BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SIDNEY ROBERT LONG, Claimant, vs. JACOBSON TRANSPORTATION COMPANY, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 5067240.01 ARBITRATION DECISION Head Note Nos.: 1100, 4100, 1702, 1803, 1801, 1806

STATEMENT OF THE CASE

Claimant, Sidney Long, has filed a petition for arbitration seeking workers' compensation benefits against Jacobson Transportation Company, employer, and Indemnity Insurance Company of North America, insurance carrier, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on October 30, 2020, via Court Call. The case was considered fully submitted on November 20, 2020, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-7, claimant's exhibits 1-8, Defendants exhibits A-O, and the testimony of claimant, Jessica Cabanaw, and Noah Peterson.

ISSUES

1. Whether claimant is entitled to temporary or healing period benefits;
2. Whether claimant sustained a permanent disability;
3. Whether claimant's injury resulted in a scheduled member or industrial disability;
4. Whether claimant is entitled to a finding of permanent total and/or benefits under the odd-lot doctrine;
5. Whether claimant is entitled to payment and/or reimbursement of medical expenses itemized in Claimant's Exhibit 7;
6. Whether claimant is entitled to a reimbursement of a medical examination under Iowa Code section 85.39;
7. Whether defendants are entitled to credits under Iowa Code section 85.34 for prior injury with the same employer;

8. And the assessment of costs.

STIPULATIONS

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

The parties stipulate claimant sustained a work related injury arising out of and in the course of employment on December 17, 2018. While the parties disagree as to whether claimant is entitled to additional healing period benefits, they agree claimant was off work from the date of the injury through July 16, 2020.

At the time of the accepted work injury, claimant's gross earnings were $909.23 per week. He was single and entitled to one exemption. Based on the foregoing, claimant's weekly benefit rate is $565.64.

FINDINGS OF FACT

Claimant was a 55-year-old person at the time of hearing. He was an above average student. He liked shop and history and auto mechanics. He is a person who likes to work with his hands and mechanical things. He obtained his Class A, CDL in 1999 and has held it for twenty years. His adult work history consisted of truck driving jobs that required him to have a healthy body.

A Con-Way Truckload Services Driver/Sales Rep (DSR) position required the ability to change tires, lift chains, unload and load or stack freight. (Defendants' Exhibit L:110) These tasks required the frequent lifting of up to 50 pounds and the occasional lifting of more than 76 pounds. Id. Claimant also testified that inspections of the vehicles and trailers required bending, crawling and lifting. He was terminated on or about August 31, 2019, as part of a reduction in the work force. (Claimant's Exhibit 5:76)

Some of claimant's testimony about the physical demands of his job were not consistent from his 2017 testimony in a previous workers' compensation proceeding and his testimony at hearing. For instance, he testified during his 2017 deposition that as a concrete truck driver, he was only required to hose out the chutes that weighed five to seven pounds. (Depo p. 15) At the 2020 hearing, he maintained those chutes were 50 pounds. At hearing, he testified that even with no touch driving, there were physical tasks. In the deposition testimony, he testified that dock to dock driving required no physical tasks other than opening the doors. (Depo p. 19) At CRST, claimant did drop and hook trucking which required no loading or unloading. (Depo p. 26-27)

During his period of employment with defendants, claimant did have at least two accounts where he was not required to touch the load.

On October 17, 2007, claimant suffered an injury to his left shoulder while pulling himself into his truck. He first sought care at Boone County Family Medicine with Richard E Vermillion, D.O. (JE 1:1) Claimant displayed severe restriction in shoulder movement and trigger point tenderness. Id. In the medical record, claimant's medical history included fibromyalgia, fibromyositis, lumbosacral strain and torsion, and psoasitis. Id. An MRI study revealed a small incomplete full thickness rotator cuff tear and some mild to moderate signs of degenerative disease. (JE 1:3) He was initially provided treatment in the form of injection, medications, and physical therapy. (JE 1:1, 1:5) Eventually, he underwent surgical repair.

On January 11, 2017, claimant was seen at Newton Clinic by Stephanie Bantell, M.D., for an injury to multiple body parts following a fall while disembarking the cab of his semi truck. (JE 3:22) He fell and did a sort of splits and felt something pop or give in the left knee. He fell on his right knee and then back onto his right shoulder. Id. The examination revealed swelling in the left knee with tenderness and limited ROM. (JE 3:22) Claimant exhibited tenderness in the right shoulder blade with active range of motion limited to 80 degrees but full passive ROM. (JE 3:23)

An MRI of the right shoulder was conducted on January 27, 2017, which revealed a full thickness rotator cuff superimposed with rotator cuff tendinopathy. (JE 3:32) Following the MRI, claimant was referred to Dr. Vincent at Iowa Ortho. (JE 3:33)

On the same day, claimant returned to Dr. Bantell with reports of ongoing pain and weakness in the left knee. (JE 3:35) Because of this, claimant was sent for an MR Arthrogram which showed a rupture of the ACL (JE 3:37)

Claimant presented Christopher Vincent, M.D., on February 1, 2017, regarding right shoulder pain. (JE 4:85) Dr. Vincent noted the claimant had not been previously treating for the right shoulder nor had he suffered any previous right shoulder pain. Id. Claimant's reports of pain, tenderness and range of motion restrictions along with the testing were suggestive of a full-thickness rotator cuff tear, subacromial impingement, acromioclavicular joint arthralgia and biceps tendinopathy of the right shoulder. Id. Because of this diagnosis, Dr. Vincent offered surgical repair which claimant selected.

On March 1, 2017, claimant underwent surgical repair on the rotator cuff tear. (JE 3:44) On March 8, 2017, claimant returned to Dr. Vincent in follow up to the surgery on the right shoulder and complained of new left knee pain which claimant attributed to the fall on January 11, 2017. (JE 4:88) He shared with Dr. Vincent that while he had had past knee surgery, he had been completely asymptomatic in the recent past. (JE 4:89) Dr. Vincent suggested a corticosteroid injection, which was administered during the visit. (JE 4:90-91) Claimant was then referred to PT. (JE 3:46)

On April 12, 2017, claimant returned to Dr. Vincent for recheck of the right shoulder and follow up of the left knee complaints. (JE 4:93) Dr. Vincent discussed a number of treatment options and claimant elected to proceed with a left knee arthroscopic ACL reconstruction which took place on May 24, 2017. (JE 4:95, 97)

During a follow up with Dr. Vincent on October 11, 2017, claimant reported continuing instability in the left knee which Dr. Vincent attributed to severe atrophy. (JE 4:102) Dr. Vincent advised claimant that the visible significant atrophy of the quadriceps and hamstrings were signs of incomplete compliance with exercise and strengthening and that there was no way for claimant to regain his strength but through resistance training. (JE 4:102) Dr. Vincent recommended claimant continue progressive strengthening with physical therapy. (JE 4:102)

Jacqueline M. Stoken, D.O., provided an expert witness report on November 20, 2017 pertaining to the January 2017 injury to claimant's right shoulder and left lower extremity. (DE G) The report noted the claimant had undergone a functional capacity evaluation which placed him in the light medium duty work category with restrictions as follows:

> Waist to floor lifting 10 lbs. frequently, 20 lbs. occasionally, and 30 lbs. rarely.
>
> Waist to crown lifting (Handles) of 10 lbs. frequently, 20 lbs. occasionally,
>
> And 25 lbs. rarely.
>
> Wait to crown lifting (Preferred) of 15 lbs. frequently, 25 lbs. occasionally,
>
> And 35 lbs. rarely.
>
> Front carry of 0 lbs. frequently, 25 lbs. occasionally, and 35 lbs. rarely.
>
> Right carry of 0 lbs. frequently, 25 lbs. occasionally, and 35 lbs. rarely.
>
> Left carry of 0 lbs. frequently, 20 lbs. occasionally, and 30 lbs. rarely.
>
> He was limited to occasional elevated work, forward bending standing,
>
> Crouching, walking and climbing a ladder with 2 hands.

(DE G:83)

The functional capacity evaluation of November 6, 2017, included a mention of low back pain in addition to the left knee and right shoulder pain. (DE I:97)

Claimant's current condition at the time of the independent medical examination of November 13, 2017 included pain in his left knee that he described as aching, shooting, stabbing, exhausting, tiring and miserable with pain ranging from 4 to 9 on a 10 scale. The pain averaged 7/10 that was 5/10 at the time of the examination. (DE G:80) Climbing stairs, lifting, and squatting worsened his pain. Id. He also complained of pain in his right shoulder that range from 3 to 6 on a 10 scale in pain. Lifting overhead and lifting 15 to 20 pounds worsened his pain. (DE G:80) Therapy and ibuprofen gave a moderate amount of relief but his pain interfered mildly with sitting for one-half hour, traveling up to one hour by car, showering and bathing, writing, typing and dressing and moderately with walking one block, standing for one-half hour, sleep, social activities, daily activities, relationships, chores around the house, sexual activities, concentration and mood. Id.

Dr. Stoken assessed 18 percent impairment of the whole person for the left knee and right shoulder pain and placed claimant in the light category of work and the low range of the medium category of work in line with the FCE of November 6, 2017. (DE G:83, DE I)

Claimant testified that despite these restrictions he was able to perform the essential functions of his job prior to the injury on December 17, 2018. In his deposition, he maintained he had no pain in his left knee or right shoulder. (DE L: 34-35)

Claimant returned to Dr. Vincent on November 29, 2017, for continued left knee pain. (JE 4:104) With movement, claimant felt pain and heard a clicking sound. Id. On examination, Dr. Vincent noted claimant's knee felt normal and he had full passive range of motion. (JE 4:106) He again encouraged claimant to pursue vigorous PT. Id. A corticosteroid injection was administered. Id.

On December 14, 2017, Dr. Vincent engaged in a discussion with claimant regarding the ongoing issues of his shoulder and in a January 16, 2018, letter, Dr. Vincent stated the following:

> The patient sustained a work injury on January 11, 2017, when he fell and slipped on the ice, injuring his right shoulder and his left knee. History, exam, radiographs, and his MRI scan demonstrated a full-thickness tear of his rotator cuff with features of subacromial impingement, acromioclavicular arthralgia and biceps tendinopathy. He underwent a shoulder arthroscopy with subacromial decompression, distal clavicle excision and rotator cuff repair on March 1, 2017. He was subsequently compliant with postoperative restrictions, physical therapy and rehabilitation. I saw him back on August 30, 2017, and released to work without restrictions for his shoulder injury. I believe he had reached maximum medical improvement at that time.
>
> At the same time of his shoulder injury, he also injured his left knee. A subsequent MRI demonstrated findings of an ACL rupture, and on May 24, 2017, he underwent a left arthroscopic ACL reconstruction with partial lateral meniscectomy. Postoperatively he was compliant with his physical therapy. Objectively his knee exam findings were within normal postoperative expectations. At his most recent follow-up, his knee exam was completely stable. He had an intact ACL graft with acceptable range of motion in his ongoing rehabilitation of the knee. Throughout his postoperative course in the knee, he continued to report very high pain levels and an inability to perform his work duties. He was very resistant to attempt to return to work duties. There was incongruency sign seen on physical exam with inconsistencies throughout encounters which raised my concern for symptom magnification during my evaluation of him regarding his knee.

(DE H:86)

> During my evaluation on December 14, 2017, due to his previous reports of normal shoulder function and his new reports of a new shoulder injury, I interviewed him very pointedly regarding his new injury. I wanted to have a clear understanding of whether this was an acute reinjury, or ongoing dysfunction. Mr. Long clearly indicated and confirmed to me that he was having no pain, no weakness and no dysfunction prior to the reinjury of December 13, 2017. He told me that prior to his 12/13/17 reinjury, he was feeling great, having no pain and had full strength and range of motion in his shoulder. He stated he reinjured his shoulder when he was pulling his duffel bag out of the truck at work on December 13, 2017. Based on my evaluations of him throughout the end of the year, and in my interview with him on December 14, 2017, as well as my evaluation on August 30, 2017, it is my opinion that the patient had reached maximum medical improvement in the shoulder on August 30, 2017. I believe his current complaints of pain and weakness are new and related to a new injury of 12/13/17.

(DE H:87)

Dr. Vincent took issue with Dr. Stoken's 2017 assessments as well.

> Dr. Stoken then reports strength loss in every plan of motion for the shoulder. There is no physiologic explanation for Mr. Long to have any loss of strength in the planes of internal rotation and abduction, as these completely eliminate any use of the supraspinatus tendon, which was the repaired tendon. And yet, Dr. Stoken documented profound strength loss in essentially every measureable motion plane. This contradicts my observation of 5/5 strength in all planes through multiple visits. The function capacity evaluation dated November 6, 2017, by Work Well Systems found similar findings to what I observed regarding strength testing. When reviewing their strength testing, the patient had 5/5 strength in the planes of extension, abduction, internal rotation, and external rotation of the right shoulder on page 8. The only abnormality noted during strength testing from the functional capacity evaluation was 4/5 strength in forward flexion. Therefore, I do not believe Dr. Stoken's impairments for strength loss to be accurate. In addition, Mr. Long self-reported to me that he did not have weakness prior to his December 13, 2017, reinjury. Regarding Dr. Stoken's impairment of the left knee, I do agree with the 2% impairment rating which would be eventually awarded once the patient has reached maximum medical improvement based on the partial lateral meniscectomy that the patient underwent. However, as noted I would not place him at MMI for the knee yet.

(DE H:89) Dr. Vincent was also critical of the FCE as it did not have any blind strength tests.

On December 22, 2017, claimant was seen at Newton Clinic PT for a re-evaluation. (JE 3:47) In the history, claimant returned to work on December 11, 2017, but that he re-injured his shoulder on December 12, 2017. (JE 3:48) He also complained of a re-emerging left knee pain which he rated 4-5 on a 10 scale. (JE 3:48)

On January 9, 2018, claimant underwent an MRI of the right shoulder which showed an intact rotator cuff repair. (JE 3:52) The tendon was intact with some small vacation at the suture sites through the subacromial space. Id. Dr. Vincent did not see any evidence of an acute injury or retear. (JE 4:109)

On January 18, 2018, claimant returned to Dr. Vincent with reports of mild pain in the right arm along with difficulty elevating the arm. (JE 4:108) Dr. Vincent recommended a month of PT and anticipated releasing claimant to unrestricted work in a month. (JE 4:109)

Regardless, the parties agreed to a settlement wherein claimant was deemed to have suffered a 35.8 percent body as a whole impairment for the right shoulder and left knee injuries. (DE N:114) His benefit rate was $566.43.

On March 10, 2018, claimant was seen by David E Hatfield, M.D., for claimant's low back complaints radiating into the leg. (JE 2:10) MRI of the back showed slight decreased disc space throughout the lumbar region with a minimal disc protrusion at the L5-S1 level. (JE 2:14) Dr. Hatfield did not feel claimant was a candidate for surgery and instead claimant was sent to physical therapy for conditioning and rehabilitation. (JE 2:14) Claimant was unable to complete the course of therapy due to transportation and fuel costs and did not believe it was particularly helpful, telling Dr. Hatfield that he "thought it was too easy." (JE 2:15) After discussion with Dr. Hatfield, claimant underwent an FCE to properly assess claimant's permanent work restrictions. (JE 2:16)

On August 20, 2018, claimant returned with complaints of lumbar pain, worse on the left than the right. (JE 3:57) He attributed it to picking up a ladder in his garage and was concerned he had pulled a muscle. Id. His pain rating was 9 on a 10 scale. Id. Andrew Cope, D.O., diagnosed claimant with an acute muscle strain and claimant was provided medications and a work excuse by Dr. Cope. (JE 3:58-60) Eventually, claimant was referred to PT. (JE 3:62; 3:64)

Claimant returned to Dr. Cope on September 18, 2018, with reports of pain and decreased function. (JE 3:69) Although Dr. Cope had previously released claimant to work, claimant felt the pain was too great and he did not return to work. (JE 3:69) Dr. Cope noted claimant was able to mow his lawn without issue. (JE 3:70) At this appointment, claimant requested a return to work release due to the demands of his employer. (JE 3:70) Dr. Cope fulfilled this request.

On or about December 17, 2018, claimant was dispatched to Toledo to pick up a load. He exited the truck and fell backwards on the concrete. He was able to re-enter his truck wherein he called dispatch. Dispatch directed him to continue his route from Toledo to Kellogg. Once at Kellogg, he sat in a truck for several hours. He was then allowed to drive his personal vehicle to Concentra where he was seen by Carlos Moe, D.O., for left shoulder pain, back pain with tingling into the left leg and left knee pain

with decreased range of motion. (JE 5:111) Dr. Moe ordered an MRI and an injection was administered for lumbar pain and radiculopathy. (JE 5:116)

On December 20, 2018, claimant was seen in follow up with Dr. Moe. (JE 5:115) During this visit, claimant's back pain persisted but his left shoulder and left knee pain were getting better. Id.

On January 13, 2019, claimant underwent an MRI. (JE 2:18) The findings were compared with the lumbar spine MRI of March 17, 2008. Id. At L5-S1, there was a herniated disc that touched the left S1 nerve root which was not present on the 2008 MRI. At L4-5, there was an interim progression of degenerative disc bulge and facet changes contributing to mild spinal canal and mild bilateral neural foraminal narrowing, presumably chronic. (JE 2:18-19)

On March 5, 2019, claimant returned to see Dr. Cope for a review of medications and follow up for the low back pain. (JE 3:73) Claimant reported a MVA on December 17, 2018. Id. His low back pain radiated down into the left leg with a pins and needles sensation. (JE 3:73) At the request of claimant, Dr. Cope made an orthopaedic referral. (JE 3:74)

Claimant began care with Trevor Schmitz, M.D., on April 15, 2019, for the low back pain which claimant said began four months prior. (JE 6:121) Dr. Schmitz concluded that claimant should attempt conservative care in the form of injection medications and physical therapy. (JE 6:121) Dr. Schmitz started claimant on gabapentin and Flexeril. Id. On April 26, 2019, claimant was administered a transforaminal epidural steroid injection. (JE 6:123) Per the notes, claimant presented with pain at 9 on a 10 scale and after the injection, his pain level was zero on a ten scale. (JE 6:23)

On May 17, 2019, claimant returned to Dr. Cope for follow up of back pain which Dr. Cope noted started after the MVA of December 17, 2018. (JE 3:79)There was no mention of left knee pain other than the radicular arm pain or left shoulder pain. Id. During the physical exam action, he had normal range of motion bilaterally in the knees with negative straight leg test and ability to stand on toes and walk on heels. (JE 3: 79) Claimant reported that the epidural steroid injection worsened his pain but gabapentin alleviated it. (JE 3:79) Unfortunately, Dr. Schmitz refused to refill the medications likely due to claimant's missed appointment. (JE 3:80) Dr. Cope called in a refill for the gabapentin and Flexeril to serve as a bridge until claimant's next ortho appointment. Id.

In a physical therapy progress note dated May 28, 2019, claimant's pain was 8 on a 10 scale for lumbar pain. (JE 3:82)

On June 5, 2019, claimant returned to Dr. Schmitz's office for follow up complaining of low back pain, left leg tingling, and numbness and weakness. (JE 6:125) Because of the lack of response to the conservative treatments, claimant proceeded with posterior lumbar decompression and discectomy at the L5-S1 level which took place on September 16, 2019. (JE 6:126; 7:147)

Defendants requested a records review performed by William Boulden, M.D., on July 18, 2019 (DE E:58) Dr. Boulden opined the claimant's low back pain was attributable to the underlying pre-existing significant degenerative disc disease at all five lumbar disc levels. (DE E:57) Dr. Boulden did find that the work injury could have been the cause of the herniated disc but not the degenerative changes. (DE E:57) Dr. Boulden was concerned claimant suffered some nonorganic pain problems and that as a result, claimant would find the surgery a failure. (DE E:57) Based on the radiculopathy, Dr. Boulden would assign a 10 percent impairment rating but had concerns that the primary areas of complaint were in the claimant's low back, which was not related to the work injury. (DE E:58)

In the meantime, claimant underwent right inguinal hernia repair on September 5, 2019. (JE 3:82) On September 16, 2019, he underwent lumbar discectomy with Dr. Schmitz which Dr. Schmitz earlier explained to claimant would provide relief only for the leg pain. (JE 6:127. 7:147-48)

He presented on October 30, 2019, for follow up, with reports of mild pain symptoms that were aggravated by sitting. (JE 6:128) He did feel his left leg was better but was experiencing new right sided low back and hip pain. (JE 6:128)

On December 3, 2019, claimant was seen by Dr. Schmitz in follow up for the back surgery. (JE 6:132) Claimant had reports of pain in the left lower back and back of the knee. (JE 6:132) Dr. Schmitz encouraged claimant to return to PT. (JE 6:137) In a follow up visit on January 7, 2020, claimant reported left sided low back pain. (JE 6:137) The therapist wanted to continue treatment but claimant felt it was not helpful. (JE 6:138) Given that claimant was not making significant strides in therapy, Dr. Schmitz believed claimant was at MMI and sent claimant for an FCE. (JE 6:138)

The FCE was rated as invalid.

Claimant returned to Dr. Schmitz on February 11, 2020. (JE 6:140) Dr. Schmitz documented that claimant had several findings of examination that were consistent with a nonanatomic source for pain and that Dr. Schmitz did not have a good explanation for the current clinical presentation. (JE 6:141) Dr. Schmitz opined that claimant had a stable spine and could do whatever he wishes to do in life. Id. Dr. Schmitz placed claimant at MMI without restrictions upon his return to work. Id.

Claimant had one more visit with Dr. Schmitz prior to hearing on July 14, 2020. (JE 6:144) During that visit, claimant reported ongoing low back and left sided pain.

> I had a lengthy discussion with Robert today in clinic. On examination he has exam findings fully inconsistent with any known anatomic source for pain. History of axial compression of his head. He has pain with simulator trunk rotation. He has nondermatomal numbness and tingling on the LEFT leg. He has a distractible straight leg raise on the LEFT. When he thinks we are testing his knee range of motion he has a negative straight leg raise. When he thinks that I am testing for nerve root impingement he has a positive nerve root response. X-rays appear to be unchanged.

> I certainly do not think he has anything further surgically or interventionally that is going to drastically alter his underlying treatment course. From my perspective he is at maximum medical improvement (MMI). He is requesting a referral to pain management. I will see him back on an as-needed basis and we will go from there.

(JE 6:144-45)

On December 9, 2019, claimant underwent an FCE at Kinetic Edge Physical Therapy with Todd Schemper, PT. (CE 2) The FCE was deemed valid as claimant demonstrated cooperative behavior, consistent performance with reproducible activities, and maximum effort. (CE 2:1)

As a result of the test, claimant was placed in the sedentary work category due to limitations in his ability to front carry only 10 pounds on an occasional basis and 15 pounds on a rare basis. (CE2:21) His ability to lift waist to crown fell within the light duty category which meant he could handle up to 15 pounds occasionally and 25 pounds rarely. Therapist Schemper also recommended claimant use a cane for longer distance walking and on uneven surfaces. (CE 2:22)

After reviewing the FCE from Atletico discussed below, Mr. Schemper made no changes to his FCE report. (CE 2:29)

Claimant was sent to Dr. Stoken for an IME pertaining to the low back and left shoulder on January 9, 2020. (CE 1) His current complaints included left shoulder pain that was aching, shooting, exhausting and miserable, ranging from 6-7 on a 10 scale. Rest, medicine and hot baths alleviated pain while lifting and overhead reaching worsened it. (CE 1:11) For his back, he described the pain as aching, shooting, stabbing, exhausting, continuous and miserable, ranging from 7-8 on a 10 scale. He also reported left leg pain that he described as aching, shooting, intermittent, exhausting, penetrating and miserable, ranging from 6-8 on a 10 scale. Hot baths, a soft chair and ice reduce pain and walking, twisting, standing worsen pain. Id.

Gabapentin, cyclobenzaprine and physical therapy gave him a moderate amount of relief. The pain interfered moderately with sitting for one-half hour, showering and bathing, writing and typing, dressing, concentration and his mood. The pain interfered moderately to severely with walking one block, lifting ten pounds, sleep, traveling up to one hour by car, his daily activities, his relationships, chores around the house, and sexual activities. The pain completely interfered with standing for one-half hour and social activities. Id.

For objective findings, claimant's reflexes were normal and symmetrical. Muscle tone and bulk was within normal limits. (CE 1:12) Muscle strength was 5+/5. Sensation as normal. Right shoulder had reduced range of motion while the left shoulder was positive for Hawkin's, Neer, and supraspinatus tests. Lumbar range of motion was also reduced. He had a positive straight leg raise test on the left, ambulated with an antalgic gain, and used a cane. Id.

Dr. Stoken's diagnoses included several impressions including herniated disk, chronic low back pain, left knee strain with ACL rupture and lateral meniscus tear. (CE 1:12) She opined slipping on the truck stairs and falling caused or aggravated claimant's injury to his back, left shoulder, lower extremity and body as a whole. Prior to this incident, claimant was able to work full duty without restrictions.

This conclusion appears to be in contradiction to the claimant's assertions in the 2017 workers' compensation case and Dr. Stoken's own expert witness report rendered on November 2017. (Ex. G) Dr. Stoken assigned permanent impairment ratings of 18 percent to the whole body based on the right shoulder and left knee injuries. The 2017 FCE placed claimant in the low range of medium to light duty category of work. The settlement between the parties resulted in a 38.5 percent impairment to the body as a whole.

Claimant was off work during periods of 2017 and 2018 for right shoulder, left knee, low back on the left and the right. Dr. Cope noted claimant had been reluctant to return to work even after Dr. Cope released claimant.

Thus, the statement that claimant was able to work full duty without restrictions is not wholly accurate and diminishes the weight to be afforded Dr. Stoken's opinions.

As it related to the back, left shoulder, left lower extremity and whole body, Dr. Stoken assigned the following impairment ratings:

> Low back injury due to the history of herniated disc and associated radiculopathy = 13%
>
> Left upper extremity range of motion deficits – 10% UE or 6% whole person

(CE 1. at 13, 14)

For work restrictions, claimant was placed in the light category of work and ordered to avoid lifting more than 10 pounds on a frequent basis, 15 pounds on an occasional basis, and 20 pounds on a rare basis. (CE 1:13)

Claimant was then sent for a vocational evaluation with Jeff Johnson. Based on an interview, the IME of Dr. Stoken and the FCE from Mr. Schemper, Mr. Johnson opined that claimant was precluded from returning to any previous occupations and that he had sustained a 75-97 percent loss of access to the labor market (CE 3:40) On the low end, using Dr. Stoken's assessments placing claimant in the light duty work category, claimant lost 58 percent access to the labor market. On the high end, based on the more restrictive evaluation of Mr. Schemper, claimant lost 97 percent of access to the labor market. Id.

In a follow-up letter dated October 2, 2020, Mr. Johnson revised his opinion on claimant's employability, finding him able to perform less than a full range of light duty work activities and that his actual loss of employment opportunities was greater than 72 percent. (CE 3:57) He also took issue with the opinion of Ms. Sellner described below

who suggested claimant could work jobs outside of his past skilled work experience. (CE 3:56-57)

On February 7, 2020, claimant underwent an FCE at Athletico Physical Therapy. (DE D:28) The FCE was deemed invalid due to testing inconsistencies, subjective complaints of pain that were not consistent or did not correlate with observed functional movement patterns, and absence of signs that claimant was displaying maximum effort. (Id. at 29) Though not requested, claimant completed 20 minutes of activity without the use of a single point cane. (Id at 33) At one point, claimant's lower left extremity gave way and the therapist requested claimant use the cane for the remainder of the testing. Id. Despite the invalid results, John Kruzich placed claimant in the light physical demand level. Id.

The second baseline functional capacity evaluation was performed on August 20, 2020. (DE D:38) This test was deemed valid as claimant's performance was consistent and repeatable with no significant exaggerated pain behaviors and a display of good effort. (DE D:38) Based upon the August 20, 2020, functional capacity evaluation placed claimant in the light physical demand level with the following restrictions;

- Waist to floor lifting – 20 lbs., occasionally
- Waist to shoulder lifting – 15 lbs., occasionally
- Waist to overhead lifting – 15 lbs., occasionally
- Bilateral carrying – 15 lbs., occasionally
- Horizontal pushing/pulling – 35 lbs. of force, occasionally
- Standing/walking – Frequently, with positional changes as required
- Stair climbing – Frequently, with use of hand rails
- Bending – Occasionally, within available range of motion
- Kneeling – Occasionally, with use of upper extremity support for transitional movements
- Squatting – Occasionally, with use of upper, extremity support for transitional movements
- Left unilateral overhead reaching – Occasionally, within available range of motion

(DE D:38)

Trevor R. Schmitz, M.D., an orthopaedic spine surgeon authored a report in response to a request from defendants. (DE A) Dr. Schmitz diagnosed claimant with a disc herniation which he attributed to claimant's fall at work on December 17, 2018[1], and performed a hemilaminotomy and microdiscectomy to remove the disc. (DE A:1) Dr. Schmitz believed that the surgery resolved the radiating pain into the left leg but that during subsequent visits claimant presented with symptoms that were not consistent with any known anatomic structure. Id. Based on the successful resection of the herniated disc, the modest surgical procedure and the nonanatomic pain behaviors, Dr. Schmitz opined claimant's future prognosis was good, achieving MMI on January 7,

[1] Dr. Schmitz' report says December 17, 2019, but the fall was on December 17, 2018. I believe that the date in Dr. Schmitz's report is a scrivener's error.

2020. Id. He assigned a 10 percent whole person impairment rating and based on the FCE of February 7, 2020, no work restrictions. (DE A:2)

On September 9, 2020, Dr. Cope filled out a checklist letter authored by defendants wherein Dr. Cope acknowledged treating claimant for a back injury on August 2018 prior to his fall at work on December 17, 2018. (Ex B:7) Dr. Cope agreed that during his last medical visit with claimant, claimant's back condition had markedly improved from the December 17, 2018, injury. (DE B:8)

On September 14, 2020, claimant underwent an IME with Jeff Henson, M.D., at the request of the defendants. (DE C) Dr. Henson opined claimant had chronic back pain from degenerative changes not caused by his work injury. (DE C:16) Based on claimant's condition during the September 14, 2020, examination, Dr. Henson would impose permanent restrictions based on claimant's chronic back pain of no lifting greater than 25 pounds frequently and no greater than 40 pounds occasionally. (DE C:17) He also felt that Dr. Stoken's IME was thorough and well performed and that he agreed with the majority of the opinions held by Dr. Stoken but for the area of permanent work restrictions. (DE C:18)

On February 19, 2020, Lana Sellner issued an employability report at the request of the defendant. (DE F:60) Ms. Sellner determined that based upon the opinions of Dr. Stoken and Dr. Schmitz, claimant could work in the light work category. (DE F:64) Based on that physical demand categorization, Ms. Sellner identified the claimant would be able to perform several jobs within the transportation industry that would not require him to drive in addition to no touch driving positions. (DE F:64) Ms. Sellner acknowledged that the SVP score of several of the non-driving positions were higher than that which claimant held in the past but that he was qualified to perform these different positions. Id. Thus it was Ms. Sellner's position that claimant suffered little, if any, vocational impact. (Ex F:66)

A follow-up report was provided on August 4, 2020 by Ms. Sellner, but her opinions remained unchanged that claimant had sustained very little if any vocational impact based upon the expert witness opinions about his physical capabilities when paired with her market research. (Ex F:67; 72)

Ms. Sellner did identify several jobs available to the claimant within his work restrictions, but several were higher in SVP than he had previously worked. While it is possible that claimant's extensive experience as an over-the-road trucker would be welcomed by hiring authorities within the trucking industry for higher-level office positions, that still would not obviate claimant's loss of access to a portion of the labor market that was open to him prior to the December 17, 2018 work injury. For Ms. Sellner to claim that claimant sustained little, if any, loss of access to the labor market would ignore the physical change all experts have agreed claimant has undergone since the work injury of December 17, 2018. For that reason, Ms. Sellner's opinions are given lower weight.

Claimant maintains he has a difficult time sleeping, lifting, standing, walking, and doing most activities. He takes gabapentin 10 mg three times a day, suffers from anxiety, has high cholesterol, and can walk only approximately 50 feet.

He has not shown a motivation to return to work. He did look for work in March 2020 but felt that he was being treated unfairly due to his work injury. Prospective employers were not interested in him after he shared the level of pain and discomfort he was in. Claimant admitted he did not want to work a no-touch trucking job because it paid less.

There is an issue of credibility raised by the defendants. Claimant was sharp in tone during some parts of cross-examination and he had some inconsistencies in his testimony, admitting, for instance, that the medical visit he had with Dr. Henson two months prior to hearing did not fully and accurately present claimant's post injury symptoms.

There were inconsistencies in his presentation to his doctors. Dr. Vincent was particularly bothered by the changeable nature of claimant's subjective symptoms. More recently, claimant told his family doctor, Dr. Cope, during a July 2020 visit, claimant reported that his back condition was "markedly improved." (DE B:8) At hearing, claimant maintained the surgery was not helpful. He also reported to various IME examiners that the back surgery was not helpful.

Dr. Schmitz and Dr. Vincent, surgeons who cared for claimant for significant periods of time, both opined that claimant's complaints of pain were not consistent with his physical objective findings. These opinions were given in two separate workers' compensation cases, three years apart.

Finally, claimant maintained in early 2018, he was significantly impaired, yet, he later asserted he was fully healed and had no restrictions by his injury of December 2018, notwithstanding the two prior events of 2018 that led to days off of work and medical visits.

Claimant reported to Dr. Stoken, among others, that he could not sit for longer than 30 minutes but that was not evident during the video conference hearing. Based on the foregoing, it is found claimant's subjective complaints of pain and discomfort are given low weight.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" 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).

The parties agree claimant sustained an injury arising out of a slip and fall on December 17, 2018. Defendants maintain claimant's injury was temporary in nature while claimant argues that he has suffered a total loss or a near total loss of access to the labor market as a result of the 2018 work injury.

Claimant relies on the expert opinions of Dr. Stoken to provide a causal connection between his current symptomatology and the work injury; however, as discussed above, her opinion is given low weight.

The remainder of the expert opinions weigh in favor of finding claimant did sustain an aggravation of his underlying degenerative disc condition. Dr. Schmitz, the surgeon who performed the discectomy, opined that the disc herniation was caused by the fall at work. Dr. Boulden who performed an IME also opined that the work injury caused claimant's disc herniation.

However, the shoulder and knee problems predate claimant's December 2018 injury and claimant has not met his burden as it relates to the ongoing pain and discomfort in his left shoulder, left knee, and, to the extent that there is a claim, for the right shoulder. The contemporaneous medical treatment records do not include reference to left shoulder pain or knee pain beyond the first couple appointments with Dr. Moe nor is there any treatment to those areas of the body. When claimant consulted with his own physician, Dr. Cope, there was no mention of left shoulder or left knee

problems. Claimant's primary complaints were of low back radiating into the left lower extremity pain. There was no injury found to claimant's left knee but instead he suffered pain radiating from the disc herniation. Dr. Schmitz noted claimant's left leg pain was ameliorated by the surgery. The greater weight of the evidence supports a finding that claimant's permanent disability arising from the December 17, 2018, work injury is limited to his lumbar region.

Iowa Code section 85.34(2)(v) now provides:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs 'a' through 't' hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability **shall** take into account the permanent partial disability of the employee and **the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury**. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. (emphasis added)

Claimant has not returned to work nor does it appear he was offered work at the same or greater salary. He was terminated as part of a reduction in the work force, thus, 85.34(2)(v) mandates that the claimant's industrial disability be measured in relation to his earning capacity.

Iowa Code section 85.34(7) states:

> 7. Successive disabilities.
>
> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the

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

In Warren Properties v. Stewart, the Iowa Supreme Court directed the fact finding to determine the earning capacity when the successive injury occurred and the reduction in earning capacity caused by the disabilities. Warren Properties v. Stewart, 864 N.W.2d 307, 320 (Iowa 2015), as corrected (July 1, 2015). In Second Injury Fund of Iowa v. Nelson, the Supreme Court wrote that:

> [w]hen there are two successive *work-related* injuries, the employer liable for the second injury "is generally held liable for the entire disability resulting from the combination of the prior disability and the present injury." Celotex Corp. v. Auten, 541 N.W.2d 252, 254 (Iowa 1995). In another opinion filed today, we applied this "full responsibility" rule, holding the employer liable for its employee's 100% permanent industrial disability resulting from a recent work-related injury and two prior work-related injuries. Id. Thus, the employer liable for the current injury is also liable for any preexisting industrial disability caused by a work-related injury when that disability combines with industrial disability caused by a later injury."

Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 265 (Iowa 1995), as amended on denial of reh'g. (Feb. 14, 1996).

In Summerlin v. Tyson Foods, Inc., File No. 5025718, 5025719 (App. May 19, 2011), the commissioner engaged in the following application of facts to the law:

> As it relates to claimant's subsequent left shoulder disability, consideration must also be given to his existing right shoulder disability for which Tyson is liable. Both the prior injury and the present injury are compensable injuries under the same paragraph of section 85.34(2). It is therefore required that the employer's liability for the "combined disability" - herein the combined disability resulting from the right shoulder injury and the left shoulder injury - shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer for the right sided injury. Claimant is no longer capable of most of the heavy work he has previously performed for Tyson. While claimant was significantly disabled

> due to his right shoulder, his subsequent loss of use of the left shoulder is devastating vocationally. Claimant remains capable of employment, but only in a mostly non-physical position called pick trim. Claimant's permanent restrictions preclude a return to anything but modest labor meatpacking positions. Upon consideration of all of the industrial disability factors it is concluded that the presiding deputy correctly found claimant's combined disability at the present time to be 75 percent due to his ongoing work activity. Such a finding entitles claimant to 375 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 75 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

Summerlin v. Tyson Foods, Inc., File Nos: 5025718, 5025719, 2011 WL 2010321, at *10 (May 19, 2011).

The first step is to determine the combined disability of the whole body injuries. See Bridgestone/Firestone v. Accordino, 561 N.W.2d 60, 62 (Iowa 1997) (requiring the decision include the process used to reach conclusions in order for adequate judicial review).

Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 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).

Dr. Schmitz concluded that the surgery resolved the radiating pain into the left leg but that the lingering low back problems were nonanatomic. Claimant's spine was stable and thus there was little claimant could not physically undertake. Dr. Schmitz assigned a 10 percent whole person impairment but no work restrictions. Dr. Cope, claimant's family doctor, shared that claimant reported a marked improvement during a July 2020 visit. The vocational report of Dr. Sellner suggests that there was little to no loss of access to the labor market.

Claimant has shown little interest in returning to work. This was true in 2017 after his work injury and again in the summer of 2018 when Dr. Cope released claimant to return to work but claimant did not.

Two valid FCEs in 2020 placed claimant in the light to sedentary work category. FCEs can have flaws as pointed out by Dr. Vincent for the 2017 FCE however, the FCE was performed by two different therapists at different times at the request of both the claimant and defendant. While part of the FCE and claimant's SSD determination is, in part, due to his multiple problems that existed both before and developed after December 17, 2018, claimant's condition arising out of the work injury is worse than before the work injury. Dr. Schmitz opined claimant's leg pain was resolved after the surgery but not the back pain. Even Dr. Cope's notes portrayed claimant as continuing to have pain, albeit better than previously.

Defendants argue that claimant's baseline condition was unchanged by the December 17, 2018, injury. This seems to ignore the disc herniation, subsequent surgery, valid FCEs, and impairment ratings assigned by Dr. Schmitz. Dr. Schmitz assigned a 10 percent impairment and Dr. Henson put claimant in the DRE lumbar category III as well.

It is more likely than not claimant's current physical condition places him in the light duty category balancing the results of the 2020 FCEs and the opinions of Dr. Schmitz, Dr. Henson, and Dr. Cope. Claimant was previously in the low end of the medium category of work and light duty category of work prior to his December 2018 work injury. Based on this finding, Ms. Sellner's opinions do not provide much guidance.

In the light duty category, there is no touch or drop and hook driving, as well as dispatching and other office related trucking industry work. He could also return to his job as a meat cutter as he testified that the work required lifting of five to ten pounds. (DE, Depo. P. 9-11) In the light duty category of work, Mr. Johnson opined claimant would incur a 58 percent loss of access to the employment market based on Dr. Stoken's assessment of claimant's whole body impairment. This is adopted herein.

It is found claimant's full impairment is 58 percent.

Once the combined disability is determined, the statute requires that the previous award be deducted from whole impairment. Deputy Elliott in Dunham v. United Parcel Service, File No. 5045229 and 5062713, (affirmed on appeal on January 5, 2019) applied a formula that required the combined disability to be partially satisfied by the extent of the percentage of disability the employee was previously compensated (38.5%) minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

In 2017, the claimant's weekly benefit rate was $566.43. The stipulated benefit rate in 2018 is $565.64. The percentage reduction in weekly wages is 13 percent

Claimant's reduction in earning capacity due to the successive injury was 19.5 percent (58% - 38.5%= 19.5%). The reduction of the earning capacity, 19.5 percent, is then divided by the earning capacity at the time of the successive injury which was 80.5 percent (100%-19.5%). The resulting percentage credit is 24 percent (19.5/80.5). Thus the total award for the claimant is 120 (500 x 24%) weeks of compensation.

Claimant is not permanently totally disabled nor is he an odd-lot employee.

Claimant has worked no touch and drop and hook jobs previously and based on his deposition testimony, that work required little to no manual labor. Those positions would be within his light duty work restrictions. While he does not have the experience in dispatching or other non driving jobs, he does have years of experience in the trucking industry that could open up other non-driving positions. Thus, the claimant has not proven that he is permanently totally disabled or that he is entitled to recovery under the odd-lot doctrine.

The next question is the commencement date of benefits.

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).

Dr. Schmitz returned claimant to work with no restrictions on January 7, 2020. However, claimant continued to receive treatment and reported to Dr. Cope in July 16, 2020, who found claimant's back to be markedly improved. Given that improvement is the key to determining MMI, it is determined permanent partial disability benefits should commence on July 16, 2020.

The parties have stipulated claimant was off work from the date of his injury, December 17, 2018, through July 16, 2020. Given that he had a compensable workers' compensation injury that necessitated back surgery followed by a period of recovery and that the commencement date of PPD benefits is July 16, 2020, claimant would be entitled to temporary benefits from December 17, 2018 through July 15, 2020. Claimant did not return to his pre-injury employment or substantially similar employment.

Claimant seeks reimbursement of medical expenses. To the extent the medical was for the treatment of claimant's work injury including but not limited to his low back, left knee, and shoulder—the latter two which resolved without permanent disability, claimant is entitled to reimbursement, mileage, out of pocket co-pays and all other reasonable medical expenses.

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).

Dr. Boulden issued an impairment rating of 10 percent on July 18, 2019. Claimant retained the services of Dr. Jacqueline Stoken on January 9, 2020. The examination of claimant by Dr. Stoken is subject to reimbursement under Iowa Code section 85.39 with the report awarded under Rule 876 IAC 4.33.

Claimant is the prevailing party and has requested an assessment of costs. Costs are awarded at the discretion of the commissioner. Iowa Code section 86.40 states:

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.

Thus the costs itemized by claimant are awarded herein.

ORDER

THEREFORE IT IS ORDERED:

That defendants are to pay unto claimant one hundred twenty (120) weeks of permanent partial disability benefits at the rate of five hundred sixty-five and 64/100 dollars ($565.64) per week from July 16, 2020.

That defendants are to pay unto claimant healing period benefits from December 17, 2018, through July 15, 2020 at the rate of five hundred sixty-five and 64/100 ($565.64).

That defendants are to reimburse claimant for all medical expenses, mileage, and other medical related costs arising out of and the course of his work injury.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

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

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 14th day of April, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Tom Drew (via WCES)

Patrick Waldron (via WCES)

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