BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CRAIG IVESTER, Claimant, vs. XPO LOGISTICS, Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File Nos. 5064976.01, 5064977.01 ARBITRATION DECISION Head Note Nos.: 1402.40; 1402.60; 1803; 1803.1; 1804; 2501; 2701

STATEMENT OF THE CASE

Claimant Craig Ivester filed two petitions in arbitration seeking worker's compensation benefits against XPO Logistics, employer, and Indemnity Insurance Company of North America, insurer. The petitions were consolidated for hearing. File No. 5064977.01 involves an accepted work injury date of June 8, 2016. File No. 5064976.01 involves an accepted work injury date of April 12, 2018. The consolidated cases came before the undersigned for an arbitration hearing on December 9, 2020. The hearing was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, these files proceeded to a live video hearing via Court Call with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed hearing reports prior to the commencement of the hearing. On the hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 20, Claimant's Exhibits 1 through 7, and Defendants' Exhibits A through D.

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on December 9, 2020. The parties submitted post-

hearing briefs on February 2, 2020, and the case was considered fully submitted on that date.

ISSUES

File No. 5064977.01 (June 8, 2016, low back)

1. Whether claimant has reached maximum medical improvement;
2. If so, the extent of permanent disability, including permanent total disability;
3. Payment of certain medical expenses;
4. Alternate medical care pursuant to Iowa Code section 85.27;
5. Taxation of costs.

File No. 5064976.01 (April 12, 2018, left shoulder/arm)

1. The nature and extent of claimant's permanent disability;
2. Taxation of costs.

FINDINGS OF FACT

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

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

At the time of hearing, claimant was a 50-year old person. (Hearing Transcript, p. 10) He was married with one adult child. (Tr., pp. 10-11) Claimant moved to Iowa when he was 5 years old, and attended school in Cedar Rapids, Iowa. (Tr., p. 11) When claimant was in 5th or 6th grade, he was diagnosed with dyslexia. (Tr., p. 12) This made school more difficult for him, although he was in special education classes. (Tr., p. 13) Claimant finished the 11th grade, but dropped out of school during his senior year and did not graduate. (Tr., p. 13) When claimant dropped out of school, he was 20 years old, having been held back in previous grades. (Tr., pp. 13-14)

After leaving school, claimant had a variety of jobs. He worked as a part-time janitor, while also working other part time jobs for periods of time. (Tr., pp. 14-15) At some point, he started working for Precision Drywall on a part-time basis, and eventually started doing drywall full-time. (Tr., p. 15) In the mid-1990s, claimant went to Kirkwood Community College and obtained 6 weeks of training to get his commercial drivers' license (CDL). (Tr., p. 15) Once he obtained his CDL, he took an over-the-road trucking job at Midwest Connection, which required that he drive to the West Coast and back. (Tr., p. 16) Claimant did not enjoy that type of work, as he missed his son, so after about a year he went to local trucking work for Rental Service Corporation (RSC). (Tr.,

p. 16) That job involved moving heavy equipment with a flatbed trailer. (Tr., pp. 16-17) Claimant worked there for about 7 years. (Tr., p. 17)

When claimant left RSC, he started a business called "Ivester Texture," which did custom texturing in people's homes. (Tr., p. 17) Claimant had the business for about a year and a half. After closing his business, in 2005, claimant got a job at Conway, which was later purchased by defendant employer XPO. (Tr., pp. 17-18)

Claimant's job at XPO involved about 50 percent of his time in his truck, and 50 percent of his time on the dock loading. (Tr., p. 20) Claimant testified that he normally worked anywhere from 8 to 14 hours per day, depending on what was needed. (Tr., p. 20) Claimant described his usual day as being in the truck for half the day, driving within a 150 air-mile radius to various companies to pick up freight. When he would return he would be on the dock for the remainder of his shift, to load for the "line haul" for that night. (Tr., p. 20) He explained that a line haul means that when all the freight came into the terminal, it would be separated and loaded into smaller trailers, which were then hooked together as a set. (Tr., pp. 20-21) Then when the drivers arrive, they hook onto the set, and then drive the freight where it needs to go. (Tr., p. 21)

Claimant was injured while working on June 8, 2016. On that day, the employer sent claimant to a weigh station on Interstate 380 to assist another driver whose trailer was overweight. (Tr., p. 22) Claimant had to take a smaller "pup" trailer and back it door to door with the coworker's trailer in order to remove 3,000 pounds of freight from the overweight truck, and then transfer the freight back after the initial trailer passed through the weigh station. (Tr., p. 22) Claimant testified that he wanted to take a "long box" trailer so the two trailers would fit evenly together, but was sent with the pup trailer instead. The pup trailer sits about a foot lower than the long trailer. (Tr., p. 22) Claimant testified that when he was putting the freight back onto the original trailer, the motion of pulling the freight up and moving sideways to put it into the truck caused his back to pop. (Tr., p. 23) At the time, it felt like a pulled muscle, but it continued to worsen that day. (Tr., p. 23) He was able to complete his shift, but advised his employer that he hurt his back. He was told to take it easy and see if it would resolve on its own. (Tr., p. 23)

Claimant used ice and heat and massage at home to see if his back would get better, but instead it got worse. (Tr., p. 24) He testified that at some point he was sent to a company doctor in Cedar Rapids who "jabbed his thumb in the back - - in my back, and then he gave me like a ramped-up ibuprofen and gave me light duty." (Tr., p. 24) Claimant testified that he later went to a chiropractor, who said it was beyond what he could do, so he then saw his personal care provider (PCP), Rita Taylor-Stewart, PA-C.

Claimant saw PA-C Taylor-Stewart on June 13, 2016. (Joint Exhibit 1, p. 1) At that visit, claimant reported receiving new orthopedic insoles, which were thought to be the cause of his back pain. (Jt. Ex. 1, p. 3) It does not appear claimant advised PA-C Taylor- Stewart at that visit that he had initially felt back pain while working. Claimant testified that PA-C Taylor-Steward recommended he see a specialist, and referred him to Loren Mouw, M.D. (Tr., p. 24)

On June 22, 2016, claimant was seen at Mercy Occupational Health. (Jt. Ex. 2, p. 34) He was diagnosed with a low back strain, prescribed medications, and released with no restrictions. (Jt. Ex. 2, pp. 34-36) It does not appear claimant had any additional treatment for his low back until he saw Dr. Mouw on September 15, 2016. (Jt. Ex. 4, p. 38) Claimant testified that it took a while before he was able to see Dr. Mouw, but he could not remember exactly how long. (Tr., p. 25) Prior to his appointment with Dr. Mouw, claimant had an MRI of the lumbar spine on September 12, 2016. (Jt. Ex. 3, p. 37) The MRI showed a "moderate to large broad-based disc protrusion epicenter posterolaterally on the left L5-S1 level. This abuts and mildly displaces the left descending S1 nerve root. Disc also extends across midline and abuts the right S1 nerve root." (Jt. Ex. 3, p. 37)

At his appointment with Dr. Mouw, claimant reported low back pain that radiated into the left buttock, hip, and groin. (Jt. Ex. 4, p. 38) Dr. Mouw reviewed the MRI, which revealed a herniated disc at L5-S1 on the left. (Jt. Ex. 4, p. 38) Dr. Mouw recommended surgery.

Claimant had surgery on October 12, 2016, consisting of left L5-S1 minimally invasive discectomy with intraoperative microscope. (Jt. Ex. 5, p. 56) Claimant testified that following surgery, his left side seemed to be okay, but his right leg started going numb. (Tr., p. 26) He testified that he told Dr. Mouw, who said it would go away. (Tr., p. 26) Claimant participated in physical therapy, and was released to return to light duty work on November 7, 2016. (Jt. Ex. 4, p. 41) His temporary restrictions included a 20-pound lifting limit; no repetitive bending or twisting; ability to sit, stand, and walk as desired; and no driving truck. (Jt. Ex. 4, p. 41) Claimant reported to physical therapy at that time that he was having intermittent radiating symptoms in his bilateral lower extremities, but the severity of both his radiating symptoms and pain had decreased overall. (Jt. Ex. 6, p. 57) However, after returning to light duty work, he noted ongoing numbness. (Jt. Ex. 6, pp. 57-58)

Dr. Mouw ordered an MRI due to claimant's ongoing symptoms. Claimant had the MRI on November 17, 2016, after which he saw Dr. Mouw. (Jt. Ex. 4, p. 42; Jt. Ex. 7, pp. 64-65) Dr. Mouw noted claimant's symptoms included low back pain, paresthesia/pain in the right leg, and right leg weakness. (Jt. Ex. 4, p. 42) The pain had not changed since the previous visit. Dr. Mouw reviewed the MRI, and noted postoperative changes at L5-S1 left with no recurrent or residual disc herniation. (Jt. Ex. 4, p. 42) Dr. Mouw opined that his symptoms appeared to be related to inflammatory changes, and told claimant to continue with physical therapy. (Jt. Ex. 4, p. 44)

Claimant returned to Dr. Mouw for a follow up on December 1, 2016. (Jt. Ex. 4, p. 45) At that time, he reported that his preoperative symptoms of radicular pain, paresthesia, and weakness had improved since surgery in both the back and the leg. The note also states that claimant "has not developed any new symptoms since surgery," despite the fact that claimant had reported new symptoms at his last several appointments. (Jt. Ex. 4, p. 45) Dr. Mouw continued claimant with restrictions and physical therapy. (Jt. Ex. 4, p. 46) Claimant next returned to Dr. Mouw on December 15,

2016, at which time Dr. Mouw noted "symptoms essentially resolved." (Jt. Ex. 4, p. 48) He told claimant to finish out his physical therapy, and return to work full duty on January 3, 2017, (Jt. Ex. 4, p. 48)

Claimant continued physical therapy until December 28, 2016. (Jt. Ex. 6, pp. 58-63) Over the course of his visits, he reported ongoing numbness in the right leg, although he generally indicated it was improving. (Jt. Ex. 6, pp. 58-62) At his last session on December 28, 2016, claimant reported he was going to return to work with no restrictions on January 3, 2017. (Jt. Ex. 6, p. 62) He reported no right lower extremity numbness after walking around at work for 45 to 60 minutes, although he continued to take anti-inflammatory medications. (Jt. Ex. 6, p. 62) Claimant returned to Dr. Mouw on April 20, 2017 for his impairment rating. (Jt. Ex. 4, pp. 50-52) Dr. Mouw noted that claimant had "occasional symptoms into the right leg, however, this is the opposite side of the disk herniation." (Jt. Ex. 4, p. 50) His preoperative symptoms had essentially resolved. Dr. Mouw noted "some back stiffness and opposite leg paresthesias," and provided claimant with an 11 percent whole body impairment rating. (Jt. Ex. 4, p. 52)

Claimant testified regarding his full-duty return to work in January. He stated that his job duties were substantially different after surgery, despite his full-duty release. (Tr., p. 28) He stated that he shortened his hours, and did not drive nearly as often. (Tr., p. 28) He spent more time on the dock than in the truck, as it was easier for him to maneuver and change positions. If he needed help, he could "always get help on the dock." (Tr., p. 28) He testified that often the younger employees would come over and help him with lifting, and that he would also use a "dock hook" to hook boxes and lift them up so he could grab them. (Tr., pp. 28-29) Claimant further explained that driving his truck aggravated his condition, because of the sitting. (Tr., p. 29) He stated that after sitting for a long period of time, his right leg would be numb, and he would need to move around and adjust his position to get the feeling to return. He noted that driving an 80,000-pound truck with a numb leg is frightening and started to become dangerous, so he asked his boss if he could slow down. (Tr., pp. 29-30)

Claimant testified that his employer was good about working with him to help him get through the time after his return to work. (Tr., p. 30) He was also given different duties such as painting the inside of the building, running errands, and training new employees. (Tr., pp. 30-31) These duties helped claimant be able to adjust his position as needed. (Tr., p. 31) He still drove and did dock work, but it was limited. (Tr., p. 31)

Despite his more limited work, claimant's back condition, including the numbness into his right leg, was slowly continuing to get worse between January of 2017 and his next injury to his shoulder on April 12, 2018. (Tr., pp. 30; 32) Specifically, claimant started experiencing electrical shocks and pain that started in his thigh, and would move down to his toe. (Tr., p. 32) He would get sharp, stinging pains in the end of his toe, and then his whole leg would go numb. Claimant testified he would also get pains throughout his back, that would then radiate down through his anus and penis and cause problems in his groin area. (Tr., p. 32) As these symptoms continued to worsen, claimant tried heat and ice therapy, and at one point was taking as many as 12

ibuprofen per day. (Tr., p. 32-33) Claimant's wife used to be a massage therapist, and would attempt to help with massage. (Tr., p. 33) However, his symptoms continued to progress.

Claimant testified that he attempted to get back in to see Dr. Mouw through workers' compensation. (Tr., p. 34) He explained that he contacted his human resources department, and was told to contact Travelers Insurance. When he contacted Travelers, he was told that his claim was now managed by Sedgwick. When he contacted Sedgwick, they did not have him "on file," and then failed to return his calls. (Tr., pp. 34; 36) He tried to go directly to Dr. Mouw, but was told that Dr. Mouw would not see him "unless he got a check" from the employer. (Tr., pp. 36-37) His personal care provider was hesitant to treat him because it was a workers' compensation injury. (Tr., p. 34) He did bring it up to PA-C Taylor-Stewart at a visit on February 5, 2018. (Jt. Ex. 1, p. 4) At that visit, claimant reported chronic back pain and occasional tingling in his right great toe. It is noted that he has "a very physical job and his back hurts a lot due to this." (Jt. Ex. 1, p. 4) However, no specific treatment appears to have been offered at that time.

Claimant continued working for the employer, and on April 12, 2018, he was inside a trailer full of farm implement attachments, measuring the freight. (Tr., pp. 42-43) One of the attachments was a crane boom, and claimant's foot got caught in the boom, causing him to trip and fall. (Tr., p. 43) When he fell, he landed on his left elbow, which "popped" his shoulder. (Tr., p. 43) He reported the injury, but for reasons that are not clear, he was not offered treatment. Instead, he saw his personal care provider the next day. At that time, he reported pain in the left shoulder, left knee, and left buttock. (Jt. Ex. 16, p. 142) X-Rays of his shoulder were negative. (Jt. Ex. 16, p. 145) He was advised to follow up if his pain was not improving within 10 to 14 days for further evaluation of a possible ligament injury. (Jt. Ex. 16, p. 145)

Claimant continued working, despite his shoulder pain. He testified that he used his right arm more during that time, and "really babied" his left arm because it hurt. (Tr., p. 44) He finally had an MRI of the left shoulder on July 31, 2018, which was ordered by PA-C Taylor-Stewart. (Jt. Ex. 17, p. 147) Again, it is unclear why he was seeing his personal care provider and why it took over three months to get the MRI. The MRI showed a high-grade partial tear of the supraspinatus portion of the rotator cuff. (Jt. Ex. 17, p. 147) Claimant was referred to orthopedics.

Claimant saw orthopedic surgeon Lisa Coester, M.D., on August 22, 2018. (Jt. Ex. 18, p. 151) Dr. Coester noted that workers' compensation was now involved. She reviewed the MRI, and noted the partial high grade tear. (Jt. Ex. 18, p. 153) She administered a corticosteroid injection, and advised claimant to follow up in three weeks. (Jt. Ex. 18, pp. 153-154) She further noted that he may need surgical intervention. (Jt. Ex. 18, p. 154) Claimant was allowed to return to work, with restrictions of no reaching above shoulder level, no repetitive movement, and lifting, pulling, and pushing no more than 10 pounds. (Jt. Ex. 18, p. 155)

Claimant returned to Dr. Coester on September 19, 2018. (Jt. Ex. 18, p. 156) His left shoulder pain had not improved following the injection, and surgery was recommended. (Jt. Ex. 18, pp. 156-157)

In the meantime, claimant continued to have worsening back pain with radiculopathy into his right leg. He saw PA-C Taylor-Stewart on October 5, 2018. (Jt. Ex. 1, p. 9) He reported that the back surgery had relieved the pain down his left leg, but ever since then he had experienced right leg radiculopathy. (Jt. Ex. 1, p. 9) PA-C Taylor-Stewart recommended an MRI, and prescribed Gabapentin to see if it would help. (Jt. Ex. 1, p. 13) Claimant returned to PA-C Taylor-Stewart on October 23, 2018, for his preoperative consultation for his shoulder surgery. (Jt. Ex. 1, p. 14) It is noted in that record that with respect to claimant's low back pain with right leg radiculopathy, his insurance had denied the request for the lumbar MRI. As such, claimant was doing six weeks of home physical therapy and medication management. It is further noted that Neurontin had only helped "a very little bit," and claimant was not responding to conservative treatment. (Jt. Ex. 1, p. 14) Claimant was cleared for his shoulder surgery, and told to continue with his home exercises for his back. (Jt. Ex. 1, p. 17) If he continued to show no improvement, another request would be made for an MRI. (Jt. Ex. 1, p. 17)

Claimant had left shoulder surgery on October 30, 2018, which consisted of arthroscopic extensive debridement of rotator cuff tear followed by bursectomy, acromioplasty, and rotator cuff repair. (Jt. Ex. 17, p. 149)

Claimant followed up with Dr. Coester on November 5, 2018. (Jt. Ex. 18, p. 159) At that time he reported feeling fine and his pain was controlled. (Jt. Ex. 18, p. 159) He returned to PA-C Taylor-Stewart on November 16, 2018, regarding his back and right leg. (Jt. Ex. 1, p. 18) At that time, he reported his back pain and radiculopathy was worse, despite his six weeks of home therapy and medication. He was also noticing increased weakness. (Jt. Ex. 1, p. 18) PA-C Taylor-Stewart again recommended an MRI, once he had fully recovered from his shoulder surgery. (Jt. Ex. 1, p. 22)

Claimant remained off work following shoulder surgery until December 17, 2018, when he was released to light duty with restrictions of no use of the left arm. (Jt. Ex. 18, p. 162) Claimant did return to work and described his light duty as "separating nuts and bolts and washers, cleaning up the storage room, just light things like that. I'd walk on the dock and, you know, help train people, you know, point the finger, that kind of thing." (Tr., p. 45) Claimant continued with physical therapy and following up with Dr. Coester for his shoulder injury.

On January 23, 2019, claimant finally had the lumbar MRI that PA-C Taylor-Stewart had recommended. (Jt. Ex. 8, pp. 66-67) He then saw Dr. Mouw again on February 12, 2019. (Jt. Ex. 4, p. 53) He continued to report low back pain, paresthesias and pain in the right leg, and right leg weakness. At that time, he reported his symptoms were gradually worsening, and had started after his 2016 back surgery. Dr. Mouw reviewed the recent MRI, and noted postoperative changes at L5-S1, and mild foraminal

narrowing at L4-L5 and L5-S1 on the right, and moderate narrowing at L4-L5 on the left. (Jt. Ex. 4, p. 53) Dr. Mouw did not see any surgical lesions on the lumbar spine, and recommended reevaluation with occupational medicine or neurology. (Jt. Ex. 4, p. 55)

Claimant passed his DOT physical on April 8, 2019. (Jt. Ex. 20, p. 177) Claimant testified that he told the examiner that his leg was going numb since surgery. (Tr., p. 49) Claimant testified that he was not subjected to any type of physical testing, and the examiner told him "if [you] can drive a car, then [you] can drive a truck." (Tr., pp. 49-50) Claimant's CDL has since expired, and he has not renewed it. (Tr., p. 48)

Claimant returned to PA-C Taylor-Stewart on April 19, 2019. (Jt. Ex. 1, p. 23) She noted that claimant had an appointment with a neurologist scheduled in June. Claimant was still working light duty due to his shoulder, but was worried about returning to full duty. Claimant was requesting an appointment with Stanley Mathew, M.D., at St. Luke's Physical Medicine, which was scheduled. (Jt. Ex. 1, p. 27) In the meantime, claimant was to continue with his physical therapy for his shoulder and physical conditioning of his back with strengthening exercises. (Jt. Ex. 1, p. 27)

Claimant returned to Dr. Coester for his shoulder on May 3, 2019. (Jt. Ex. 18, p. 168). He was released to return to full duty work effective May 6, 2019, but was not yet considered to be at maximum medical improvement. (Jt. Ex. 18, pp. 171-172)

Claimant tried to return to work at full duty on May 6, but was only able to make it for one day. (Tr., p. 45) He testified that his leg and back overwhelmed him that day, and he "paid for it" for days after. (Tr., p. 45) That was the last day that claimant physically worked for defendant employer, although as of the date of hearing he was still considered an inactive employee. (Tr., pp. 19; 46)

Claimant saw a neurologist, Marc Hines, M.D., on May 7, 2019. (Jt. Ex. 9, p. 68) Dr. Hines went over claimant's history, which is consistent with the other medical evidence and claimant's testimony. (Jt. Ex. 9, pp. 68-70) Dr. Hines noted that claimant had a notable delay in right leg movement, causing a limp. (Jt. Ex. 9, pp. 69-70) Dr. Hines recommended an electromyography (EMG) study and consultation with Dr. Mathew, which had already been scheduled. (Jt. Ex. 9, p. 73) He suggested a trial of non-invasive treatment with a pain physician, probable water therapy after injections, and consideration of vocational rehabilitation and re-education for employment. (Jt. Ex. 9, p. 73) He also took claimant off work "or at minimum no more than light duty" until further notice. (Jt. Ex. 9, p. 73; 76)

Claimant saw Dr. Mathew on May 13, 2019. (Jt. Ex. 10, p. 78) Claimant again reported that his low back pain with associated numbness and tingling in the right leg had progressed since his 2016 surgery. At that time, he reported pain at a level 7 out of 10. He also noted that his left shoulder pain had improved since surgery, but his back and right leg pain was very concerning and limiting his ability to work, stand, bend, and lift. (Jt. Ex. 10, p. 78) Dr. Mathew's impression was lumbar spine radiculopathy; enthesopathy lumbar spine sacroiliitis/trochanteric bursitis; postlaminectomy syndrome;

and chronic low back pain. (Jt. Ex. 10, p. 80) Dr. Mathew recommended out-patient physical therapy focusing on aqua therapy; a lumbar epidural injection; trigger point injection therapy; and an EMG of the lower extremities. (Jt. Ex. 10, p. 80) Dr. Mathew also recommended that claimant remain off work. (Jt. Ex. 10, p. 82)

On May 16, 2019, Sedgwick issued a letter to claimant's attorney explaining that claimant's current medical care is "unrelated or unnecessary to the previous lumbar spine injury/condition sustained" on June 8, 2016. (Defendants' Exhibit D, p. 1) As such, claimant was advised to continue his medical treatment under his personal health insurance.

Claimant's EMG took place on May 29, 2019. (Jt. Ex. 10, p. 83) Dr. Mathew noted positive findings consistent with right S1 radiculopathy. (Jt. Ex. 10, pp. 83-84) Given the findings and claimant's worsening pain, Dr. Mathew again recommended trigger point injection therapies. (Jt. Ex. 10, p. 84) Claimant had his first set of trigger point injections that day, which improved his pain by 80 percent. (Jt. Ex. 10, p. 87) The records note that pain reduction with trigger point injections typically lasts 6 to 8 weeks. (Jt. Ex. 10, p. 87)

Claimant had an epidural steroid injection shortly after the trigger point injections. On June 27, 2019, he returned to Dr. Mathew's office, where he was seen by Whitney Hanken, ARNP. (Jt. Ex. 10, p. 89) He reported that the epidural decreased his pain level significantly, but did not stop his numbness or tingling. Additionally, he continued to have occasional shooting pains through his groin to his penis into his rectum. (Jt. Ex. 10, p. 89) He also brought paperwork for Dr. Mathew to complete regarding short-term disability benefits. (Jt. Ex. 10, p. 89; 91)

On July 24, 2019, Dr. Mathew authored a letter to claimant's attorney. (Claimant's Exhibit 1, pp. 1-3) He confirmed his diagnoses of post laminectomy syndrome; chronic low back pain; right S1 radiculopathy; enthsopathy of the lumbar spine; sacroiliitis; and trochanteric bursitis. (Cl. Ex. 1, p. 2) He opined that these diagnoses are sequelae of the back injury that occurred on June 8, 2016. He explained that claimant's initial MRI after the incident showed a large base disc protrusion at L5-S1, displacing the left S1 nerve root as well as irritating the right S1 nerve root. He also noted that the EMG showed positive S1 radiculopathy. He opined that claimant is at MMI, but will benefit from continued medical and surgical management of his pain. He recommended ongoing injection therapy, further medication management, chronic pain management, chronic pain psychology, and stated that he will likely require further surgical intervention in the future. (Cl. Ex. 1, p. 2) He also noted that claimant will likely have progressive degeneration of his spine, which will then require a multilevel spine fusion. With respect to restrictions, Dr. Mathew opined that claimant should avoid sitting or standing for more than 30 minutes; repetitive lifting of more than 25-pounds; prolonged walking, standing, bending, and lifting; and avoid heights and ladders. (Cl. Ex. 1, p. 2)

Claimant returned to Dr. Mathew on July 29, 2019. (Jt. Ex. 10, p. 93) Claimant continued to have reduced pain from the epidural injection, although he still had problems with walking, bending, standing, and lifting. (Jt. Ex. 10, p. 93) He had another round of trigger point injections, and another lumbar epidural was recommended. (Jt. Ex. 10, p. 95) He again returned on September 3, 2019, at which time his pain had increased. (Jt. Ex. 10, p. 96) He was also experiencing lower extremity muscle spasms. He was provided with another round of trigger point injections, given a trial of a muscle relaxer for muscle spasms, and told to consider a pain psychology group. (Jt. Ex. 10, p. 98) He had another follow up on September 23, 2019, at which time he reported doing fair. (Jt. Ex. 10, p. 101) Dr. Mathew thought claimant could return to work in six months. (Jt. Ex. 10, p. 100) However, when claimant next followed up on October 21, 2019, he reported his condition had worsened, including worsening numbness and tingling down his *left* lower extremity. (Jt. Ex. 10, p. 105) He again received trigger point injections, as well as bilateral hip cortisone injections. (Jt. Ex. 10, pp. 105; 107)

On November 4, 2019, claimant saw Dr. Coester for his shoulder, and was placed at MMI and released from care. (Jt. Ex. 18, p. 173) Dr. Coester provided a 13 percent upper extremity impairment rating, which translates to 8 percent of the whole person. (Jt. Ex. 18, p. 173)

Claimant returned to Dr. Mathew's office on December 5, 2019, where he saw Staci Becker, ARNP. (Jt. Ex. 10, p. 108) He responded well to the bilateral hip cortisone injections, and reported continued numbness and tingling down both lower extremities. He received additional trigger point injections and bilateral hip cortisone injections. (Jt. Ex. 10, p. 110) He returned to ARNP Becker on January 16, 2020. (Jt. Ex. 10, p. 111) At that time, he was doing poorly, and reporting worsening pain in his low back radiating down both lower extremities. He also reported more weakness with his gait, and was using a cane. (Jt. Ex. 10, p. 112) Claimant declined injections that day due to the expensive copayment required. ARNP Becker recommended a new lumbar MRI and another lumbar epidural injection. (Jt. Ex. 10, p. 113)

Claimant had the recommended lumbar MRI on February 6, 2020. (Jt. Ex. 13, p. 131) He returned to Dr. Mathew on February 19, 2020, and requested a second opinion with neurosurgery. (Jt. Ex. 10, p. 115) He was referred to Matthew Howard, M.D., at University of Iowa. (Jt. Ex. 10, p. 117) He saw Dr. Mathew again on May 4, 2020, at which time he noted the MRI in February showed some degenerative changes at L3-L4 and L4-L5. (Jt. Ex. 10, p. 119)

Claimant saw Dr. Howard on May 12, 2020. (Jt. Ex. 15, p. 135) Dr. Howard reviewed claimant's history, which is consistent with claimant's testimony and the other medical evidence in the record. (Jt. Ex. 15, p. 135) Dr. Howard also reviewed the 2020 MRI, and noted multilevel degenerative changes with facet joint arthritis. (Jt. Ex. 15, p. 136) He did not see any signification residual neuroforaminal compression at the L5-S1 level. (Jt. Ex. 15, p. 136) There was no evidence of recurrent disc herniation. (Jt. Ex. 15, p. 137) As such, no surgery was recommended, and claimant was advised to continue to follow up with Dr. Mathew for pain management. (Jt. Ex. 15, pp. 137; 141)

On July 22, 2020, Dr. Mathew provided a second letter to claimant's attorney. (Cl. Ex. 1, p. 4) Dr. Mathew opined that barring firm plans in the future for a fusion surgery or spine stimulator, claimant reached MMI on June 29, 2019. He also stated that claimant will need lifelong pain management intervention for his ongoing symptoms and disabilities. (Cl. Ex. 1, p. 4)

Claimant underwent a functional capacity evaluation (FCE) at his attorney's request on September 2, 2020. (Cl. Ex. 2) Claimant demonstrated a full and consistent effort, and the FCE was considered to be valid. (Cl. Ex. 2, p. 5) The results placed claimant in the sedentary work category. (Cl. Ex. 2, p. 5-11)

Claimant had an independent medical evaluation, again at his attorney's request, with David Segal, M.D., J.D. (Cl. Ex. 3) The examination took place on August 8, 2020, and Dr. Segal's report is dated September 10, 2020. (Cl. Ex. 3, p. 13) Dr. Segal reviewed all of the medical records, interviewed claimant, and performed a physical examination. His report is 30 pages long and extremely detailed. (Cl. Ex. 3, pp. 13-42) His summary of the work incidents that led to claimant's injuries, claimant's treatment history, and claimant's ongoing symptoms are supported by the remainder of the evidence as well as claimant's testimony. Dr. Segal provided the following diagnoses related to the injury of June 8, 2016:

1. Disc herniation L5-S1, central large herniation more to the left than the right compressing both right and left descending S1 nerve roots, more on the left;
2. Disc herniation L3-L4 on the right with moderate neural foraminal narrowing: this is likely a permanent aggravation of a preexisting asymptomatic condition;
3. Left S1 radiculopathy;
4. Right S1 radiculopathy;
5. Right L3 and L4 radiculopathies;
6. Facet arthropathy;
7. Bilateral SI joint arthropathy;
8. Trochanteric bursitis;
9. Post-laminectomy syndrome;
10. Reflex sympathetic dystrophy or causalgia-type of symptomatology;
11. Gait deviation due to a combination of above; and
12. Erectile dysfunction.

With respect to the injury of April 12, 2018, Dr. Segal provided the following diagnoses:

1. High-grade partial articular-sided tear of the supraspinatus portion of the rotator cuff with residual bursal side effects;
2. Acromioclavicular impingement syndrome.

(Cl. Ex. 3, p. 21)

Dr. Segal then spent a great deal of time discussing and explaining each diagnosis. (Cl. Ex. 3, p. 22-23) He explained causation for each diagnosis as well. (Cl. Ex. 3, p. 24-27) Importantly, he provided a clear explanation for how claimant's initial disc herniation in 2016 led to his current symptoms. In short, the initial disc herniation affected both nerve roots. (Cl. Ex. 3, p. 28) Both the left and right nerve roots were compressed, but the left was worse than the right. After surgery, which was to the left side, the right side radiculopathy continued to progress. Dr. Segal stated that there were three possible etiologies for this progression:

1. Continued inflammatory factors on the right side;
2. The natural course of some nerve injuries as progression;
3. The decompressing of the right nerve root caused nerve intrinsic changes and injury causing the continued pain with sympathetic-type mediated pain and symptoms.

(Cl. Ex. 3, p. 28)

Dr. Segal went on to opine that the bilateral radiculopathies were caused by the disc herniation, the pressure, and the inflammatory process. (Cl. Ex. 3, p. 31) The left side resolved with surgery, but the right side continued. Dr. Segal stated that there is "no other likely cause of the progression of the right S1 radiculopathy – the right S1 symptoms represent progression of the work injury of June 8, 2019 [sic]." (Cl. Ex. 3, pp. 31-32)

Dr. Segal then provided a very detailed impairment rating, including each specific diagnosis. (Cl. Ex. 3, p. 33-38) Ultimately, for the June 8, 2016 injury, he provided 35 percent impairment related to claimant's lumbar spine diagnoses; 2 percent related to trochanteric bursitis; 6 percent related to erectile dysfunction. (Cl. Ex. 3, p. 37-38) With respect to the April 12, 2018 shoulder injury, Dr. Segal provided 14 percent permanent impairment of the upper extremity, which is equal to 8 percent of the whole person. (Cl. Ex. 3, p. 38)

Regarding permanent restrictions, Dr. Segal stated that due to the impact of the work injury on June 8, 2016, he does not believe claimant has a realistic ability to sustain gainful full-time employment. (Cl. Ex. 3, p. 39) Given the restrictions he recommended, he opined that there are "realistically no categories of employment that would be able to accommodate his restrictions. This will likely not change, even with any type of medical care in the future, and this condition is permanent." (Cl. Ex. 3, p. 39) He recommended the following permanent restrictions:

- Sitting: 15-45 minutes (to tolerance) with ability to shift
- Standing: 30 minutes with ability to shift
- Walking: 30 minutes, then must sit for 30 minutes, then can walk again
- Driving: 30 minutes (to tolerance)
- Repetitive overhead work: never

- Repetitive bending: never
- Lifting 0-10 pounds: occasionally
- Lifting 11-20 pounds: rarely (avoid)
- Lifting, repetitive: never
- Pushing/pulling with 0-20 pounds of force: occasionally
- Bouncing with vibration (such as riding mowers) 15-20 minutes: Occasionally
- Squatting/Kneeling/Crawling: rarely
- Ladders: never
- Stairs 1-2 flights: Occasionally

(Cl. Ex. 3, p. 39)

Dr. Segal recommended future medical care including flexion and extension x-rays to rule out instability at L5-S1; epidural, facet, and SI joint injections; radiofrequency ablation if facet injections or SI injections are positive. (Cl. Ex. 3, p. 39-40) He further noted that a spinal cord stimulator is the best chance for the best long term function with the least amount of risk. If that does not work, he suggested a discogram would be a possibility, and if positive, then a lumbosacral fusion. (Cl. Ex. 3, p. 40) With respect to the shoulder, he suggested he may need occasional cortisone injections. (Cl. Ex. 3, p. 41) He further noted that risk of re-tear of a rotator cuff is fairly significant, which may require a second surgery, and also suggested that claimant may require a total shoulder replacement over time due to accelerated arthritic changes caused by the injury. (Cl. Ex. 3, p. 41)

In closing, Dr. Segal specifically noted that there was nothing in the records that was inconsistent with claimant's history. Further, Dr. Segal stated that he "did not note any type of symptom magnification. In fact, quite the opposite is true. He is eager to return to work and is be (sic) as productive as possible despite his severe disability." (Cl. Ex. 3, p. 42)

Dr. Segal issued a correction and addendum to his IME report on October 26, 2020, indicating that for the lumbar diagnoses, he believes claimant reached MMI on July 29, 2019. (Cl. Ex. 3, p. 50) He also stated that for the left shoulder, claimant reached MMI on November 4, 2019. (Cl. Ex. 3, p. 51) He did not make any other changes or corrections to his original report.

Both Dr. Segal and Dr. Mathew have opined that claimant's ongoing low back and lower extremity symptoms, including his right-sided symptoms, are related to the work injury of June 8, 2016. Defendants have presented no contrary medical evidence. The opinions of Dr. Segal and Dr. Mathew are accepted.

Barbara Laughlin, M.A., provided an employability assessment dated October 12, 2020. (Cl. Ex. 4) Ms. Laughlin reviewed claimant's medical records and tax returns, and interviewed claimant personally. (See Cl. Ex. 4) She noted that claimant did not graduate high school or obtain an GED, as well as his diagnosis of dyslexia. (Cl. Ex. 4,

p. 64) At the time of her interview, claimant still had his commercial drivers' license, which had expired by the time of hearing. (Cl. Ex. 4, p. 64) Claimant further advised Ms. Laughlin that he has very few computer skills, and is a "hunt and peck" typist. (Cl. Ex. 4, p. 64)

Ms. Laughlin performed a transferable skills analysis, and applied it to three separate scenarios when determining claimant's occupational loss. (Cl. Ex. 4, pp. 66-69) Under the first scenario, she utilized the restrictions recommended by Dr. Segal, and found claimant had a 100 percent occupational loss of all semi-skilled and skilled occupations in the closest match occupations category, 99.5 percent loss in the good match category, and 97 percent loss of unskilled occupations. (Cl. Ex. 4, p. 67) In the second scenario, she used Dr. Mathew's restrictions, which are only for the back. Under that scenario, she again found claimant had a 100 percent occupational loss of all semi-skilled and skilled occupations in the closest match occupations category. (Cl. Ex. 4, pp. 68-69) She additionally found a 79.2 percent loss in the good match category, and a 55.8 percent loss of unskilled occupations. (Cl. Ex. 4, p. 69) Finally, in the third scenario, Ms. Laughlin used the restrictions of the FCE. She found a 100 percent occupational loss of all semi-skilled and skilled occupations in the closest match occupations category, 99.5 percent loss in the good match category, and 97 percent loss of unskilled occupations. (Cl. Ex. 4, p. 69)

Ms. Laughlin also performed labor market research under the same three scenarios. (Cl. Ex. 4, p. 69-72) While she found some positions he may be able to perform in part, none of the positions could be performed without accommodation. Ms. Laughlin concluded that given claimant's need to change position frequently, "he is unemployable unless he has a benevolent employer allowing him breaks as needed." Cl. Ex. 4, p. 73) She opined that claimant has sustained a very significant injury, resulting in his inability to work.

Claimant testified that about two weeks prior to hearing, he saw Dr. Mathew and had additional trigger point injections. (Tr., p. 41) At that time he also had trigger point injections scheduled for December of 2020. (Tr., p. 41) Claimant is seeking alternate care in the form of authorization for ongoing pain management with Dr. Mathew. (Tr., p. 66)

At the time of hearing, claimant testified that he had been losing weight in an attempt to help his symptoms, and at the time of hearing had lost 50 pounds. (Tr., p. 42) He does small work-outs at home, lifting three-pound weights and stretching with resistance bands. (Tr., p. 51) He is no longer able to do lawn maintenance or snow removal. (Tr., p. 52) He has not been able to have sexual relations with his wife for four years, due to pain and his diagnosis of erectile dysfunction. (Tr., p. 54-55)

Claimant also testified that he loved his job and misses "the camaraderie and challenge of working with the guys." (Tr., p. 53) He testified that he misses "the dignity of work." (Tr., pp. 53-54) Claimant has not applied for any jobs since he last physically worked for the employer. (Tr., p. 50) He testified that he is still considered an employee

of XPO, and is now on long-term disability benefits, so he thought it would be wrong to look for work. (Tr., pp. 50-51) At the time of hearing, claimant had applied for Social Security Disability, but had not received a decision. (Tr., p. 48) [1]

CONCLUSIONS OF LAW

File No. 5064977.01 (low back injury – June 8, 2016)

The parties stipulated that claimant sustained an injury to his back arising out of and in the course of his employment with defendant employer on June 8, 2016. Claimant argues that his ongoing low back and lower extremity symptoms, including right-sided symptoms, are related back to the original injury. Defendants have denied the ongoing symptoms are related to the work injury.

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

[1] In his brief, claimant asserts he has since been approved for SSDI benefits. (Cl. Brief, p. 7)

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).

In this case, both Dr. Mathew and Dr. Segal have opined that claimant's ongoing low back and lower extremity symptoms, including his right-sided symptoms, are related to the work injury of June 8, 2016. Defendants have presented no contrary medical evidence. Defendants argue, rather, that the medical providers are relying on an "inaccurate history" in making causation determinations, because claimant told Dr. Howard that he developed "severe right lower extremity numbness immediately after his lumbar surgery, and it was present all the time." (Def. Brief, p. 15; citing Jt. Ex. 15, p. 136)

First, Dr. Howard did not provide a specific causation opinion in this case. His consultation with claimant was for purposes of evaluating his ongoing symptoms in order to provide treatment recommendations. Second, claimant has consistently testified that he did develop right lower extremity numbness fairly immediately after the surgery. This testimony is supported by the medical records, as outlined above. While the pain and numbness may not have been "severe" immediately after surgery, the addition of that single word does not make the entire record inaccurate.

Defendants also attempt to argue that the so-called "gap" in claimant's treatment for his low back symptoms somehow proves that his current symptoms are not related to the work injury. This argument is rejected for several reasons. First, claimant did report right-sided symptoms to Dr. Mouw almost immediately after surgery. His symptoms were such that Dr. Mouw ordered another MRI, which took place on November 17, 2016. (Jt. Ex. 7, pp. 64-65) When he saw Dr. Mouw that same day, it was noted that claimant's symptoms included low back pain, paresthesias/pain in the *right* leg, and *right* leg weakness. (Jt. Ex. 4, p. 42) (Emphasis added) The pain had not changed since the previous visit. Dr. Mouw opined that his symptoms appeared to be related to inflammatory changes, and told claimant to continue with physical therapy. (Jt. Ex. 4, p. 44)

Claimant did continue physical therapy, and those records reflect his waxing and waning symptoms over the course of his treatment. (Jt. Ex. 6, pp. 58-63) After claimant completed physical therapy, he returned to work with no restrictions, but it did not go well. Claimant credibly testified regarding his difficulties upon his return to work. He stated that he shortened his hours, and did not drive nearly as often. (Tr., p. 28) He spent more time on the dock than in the truck. The younger employees often helped him with lifting. (Tr., pp. 28-29) Driving his truck aggravated his condition, because of the sitting. (Tr., p. 29) After sitting for a long period of time, his right leg would be numb, and

he would need to move around and adjust his position to get the feeling to return. Claimant noted that driving an 80,000-pound truck with a numb leg is frightening and started to become dangerous, so he asked his boss if he could slow down. (Tr., pp. 29-30)

Claimant testified that his employer was good about working with him to help him get through the time after his return to work. (Tr., p. 30) He was also given different duties such as painting the inside of the building, running errands, and training new employees. (Tr., pp. 30-31) These duties helped claimant be able to adjust his position as needed. (Tr., p. 31) He still drove and did dock work, but it was limited. (Tr., p. 31)

When claimant returned to Dr. Mouw on April 20, 2017 for his impairment rating, it was noted that claimant had "occasional symptoms into the right leg, however, this is the opposite side of the disk herniation." (Jt. Ex. 4, p. 50) Dr. Mouw noted "some back stiffness and opposite leg paresthesias." (Jt. Ex. 4, p. 52)

Claimant also testified that he attempted to get back in to see Dr. Mouw through workers' compensation. (Tr., p. 34) He contacted human resources, Travelers Insurance, and Sedgwick. When he contacted Sedgwick, they did not have him "on file," and then failed to return his calls. (Tr., pp. 34; 36) He tried to go directly to Dr. Mouw, but was told that Dr. Mouw would not see him "unless he got a check" from the employer. (Tr., pp. 36-37) His personal care provider was hesitant to treat him because it was a workers' compensation injury. (Tr., p. 34) He did bring it up to PA-C Taylor-Stewart at a visit on February 5, 2018. (Jt. Ex. 1, p. 4) At that visit, claimant reported chronic back pain and occasional tingling in his right great toe. It is noted that he has "a very physical job and his back hurts a lot due to this." (Jt. Ex. 1, p. 4)

Claimant made every attempt to get treatment for his ongoing symptoms. His testimony is credible and is not contradicted. There is no evidence of any intervening incident that could have caused claimant's ongoing symptoms. Claimant had no significant problems with his back or lower extremities prior to the work injury. The opinions of Dr. Mathew and Dr. Segal are both based on accurate histories, and their opinions are unrebutted. I find that claimant's ongoing symptoms in his low back and lower extremities are related to the accepted work injury of June 8, 2016.

The next issue to determine is whether claimant has reached maximum medical improvement. Defendants argue that claimant has not reached MMI, due to his ongoing treatment with Dr. Mathew. Claimant argues that he reached MMI on July 29, 2019.

Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Both Dr. Mathew and Dr. Segal have opined that claimant reached MMI on July 29, 2019. His current treatment is for pain management. I find claimant reached MMI on July 29, 2019.

The next issue to determine is the extent of claimant's permanent disability. Claimant argues that he is permanently and totally disabled, under either the traditional analysis or as an odd-lot employee. Defendants argue claimant's permanent disability should be limited to Dr. Mouw's 11 percent impairment rating.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. 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 terms of percentages of the total physical and mental ability of a normal [person]."

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). The commissioner may also consider claimant's medical condition prior to the injury, immediately after the injury, and presently in rendering an evaluation of industrial disability. IPB, Inc. v. Al-Gharib, 604 N.W.2d 621, 632-633 (Iowa 2000) (citing McSpadden, 288 N.W.2d at 192).

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich, 219 Iowa 587, 258 N.W. 899 (1935).

The focus for evaluating total disability is on the person's ability to earn a living. Diederich, 258 N.W. at 902. The question is whether the person is capable of performing a sufficient quantity and quality of work that an employer in a well-established branch of the labor market would employ the person on a continuing basis and pay the person sufficient wages to permit the person to be self-supporting. Tobin-Nichols v. Stacyville Community Nursing Home, File No. 1222209 (Appeal December 2003). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982). Industrial disability is determined by the effect the injury has on the

employee's earning capacity. Bearce v. FMC Corp., 465 N.W.2d 531, 535 (Iowa 1991); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa App. 2003).

Another important factor in the consideration of permanent and total disability cases is the employer's ability to retain the injured worker with an offer of suitable work. The refusal or inability of the employer to return a claimant to work in any capacity is, by itself, significant evidence of a lack of employability. Clinton v. All-American Homes, File No. 5032603 (App. April 17, 2013); Western v. Putco Inc., File Nos. 5005190,5005191 (App. July 29, 2005); Pierson v. O'Bryan Brothers, File No. 951206 (App. January 20, 1995); Meeks v. Firestone Tire & Rubber Co., File No. 876894 (App. January 22, 1993); see also Larson, Workers' Compensation Law, Section 57.61, pp. 10-164.90-95; Sunbeam Corp. v. Bates, 271 Ark 385, 609 S.W.2d 102 (1980); Army & Air Force Exchange Service v. Neuman, 278 F.Supp. 865 (W.D. La 1967); Leonardo v. Uncas Manufacturing Co., 77 R.I. 245, 75 A.2d 188 (1950). An employer knows the demands that are placed on its workforce. Its determination that the worker is too disabled for it to employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

Barbara Laughlin has opined that claimant is unable to work, regardless of whether the restrictions of Dr. Mathew, Dr. Segal, or the valid FCE are applied. Dr. Segal has also opined that claimant does not have a realistic ability to sustain gainful full-time employment. These opinions are unrebutted. Claimant made a strong effort to return to his prior job, but was not able to continue with all of the duties he performed prior to the back injury. While his employer was good about working with him and helping him adjust his duties to accommodate his difficulties, even working lighter duties resulted in increased symptoms. When claimant attempted to return to work after his shoulder surgery, he was only able to make it through one day. Since that time, he has been unable to return to work, and is receiving long-term disability benefits. While claimant has not applied for any jobs, it is not due to a lack of motivation. Claimant testified that he is still considered an inactive employee, and does not believe it is right to look for work while he is receiving long-term disability benefits through his employer. It is clear that claimant would prefer to be working, as he misses the camaraderie and sense of dignity that came with his job.

I have considered claimant's age, education, employment history, inability to return to the prior jobs he has held, his ability to retrain, his motivation, the situs and severity of his injuries, his impairment and restrictions, and all other industrial disability factors identified by the Iowa Supreme Court. Having considered all of the evidence in the record, the greater weight of evidence in this case supports a finding that claimant is permanently and totally disabled as a result of his June 8, 2016 injury. Realistically, there are not jobs within the community that claimant can perform and for which he can realistically compete in his current condition. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 815 (Iowa 1994). Accordingly, I conclude that claimant proved he is permanently and totally disabled. Iowa Code section 85.34(3). Having reached this

conclusion under the traditional industrial disability analysis, I do not consider or rely upon the burden-shifting framework of the odd-lot doctrine.

The next question is when permanent total disability benefits should commence. The parties did not stipulate to this issue and it is not addressed in either post-hearing brief. Permanent total disability benefits are payable during the period of the employee's disability. Iowa Code section 85.34(3)(a). As a result, permanent total disability benefits generally commence on the date of injury. See Sandhu v. Nordstrom, Inc., File No. 5046628 (App. January 24, 2019). In this case, however, claimant did return to work, although with difficulty, until May 6, 2019. That was the last date on which claimant physically worked for the employer. It is not reasonable or logical to award permanent total disability benefits while claimant continued to work and earn wages with the employer. Miles v. City of Des Moines, File Nos. 5048896, 5048899 (Arb. September 30, 2020, aff'd on Appeal to Commissioner, March 1, 2021). Therefore, I find that the proper commencement date for permanent total disability benefits is May 7, 2019. Defendants are entitled to credits as stipulated by the parties.

The next issue to address is claimant's request for alternate medical care. Claimant seeks an order that Dr. Mathew be designated as his authorized treating physician so he can continue with pain management.

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 16, 1975).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

Because I found his ongoing symptoms to be causally related to the June 8, 2016 work injury, claimant is entitled to ongoing medical care pursuant to Iowa Code section 85.27. Currently, the defendants are not authorizing any care for his back and lower extremity symptoms. Therefore, claimant has proven that the employer is not authorizing medical care that is effective and reasonably suited to treat his injury. Defendants shall authorize and pay for all reasonable and causally related expenses with respect to claimant's ongoing treatment with Dr. Mathew.

With respect to payment of medical expenses, claimant has submitted lien information in claimant's exhibit 5. I found claimant's ongoing back and lower extremity

symptoms to be causally related to the June 8, 2016 work injury. As such, defendants are responsible for all reasonable and necessary medical treatment causally related to claimant's low back condition beginning on the date of injury, June 8, 2016.

Claimant is not entitled to reimbursement for medical bills unless claimant shows that they were paid from his own funds. See Caylor v. Employers Mutual Casualty Co., 337 N.W.2d 890 (Iowa Ct. App. 1983). Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See also: Carl A. Nelson & Co. v. Sloan, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323. Claimant has the burden of proving that the fees charged for such services are reasonable. Anderson v. High Rise Construction Specialists, Inc., File No. 850096 (App. July 31, 1990).

Defendants shall reimburse claimant for the portions of the medical bills he paid from his own funds, and are responsible to reimburse any providers or lienholders with outstanding claims.

The final issue to address is costs. Claimant is requesting taxation of costs found in claimant's exhibit 6, including the FCE in the amount of $750.00, and reimbursement of Barbara Laughlin's fee in the amount of $1,240.00. (Cl. Ex. 6, pp. 88-89)

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, in part:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be . . . (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports . . .

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). However, the Iowa Supreme Court has held that only the cost of drafting the expert's report is permissible in lieu of testimony. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015).

Ms. Laughlin's invoice indicates she spent 4.5 hours preparing the report, and charged $120.00 per hour. (Cl. Ex. 6, p. 89) As such, I award $540.00 related to the preparation of Ms. Laughlin's vocational report.

With respect to the FCE report, agency rules do not expressly authorize taxation of the cost of an FCE report. See 876 IAC 4.33. Nonetheless, the cost of an FCE report is taxable if it was "required by a medical provider as necessary for the completion of a medical report." Sainz v. Tyson Fresh Meats, Inc., File No. 5053964, p. 3 (App. Sept. 28, 2018). If the attorney for the injured employee requested the FCE, it does not qualify as a taxable cost under agency rules. Id. (citing Pastor v. Farmland Foods, Inc., File No. 5050551 (App. Oct. 27, 2017)). In this case, claimant's attorney requested and paid for the FCE. There is no indication a medical provider requested the FCE as necessary for the completion of a medical report. Therefore, the cost of the FCE report is not taxable under Rule 876 IAC 4.33.

File No. 5064976.01 (left shoulder injury – April 12, 2018)

Claimant did not submit separate costs related to this file. As such, the only remaining issue to decide is the nature and extent of claimant's April 12, 2018 shoulder injury. Claimant argues that the specific damage to the shoulder area occurred in an area that is proximal to the glenohumeral joint, and as such, should be compensated industrially. Defendants argue that pursuant to Iowa Code section 85.34(n), the shoulder is a scheduled member and should be compensated as such.

As both parties pointed out, the Commissioner has recently issued decisions on cases involving shoulder injuries post-2017 amendments to the Iowa Code: Deng v. Farmland Foods, Inc., File No. 5061883 (App. September 29, 2020) and Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020). In Deng, the main issue was whether a rotator cuff injury – specifically the infraspinatus - should be compensated as a shoulder under section 85.34(2)(n), or as a whole body injury under section 85.34(2)(v). The Commissioner ultimately determined that "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint. The Commissioner also rejected the argument that whatever is proximal to the joint should be treated as an unscheduled injury under section 85.34(2)(v). Rather, the Commissioner held that given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff and the importance of the rotator cuff to the function of the joint, the muscles of the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, the claimant's injury in Deng was compensated as a shoulder under section 85.34(2)(n).

In Chavez, the claimant had injuries involving her rotator cuff, as well as a labral tear and subacromial decompression. Similar to Deng, the Commissioner found that the labrum is closely interconnected both in location and function to the glenohumeral joint. See Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 270 (Iowa 1995), as amended on denial of reh'g (February 14, 1996) (quoting Lauhoff Grain Co., 395 N.W.2d at 839). In fact, like the rotator cuff, the labrum is not only extremely close in

proximity to the glenohumeral joint (if not wholly contained within the joint space), but it is crucial to the proper functioning of the joint. As such the claimant's labral tear was compensated as a shoulder under section 85.34(2)(n). With respect to the subacromial decompression, the Commissioner determined that based on the medical definition of "acromion," it serves a dual purpose, as it forms part of the shoulder socket and also protects the glenoid cavity. Therefore, the acromion is closely entwined with the glenohumeral joint both in location and function. As such, any disability resulting from a subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).

In this case, claimant's injury involved a high-grade partial articular sided tear of the supraspinatus portion of the rotator cuff, with residual bursal sided fibers. (Jt. Ex. 17, p. 148) While this injury involves the supraspinatus, as opposed to the infraspinatus, the analysis of Deng still applies. Claimant's injury must be compensated as a shoulder under Iowa Code section 85.34(2)(n).

Dr. Coester, claimant's treating physician who performed surgery, provided a 13 percent upper extremity rating. (Jt. Ex. 18, p. 173) Dr. Segal, the IME physician, provided a 14 percent upper extremity impairment rating. (Cl. Ex. 3, p. 38) The ratings are nearly identical, and the difference appears to be based on Dr. Coester including 2 percent related to range of motion, while Dr. Segal provided 3 percent related to range of motion. Dr. Coester's rating was issued based on measurements taken on November 4, 2019. (Jt. Ex. 18, p. 173) Dr. Segal's measurements were taken on August 8, 2020. (Cl. Ex. 3, p. 13) Given that Dr. Segal's measurements were taken more recently, they are a better reflection of claimant's overall permanency. As such, I find claimant is entitled to permanent partial disability benefits equal to 14 percent of the shoulder, or 56 weeks of benefits. Benefits commence on November 5, 2019, pursuant to the stipulation of the parties.

ORDER

THEREFORE, IT IS ORDERED:

Related to File No. 5064977.01 (low back injury – June 8, 2016):

Defendants shall pay claimant permanent total disability benefits, at the stipulated rate of seven hundred one and 62/100 dollars ($701.62), commencing May 7, 2019, and continuing during the period of permanent total disability.

Defendants shall be entitled to credits as stipulated by the parties.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most

recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall authorize and pay for all reasonable and causally related expenses with respect to claimant's ongoing treatment with Dr. Mathew.

Defendants are responsible for all reasonable and necessary medical treatment causally related to claimant's low back condition beginning on the date of injury, June 8, 2016. Defendants shall reimburse claimant for the portions of the medical bills he paid from his own funds, and are responsible to reimburse any providers or lienholders with outstanding claims.

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

Related to File No. 5064976.01 (left shoulder injury – April 12, 2018):

Defendants shall pay claimant fifty-six (56) weeks of permanent partial disability benefits, at the stipulated rate of six hundred fifty-two and 96/100 dollars ($652.96), commencing November 5, 2019.

Defendants shall be entitled to credits as stipulated by the parties.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

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

Related to both files:

Defendants shall reimburse claimant's costs in the amount of five hundred forty and 00/100 dollars ($540.00), related to the preparation of Ms. Laughlin's vocational report.

Signed and filed this 26th day of October, 2021.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Darin Luneckas (via WCES)

Timothy Wegman (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.