BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RUSSELL SCHULTZ,

Claimant,

vs.

SUB ZERO TRANSPORTATION,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 5049794

ARBITRATION DECISION

Head Note Nos.: 1100, 1803

STATEMENT OF THE CASE

Russell Schultz, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Sub Zero Transportation, Inc., the employer and Great West Casualty Co., the insurance carrier. The hearing was held initially on February 25, 2016. The matter was not completed at that time. The hearing was recessed and reconvened on April 7, 2016.

Claimant Russell Schultz, his spouse Jodi Schultz, and Mitchell Palmer, Vice President of Sub Zero Transportation, testified at the hearing. The evidentiary record also includes claimant's exhibits 1 through 19 and defendants' exhibits A through W. Claimant's exhibits 1 through 19 are numbered consecutively, 1 through 513. Therefore, the undersigned will refer to claimant's exhibits only by page number. The undersigned found a good portion of the voluminous exhibits to be duplicative, not consistently organized by provider and not in chronological order, contrary to the hearing assignment order. Citations in this decision may be found in one or more locations in the record.

Following the hearing on February 25, 2016, the record was left open for a responsive physician report, which was admitted, made a part of the record and marked as defendants' Exhibit W. The parties provided post-hearing briefs, which were filed on May 13, 2016, at which time, the matter was considered fully submitted. In addition, the undersigned takes administrative notice, at the request of the parties, of the hearing

transcript in file number 5039015, involving claimant and a different employer, from a prior arbitration that occurred on November 6, 2012.

At the time of the present hearing, the parties completed a hearing report, which contains numerous stipulations. The parties' stipulations are noted below for convenience and accepted by the undersigned without additional factual findings or conclusions of law concerning the same.

STIPULATIONS

The parties offered the following stipulations:

1. The existence of an employer-employee relationship at the time of the alleged injury.

2. Claimant was off work for the period of December 3, 2014 through September 9, 2015.

3. If any disability is found, it would be an industrial disability.

4. Claimant was married at the time of the work injury and entitled to two exemptions (M-2).

5. Although medical benefits are in dispute, the parties stipulated that the fees or prices charged by providers are fair and reasonable, and that the medical providers, if called upon, would testify as to the reasonableness of their fees and/or treatment.

ISSUES

The parties have submitted the following disputed issues:

1. Whether the claimant sustained an injury on December 3, 2014, which arose out of and in the course of employment.

2. Whether the injury is the cause of temporary disability during a period of recovery. If so, what is the correct period of recovery?

3. Whether the alleged injury is a cause of permanent disability. If so, what is the correct commencement date for permanency benefits, and what is the extent of the permanent disability?

4. The correct gross weekly earnings of the claimant and the resulting rate.

5. Whether the medical treatment received by claimant was reasonable and necessary.

6. Whether the medical expenses incurred are causally connected to the work injury or the condition upon which the claim of injury is based.

7. Whether claimant is entitled to an independent medical exam.

8. Whether claimant is entitled to alternate care.

9. Taxation of costs.

FINDINGS OF FACT

The undersigned, having considered all of the evidence, including testimony at hearing and assessing witness credibility hereby finds:

At the time of the hearing the claimant, Russell Schultz, was 51 years old. (Tr. p. 29) He was married to Jodi Schultz on or about November 8, 2014. (Tr. p. 31) The parties have stipulated to an exemption status of M-2 for the purposes of rate calculation. (Hearing Report)

Claimant's Educational History

Claimant graduated from high school in Helena, Montana in 1982. (Exhibit U, p. 6) He had technical training in the U.S. Navy, where he worked as a radioman primarily using Teletype communication for ship to ship or ship to shore communications. (Tr. pp. 29-30) Claimant also attended one semester at a technical school in Denver, Colorado, where he took drafting courses, but did not obtain a certificate or degree. (Tr. pp. 30-31) Claimant testified that he never worked in the drafting field and that the skills he learned in the Navy are now obsolete. (Id.)

Claimant's Work History

After finishing high school, claimant was on active duty in the U.S. Navy from 1983 until 1987. (Tr. p. 29) Although claimant's primary job in the Navy was as a radioman, he also played basketball on a U.S. Navy team that traveled around Australia. (Tr. p. 33; Ex. U, p.8) Claimant was honorably discharged from the Navy in 1987. (Ex. U, p. 8)

After leaving the Navy, claimant worked part-time at a convenience store in Aurora, Colorado, and then moved to Iowa in 1988. (Tr. pp. 33-34) In Iowa, claimant worked in a grocery store for a short time and later worked as a route driver, driving a straight truck, delivering product for Coca-Cola and then Robert's Dairy. (Tr. pp. 35-37) As a route driver, claimant earned about $32,000 to $36,000 per year. (Tr. pp. 37-39)

Claimant next worked driving and unloading trucks for World Wide Dedicated, delivering products to Papa John's Pizza restaurants. (Tr. pp. 39, 41) Claimant worked for this employer from 1998 until 2012 and earned about $45,000 his first year and

about $63,000 during his last year of employment. (Ex. U, pp.12-13) Claimant testified that the job required him and a partner to drive a truck, deliver product, unload the truck and lift boxes that weighed up to 55 pounds. (Tr. pp. 41-42) Claimant testified that he was terminated from this job following an on the job injury to his low back. (Ex. U, p. 13)

Claimant testified that around the time of his termination from World Wide Dedicated, his mother, who lived in Elkhorn, Nebraska, was having health issues and this, along with claimant's belief that other potential employers in the Des Moines area were aware of his back injury and that he had an accident on his record, led him to move to the Blair, Nebraska area. (Tr. p. 72)

After moving to Nebraska, claimant was hired as a driver in February, 2013 by Foodliner, a trucking company that hauled corn syrup. (Ex. U, p. 27; Tr. p. 79) He worked as a semi-truck driver and was paid per trip, earning about $825 to $950 per week. (Tr. p. 82) Claimant was not happy with this job and was having physical problems that he did not relate to his employment and did not involve his back. (Tr. p. 80) Claimant testified that he quit his job with Foodliner after a few months to get healthy and find a job with better hours and pay. (Ex. U, p. 28; Tr. pp. 80-81)

Claimant was then hired in September, 2013 to work as a semi-truck driver, by Sub Zero Transportation, the defendant employer herein. (Tr. p. 83) Claimant testified that this was a job that he considered to be a local driving job, with no unloading or loading of trailers, and involved only dropping trailers, hooking up to other trailers and driving to locations in Iowa, Nebraska and occasionally Kansas City. (Id.) Claimant testified that he earned a wage of about $1,000 dollars per week. (Tr. p. 93) Claimant worked for this employer up to the time of the alleged work injury on December 3, 2014. (Tr. pp. 93, 95) Mitchell Palmer, Vice President of Sub Zero Transportation, testified at hearing that during the hiring process, Mr. Schultz told him that he had a prior back injury and surgery and they discussed lifting restrictions of 25 or 50 pounds. (Tr. p. 219) Mr. Palmer further testified that he had no problem with the restrictions because their drivers do not unload the trailers. (Id.)

Claimant did not return to work for Sub Zero Transportation and defendants point out that on June 23, 2015, a Notice of Adjudicator's Determination from the Nebraska Department of Labor Office of Unemployment Insurance concluded that claimant left his employment with Sub Zero Transportation on December 3, 2014 voluntarily, having made all reasonable efforts to preserve the employment, due to a "non-work related illness or injury." As a result, Mr. Schultz was entitled to receive unemployment benefits. (Ex. K, p. 1)

Claimant obtained employment with Eagle Truck Driving in early to mid-March, 2016, about one month before the arbitration hearing reconvened for part II, which occurred on April 7, 2016. (Tr. p. 201) Jodi Schultz testified that the job at Eagle Truck Driving requires claimant to drive a semi from Council Bluffs to Colorado and from time to time, stay out overnight away from home. (Tr. p. 202)

Medical History Prior to December 3, 2014

Before working for Sub Zero, claimant had a long history of problems with his back.

In April and May, 2003 claimant was seen by Des Moines Orthopedic Surgeons concerning low back pain, radiating to the right buttock with numbness, with onset about one year earlier. (Ex. E, pp. 1-7; Claimant's Ex. pp. 240-251) Claimant was diagnosed with low back pain and L5-S1 degenerative disc disease. (Cl. Ex. p. 251) Claimant underwent an FCE, which placed him in the heavy work category. (Cl. Ex. p. 252) On September 23, 2003, Lynn Nelson, M.D., of Des Moines Orthopedic Surgeons, recommended a permanent lifting restriction of 55 pounds and assigned a 5 percent permanent whole person impairment rating based on the DRE category II impairment for the lumbosacral spine based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. (Cl. Ex. p. 70)

In November 2004, claimant returned to Des Moines Orthopedic Surgeons with low back pain. (Cl. Ex. p. 253) Claimant stated that his back pain did not entirely resolve from his prior visit in May, 2003. (Cl. Ex. p. 253) An MRI of claimant's lumbar spine on December 21, 2004, indicated evidence of degenerative disc disease at the L5-S1 level, and small broad-based right-sided disc protrusion at the L4-5 level. (Ex. E, p. 8) Dr. Nelson of Des Moines Orthopedic Surgeons did not recommend surgery. (Cl. Ex. p. 255)

On November 27, 2006, claimant underwent another MRI of the lumbar spine which, among other things, showed a right paracentral disc herniation at L4-L5 with asymmetric right lateral recess narrowing and multilevel degenerative disc changes, greatest at L5-S1. (Cl. Ex. p. 226) Claimant stated that he had chronic back pain since 2003, but in September he developed right leg pain, which he never had before. (Cl. Ex. pp. 261, 262) Claimant treated with William Boulden, M.D., who recommended selective nerve block but did not recommend surgery, stating that "[t]here is still an outside chance that he would have to have surgical intervention if this continues to be chronic, recurrent situation." (Cl. Ex. pp. 93, 261, 263) Dr. Boulden stated on May 7, 2007 that claimant was at maximum medical improvement (MMI) and assigned a five percent whole person impairment rating based on category II of the DRE classification of AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

On November 14, 2010, claimant sustained an injury to his low back that occurred when he was lifting boxes while working for former employer, World Wide Dedicated. (Cl. Ex. p. 271; Tr. p. 43)

Claimant had an MRI on December 13, 2010, which showed, among other things, a disc bulge at L4-5, eccentric to the right, resulting in mild right neuroforaminal narrowing; and far left lateral osteophyte formation at L5-S1 abutting the exiting left L5 nerve root. (Cl. Ex. p. 228)

Claimant also underwent a lumbar discography on February 16, 2011, for the L4-5 and L5-S1 levels, which showed at L4-5, "moderate degenerative disc changes with multiple small fissures and a posterior annular tear but is negative for concordant back pain;" and, at the L5-S1 level "advanced degenerative disc changes with nearly complete loss of disc height and extensive marginal osteophyte formation and is strongly positive for concordant severe low back pain." (Ex. E, p. 13-14) Claimant testified that the diagnostic testing confirmed that his pain following the November 14, 2010 incident came from the L5-S1 disc issues and that he "wasn't having any pain associated with the L4-L5." (Tr. p. 56) He further testified that Dr. Carlstrom said the multiple small fissures at L4-5 were "just like some arthritis . . . [h]e said it wasn't anything to be worried about." (Tr. p. 57)

Dr. Carlstrom recommended a posterior lumbar interbody fusion of the L5-S1 vertebrae. (Cl. Ex. p. 294) The surgery was performed on March 7, 2011, by Dr. Carlstrom. (Cl. Ex. p. 295)

Claimant underwent a functional capacity evaluation (FCE) in November, 2011, which found that he demonstrated physical capabilities at the medium-heavy category of work. (Cl. Ex. p. 72) On November 29, 2011, Dr. Carlstrom recommended permanent restrictions of 25 pounds maximum lifting and 15 pounds repeatedly, and to avoid sitting or standing greater than an hour at any one time. (Cl. Ex. p. 51; Ex. M, p. 15) Dr. Carlstrom also assigned an 18 percent whole person permanent impairment based on the AMA Guides, Fifth Edition, and reiterated that opinion on October 16, 2012. (Cl. Ex. p. 51; Ex. M, p. 3) On October 16, 2012, Dr. Carlstrom also stated his further recommendation "that he not return to work as a truck driver." (Ex. M, p. 3)

On February 27, 2012 claimant underwent an independent medical examination (IME) with Daniel Miller, D.O., who assigned an impairment rating of 23 percent and agreed with the permanent restrictions assigned by Dr. Carlstrom. (Cl. Ex. pp. 34-35; Ex. M. p. 3) Dr. Miller also stated that Mr. Schultz should not be operating commercial motor vehicles due to the vibrations and jarring that occurs while operating such a vehicle and that these conditions, "would very likely flare-up or exacerbate his chronic pain that he suffers from his degenerative back disease." (Cl. Ex. p. 36)

On December 13, 2012, Mr. Kent Jayne of Worklife Resources, Inc. provided a vocational assessment. (Cl. Ex. pp. 435-453; Ex. M, pp. 21-34) Mr. Jayne notes that at that time, "Mr. Schultz has been unable to return to any employment despite vocational assistance from Amy Botkin, MS, CRC." (Cl. Ex. p. 444; Ex. M. p. 25) He opined that "It is unlikely that any feasible vocational rehabilitation plan would have a reasonable likelihood of success at the present time in returning Mr. Schultz to competitive employability absent a significant amelioration of his disability and increase in his capacities." (Cl. Ex. p. 453)

Claimant filed a workers' compensation claim with this agency regarding the November 14, 2010 incident. The matter proceeded to arbitration on November 6, 2012

and a decision was issued May 7, 2013. (Arb. Dec., File No. 5039015) In the arbitration award, the deputy determined that the job of an over-the-road truck driver was no longer available to Mr. Schultz due to the injury, but that he was motivated to work and there remained areas in the trucking and transportation industry that claimant may be able to perform. (Arb. Dec. pp. 7, File No. 5039015) The deputy further found that claimant sustained an 80 percent industrial disability and that the restrictions assigned by Dr. Carlstrom and endorsed by Dr. Miller were a more accurate statement of Mr. Schultz's medical restrictions than the medium-heavy work category identified in the FCE. (Arb, Dec. p. 5, 8, File No. 5039015) Defendants appealed the arbitration decision, which was affirmed by the commissioner on November 18, 2013. (App. Dec. p. 2, File No. 5039015) The parties then resolved the matter through a compromise settlement under Iowa Code section 85.35(3), which was approved by this agency on March 18, 2014. Mr. Schultz testified that at the time the file was settled, he was not having any problems with his L4-5 area of his back and he "was fine" at that time. (Tr. p. 82)

In addition to his back problems, Mr. Schultz sustained an injury to his right ankle while playing basketball as part of his occupation for the U.S. Navy. He testified that "I blew all the ligaments," and had reconstruction surgery. (Tr. p. 32) He receives a VA disability of $131.00 per month for this injury. (Ex. U, p. 8) As stated above, claimant was in the US Navy from 1983 to 1987. (Tr. p. 29)

December 3, 2014 Incident

After having been employed by Sub Zero for over a year, on December 3, 2014, claimant, while working as a semi-driver for Sub Zero Transportation, picked up a trailer at a Tyson plant in Council Bluffs, Iowa, intending to travel to Storm Lake, Iowa. (Tr. p. 95) As he was leaving the Tyson plant, he stopped to adjust the rear axles on the trailer. (Id.) Claimant exited the semi, walked to the trailer and bent over to reach under the trailer to pull a pin to change the position of the rear axles. (Id.) Claimant testified that when he bent over, he felt a "pop" in his back. (Tr. p. 96) He stated that his back "locked up" and he was unable to stand straight up. (Id.) He managed to get back into the semi-tractor and after a while, decided to drive to the Crescent, Iowa exit on Interstate 29 where he planned to meet his wife hoping that she could "unlock" his back or "rub it out'" so that he could continue on his way to Storm Lake, Iowa, with the load. (Tr. pp. 97-98) Mr. Schultz met his wife at the exit ramp, but she was not able to get his back to "unlock" and the pain grew worse. (Tr. p. 98) Claimant was lying in the bunk of the semi-tractor when his spouse called claimant's employer and spoke with Mitch Palmer. (Tr. pp. 98-99) Mitch Palmer is the vice-president of Sub Zero Transportation. (Tr. p. 217)

Mitch Palmer and another individual came to Mr. Schultz's location. (Tr. p. 99) Mr. Palmer, asked claimant why his wife was there and Mr. Schultz stated, "sometimes when this happens, she'll massage it for me, and it didn't work this time." (Tr. p. 223) Mr. Palmer understood this to mean that he was "having a bad day with the back" as he

was aware that claimant "had back troubles before." (Tr. pp. 223-224) Mr. Palmer testified at the hearing that Mr. Schultz did not say anything to him at the scene about hurting his back bending over to push or pull a pin. (Tr. p. 224) Jodi Schultz, claimant's spouse, agreed that she also did not tell Mr. Palmer at the scene that her husband had been hurt pulling a pin or anything about workers' compensation. (Tr. p. 203) Mr. Palmer agreed that Mr. Schultz was in pain to the point of having tears in his eyes. (Tr. p. 245) Mr. Palmer assumed that this incident was due to his prior back injury and he never asked Mr. Schultz whether he was hurt at work. (Tr. p. 246)

Mr. Palmer stated that Mr. Schultz was a good employee, punctual and did his job reasonably well. (Tr. pp. 242-243)

In his deposition, Mr. Palmer described the conversation he had with Mr. Schultz when he arrived at the scene. Mr. Palmer advised in his deposition that he told Mr. Schultz, "[l]et's get you somewhere where they can look at your back." (Cl. Ex. p. 409) Mr. Palmer also said that Mr. Schultz stated "I don't know what happened. I'm just spasming. It locked up while I was driving down the road. I felt fine in Council Bluffs. It just started." (Id.) Mr. Schultz testified that he was asked by Mr. Palmer "what I thought it might be, and I said, 'I have no idea what it is because it's never locked up before'." (Tr. p. 101)

Mr. Palmer drove the semi-tractor back to the Sub Zero plant and claimant's spouse followed in her vehicle. (Id.) Claimant, who was in the bunk of the semi-tractor, testified that he was in substantial pain and that it was "getting worse," such that he had tears in his eyes during the ride. (Tr. pp. 99-100) Claimant, contrary to Mr. Palmer's testimony, stated that he told Mr. Palmer that he was pulling the pin to slide the axles when his back popped. (Tr. pp. 101, 102) Mr. Palmer stated in his deposition that he did not ask claimant what happened to his back while they were together in the semi-tractor returning the Sub Zero plant, which is a trip of about 15 to 20 minutes, or at the Sub Zero plant after they returned. (Cl. Ex., p.409) Upon their return to Sub Zero, Mr. Schultz was assisted out of the semi-tractor by several other employees of Sub Zero to his spouse's vehicle, who intended to take Mr. Schultz to get medical attention. (Tr. pp. 100, 225)

Mr. Palmer testified at hearing that he had a brief discussion with claimant's spouse, Jodi Schultz, upon their arrival at Sub Zero. (Tr. p. 225) Mr. Palmer asked her if Mr. Schultz had a regular doctor, and Mrs. Schultz advised that he did not. (Id.) According to Mr. Palmer, Mrs. Schultz then asked, "where should I go?" (Id.) To which, Mr. Palmer replied, "Well, the closest is Creighton. It's just down the freeway two exits." (Id.) Claimant's spouse then left with claimant in her vehicle and headed to Creighton Medical Center. (Cl. Ex. 10, p. 410) Mr. Palmer testified that when he suggested Creighton Medical Center, he was not intending to direct the medical care for Mr. Schultz, and only suggested it because it was nearby. (Tr. p. 226) However, Mr. Palmer testified in his deposition that if a worker gets injured, typically he would tell

the person to go to Creighton or another hospital if the injury occurred while a driver was on the road. (Cl. Ex. p. 404)

Mr. Palmer spoke to Jodi Schultz later the same day the incident occurred, when she returned to Sub Zero with "a piece of paper saying he [Mr. Schultz] couldn't work that day." (Ex. p. 410) Mr. Palmer testified that the claimant called him a few days later, expressing concern about his health insurance. Mr. Palmer assured claimant that "[y]ou're covered for now," and asked claimant how his back was doing. (Id.) Mr. Palmer testified that claimant told him something like, "[m]y doctor said this was going to happen but I just didn't think it would be this soon." (Id.) Mr. Palmer stated that he just assumed that whatever happened to his back from the previous injury was flaring up. (Ex. p. 410; Tr. p. 228) Mr. Palmer testified that at that time, a work injury was not on his mind, because it had never been mentioned to him as a specific work injury. (Tr. p. 229)

Medical Treatment on December 3, 2014 and following

Claimant was taken from the Sub Zero facility by his spouse to the emergency department at Creighton University Medical on December 3, 2014, as described above. Mr. Schultz had to be assisted out of the car and he was unable to straighten his back upon arrival. (Tr. p. 97) Mr. Schultz reported to the emergency staff that his symptoms came on suddenly and were related to bending when he was "pulling a pin on the trailer." (Cl. Ex. p. 97) Mr. Schultz told the emergency staff that he had a prior L5-S1 fusion in March, 2011, and that "'he had it lock up once since 2013' but since then reports just occasional pain 'but never this bad.'" (Cl. Ex. pp. 97-98) It is recorded that "[a]t discharge, the patient's status had improved. The patient was felt to be in fair condition. On a 0 to 10 pain scale, the patient's pain was 1/10." (Cl. Ex. p. 100) However, in the emergency room claimant was given Zofran, Ativan, and Dilaudid and was sent home with prescriptions for Percocet and Valium. (Cl. Ex. p. 109) Claimant testified at hearing that he had been "pumped . . . full of drugs," including muscle relaxers and painkillers. (Tr. p. 103)

Claimant went to the Creighton Clinic on December 5, 2014, and reported that the pain started "while pulling up a pin on back of truck." (Cl. Ex. p. 117; Ex. D, p. 5) Mr. Schultz indicated that he had a more minor flare last year that resolved with stretching and popping his back. (Id.) An x-ray indicated degenerative changes at L4-5. (Cl. Ex. p. 118) Donald Mantz, M.D. indicated a diagnosis of "back pain" and stated that claimant's history was "consistent with a disc tear with acute inflammation." (Id.) He was taken off work. (Cl. Ex. p. 119)

On December 15, 2014, claimant was seen by John McClellan, M.D. at the Nebraska Spine and Pain Center upon a referral from Dr. Mantz. Mr. Schultz reported to this clinic, the same story of how the pain began, stating that on December 3, 2014, he "got out of semi, walked to back of semi-trailer, bent forward to release hydraulic pin and felt a pop and back locked up . . . [e]xtreme pain shot through my spine radiating

down legs, buttocks and out both sides of waiste [sic]." (Cl. Ex. p. 124) Claimant reported that he had a prior L5-S1 fusion performed by Dr. Carlstrom in Des Moines, Iowa, in 2011, and that he was given restrictions of "no lifting max over 25 pounds and no repetitive lifting over 15 pounds . . . also had limitations on sitting and standing." (Cl. Ex. 128)

On December 29, 2014, Mr. Schultz underwent an MRI that showed among other things, at L4-5, "Mild-moderate degenerative disc disease. Moderate bilateral facet arthropathy. Mild diffuse disc bulge of a small posterior right paracentral annular fissure. Mild central canal and bilateral lateral recess stenosis, right greater than left. Moderate right and mild left neural foraminal stenosis." (Cl. Ex. p. 237; Ex. B, p. 7)

Following the MRI, Dr. McClelland did not recommend surgery and claimant was not to return to work until he could be seen by Phillip Essay, M.D. for non-surgical pain management. (Cl. Ex. 137; Ex. B, p. 8) Claimant was seen by Dr. Essay on January 14, 2015, who confirmed the annular tear at L4-5, provided an epidural injection, and kept claimant off work. (Ex. B, p. 9; Cl. Ex. 143)

On January 28, 2015, claimant began treating for his back pain with the VA hospital in Omaha, Nebraska. (Cl. Ex. p. 185) Claimant testified that he sought treatment at the VA because he was unable to afford regular ongoing care with Dr. Essay. (Tr. pp. 116 & 117) Defendants denied liability and were not paying for medical care. (Tr. p. 113) Claimant had only a few appointments with Dr. Essay thereafter. The last appointment with Dr. Essay, according to the records provided, was on March 11, 2015 at which time Mr. Schultz was seen for follow-up regarding physical therapy. (Cl. Ex. 154) However, claimant had not started physical therapy because it had not been approved by the workers' compensation insurance company. Claimant tried to rehab on his own without much success. (Id.) It is noted that he had been very compliant with the remainder of the treatment plan and that he was unable to return to work because of the recommendation for work hardening of 4 hours per day, which the employer was unable/unwilling to accommodate. (Id.) At the conclusion of that visit, he was continued on medication with no change in work status. (Cl. Ex. p. 157)

On March 30, 2015, Mr. Schultz received a neurosurgery consultation at the VA. (Cl. Ex. p. 203; Ex. C, p. 1) At that time, it is noted that claimant's pain began in December, but that "[s]ince that time . . . the pain has been improving," and that "he sought a second opinion to make sure that nothing was wrong." (Id.)

On April 16, 2015, Daniel Miller, D.O. was asked to respond to a letter from defense counsel. Dr. Miller last saw Mr. Schultz when he conducted an IME on February 21, 2012, for the November 14, 2010 injury at World Wide Dedicated. (Tr. p. 110) In other words, Dr. Miller last saw the claimant about three years before the December 3, 2014, incident. Without evaluating the client, he opined that the incident of December 3, 2014, "did not result in significant injuries to the lumbar spine, rather, this is a temporary exacerbation of his pre-existing back condition." (Cl. Ex. p. 40; Ex. G,

p. 2) Dr. Miller added to his opinion on June 25, 2015, in another letter to defense counsel stating: "I do not believe that this is a new incident, but rather, a continuation of his previous back incident." (Cl. Ex. p. 41, Ex. G, p. 5) Dr. Miller also added "I never recommended to Mister Schultz to return to truck driving and I would never recommend him to return to this type of work." (Id.)

Mr. Schultz then had a functional capacity evaluation (FCE) on September 10, 2015 at Physio@Work. (Cl. Ex. pp. 77-92; Ex. J, pp. 1-16) The result was that he was "able to perform within the MEDIUM Physical Demand Category of work with occasional lifting below waist height to 55 lbs. The client lifted 50 pounds to shoulder height and 35 pounds overhead. The client carried 45 pounds. Pushing abilities were evaluated and the client pulled 40 horizontal force pounds and pushed 50 horizontal force pounds respectively." (Cl. Ex. p. 77; Ex. J, p. 1)

On October 2, 2015, Mr. Schultz was seen by Jacqueline Stoken, D.O. for an (IME, which was arranged by his attorney. (Tr. p. 111) She issued a report of her evaluation on October 21, 2015. (Cl. Ex. p. 1) In her report, Dr. Stoken states that at that time, Mr. Schultz was complaining of pain in his low back, ranging from 2/10 to 7/10. His pain was averaging 4/10. (Cl. Ex. p. 14) Dr. Stoken opined that the incident described by Mr. Schultz of bending over and reaching to change the wheel position and experiencing a pop in his back, "should be considered the cause of a new injury." (Cl. Ex. p. 16) Dr. Stoken stated that "[h]e now has a mild to moderate disk collapse at the L4-5 level with neuroforaminal stenosis moderate on the right at L4-5 and L4-5 and posterior annular fissure." (Id.) Dr. Stoken stated that "[t]he work incident of 12/03/14 was a significant contributing factor to Mr. Schultz's pain and objective annular tear findings at L4-5. He did not have this finding prior to this time nor did he have the pain associated with these findings." (Id.) However, it is noted that claimant did have a discography on February 16, 2011, described above, which showed an annular tear at the L4-5 level, although Dr. Stoken is correct, that it was negative for concordant back pain. (Ex. E, p. 13) Dr. Stoken believed that Mr. Schultz reached MMI on September 10, 2015, and that reasonably anticipated future medical care would include pain management, and potentially future surgery if the L4-5 level continues to deteriorate. (Cl. Ex. p. 17) Concerning permanent restrictions, Dr. Stoken stated that she agrees with Dr. Carlstrom that,

> [H]is work restrictions should be in the [l]ight category. I do not agree with the Functional Capacity Evaluation done 9/10/15 which placed him in the [m]edium category of work. Reasonable permanent restrictions would be to avoid repetitive bending, lifting and twisting. She [*sic*] should not lift constantly. He should limit lifting to less than or equal to 10 lbs. frequently, or 20 lbs. occasionally. This places him in the [l]ight category of work.

(Cl. Ex. p. 17) Dr. Stoken then assigned a permanent impairment under the AMA Guides, Fifth Edition, of 13 percent relying in part on "an MRI which shows

collapse of the disc at L4-5 with neuroforaminal stenosis moderate on the right at L4-5 and L4-5 and [*sic*] posterior annular fissure." (Cl. Ex. p. 17)

On January 28, 2016, Dr. Miller responded to a letter from claimant's counsel. (Cl. Ex. pp. 42-46) In that response he stated that the injury from December 3, 2014 caused a period of healing and necessitated medical care and that the permanent restrictions assigned by Dr. Stoken of light physical demand work, including local truck driving, lifting 20 pounds occasionally and 10 pounds frequently were reasonable. (Cl. Ex. pp. 42-43) However, Dr. Miller then contradicts his position on restrictions in the same letter by agreeing with the restrictions from the September 10, 2015 FCE, which found claimant capable of medium physical demand level work, including a 55 pound maximum lifting restriction and 45 pounds frequently, along with frequently carrying 38 pounds and sitting 90 minutes at a time. (Cl. Ex. pp. 42-44) Dr. Miller also states that the findings of the December 29, 2014 MRI of L4-5 facet disease and mild disc bulge to the right and annular fissure were present on the MRI of December 13, 2010. (Cl. Ex. p. 44) Dr. Miller then prepared a typed letter responding to specific questions posed by claimant's counsel. This letter included a modification to his prior prohibition from truck driving as well as a change to his opinion concerning permanent restrictions. Dr. Miller previously stated his opinion that he "would never recommend" that claimant return to truck driving as stated above (Cl. Ex. p. 41; Ex. G, p. 5) and changed that position to, "I believe that Mr. Schultz may return to what I consider 'light' truck driving. That is, short runs no longer than 90 minutes in a stretch, no lifting of objects greater than 55 pounds, no frequent bending or twisting required, and no pushing or pulling over 50 pounds required." (Cl. Ex. p. 46)

I find that Dr. Miller's typed and signed response of January 28, 2016, concerning claimant's restrictions to be the most accurate statement of his opinion regarding permanent restrictions and claimant's abilities regarding truck driving. (Cl. Ex. p. 46) This written response is more reliable as to the doctor's opinion than the contradictory "check the box" responses.

On February 18, 2016, Dr. Miller responded to a letter from defense counsel and attempted to clarify his opinion of "light truck driving," stating that because Mr. Schultz can drive his car without restrictions, he should be able to drive a car, van, or light truck for courier/delivery service because this would be less strenuous than driving a large commercial motor vehicle. (Cl. Ex. p. 49)

Dr. Miller also stated that claimant went against medical advice of himself and Dr. Carlstrom to avoid driving commercial motor vehicles and that by going against that advice, Mr. Schultz "has aggravated his pre-existing back condition." (Cl. Ex. p. 49)

Thomas Carlstrom, M.D., performed the L5-S1 fusion on claimant on March 7, 2011. (Cl. Ex. p. 295) Dr. Carlstrom had not seen the claimant since November 29, 2011, about three years before the December 3, 2014, incident. (Tr. p. 111) In late November of 2011, Mr. Schultz had just completed an FCE, which placed him in the

medium work category and Dr. Carlstrom stated that the FCE "did more or less confirm restrictions for him and I think those should be considered permanent." (Ex. p. 51) Although, Dr. Carlstrom then modified the lifting restriction to a maximum lifting of 25 pounds and frequent lifting of 15 pounds. He also recommended that claimant "avoid sitting or standing for any longer than one hour at a time." (Ex. p. 52) He then also assigned an impairment rating of 18 percent to the whole person for the low back injury and subsequent L5-S1 fusion. (Ex. pp. 51 & 52)

On June 25, 2015, Dr. Carlstrom provided a letter in response to a letter from defense counsel in which he stated that annular tears are not considered by him to be significantly symptomatic, and that although the current symptoms were caused by the work activity, the injury "should not result in any further impairment." (Ex. I, pp. 17-18)

Dr. Carlstrom then responded to a letter from claimant's counsel on January 27, 2016, in which he agrees that Mr. Schultz sustained a work injury on December 3, 2014. (Cl. Ex. p. 57) He, like Dr. Miller, agreed that the L4-5 facet disease, mild disc bulge and annular fissure were present on the pre-injury MRI of December 13, 2010. (Cl. Ex. p. 58) Dr. Carlstrom, indicates that he agrees with Dr. Stoken's assessment of restrictions that claimant is capable of local truck driving and lifting 20 pounds occasionally and 10 pounds frequently, provided that the lifting requirements are understood to relate to "lifting and repositioning material" and not "carrying and delivering." (Cl. Ex. p. 58) However, Dr. Carlstrom states that he disagrees with Dr. Stoken that Mr. Schultz is capable of local truck driving jobs and limits claimant to "maybe a pickup sized truck on short runs, no loading or unloading." (Cl. Ex. p. 59) Dr. Carlstrom also contradicts his prior opinion concerning appropriate lifting restrictions, stating that claimant can perform maximum lifting of 30 pounds occasionally and 15 pounds frequently. (Cl. Ex. p. 59)

As stated above, neither Dr. Miller, nor Dr. Carlstrom had seen the claimant for about three years prior to the December 3, 2014 incident and neither doctor saw Mr. Schultz after the December 3, 2014 incident.

A physician who actually saw and provided treatment to claimant after the December 3, 2014 incident was Phillip Essay, M.D. of the Nebraska Spine and Pain Center. Dr. Essay, stated in a letter dated June 5, 2015, to claimant's counsel that,

> It is my opinion that Mr. Schultz's current symptoms are a result of the annular tear described above, but are essentially [an] aggravation of a pre-existing back condition. The treatment outlined above, including physical therapy, medications and epidural injections has [*sic*] been medically reasonable and necessary due to the December 3, 2014 work accident and injury. It is my opinion that at the time Mr. Schultz reaches maximum medical improvement, that a functional capacity evaluation should be performed to determine safe permanent working limitations.

(Cl. Ex. p. 27-28) Because Dr. Essay actually saw and treated Mr. Schultz after the December 3, 2014 incident, he was in a better position than Dr. Miller and Dr. Carlstrom to provide an opinion concerning causation and current work capacity. I therefore give greater weight to the opinion of Dr. Essay. The undersigned notes that Dr. Stoken opined that claimant sustained a work injury on December 3, 2014. (Cl. Ex. p. 16) Further, Dr. Miller has stated that Mr. Schultz "has aggravated his pre-existing back condition." (Cl. Ex. p. 49) Also, Dr. Carlstrom has opined that claimant's current symptoms were caused by the work activity. (Ex. I, pp. 17-18) Therefore, the medical evidence as a whole, supports the conclusion that claimant sustained an injury with the question being the extent of the injury.

Dr. Essay noted in the June 5, 2015, letter to claimant's counsel that at that time, he had last seen Mr. Schultz on May 13, 2015, and had released him to return to work of 7 hour days, 3 days per week. (Cl. Ex. p. 27) Dr. Essay further stated that he anticipated seeing Mr. Schultz again on July 8, 2015, to determine if he has reached MMI. (Id.) Dr. Essay then states that "[i]t is my opinion that at the time Mr. Schultz reaches maximum medical improvement, that a functional capacity evaluation should be performed to determine safe permanent working limitations." (Cl. Ex. p. 28) On July 8, 2015, Dr. Essay released Mr. Schultz to return to work of 8 hours per day, 5 days per week with no lifting more than 25 pounds maximum and 15 pounds repetitively and ordered an FCE. (Ex. B, p. 12)

Mr. Schultz then had an FCE on September 10, 2015 at Physio@Work. (Cl. Ex. pp. 77-92; Ex. J, pp. 1-16) The result was that he was "able to perform within the MEDIUM Physical Demand Category or work with occasional lifting below waist height to 55 lbs. The client lifted 50 pounds to shoulder height and 35 pounds overhead. The client carried 45 pounds. Pushing abilities were evaluated and the client pulled 40 horizontal force pounds and pushed 50 horizontal force pounds respectively." (Cl. Ex. p. 77; Ex. J, p. 1)

Dr. Essay did not modify his opinion after the FCE was obtained concerning work restrictions. In addition, Mr. Schultz testified that he did not believe that he would be able to perform at the levels indicated in this FCE on a regular basis. (Tr. p. 118)

Dr. Stoken in her IME stated that she did not agree with the conclusion of the September 10, 2015 FCE that claimant be placed in the medium work category. (Cl. Ex. p. 17) After her examination of claimant and review of the medical records, she assigned permanent restrictions of: "avoid repetitive bending, lifting and twisting. She [*sic*] should not lift constantly. He should limit lifting to less than or equal to 10 lbs. frequently, or 20 lbs. occasionally." (Id.)

I find, based on Dr. Essay's opinion, that Mr. Schultz experienced an aggravation of a pre-existing back condition that arose out of and in the course of his employment on December 3, 2014. No physician has indicated that an injury did not occur. I further find based on Dr. Essay's opinion that the treatment claimant has received discussed

above, including physician appointments, physical therapy, medications and epidural injections are causally connected to, and were made reasonable and necessary, due to the December 3, 2014 work injury.

I further find that the restrictions as assigned by Dr. Essay of returning to work 8 hours per day, 5 days per week with no lifting more than 25 pounds maximum and 15 pounds repetitively (Ex. B, p. 12), were not modified following the FCE, which along with both Dr. Stoken's and claimant's rejection of the FCE results as a realistic statement of claimant's capabilities, renders Dr. Essay's opinion concerning restrictions most persuasive. Dr. Stoken assigned more restrictive restrictions. Nevertheless, I find that Dr. Essay's statement of restrictions is most appropriate in light of the benefit he had of multiple visits with the claimant as opposed to the single IME performed by Dr. Stoken.

Although Dr. Miller and Dr. Carlstrom offered opinions about permanent restrictions their opinions contradicted themselves and neither physician had the opportunity to personally evaluate and examine Mr. Schultz after the December 3, 2014 incident and, in fact, had not seen Mr. Schultz for a period of about three years before that date.

I find that Mr. Schultz, prior to December 3, 2014, had permanent work restrictions in place as stated in the prior Arbitration Decision entered May 7, 2013, in File Number 5039015, as assigned by Dr. Carlstrom and Dr. Miller of 25 pounds maximum lifting, and 15 pounds frequently, and to avoid sitting and standing more than an hour. (Ex. M, p. 48) At that time, the deputy in the prior case also included Dr. Carlstrom's statement that he did not recommend that claimant return to work as a truck driver. (Id.) The evidence does not indicate that these restrictions were lifted or modified prior to December 3, 2014.

Healing Period

The parties agree in the hearing report that claimant was off work from December 3, 2014 until September 10, 2015. However, defendants assert that claimant reached MMI on May 13, 2015. I find that claimant was off work from the date of the injury on December 3, 2014 and did not return to work for Sub Zero Transportation. Dr. Essay released him to return to work at 8 hours per day, 5 days per week on July 8, 2015, with lifting restrictions of no lifting greater than 25 pounds maximum and 15 pounds repetitively. (Ex. B, p. 12) Mr. Palmer testified that when Mr. Schultz was initially hired, they discussed lifting restrictions of 25 or 50 pounds due to his previous back injury and fusion surgery. (Tr. p. 219) Mr. Palmer further testified that he had no problem with the restrictions because their drivers do not unload the trailers. (Id.) Therefore, although Dr. Stoken did not assign MMI until September 10, 2015, I find that when Dr. Essay released Mr. Schultz to return to full time work hours with the lifting restrictions described above, that Mr. Schultz was medically capable of returning to employment substantially similar to the employment in which he was engaged at the

time of the injury, per Iowa Code section 85.34(1). (Cl. Ex. p. 17; Cl. Ex. 77; Ex. J, p. 1) I therefore find that the appropriate healing period is December 3, 2014 through July 8, 2015.

Average Weekly Wage and Applicable Rate

Concerning claimant's applicable rate, the parties have stipulated that claimant is married with 2 exemptions. (Hearing Report) Claimant alleges in his exhibits that his average weekly earnings are $1,032.98, but provides no argument in his brief for the calculation. (Cl. Ex. p. 369) Defendants allege the average weekly wage is $1,001.30, but again with no argument of any significance. (Ex. R, p. 1) The undersigned notes that defendants and claimant do not agree as to the proper week ending dates such that a side-by-side comparison is difficult. It is also noted that defendants have used in their calculation the week that they believe ended December 5, 2014, which is two days after the injury on December 3, 2014, and not proper for consideration in a rate calculation. Defendants then rely on what appears to be the preceding weeks in succession without excluding any weeks. (Ex. R, p. 1) Claimant's most recent week relied upon is noted as ending on November 24, 2014. (Cl. Ex. p. 369) Claimant then excludes the weeks ending November 10, and September 2, 2014, presumably as unrepresentatively low. (Id.) The gross pay for the week ending November 10, 2014 was $796.40. (Cl. Ex. p. 374) The gross pay for the week ending September 2, 2014 was $766.00. (Cl. Ex. p. 394) These are the only two weeks below $800.00 with most weeks nearer $1,000.00. Also, these two weeks represent weeks of 9 or 10 loads hauled, when the majority of the remaining weeks involve 12 to 14 loads hauled, with three weeks having 11 loads hauled. Therefore the remaining weeks' average loads hauled is 12.38 loads per week. The average of the two excluded weeks is 9.5 loads per weeks, or a reduction of nearly 24 percent of loads hauled per week. Based on these factors, I find that the weeks excluded by the claimant should be excluded as not fairly representative of claimant's earnings. I therefore adopt claimant's calculation of average weekly wage and rate as correct.

Industrial Disability

After the December 3, 2014 work injury, claimant did not have additional surgery. The annular tear and fissures at L4-5 predated the December 3, 2014 incident as they also appeared on the discography on February 16, 2011. (Ex. E, p. 13) Although, they were not associated with concordant back pain prior to December 3, 2014. (Id.) Claimant's work restrictions as assigned by Dr. Essay and adopted by the undersigned are similar to the work restrictions claimant had been assigned by Dr. Carlstrom and endorsed by Dr. Miller years before the December 3, 2014, incident. Claimant applied for work at Sub Zero with these restrictions in place and known to the employer at the time he was hired. Also, claimant testified concerning his condition following the December 3, 2014 work injury as follows:

Q: (By Mr. King) Russ, do you feel like you're back to where you were before this injury happened, or do you feel worse? How do you feel about your condition now?

A: With all the exercises and stuff that I have done through physical therapy and stuff, I could have went back to work at Sub Zero.

(Tr. p. 119) Claimant has since returned to truck driving in a job that requires some occasional overnight hauls. (Tr. p. 201)

On October 21, 2015, Dr. Stoken assigned permanent impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Cl. Ex. p. 17) Dr. Stoken examined claimant and found asymmetrical reflex response in the lower extremities as well as asymmetric lumbar range of motion. Dr. Stoken assigned a 13 percent impairment to the body as a whole based on the DRE Lumbar Category III, due to the lumbar injury, asymmetric range of motion, muscle spasms and radicular symptoms.

When considering claimant's loss of earning capacity the question includes an assessment of claimant's loss of access to the competitive labor market in light of the injury. Claimant was reassessed by the competitive labor market when he was hired and worked for Sub Zero for more than a year before the work injury. Claimant has likewise shown by his hiring at Eagle Trucking Company that he is able to continue to function as a truck driver in the competitive labor market.

In light of the factors relative to industrial disability and noting in particular claimant's continued employment as a truck driver, in addition to claimant's age, education, the applicable restrictions, his work experience, the length of the healing period, among other appropriate considerations for the determination of industrial disability, I find that claimant sustained industrial disability of 20 percent (100 weeks).

CONCLUSIONS OF LAW

Defendants allege that this claim is barred based on the notion that claimant was not forthcoming about his restrictions during the application process. Defendants argue that claimant was told by Dr. Carlstrom and Dr. Miller that he should not drive a semi and his failure to disclose this specific information to the employer, should preclude claimant from receiving any award in this matter. The undersigned is unable to locate any supportive authority for this position. Further, Mr. Palmer testified that he spoke with Mr. Schultz at the time that he was hired about restrictions, saying that, "he said due to his injury he couldn't lift, like 25 or 50 pounds or something like that." (Tr. p. 219) Mr. Palmer stated that the restrictions were not a problem because the drivers were not required to do any lifting. (Id.) In addition, claimant worked successfully for the employer for over a year before the incident occurred on December 3, 2014, which is a good indicator of his physical abilities at the time. Also, claimant provided unrebutted

testimony that this job with Sub Zero was considered a local truck driving job, such that he was not over the road. (Tr. p. 83) Claimant's own IME physician, Dr. Stoken said that "Mr. Schultz could perform local truck driving jobs without lifting." (Cl. Ex. p. 17) I respectfully, find that this argument is without merit.

The primary issue in dispute in this case is whether or not the claimant sustained an injury that arose out of and in the course of his employment with Sub Zero Transportation on December 3, 2014.

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).

As found above I accept the opinion of Dr. Essay concerning causation, particularly relying upon his conclusion that what claimant really had was an aggravation of a pre-existing condition and for the reasons stated above I conclude that claimant, did sustain an injury that arose out of and in the course of his employment with Sub Zero Transportation on December 3, 2014.

The next issue is the extent of healing period benefits. The parties stipulated that claimant was off work from December 3, 2014 through September 10, 2015. (Hearing Report) Claimant was taken off work by the Creighton Emergency Department physician on December 3, 2014 and never returned to work for the defendant employer. (Cl. Ex. p. 100) Claimant argues that the healing period should extend to September 10, 2015, the date that Dr. Stoken assigned MMI. (Cl. Ex. p. 17) Defendants argue that the healing period should end on May 13, 2015 based on claimant's testimony at hearing that Dr. Essay told the claimant that he was at maximum

improvement at that time and claimant felt he could have returned to work at Sub Zero Transportation. (Tr. p. 125)

Healing period benefits under Iowa Code section 85.34(1) are payable to an employee who has sustained a permanent partial disability "beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first."

Concerning the May 13, 2015 visit with Dr. Essay, there is no document in evidence that records the appointment concerning the doctor's words, or claimant's sense of his ability at that time. The defendants did not offer any record in support of this contention. The only record in evidence regarding this appointment appears to be a payment receipt with a hand written note, which states: "Receipt for Dr. Essay visit 5/13/15." (Cl. Ex. p. 356) The undersigned relies instead on the verifiable physician records in evidence which support the conclusion that it was not until July 8, 2015, when claimant was returned to work by Dr. Essay to work full time with lifting restrictions, which Mitch Palmer had testified were not a problem. (Ex. B, p. 12; Tr. p. 219)

After being taken off work on December 3, 2014, the question is which occurs first: claimant returns to work; claimant reaches MMI; or, claimant reaches a point of healing, such that he is medically capable of returning to similar employment that he/she had at the time of the injury. In this case, it is the latter that occurs first, when Dr. Essay released claimant to return to work at 8 hours per day, 5 days per week on July 8, 2015, with lifting restrictions of no lifting greater than 25 pounds maximum and 15 pounds repetitively. (Ex. B. p. 12) Mr. Palmer had testified that the lifting restrictions were not a problem at the time that claimant was hired, because according to Mr. Palmer, "[w]e don't do any driver unloadings." (Tr. p. 219) Therefore, claimant could have returned to work with these restrictions at that time and the appropriate healing period is from December 3, 2014 through July 8, 2015 and claimant is entitled to the same.

The next issue is whether the alleged injury is a cause of permanent disability and if so, the extent of permanent disability and the correct commencement date.

The parties stipulated that any permanent disability is an industrial disability. (Hearing Report) As found above, I conclude that claimant sustained permanent impairment.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained.

Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

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

When considering claimant's loss of earning capacity the question includes an assessment of claimant's loss of access to the competitive labor market in light of the injury. Claimant was reassessed by the competitive labor market when he was hired and worked for Sub Zero for more than a year before the work injury. Claimant has likewise shown by his hiring at Eagle Trucking Company that he is able to continue to function as a truck driver.

In light of the factors relative to industrial disability and noting in particular claimant's continued employment as a truck driver, I have found above that claimant has sustained industrial disability of 20 percent. Industrial disability benefits shall begin at the termination of healing period benefits, which as stated above conclude on July 8, 2015.

The next issue is a determination of the correct gross weekly earnings of the claimant and the resulting rate.

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

As found above and for the reasons there stated, I accept the claimant's rate calculation and conclude the applicable rate is $651.84 per week.

The next issue to be addressed is whether the medical treatment received by claimant was reasonable and necessary and causally connected to the work injury.

The undersigned found above that the medical treatment claimant received was causally related to the work injury and reasonable and necessary. Claimant's exhibit at page 344 totaling $10,991.76 shall be paid by defendants. In addition thereto, defendants shall pay to claimant the mileage reimbursement of $645.84 as detailed in claimant's exhibit, page 368.

The next issue is whether or not claimant is entitled to an IME under Iowa Code section 85.39. Iowa Code section 85.39 provides in pertinent part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

On May 18, 2015, the employer obtained an opinion from Dr. Miller in which he stated, "it is my opinion within a reasonable degree of medical certainty that [the] alleged work injury on December 3, 2014, did not result in significant injuries to the lumbar spine, rather this is a temporary exacerbation of his pre-existing back condition." (Ex. G, p. 2) On June 25, 2015, the employer obtained an opinion from Dr. Carlstrom, in which he stated, "[i]t seems to me that his current symptoms were caused by the work activity . . ." (Ex. I, p. 17) Dr. Carlstrom also stated, "As to impairment, I see that I suggested an 18% impairment to the body as a whole back in 2011. I do not think this injury should result in any further impairment." (Ex. I, pp. 17-18) These opinions represent "an evaluation of permanent disability . . . made by a physician retained by the employer . . ." (Iowa Code section 85.39).

On October 2, 2015, claimant underwent an independent medical examination with Dr. Stoken, who issued her report on October 21, 2015, assessing permanent impairment. (Cl. Ex. pp. 1-26) Claimant is entitled to reimbursement under Iowa Code section 85.39. The amount of the evaluation is contained in claimant's exhibit, page 342, which is $3,400.00.

Claimant identified alternate medical care as an issue on the hearing report, but did not present any particular care that claimant is seeking at this time. Claimant has not had medical treatment related to this injury since the summer of 2015. Therefore, because no specific care was sought, no specific care under alternate medical care will be ordered, however, defendants shall provide reasonable medical care to claimant for this work injury pursuant to Iowa Code section 85.27(1).

Claimant argued in his brief for penalty benefits. However, penalty was not made an issue on the hearing report. Further, the undersigned went through the pending

issues with counsel on the record and because penalty was not included on the hearing report, the undersigned did not identify it as an issue for hearing. The undersigned then asked counsel whether the issues for hearing had been identified correctly, and both claimant and defense counsel responded, "yes." (Tr. p. 7) Therefore, because penalty was not properly raised at the time of the hearing, the same will not be determined now.

Concerning costs, I exercise discretion and award the costs from claimant's exhibit page numbers 337-343, excluding the Dr. Stoken evaluation, as the same has been addressed above as an IME reimbursement and is not taxed as a cost herein. Concerning said costs, I combine the amounts from Nebraska Spine & Pain (Dr. Essay) of $250 and $500 for a total of $750 as these represent one physician opinion/report. Claimant's counsel had a conversation with Dr. Essay at The Nebraska Spine & Pain Center on or about December 16, 2014, which cost $250. Payment was then made in the amount of $500 on or about February 27, 2015 for the purpose of obtaining written opinions. Those opinions were issued by Dr. Essay in his letter to claimant's counsel on June 5, 2015. Therefore, the $250 conference and the $500 cost for the written opinion letter, both related to claimant obtaining the opinions set forth in the single letter of June 5, 2015 from Dr. Essay, which is contained at claimant's exhibits, page numbers 27-28. Regarding the cost of $1,000 charged for the February 2, 2016, medical review of Dr. Daniel Miller, I find that the date of February 2, 2016 was the date of the billing for the service provided on or about January 28, 2016, which includes a "letter RE: Russell Schultz," and was issued to claimant's counsel. (Cl. Ex. p. 343; Cl. Ex. pp. 45-46) This is the second physician opinion/report allowed under rule 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from December 3, 2014 through July 8, 2015.

Defendants shall pay claimant weekly benefits for permanent partial disability of one hundred (100) weeks.

All weekly benefits shall be paid at the rate of six hundred fifty-one and 84/100 dollars ($651.84) per week.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30 and shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay, reimburse, and or otherwise satisfy all medical expenses and medical transportation expenses identified in claimant's exhibit, page numbers 344 and 368.

Defendants shall reimburse claimant's IME expense of three thousand four hundred and 00/100 dollars ($3,400.00) as set forth in claimant's exhibit, page number 342.

Defendants shall provide future medical treatment as may be needed pursuant to Iowa Code section 85.27(1).

Defendants shall pay the costs of this action as set forth in claimant's exhibit, page 337, excluding the IME expense of Dr. Stoken of three thousand four hundred and 00/100 dollars ($3,400.00), which is addressed above and not included as a cost.

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.

Signed and filed this 10th day of October, 2016.

TOBY J. GORDON
DEPUTY WORKERS'
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TJG/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.