or he secures the assistance of another person, if necessary. (Claimant's testimony)

Claimant testified he would not be able to return to his pre-injury duties at XL Specialty Trailers. He explained his work required a great deal of lifting, as well as prolonged bending in order to perform welds. Claimant testified he would also be precluded from pre-injury work as a heavy equipment mechanic due to the bending and welding required. He similarly expressed an inability to return to his pre-injury position at Permeate Refinery, without restrictions, as it involved a great deal of physical labor and bending in uncomfortable positions. Claimant also believes he would be unable to return to the physical labor required in his work building log homes. (Claimant's testimony)

The motor vehicle accident of February 17, 2013 became the subject of a lawsuit, with claimant filing an expedited civil action against the other drivers involved. An expedited civil action caps claimed damages at $75,000.00 or less. (Ex. C) Claimant testified he continues to suffer with a sharp pain in his neck, as well as with migraines. He does not believe either condition impacts his employment in any way. (Claimant's testimony)

## CONCLUSIONS OF LAW

The first issue for determination is whether claimant is entitled to temporary partial disability benefits during the period of June 4, 2012 through October 21, 2012.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Claimant claims entitlement to temporary partial disability benefits during the period of June 4, 2012 through October 21, 2012. The basis of claimant's claim is his placement in a position which earned a lesser hourly wage than he earned at the time of the work injury. The evidence found in Exhibit 16 corroborates claimant's assertion he was paid at a lesser hourly wage following the work injury.

By post-hearing brief, defendants did not dispute claimant's claim for temporary partial disability benefits on the basis of hourly wage, but rather focus on claimant's entitlement to benefits on certain dates. Defendants argue claimant was absent from work on several occasions for personal reasons, unrelated to the work injury and accordingly, should not be entitled to temporary partial disability benefits for these dates.

Claimant argues he is not claiming entitlement to temporary partial disability benefits on the dates he missed time for personal reasons, as supported by defendant-employer's absence reports.

Claimant's temporary partial disability benefits calculation is included in evidence at Exhibit 16, page 1. By this calculation, claimant excludes from his computation the wages which claimant would have earned had he worked all of the light duty hours offered (i.e. he had not missed work for personal reasons). Claimant's calculation and the days and hours excluded from computation reconcile with defendant-employer's records regarding the dates and hours claimant missed for personal reasons. Claimant's computation excludes wages from the calculation which correspond to absences detailed in defendants' post-hearing brief, with one exception. Defendants claimed claimant was not entitled to benefits resulting from an absence for an eye appointment on August 10, 2012; however, review of defendant-employer's records reveal that absence actually occurred on September 10, 2012. It appears to the undersigned that claimant also excluded this portion of wages from his computation with respect to the September 10, 2012 date.

During the period of June 4, 2012 through October 21, 2012, claimant remained under light duty work assignments. Claimant has proven he earned a lesser wage while on light duty and further proven his gross pay during this period was consistently less than his stipulated average weekly wage of $750.00. Claimant admits to personal absences on occasions throughout this period and argues he is not claiming entitlement to temporary partial disability benefits for these personal absences. Claimant's temporary partial disability benefits calculation appears to have accounted and adjusted for the personal absences such that claimant is not requesting temporary partial disability benefits for those personal absences. Claimant's calculation comports with defendant-employer's records regarding his absences and defendants' post-hearing brief regarding those absences.

The undersigned finds claimant's calculation to have accurately considered claimant's entitlement to temporary partial disability benefits. Claimant has calculated a total temporary partial disability entitlement of $1,921.33 during this period. Claimant concedes defendants paid $67.21 in temporary partial disability benefits during this period. Therefore, claimant claims entitlement to an additional $1,854.12 ($1,921.33 - $67.21) in temporary partial disability benefits. The undersigned adopts claimant's temporary partial disability benefits calculation as set forth at Exhibit 16, page 1. Claimant is found entitled to additional temporary partial disability benefits in the amount of $1,854.12.

The next issue for determination is the extent of claimant's industrial disability.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

Claimant was 48 years of age on the date of evidentiary hearing. He completed high school through the 9th grade, but subsequently obtained his GED. Claimant has also earned additional college credits and secured his CDL licensure and welding certification. Claimant is clearly mentally capable of learning new vocational skills. Throughout his employment history, claimant has worked as a bartender, laborer in construction and farming sectors, welder, heavy equipment mechanic, maintenance employee and supervisor, forklift operator, race car mechanic, and truck driver. While claimant's work experience has varied, the vast majority have involved manual, medium to heavy natured, labor.

As a result of the work injury of March 23, 2012, claimant suffered a disc extrusion at L4-L5, causing significant impingement and radiculopathy. Claimant was treated conservatively, but ultimately underwent surgery by Dr. Abernathey in October 2012, consisting of a right L4-L5 partial hemilaminectomy and discectomy. Following surgery, claimant continued to require periodic medical maintenance and evaluation. Claimant credibly testified he continues to suffer with low back pain which impacts his daily activities and causes difficulty with bending, lifting, or prolonged walking or sitting.

Claimant received two physician opinions regarding the extent of his permanent impairment as a result of the work injury, authored by Drs. Abernathey and Neiman. Dr. Abernathey opined claimant sustained a 7 percent whole person impairment due to chronic pain, decreased range of motion, and the previous disc extrusion with surgical intervention. Dr. Neiman opined for a surgically treated lesion with residual medical-documented pain, as well as rigidity and loss of motor strength, claimant's condition warranted a permanent impairment of 14 percent whole person.

Following surgery, Dr. Abernathey released claimant to return to work without restrictions in December 2012. However, Dr. Abernathey ultimately acknowledged the release without restrictions was given from a structural standpoint, i.e. claimant would not cause further structural injury to his spine by working without restrictions. However, the question of whether claimant was actually capable of functioning without restrictions was beyond the province of his practice and claimant's need for functional limitations should properly be determined by an occupational health physician, physical medicine specialist, or neurologist. Dr. Neiman recommended permanent restrictions of avoidance of excessive flexion, extension and lateral flexion of the lumbosacral spine; a maximum lift of 50 pounds no more than 4 times per hour; repetitive lifting limited to 10 to 15 pounds; and the ability to alternate positions.

After reviewing the medical evidence and claimant's testimony, the undersigned adopts the permanent restrictions set forth in claimant's functional capacity evaluation. The therapist opined claimant gave valid, maximum and consistent effort and performance throughout the evaluation. He then opined claimant demonstrated the ability to perform rare standing forward bends, crawling, crouching, or step ladder use; occasional elevated work, standing trunk rotation, kneeling, squatting, or stair use; and lifting up to 35 pounds rarely, 20 pounds occasionally, and 10 pounds frequently. The therapist opined these findings denoted claimant's ability to function in the light physical demand category. The therapist's findings are consistent with claimant's credible testimony that he believes he is capable of lifting 30 to 40 pounds, but not repetitively or for prolonged periods, and is required to limit the amount of time he is in a bent posture or remains seated to drive. These restrictions foreclose claimant from returning to the majority of his former employment in fields such as laborer, heavy equipment mechanic, welder, and maintenance employee.

Although the functional capacity evaluation took place after the motor vehicle accident of February 17, 2013, there is no evidence in the record which supports a finding the motor vehicle accident impacted the results of the functional capacity evaluation. The functional capacity evaluation measured the impact of claimant's back condition upon his ability to function. While claimant initially suffered with a flare in his back symptoms post motor vehicle accident, it appears by claimant's testimony and the medical records that this flare resolved quickly and without lasting impact on claimant's back condition. By February 20, 2013, claimant's symptoms had dissipated by his voluntary account to Dr. Abernathey. Dr. Neiman opined claimant did not sustain a low back injury as a result of the motor vehicle accident. Accordingly, the undersigned finds

the occurrence of the motor vehicle accident does not warrant discounting the functional capacity evaluation.

After Dr. Abernathey released claimant from care in December 2012, defendant-employer did not place claimant in any work assignments. Defendant-employer is a staffing agency, doubtless with numerous job placements across the spectrum of physical demand levels. Defendant-employer's failure to return claimant to work in any placement is indicative of either defendant-employer's inability or unwillingness to attempt to place claimant.

Despite his permanent limitations, claimant has successfully retained and maintained work with three employers following his release. During his temporary assignment in 2012, claimant earned $16.00 per hour; if had been hired by XL Specialty Trailers directly, claimant testified he would have earned $17.00 or $18.00 per hour. However, claimant's permanent restrictions foreclose claimant from returning to his pre-injury welding work due to the weight and positional requirements.

Claimant subsequently returned to Permeate Refining in 2013 and earned $16.75 per hour; however, his return in an accommodated, supervisory position likely was influenced by claimant's former employment and may not have been available to any prospective applicant. Claimant's permanent restrictions foreclose claimant from returning to his pre-injury maintenance and welding work due to the weight and positional requirements.

Following the plant closure, claimant then secured employment with RCZ Enterprises and Mormann Farms in early fall 2014. Claimant's work with RCZ Enterprises began as an independent contractor; he was then hired as an employee earning $16.00 per hour. He concurrently works at Mormann Farms, where he is paid by the load and averages $1,000.00 per week in wages. In his work performing maintenance on race cars, driving a car hauler, and driving a cattle hauler, claimant has altered the manner in which he performs certain maintenance tasks, utilizes assistive devices, and also stops every 1 to 1 ½ hours while driving. When one considers the income from both current employers, claimant's earnings have not changed considerably following the work injury. However, claimant's earnings have not increased over the more than 3 years following the work injury.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 40 percent industrial disability as a result of the stipulated work-related injury of March 23, 2012. Such an award entitles claimant to 200 weeks of permanent partial disability benefits (40 percent x 500 weeks = 200 weeks), commencing on the stipulated date of December 18, 2012. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $750.00, and claimant was single and entitled to one exemption. The proper rate of compensation is therefore, $469.99.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the cost of $100.00 filing fee. Defendants do not dispute taxation of this cost. The filing fee is an allowable cost and is taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant an additional one thousand eight hundred fifty-four and 12/100 dollars ($1,854.12) of temporary partial disability benefits accrued during the period of June 4, 2012 through October 21, 2012.

Defendants shall pay unto claimant two hundred (200) weeks of permanent partial disability benefits commencing December 18, 2012 at the weekly rate of four hundred sixty-nine and 99/100 dollars ($469.99).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall receive credit for benefits paid.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 as set forth in the decision.

Signed and filed this 7th day of April, 2016.

Erica J. Fitch

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Ryan T. Beattie
Attorney at Law
4300 Grand Ave.
Des Moines, IA 50312-2426
ryan.beattie@beattielawfirm.com

Peter J. Thill
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807-2708
pjt@bettylawfirm.com

EJF/sam

**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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.