BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUSTIN LOEW,

Claimant,

vs.

MENARD, INC.,

Employer,

and

PRAETORIAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED
OCT 30 2018
WORKERS COMPENSATION

File No. 5057482

ARBITRATION

DECISION

Head Note Nos.: 1108, 1402, 1802,1803, 3000, 3800, 3002

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Justin Loew, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on January 23, 2017. Claimant alleged he sustained a work-related injury on March 19, 2015. (Original notice and petition)

For purposes of workers' compensation, Menard, Inc., is insured by Praetorian Insurance Company. Defendants filed their answer on February 15, 2017. The defendants admitted the occurrence of the work injury on March 19, 2015 but they denied any injury that resulted in a second surgery. A First Report of Injury was filed on March 9, 2016.

The hearing administrator scheduled the case for hearing on January 29, 2018. The hearing took place at 150 Des Moines Street in Des Moines, Iowa. The undersigned appointed Ms. Tammy L. Guenther, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants did not call any witnesses to testify at the hearing. Joint Exhibits 1 through 22 were admitted. The parties also submitted post-hearing briefs on February 19, 2018. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;
2. Claimant sustained an injury on March 19, 2015, which arose out of and in the course of his employment;
3. The alleged injury is a cause of both temporary and permanent disability;
4. While healing period benefits are in dispute, the parties admit claimant was off work from October 1, 2016 through May 16, 2017;
5. The permanent disability is an industrial disability;
6. Defendants waive any affirmative defenses they may have had available to them;
7. Prior to the hearing, defendants paid claimant 74.54245 weeks of compensation at the rate of $322.26 per week for a total of $24,022.05; and
8. The parties agree claimant has paid the costs listed in his attachment. (However, no such attachment was found.)

ISSUES

The issues presented are:

1. The extent of healing period benefits to which claimant is entitled;
2. The nature and extent of claimant's permanent partial disability;
3. Whether the commencement date for permanent partial disability benefits is September 27, 2016 or May 16, 2017;
4. Whether the weekly benefit rate is $284.90 or $290.07; and
5. Whether defendants are liable for the payment of medical expenses pursuant to Iowa Code section 85.27.
6. Whether defendants are liable for the cost of the functional capacity evaluation performed by Daryl Short, DPT, of Short Physical Therapy, PLLC, in the amount of $900.00.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and after judging the credibility of claimant, plus after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 30 years old and married. He was single on the date of his March 19, 2015 work injury. He graduated from high school in 2007. Then he received an Associate of Science degree from Iowa Western Community College in Electrical Engineering Technology. Claimant transferred to the University of Northern Iowa where he attended classes for 3 years. He testified he is 3 or 4 courses shy of receiving his bachelor's degree. Claimant has worked for Menard, Inc. for approximately 11 years.

On March 19, 2015, claimant was working full time in the receiving department. Claimant unloaded patio chairs from the back of a truck. One of the chairs tipped backwards and claimant felt pain on the lower left side of his back. Claimant testified he dropped to his knees.

RELEVANT TREATMENT RECORDS

The employer sent claimant to Covenant Clinic Occupational Medicine & Wellness on April 6, 2015. (Joint Exhibit 21, pages 168-169) James Haag, PA-C, examined claimant for pain in the lumbar region. (Jt. Ex. 21, p. 168) Mr. Haag diagnosed claimant with a lumbar sprain. (Jt. Ex. 21, p. 169) Medication and physical therapy were prescribed. The physician's assistant returned claimant to restricted duty at work. (Jt. Ex. 21, p. 169) The restrictions imposed were:

> Back: Bending may be performed up to 15 minutes per hour. Lifting should be limited to 10 pounds or less. Pushing and pulling should be limited to 20 pounds or less. sit/stand/walk [sic] as needed.

(Jt. Ex. 21, p. 169)

Claimant returned to the clinic on April 13, 2015. Mr. Haag prescribed Naproxen to be taken twice a day. (Jt. Ex. 21, p. 171) Physical therapy was continued and work restrictions as stated above. (Jt. Ex. 21, p. 171) Claimant was advised to return to the clinic in 10 days. (Jt. Ex. 21, p. 171) On April 22, 2015, Mr. Haag ordered Magnetic Resonance Imaging. (Jt. Ex. 21, p. 173)

MRI testing occurred on April 28, 2015 at Allen Memorial Hospital. (Jt. Ex. 5, p. 72) Rajeev Anugu M.D., interpreted the results as:

IMPRESSION:

Left paracentral disc protrusion at L5-S1 with possible impingement on left S1 nerve root.

Central disc protrusion at L3-L4 and L4-L5.

Congenital spinal stenosis secondary to short pedicles.

(Jt. Ex. 5, p. 73)

In May of 2015, the physician's assistant recommended several chiropractic treatments. (Jt. Ex. 21, p. 174) Then pain management was suggested. (Jt. Ex. 21, p. 178)

Eventually, Mr. Haag referred claimant to Loren J. Mouw, M.D., a board certified neurosurgeon in Cedar Rapids, Iowa. (Jt. Ex. 1, p. 1) The initial examination occurred on January 28, 2016. (Jt. Ex. 1, p. 1) Claimant complained of low back pain, paresthesias in the left leg, left leg weakness, and left leg pain. (Jt. Ex. 1, p. 1) Claimant rated the pain at 8 out of 10 on an analog scale with 10 being the worst pain imaginable. (Jt. Ex. 1, p. 1) Dr. Mouw ordered another MRI. (Jt. Ex. 1, p. 2)

Dr. Mouw reviewed the following radiology reports and images with claimant:

INFORMATION REVIEWED:

The following information was reviewed: radiology reports and images and referring physicians [sic] notes. An MRI of the lumbar spine revealed a herniated disc. The herniated disc is at L5-S1 on the left. He has a large central protrusion at L4-5 and small right L3-4 protrusion.

(Jt. Ex. 1, p.3)

Dr. Mouw fully apprised claimant of the risks of surgery. Nevertheless, claimant selected to proceed. On April 20, 2016, Dr. Mouw performed a left L5-S1 diskectomy with an intraoperative microscope to claimant's lumbar spine. (Jt. Ex. 1, p. 7) Claimant had a two week follow-up appointment with Dr. Mouw on May 5, 2016. (Jt. Ex. 1, p. 7) Claimant reported his symptoms persisted, despite the surgery. (Jt. Ex. 1, p. 7) Dr. Mouw recommended physical therapy. (Jt. Ex. 1, p. 8) Six weeks after surgery, claimant reported some improvement with his symptoms. (Jt. Ex. 1, p. 9) The patient did report, "developing parethesias in the left leg and LBP and left hip pain. The paresthesias involve the left plantar aspect of foot distribution." Claimant stated he woke up with low back pain and left lower extremity numbness and tingling one Saturday morning. (Jt. Ex. 1, p. 9) Dr. Mouw opined claimant would benefit from work hardening. (Jt. Ex. 1, p. 10)

On June 28, 2016, claimant presented for a 2 month postoperative evaluation. Claimant reported his postoperative symptoms had improved and his left leg pain had resolved. However, claimant described increased low back pain with physical therapy over the prior week. **He indicated he developed right-sided back pain.** (Jt. Ex. 1, p. 11) (Emphasis added.) The physical therapist recommended claimant engage in continued work hardening. (Jt. Ex. 1, p. 11)

Claimant reported to his physical therapist that his **right side** was hurting after he began increasing the weight he had to lift during his therapy sessions. (Jt. Ex. 2, p. 60) (Emphasis added.) Claimant requested the use of lighter weights during his sessions. (Jt. Ex. 2, p. 60) Claimant also reported to his physical therapist that he had been vomiting in July of 2016. Claimant was not sure if the vomiting was causing his **right back** to hurt. (Jt. Ex. 2, p. 64) (Emphasis added)

One month later, on July 28, 2016, claimant returned for a follow up examination. The treating physical therapist recommended claimant complete the work hardening program. (Jt. Ex.1, p. 4). Claimant was in agreement with the recommendation of the physical therapist. (Jt. Ex. 1, p. 4)

On August 31, 2016, Kelly A. Martin, DPT, issued her Therapy Discharge Summary. (Jt. Ex. 2, pp. 67-68) The therapist noted claimant was concerned about pain in his right low back area. (Jt. Ex. 2, p. 67)

On September 27, 2016, claimant returned to Dr. Mouw with symptoms of low back pain, paresthesias/pain in the in the **right leg, and right leg weakness.** The pain was new since the previous visit. (Emphasis added.) (Jt. Ex. 1, p. 15) Claimant described his pain as 8 out of 10 on the pain scale. The right leg pain was confined to the right posterior thigh and the hamstrings. (Jt. Ex. 1, p. 15) Claimant reported to Dr. Mouw, "He can recall no specific event causing the discomfort." (Jt. Ex. 1, p. 15) Dr. Mouw ordered MRI testing. (Jt. Ex. 1, p. 16)

On October 7, 2016, claimant underwent MRI testing at the McFarland Clinic in Marshalltown. Matthew C. Peterson, M.D., determined the findings were:

L1-2: Unremarkable.

L2-3: Unremarkable.

L3-4: Mild diffuse disc bulge with small right paracentral disc protrusion which mildly effaces the anterior thecal sac. No significant neural foraminal impingement.

L4-5: Focal right paracentral disc extrusion which causes moderate canal stenosis and displaces the descending non exited right L5 nerve root. There is mild bilateral neural foraminal impingement.

> L5-S1: Diffuse disc bulge which is eccentric to the left with foraminal component combined with facet hypertrophy to cause mild-to-moderate left-sided neural foraminal narrowing. No significant right-sided neural foraminal narrowing.
>
> Impression:
>
> Multilevel degenerative changes of the lumbar spine worst at L4-5 where there is a right paracentral disc extrusion causing moderate canal stenosis and mass-effect on the descending non exited right L5 nerve root.

(Jt. Ex. 3, p. 70)

Four days thereafter, claimant again saw Dr. Mouw. The neurosurgeon opined:

> **INFORMATION REVIEWED:**
>
> The following information was reviewed: radiology reports and images and referring physicians [sic] notes. An MRI of the lumbar spine revealed postoperative changes L5-S1 left. New herniated disc L4-5 right. Small protrusion L3-4 right.

(Jt. Ex. 1, p. 17)

Dr. Mouw discussed surgery with claimant. All of the risks were discussed with claimant. Claimant desired to proceed with a right L4-5 minimally invasive diskectomy. (Jt. Ex. 1, p. 18) Dr. Mouw performed the surgery on February 1, 2017.

Claimant presented to Dr. Mouw for a 2-week postoperative examination on February 16, 2017. (Jt. Ex. 1, p. 27) Claimant reported the symptoms had improved by 50 to 75 percent. (Jt. Ex. 1, p. 27) Once again, physical therapy was recommended. (Jt. Ex. 1, p. 28)

By March 16, 2017, claimant reported his symptoms had improved by 75 percent in both his back and legs. (Jt. Ex. 1, p.29) On April 13, 2017, claimant returned to see Dr. Mouw. Claimant indicated he had developed paresthesias in the left leg and it involved the left posterior thigh distribution. Claimant reported left-sided symptoms during physical therapy but no right-sided problems. (Jt. Ex. 1, p. 31)

On May 16, 2017, claimant had a 3-month postoperative evaluation. Claimant reported the symptoms on the right side of his back and his right leg symptoms had resolved. (Jt. Ex. 1, p. 33) Dr. Mouw opined since the symptoms had resolved, claimant need only return on an as needed basis. (Jt. Ex.1, pp. 33-34) Dr. Mouw rated claimant as having a 10 percent permanent impairment to the body as a whole according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 384, Table 15-3, category III. (Jt. Ex. 1, page 35)

Dr. Mouw did not impose any restrictions. Claimant testified he thought he would lose his job if permanent work restrictions were imposed.

With respect to the cause of claimant's L4-5 disk herniation, Dr. Mouw related the condition to the work injury of March 19, 2015, and/or the physical therapy treatment following the April 20, 2016 surgery as substantial factor[s] in aggravating the degenerative changes at the L4-5 level. (Jt. Ex. 1, p. 22)

Dr. Mouw also testified by deposition on January 25, 2018. When asked about causation, he answered:

> Q. And if we go to Justin's case then and ask you for your opinion as to whether or not the leg pain on the right side that he told you about in September is related to the low back pain brought about by the increased therapy, what is your opinion on that?
>
> A. Mr. Loew's history to me was that his right-sided back pain began after – during physical therapy. It was my understanding that his back pain may have improved but did not resolve and that a week prior to seeing me, he developed right lower extremity discomfort. To me it would seem that this is a continued- his symptoms continued from the time he complained of back pain during his therapy, so they would be related.
>
> Q. You've probably answered this, so I apologize for asking a redundant question, but is that your best medical judgment as to what happened here?
>
> A. Based upon the patient's history, I believe he had persistent back pain, he developed right lower extremity symptoms from it, and he attributes it to his increased activities of physical therapy, which appears to be substantiated by the therapist's notes as well.
>
> Q So do you believe then that the most likely explanation for the development of the low back pain and later the right leg pain would be the activities that he was asked to perform at physical therapy?
>
> A. Based upon the patient's history, yes.
>
> Q. And do you – After having reviewed the physical therapy records and discussing them to some extent today here in the deposition, do you have any reason to doubt the patient's history given to you?
>
> A. I don't, no.

(Jt. Ex. 17, pp. 33-34)

Defendants requested an independent medical report from R. L. Broghammer, M.D., MBA, MPH. He is a staff physician at Centura Centers for Occupational Medicine in Lone Tree, Colorado. Initially, Dr. Broghammer performed a records review of claimant's case. The report was written on November 18, 2016. Defense counsel posed a question to Dr. Broghammer and requested a response to the question. The question and response are duplicated below:

> Is Mr. Loew's disk herniation on the right side related to his alleged injury of March 20, 2015?
>
> No, it is not. In my medical opinion to a reasonable degree of medical certainty, Mr. Loew's disk herniation on the right side, which is new, is not related to his alleged industrial injury and was not substantially contributed to or materially aggravated by his alleged injury of March 20, 2015.
>
> In my medical opinion to a reasonable degree of medical certainty, Mr. Loew's left disk herniation for which Dr. Mouw completed appropriate operative intervention was more likely than not aggravated by the alleged work injury of March 20, 2015.
>
> In my medical opinion to a reasonable degree of medical certainty, Mr. Loew's preexisting lumbar spondylosis and the natural progression of this disease is the sole contributing factor to his disk herniation on the right side. It should be noted that his initial MRI did not demonstrate any right-sided pathology, and his repeat MRI completed in October 2016, demonstrated a right paracentral disk extrusion at L4-L5. In my medical opinion, the new right sided disc extrusion at L4-L5 is in no way related to the industrial injury that occurred over one and one-half years prior.
>
> In my medical opinion, the new finding from the October 7, 2016, MRI represents natural progression of Mr. Loew's lumbar spondylosis. It should also be noted that Dr. Mouw in his September 27 clinical note references the fact that Mr. Loew's symptoms began spontaneously approximately one week prior to the September 27, 2016, visit. Dr. Mouw also noted specifically, "He can recall no specific event causing the discomfort." In this regard, it is my medical opinion that this represents a condition with an unknown cause more likely than not related to the worker's preexisting lumbar spondylosis. It should be noted that these types of changes are quite common in the symptomatic general population. Please see attached reference list. (List is omitted here.)
>
> **REMARKS**
>
> The opinions rendered in this case are the opinions of the reviewer. The review has been conducted without a medical examination of the individual reviewed. The review is based on documents provided with the

assumption that the material is true and correct. If more information becomes available at a later date, an additional service/report/consideration may be requested. Such information may or may not change the opinions rendered in this report. This report is a clinical assessment of documentation and the opinions are based on the information available. This opinion does not constitute, per se, a recommendation for specific claims or administrative functions to be made or enforced.

My opinions expressed above are those that I currently hold with a reasonable degree of medical certainty based on my education, training, and experience as a Board-Certified Specialist in Occupational and Environmental Medicine, licensed to practice allopathic medicine in the State of Iowa.

I hope this aids in your management of Mr. Loew's case. If you have any further questions, please feel free to contact my office.

(Jt. Ex. 7, pp. 81-82)

On March 27, 2017, Dr. Broghammer conducted an actual physical examination of claimant in Des Moines, Iowa. (Jt. Ex. 7, p. 85) Dr. Broghammer described the physical examination he conducted. The description is duplicated below:

PHYSICAL EXAMINATION

Physical examination revealed a well-developed, well-nourished male who appeared his stated age. Verbal reported height was 6 feet 2 inches. Verbal reported weight was 275 pounds. Deep tendon reflexes were 1+ and symmetrical in the bilateral patellar and Achilles tendons. There was subjectively decreased sensation in the left foot dorsum.

Examination of the lumbar spine revealed two well-healed surgical scars consistent with Mr. Loew's prior lumbar microdiskectomy. One scar was to the right of the lumbar spine, and one scar was to the left. Both were directly across from one another. Skin was otherwise without lesions.

The lumbar spine itself revealed normal alignment with no evidence of asymmetry and no stepoff. Muscle bulk and symmetry were normal in the lumbar spine. Seated straight leg raising was negative for radicular symptoms bilaterally. Supine straight leg raising was negative for radicular symptoms bilaterally and accomplished to approximately 70 degrees. Mr. Loew reported back pain with supine straight leg raising, but no leg pain. EHL strength was 5 out of 5 bilaterally.

> Axial load test and simulated axial rotation were negative for increased pain complaints. Lumbar range of motion demonstrated the worker able to flex forward to 70 degrees. Extension was to 25 degrees. Right and left lateral bending were to 25 degrees each. The worker's gait, station, and posture were normal and maintained.

(Jt. Ex. 7, p. 92)

Dr. Broghammer diagnosed claimant with lumbar strain and aggravation of a preexisting L5-S1 disc herniation which resulted in left leg pain. (Jt. Ex. 7, p. 92) Dr. Broghammer opined claimant reached maximum medical improvement for the March 19, 2015 work injury on September 27, 2016. (Jt. Ex. 7, pp. 92-93) Dr. Broghammer opined claimant had a 10 percent whole person impairment according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, page 384, Table 15-3. (Jt. Ex. 7, p 93) The evaluating physician did not believe work restrictions were appropriate for claimant. (Jt. Ex. 7, p. 93)

With respect to claimant's right-sided complaints, Dr. Broghammer was in total disagreement with the opinions of Dr. Mouw. (Jt. Ex. 7, p. 94) Dr. Broghammer opined:

> No, I do not agree with Dr. Mouw that Mr. Loew's right-sided complaints are more likely than not attributable to the physical therapy treatment performed for his 3/19/15 work injury. Physical therapists are highly trained, highly skilled individuals and are quite adept at helping injured workers to heal. It is highly unlikely that any physical therapy that Mr. Loew was performing resulted in any aggravation of his lumbar spondylosis.
>
> In addition, the medical records reflect that Mr. Loew had no specific event or injury that correlated with his right leg complaints. In fact, according to my interview with Mr. Loew today, he indicated that his pain greatly increased upon awakening on a Monday morning. Mr. Loew reported to me today that he did nothing the day prior. This further suggests that the natural progression of Mr. Loew's pre-existing spondyloarthropathy was responsible for his increased low back pain and right leg radicular complaints.
>
> In my medical opinion, it is more likely than not that Mr. Loew's right-sided disc herniation represents natural progression of his chronic preexisting condition. In this regard, I stand by my opinions expressed in my 11/18/2016 report. Please see the attached reference list discussing the natural progression of spinal spondyloarthropathy. (List not included.)

(Jt. Ex. 7, p. 94)

Claimant had an independent medical examination with Sunil R. Bansal, M.D., M.P.H., a Board Certified physician in Occupational Medicine. The examination occurred on September 26, 2017. (Jt. Ex. 9, p. 103) Dr. Bansal conducted a physical examination of claimant. In his report, the independent medical examiner noted:

BACK:

Well-healed surgical scarring is noted.

There is tenderness to palpation over the lower lumbar paraspinals.

Fabre's Test:

Left: Negative.

Right: Negative.

(Performed Supine and Sitting)

LEFT STRAIGHT LEG RAISE: Positive at 50 degrees.

RIGHT STRAIGHT LEG RAISE: Negative.

RANGE OF MOTION (inclinometer)

Flexion: 60 degrees

Extension: 30 degrees

Left Lateral Flexion: 35 degrees

Right Lateral Flexion: 30 degrees

SENSATION

LEFT LOWER EXTREMITY

Using a two-point discriminator, there is a loss of sensory discrimination over the lateral lower leg (12 mm).

LOWER EXTREMITY REFLEXES:

Right: Patellar +2, Achilles +2, hamstring +2

Left: Patellar +2, Achilles +2, hamstring +2

LOWER EXTREMITY STRENGTH

	Right	Left
Ankle dorsiflexion	5/5	4/5
Plantar flexion:	5/5	5/5
Quadriceps:	5/5	5/5

(Jt. Ex. 9, pp. 112-113)

Dr. Bansal opined the work injury on March 19, 2015 was a substantial factor in the development of the herniated disk at L5-S1, for which surgery was performed by Dr. Mouw on April 20, 2016. (Jt. Ex. 9, p. 113) Dr. Bansal also held the opinion, the May 2016 through August 2016 physical therapy sessions were substantial factors in aggravating claimant's degenerative changes at the L4-L5 level and in the development of the herniated disc on the right side, resulting in the need for surgery on February 1, 2017. (Jt. Ex. 9, p. 114)

Specifically, Dr. Bansal opined:

> In my medical opinion, both the injury on March 19, 2015 and the subsequent physical therapy/work hardening were substantial contributing factors towards his right-sided disc herniation, requiring surgery. As noted in his initial post March 19, 2015 injury MRI, an L4-L5 central disc protrusion with annular tear was noted. Essentially, he had a tear of the covering of his disc and centrally placed disc protrusion. Against that backdrop, he performed rigorous and repetitive lifting tasks in therapy and work hardening that caused leaking or extravasation of the disc tissue at L4-L5. With a torn disc covering, the threshold for further herniation is markedly lowered. Given that he already had a central disc protrusion at that level, it would not be difficult for the disc material extravasation to continue to leak into the right neural foramen.

(Jt. Ex. 9, pp. 114-115)

Dr. Bansal provided a permanent impairment rating for claimant subsequent to the physical examination. Dr. Bansal relied on the range of motion method often employed in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Bansal used Tables 15-8 and 15-9. His analysis is duplicated below:

> Flexion of 60 degrees- 0% BAW.
>
> Extension of 30 degrees – 0% BAW.
>
> Left Lateral Bending of 35 degrees – 0% BAW.
>
> Right Lateral Bending of 30 degrees – 0% BAW.

Total for range of motion is 0% impairment of the body as a whole.

The rating for the accompanying diagnosis, Table 15-7, letter IIe+f+g is most appropriate, assigning a 10% impairment of the body as a whole for his disc surgery, an additional 1% for two levels, and an additional 2% for two surgeries Total is 13% for diagnosis.

Ratings for spinal nerve deficits, using Tables 15-15, 15-16, and 15-18, the following calculations are derived:

20% sensory and motor of L5 =42 x 20% = 8%

Total spine impairment using the Combined Values Chart is 13 + 8 = **20% impairment of the body as a whole.**

(Jt. Ex. 9, p. 116)

RELEVANT POST-SURGICAL EMPLOYMENT INFORMATION

When claimant was released to full duty work in May of 2016, there was an opening for a delivery coordinator at the Menard's Store in Council Bluffs. Claimant also worked at the Shelby Distribution Center for one year. Just prior to the date of the arbitration hearing, management offered claimant a position as an assistant manager at the Menard's Store in Cedar Falls. Claimant was provided a pay increase to $14.15 per hour. He will be eligible for an annual manager's bonus. Claimant testified there is over-time work available but he is only required to work 40 hours per week. Claimant testified he is happy with his present job. His current duties include coordinating deliveries to and from the store, working with customers, inspecting deliveries, invoicing, telephone customer service, and working with customers including building contractors, to design structures and determine the materials needed.

RATIONALE AND CONCLUSIONS OF LAW

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (1956). It the claimant had a preexisting condition or disability that is materially, aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 135, 115 N.W.2d 812, 815 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 375, 112 N.W.2d 299, 302 (1961).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

It is stipulated claimant sustained a permanent disability as a result of a work injury on March 19, 2015. The salient issue is whether the physical therapy treatment ordered by Dr. Mouw following the April 2016 surgery was a substantial factor in causing the herniated disk at the L4-5 level, resulting in the need for a second surgery on February 1, 2017.

The long settled law in Iowa has been: Defendants are responsible when treatment aggravates or increases disability so long as the worker is not negligent in selecting the person who administers the treatment. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 386-387, 101 N.W.2d 167, 173 (1960). In Bradshaw, the Iowa Supreme Court stated:

> [I]t is also generally held that a workman [sic] who receives an injury which entitles him to workmen's [sic] compensation may have compensation for an aggravation of increase thereof in its treatment provided he is not negligent in selecting the person who administers such treatment. (Citations omitted.)
>
> And the rules just mentioned seem equally applicable to negligent treatment of an injury by nurses or other employees of a hospital in which the injured person is treated. (Citations omitted.)

(Bradshaw at 386-387)

There is a preponderance of the evidence to establish claimant sustained an injury to his L4-5 disk as a result of the work hardening phase of the physical therapy treatment ordered by Dr. Mouw after the first surgery on April 20, 2016. Claimant reported right-sided back pain at his two-month post-operative appointment with Dr. Mouw. The physical therapist recommended claimant engage in additional work hardening. Claimant had not yet reached maximum medical improvement.

Claimant reported his right side hurt after he increased the weight he lifted during work hardening. He requested a reduction in the amount of weight he was expected to

maneuver. There were numerous references throughout the physical therapy notes where claimant had discussed symptoms in the L4-5 area of the spine. Ms. Martin, the physical therapist, discussed claimant's concerns with his right L4-5 spine in the Therapy Discharge Summary. (Jt. Ex. 2, p. 67) Claimant complained to Dr. Mouw of radicular pain in September of 2016. MRI testing demonstrated a L4-5 disk herniation. Dr. Mouw had expressed his written opinion there was medical causation between the first surgery and the requisite physical therapy. The surgeon testified to the same opinion. Dr. Mouw had no reason to doubt the credibility of his patient.

Dr. Bansal concurred with the opinions expressed by Dr. Mouw regarding medical causation. Dr. Bansal provided an especially stalwart opinion that was previously cited above at Joint Exhibit 9, pages 114-115.

Only Dr. Broghammer disagreed about medical causation. He opined claimant's pre-existing lumbar spondylosis and the natural progression of the disease was the sole contributing factor to the disk herniation on the right side. (Jt. Ex. 7, pp. 81-82, 94) Dr. Broghammer did not believe claimant had any specific event or injury that occurred. In short, the independent medical examiner did not find claimant to be a credible person. Unlike Dr. Broghammer, this deputy did find claimant to be a credible witness. Claimant has established he sustained an injury to his spine at L4-5 as a result of the physical therapy he was performing after the surgery he had for the work injury that occurred on March 19, 2015.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Dr. Mouw provided a functional impairment rating of 10 percent after the initial surgery. (Jt. Ex. 1, p.23) The surgeon rated claimant as having an additional 10 percent functional impairment rating after the second surgery. (Jt. Ex. 1, p. 35) Dr. Bansal provided a 20 percent functional impairment rating.

Claimant testified he did not want the surgeon to impose any work restrictions. Claimant feared he would lose his job if permanent work restrictions were imposed. At the time of the arbitration hearing, claimant had been back to work for approximately 8 months. He testified he is incapable of lifting appliances and unloading semi-truck trailers since his return to work. He no longer holds a license to drive a fork lift truck but he has driven one since he returned to work. He has not been on a "Joe Lift." The physical therapy records demonstrate claimant is capable of lifting, pushing, pulling and carrying 50 pounds.

In claimant's post-hearing brief, counsel cites to an appeal decision written by Commissioner Cortese in Baker v. Bridgestone/Firestone, File No. 5040732 (April 13, 2016). The Commissioner wrote at page 11 of the decision:

> A release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means the worker is limited in the activities of daily living. See AMA Guides to Permanent Impairment, Fifth Edition, Chapter 1.2, p.2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, e.g., the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the worker's future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low....Consequently, the impact of a release to full duty must be determined by the facts of each case.

(Baker at page 11)

Claimant is a young worker. He has many years available in the workforce. He is just a few courses shy of obtaining his bachelors' degree. He is capable of returning to college or seeking retraining. He earns more money now than he did at the time of his work injury. Claimant enjoys his present position within the company.

It is the determination of the undersigned; claimant has sustained a thirty (30) percent permanent partial disability as a result of his work injury. The commencement date for permanent partial disability is May 16, 2017. Defendants shall pay unto

claimant one hundred-fifty weeks of benefits. However, defendants shall take credit for permanency benefits previously paid as follows:

September 1, 2016 through September 27, 2016 (4 weeks X $449.20 per week=$1,797.20).

May 17, 2017 through August 16, 2017 (13 weeks at $322.26 and 1 week at $276.24= $4,465.62).

TOTAL CREDIT FOR PERMANENCY BENEFITS = $6,262.82

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant is requesting healing period benefits from April 20, 2016 through August 31, 2016 and from September 28, 2016 through May 16, 2017. The total number of weeks equals 52. Claimant is entitled to healing period benefits for the same period.

A major issue in the case is the weekly benefit rate. Claimant alleges the gross earnings were $705.86 per week with a weekly benefit rate of $434.09 or $290.07. Defendants argue the gross weekly earnings were $445.71 per week and weekly benefit rate was $284.90 per week.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

It is claimant's duty to prove the gross wages and the weekly benefit rate. Claimant contends his February 2015 bonus in the amount of $3,258.19 should be included in calculating the weekly rate. The employer maintains the bonus is based on

company profitability and is discretionary. (Jt. Ex. 14) All parties relied on the Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan that was issued by Commissioner Joseph Cortese on July 12, 2017. After listening to claimant's testimony, reading joint exhibit 14 and pondering the arguments of the parties in the briefs, it is the determination of this deputy, defendants have the better argument.

Defendants calculated claimant's gross earnings as $445.71. (Jt. Ex. 1, p. 149) The method used relied upon the 13 consecutive weeks immediately prior to the March 19, 2015 work injury. The resulting weekly benefit rate equals $284.90. Claimant asserted several of the weeks were not representative. However, no evidence was produced to explain why the weeks were not representative. A review of claimant's payroll history dating back to March 19, 2014 shows it was customary and usual for claimant to work weeks in which the total hours worked were similar to the weeks claimant wanted to exclude as not representative. (Jt. Ex. 10, pp. 125.1-125.2) Weeks with fewer hours worked are representative weeks for claimant.

As indicated earlier, claimant requested the average weekly wage should be calculated with the inclusion of the Menards' instant profit-sharing (IPS) bonus included. I am in agreement with defendants. The IPS bonus does not qualify as a regular bonus under Iowa Code section 85.22 because it is paid to an individual employee in a particular year only upon satisfaction of a number of requirements. The requirements are: 1) the employee has to achieve 1,000 hours paid during W-2 year; 2) the employee is paid for hours actually worked on or after December 15 of the W-2 year; 3) the store must achieve a certain level of profitability. Additionally, the employer may amend or cancel the IPS program in whole or in part and without notice to any employees. The employer also has the right to reduce, modify or withhold benefits due to regulatory events, changes in business conditions, individual performances or for any other reason. (Jt. Ex. 14, p. 145)

In the July 12, 2017 Declaratory Order, the commissioner determined a similar bonus to Menards' IPS bonus was "not a recurring payment or is an irregular bonus dependent on the overall profitability ... for the prior fiscal year." Thus, the commissioner concluded the bonus should not be included in the gross earnings when determining rate. Here, the Menards' IPS bonus is almost identical to the profit sharing bonus in the Declaratory Order. The IPS bonus should not be included in the calculation of the weekly rate. It is the determination of this deputy; the weekly benefit rate for claimant's work injury is $284.90 per week.

Because claimant's second surgery and all of the medical costs were paid by the insurance carrier for claimant's spouse or else claimant paid some out of pocket expenses, medical benefits are at issue. Likewise, medical transportation costs are in dispute. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred

for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants shall reimburse the health and accident insurance carrier for all expenses it incurred to pay for the cost of claimant's medical bills for the L4-5 spine condition. The reimbursement totals $11,033.75. (Jt. Ex. 12, p. 132) Defendants shall also reimburse claimant for his out-of-pocket expenses in the amount of $3,074.27 and the unpaid out of pocket expenses, $1,051.30. (Jt. Ex. 12, p. 132) Defendants owe claimant medical mileage as detailed in joint exhibit 13, pages 133-134. The total miles equate to 3,216.8.

Claimant is requesting the payment of an independent medical examination pursuant to Iowa Code section 85.39. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

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

Defendants shall reimburse claimant for the cost of the independent medical examination provided by Dr. Bansal in the amount of $532.00

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

The final issue is the matter of costs.

Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant is requesting certain costs as detailed on page 2 of the hearing report

The following costs are taxed to defendants:

Filing fee: $100.00

Dr. Mouw's Report: $200.00

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the weekly benefit rate of two hundred eighty-four and 90/100 dollars ($284.90) and commencing from May 17, 2017.

Defendants shall pay fifty-two (52) weeks of healing period benefits as detailed in the body of this decision at the weekly benefit rate of two hundred eighty-four and 90/100 dollars ($284.90) per week.

Defendants shall pay the cost of the independent medical examination performed by Dr. Bansal in the amount of five hundred thirty-two and no/100 dollars ($532.00).

Defendants shall pay medical costs and medical mileage pursuant to Iowa Code section 85.27 and as detailed in the body of this decision.

All past due benefits shall be paid in a lump sum together with interest as allowed by law.

Defendants shall take credit for all benefits previously paid to claimant.

Defendants shall file all reports as required by law.

Signed and filed this 30th day of October, 2018.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.