BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| RON PETER CAIN,<br><br>Claimant,<br><br>vs.<br><br>FLEET WHOLESALE SUPPLY, INC.,<br><br>Employer,<br><br>and<br><br>SENTINEL INSURANCE COMPANY, INC.,<br><br>Insurance Carrier,<br>Defendants. | File Nos. 5064100, 5064101, 5064102<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Notes: 1100, 1702, 1801.1, 1803, 2206, 2207 |

## STATEMENT OF THE CASE

Claimant, Ron Cain, filed three petitions in arbitration for workers' compensation benefits against Fleet Wholesale Supply Company, Inc., employer, and Sentinel Insurance Company, Inc., insurance carrier. The undersigned heard this case on August 28, 2019, in Des Moines, Iowa.

The parties filed three hearing reports at 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 4, Claimant's Exhibits 1 through 7, and Defendants' Exhibits B through F. Claimant testified on his own behalf. Lisa Reitan, a representative from the defendant employer, also provided testimony. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed their post-hearing briefs on October 22, 2019, at which time the case was deemed fully submitted to the undersigned.

## ISSUES

The parties submitted the following disputed issues for resolution in File Nos. 5064100 and 5064101:

1. Whether claimant sustained an injury arising out of and in the course of employment on or about June 7, 2016;

2. Whether the alleged injury caused temporary disability;

3. Whether the alleged injury caused permanent disability; and

4. Nature and extent of permanent disability, if any.

The parties submitted the following disputed issue for resolution in File No. 5064102:

1. Whether the stipulated injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, if any.

## FINDINGS OF FACT

Claimant filed three petitions for arbitration and medical benefits in this matter on June 8, 2018. The first petition, chronologically, set forth an injury date of May 19, 2016, and alleged the injury occurred as a result of performing work duties/placing items on display. The second petition set forth an injury date of June 20, 2016, and alleged the injury occurred as a result of performing work duties. The third and final petition set forth an injury date of July 6, 2016, and alleged the injury occurred as a result of performing work duties. Defendants accepted the May 19, 2016, injury as compensable.

The evidentiary hearing occurred as scheduled on August 28, 2019. Prior to calling his first witness, claimant's counsel moved to amend his petition in File No. 5064101, which alleged a June 20, 2016, date of injury. Claimant moved to amend the petition to reflect a June 7, 2016, date of injury, as opposed to June 20, 2016. (Hearing Transcript, pages 5-6, 7-8) It is undisputed claimant did not sustain a work injury on June 20, 2016.

After both parties had rested, claimant renewed his oral motion, and urged the court to consider utilizing the cumulative injury theory in analyzing all of claimant's alleged injuries. (Hr. Tr., pp. 106-107) Alternatively, claimant urged the undersigned to utilize a deputy commissioner's inherent power to choose the correct injury date(s). (Hr. Tr., p. 107) Essentially, claimant is asserting he sustained an injury to his low back, but the proper date of injury is to be determined by the undersigned.

Defendants resisted the amendments at hearing. Defendants subsequently filed a formal resistance to claimant's motions to amend, on October 22, 2019.

On October 25, 2019, the undersigned notified the parties that claimant's motions would be considered and addressed in the arbitration decision. As the ruling on claimant's motion to amend is heavily dependent upon case law, the majority of the analysis behind my ruling will be discussed in the conclusions of law section. However, to provide the reader with some clarity, I find the amendment to claimant's petition in File No. 5064101 will not be prejudicial to defendants. I further find defendants had notice and were aware of a June 7, 2016, injury. As such, I grant claimant's motion to

amend the date of injury from June 20, 2016, to June 7, 2016. All other motions will be addressed in the Conclusions of Law section.

Ronald Cain was born in December 1952, making him 66 years old on the date of the evidentiary hearing. (Hr. Tr., p. 15) He is a high school graduate. After graduating from high school, claimant joined the Marine Corps. Mr. Cain received an honorable discharge in October of 1974. (Hr. Tr., pp. 18-19) Claimant's employment history consists of work as an auto mechanic, a pest control specialist, an apartment manager, and a heavy equipment operator. (See Hr. Tr., pp. 19-28)

Claimant began working for the defendant employer on September 5, 2014. (Ex. C, p. 3) He continued to work for the defendant employer through the date of the evidentiary hearing. (Hr. Tr., pp. 17, 80-81) Between his date of hire and July 21, 2018, claimant worked in the plumbing and electrical departments as a sales associate. (Exhibit D, p. 1) Claimant's job duties consisted of assisting customers, receiving freight, moving freight, distributing freight, and stocking inventory. (Hr. Tr., p. 29) Claimant transferred to the auto service center as a part-time advisor on July 22, 2018. (Ex. D, p. 1) He works 28 hours per week in his new role. (Hr. Tr., pp. 80-81) According to claimant, the advisor position is less strenuous than the sales associate position, as he is not required to perform as much walking and he no longer needs to use a ladder. (Hr. Tr., pp. 80-81)

On May 19, 2016, claimant was transporting generators, weighing approximately 150 pounds, from the warehouse to their proper location within the store. (Hr. Tr., p. 31) In the process of picking one of the generators up and sliding it onto a shelf, claimant experienced a sharp pain in his left shoulder that radiated down the left side of his body. (Hr. Tr., p. 32) Claimant recalls experiencing pain in his left shoulder, arm, and lower back throughout the rest of the day. (Id.) Evidence suggests claimant only reported injuries to his left shoulder and hip when discussing the incident with his employer. (Ex. C, p. 2) The medical records reflect claimant's low back complaints were not a primary concern between May 19, 2016 and June 6, 2016.

Defendants authorized medical treatment through Concentra on May 20, 2016. (See JE2, p. 1) Carlos Moe, D.O., claimant's authorized treating physician, diagnosed claimant with thoracic myofascial strain, a pinched nerve in the shoulder, and a hip pointer. (JE2, p. 2) Shortly thereafter, Dr. Moe referred claimant to physical therapy for his left shoulder, neck, and upper back complaints. (JE2, p. 3) Medical records reflect claimant's pain reduced significantly between May 20, 2016, and June 6, 2016. On June 6, 2016, claimant reported he no longer experienced pain; however, he continued to exhibit some neck stiffness. (JE2, p. 19) Despite claimant's fears that his shoulder pain would return with activity, Dr. Moe released claimant to return to work without restrictions on June 6, 2016. (JE2, pp. 20-21) Dr. Moe assessed five (5) percent impairment to the left shoulder, and assigned permanent restrictions of lifting, pushing, and pulling no more than 25 pounds at one time. (JE2, p. 54)

Claimant asserts he sustained his second injury on his first day back from full duty release. Medical records suggest claimant injured his left arm, neck, and lower

back while lifting rolls of carpet on June 7, 2016. (See JE2, p. 27) Claimant testified to the same at the evidentiary hearing. (Hr. Tr., pp. 41-42)

On June 8, 2016, claimant presented to physical therapy – a previously scheduled appointment in association with the May 19, 2016, injury – and reported his belief that he had sustained a new or aggravating injury while lifting rolls of carpet at work on June 7, 2018. (JE2, p. 24) Claimant told his physical therapist that he had reported the injury to his supervisor. (Id.)

At deposition, claimant testified that he felt a stiffness in his low back while moving the first few carpet rolls, and then his back went "kapooey" when he tried to move the next-to-last roll. (See Hr. Tr., p. 60)

One expert report details the carpet lifting incident as follows:

> He had been asked to move rolls of carpet remnants. He is not certain how much they weighed, but they were leaning up against the wall in a rack. There was a lip on the front of the rack. He grabbed a carpet remnant in a bear-hug grip, using both arms around the roll of carpet. He lifted the roll up over the lip of the rack, and had to carry the carpet approximately 15 to 20 feet. He then lifted it up again to get it over the lip in another rack. He moved approximately 8 to 10 rolls of carpet in this manner, and again started to have twinges of pain in his back. However, this time it was severe pain. He reported this to management, and was returned to the Concentra clinic.

(Ex. 1, pp. 6-7) It is important to note the above quoted report inaccurately documents the carpet lifting injury as having occurred on July 6, 2016. Nevertheless, the medical record establishes the carpet lifting incident was a singular event, and it occurred on June 7, 2016.

Following the development of claimant's low back pain, defendants authorized additional treatment through Dr. Moe. (See JE2, p. 27) Dr. Moe's June 9, 2016, medical records reflect, "[O]n June 7, 2016 at work was lifting rolls of carpet and then noticed pain in his left arm, neck and lower back." (JE2, p. 27) Dr. Moe noted increased pain and tenderness with decreased range of motion in claimant's lumbosacral spine. Dr. Moe diagnosed claimant with an injury to the left shoulder, a thoracic sprain, and a lumbar sprain. (JE2, p. 28) Dr. Moe reinstated lifting restrictions and prescribed additional conservative treatment, including physical therapy. (Id.)

Physical therapy records indicate Dr. Moe referred claimant "back to PT for original injury and now the lower back." (JE2, p. 29) This note appears to distinguish symptoms related to claimant's June 7, 2016, injury, from the original, May 19, 2016, injury. It is abundantly clear to the undersigned that claimant sustained an injury to his lumbar spine on June 7, 2016.

Fortunately, claimant's low back condition showed improvement with conservative care throughout the month of June 2016. (See JE2, pp. 33-36, 39, 42)

Claimant was released from physical therapy on June 23, 2016. (JE2, pp. 47-49) He was released from Dr. Moe's care on June 30, 2016. (JE2, p. 53)

This is not to say claimant's low back condition had completely resolved by June 30, 2016. Claimant was still complaining of stiffness and pain, albeit minimal, in his back when he was released from physical therapy on June 23, 2016. (JE2, pp. 47-49) He was released from physical therapy prior to meeting the goals established by his therapist. (See JE2, p. 49) Similarly, claimant reported ongoing stiffness in his back and shoulder on the date in which Dr. Moe placed him at maximum medical improvement (MMI). (JE2, pp. 53-54) Claimant reported the stiffness would increase when he had to lift objects over 25 pounds. (JE2, p. 53) Nevertheless, Dr. Moe released claimant to full duty work on June 30, 2016. (JE2, p. 54) Claimant returned to his regular duty work in the plumbing and electrical department, and worked through episodes of back pain and stiffness, between June 30, 2016, and July 6, 2016.

Similar to the sequence of events that occurred after claimant was released to full duty work in early June 2016, claimant asserts he reinjured his low back, on two different occasions, shortly after returning to his full duty position.

Claimant presented to Mercy North Family Practice and Urgent Care on July 8, 2016. (JE1, p. 1) He reported lower back pain for the past two days, with no known injury. Claimant believes he reported the July 6, 2016, injury to his employer; however, he did not fill out an incident report until July 12, 2016. (Ex. C, p. 7)

On July 12, 2016, claimant told Dr. Moe that he had strained his back when he returned to work in a full duty capacity on or about July 6, 2016. (JE2, p. 55) Claimant subsequently took four days of work off between July 7, 2016 and July 10, 2016, to give his back time to heal on its own. (Ex. C, p. 7) Claimant told Dr. Moe that his back pain improved over these four days. (See JE2, p. 55)

Unfortunately, when claimant returned to work on July 11, 2016, he again experienced stiffness in his back. (JE2, p. 55) After completing his shift and driving himself home, claimant exited his vehicle and experienced severe pain. (Hr. Tr., pp. 44-45; See JE2, p. 55) In addition to the above description of events, Dr. Moe's July 12, 2016, medical record provides claimant's injury occurred after he "stood up[,] stretched[,] and injured his back…" (JE2, p. 55) Another medical record provides claimant took a nap after he returned home from work and woke up with severe pain in his back and right lower extremity. (See JE2, p. 58)

Claimant completed an incident report for both dates of injury on July 12, 2016. (Ex. C, p. 7) The supervisor's incident report notes that defendants originally believed the injuries were related to a prior workers' compensation claim. (Ex. C, p. 6) The team member incident report provides claimant injured the same body part as part of a, "previous work comp claim in June." (Ex. C, p. 8) The incident report also provides that the third-party administrator for defendant recommended claimant file a separate claim. (Ex. C, pp. 6, 7)

As previously mentioned, claimant presented to Dr. Moe's office for his low back pain on July 12, 2016. (JE2, p. 55) Claimant relayed his belief that he strained his back when he returned to work on or about July 6, 2016, and again on July 11, 2016. For the first time in any medical record, claimant complained of radiating pain down the right lower extremity to the level of his knee. (Id.) On examination, Dr. Moe documented pain and tenderness over the lumbar paravertebral muscles with reproducible radiculopathy down the right leg consistent with sciatica. Dr. Moe assessed claimant as having sciatica. (JE2, p. 56) As with all of claimant's past injuries, Dr. Moe recommended conservative treatment. (JE2, p. 56)

Claimant presented to three physical therapy sessions for his low back between July 15, 2016, and July 19, 2016. (See JE2, pp. 58, 67) On July 18, 2016, physical therapy records reflect claimant was experiencing more discomfort in his right leg than in his low back. (JE2, p. 63) Claimant's overall progress was slower than expected. (See JE2, p. 69)

Claimant presented to Terrance Kurtz, D.O., of Concentra, on July 19, 2016. (JE2, p. 71) Neither party addressed why claimant presented to Dr. Kurtz as opposed to Dr. Moe in this particular instance. Dr. Kurtz imposed blanket lifting restrictions of no lifting greater than two pounds, and recommended claimant undergo an MRI of the lumbar spine. (JE2, pp. 71-72)

The MRI, dated July 25, 2016, revealed a right-sided disc herniation at L5-S1, encroaching upon the right, S1 nerve root. (See JE3, p. 2) After reviewing the MRI results, Dr. Moe diagnosed claimant with a herniated intervertebral disc of the lumbar spine, annular tear of lumbar disc, lumbar nerve root compression, and neural foraminal stenosis of lumbar spine. (JE2, p. 78)

Dr. Moe's July 28, 2016, physical examination of claimant's lumbosacral spine illustrated "positive pain and tenderness over the lumbar spine and paravertebral muscles." (JE2, p. 77) These findings are similar to Dr. Moe's findings from his physical examination of claimant on June 9, 2016. The observations and ROM tests performed on the two dates are similar, with the noted addition of radiculopathy. (JE2, p. 77; JE2, p. 28)

Dr. Moe subsequently referred claimant to Todd Harbach, M.D. for an independent medical evaluation. (JE2, p. 78) The evaluation occurred on August 22, 2016. (JE4, p. 1) Dr. Harbach understood claimant sustained an injury when he moved a generator on May 19, 2016. Dr. Harbach's injury history correctly notes that approximately two to three weeks later claimant injured his low back while lifting rolls of carpet. (JE4, p. 1) This is consistent with what claimant told Dr. Moe and his physical therapist in the days following the June 7, 2016, work injury. (JE2, pp. 24–28; JE4, p. 1)

For the July 2016 injuries, Dr. Harbach's report also details a timeline similar to that provided by claimant to Dr. Moe:

> […] He went home, got out of the car, and felt a lot of pain into his right leg and back. He took 4 days off of work. When he returned from work that following Monday, the pain was so terrible that he states it almost dropped him to his knees.

(JE4, p. 1) Dr. Harbach attributes inaccurate dates, or no dates at all, to the above events. Nevertheless, the sequence of events described in Dr. Harbach's IME report is in line with the timeline provided in Dr. Moe's initial medical records, as well as the incident report created on July 12, 2016.

Dr. Harbach diagnosed claimant with low back pain, lumbar degenerative disk disease at L1-L2, L2-L3, and L5-S1, herniated nuclear pulposus to the right at L5-S1, and left S1 radiculopathy. (JE4, p. 3) Dr. Harbach opined claimant's herniated disk and resulting right S1 radiculopathy were directly related to the lifting and twisting injury he sustained at work in May 2016. (Id.) Dr. Harbach did not feel as though the degeneration of the three disks were related to the work injury; however, he opined the work injury did aggravate or "light up" a pre-existing, degenerative condition. (JE4, p. 4)

Dr. Harbach recommended claimant continue to receive conservative care. (Id.) Dr. Harbach recommended continued physical therapy, with a tentative recommendation for epidural steroid injections, if physical therapy proved ineffective. (Id.) He did not recommend claimant pursue surgical intervention at that time. (Id.)

Claimant completed six weeks of physical therapy between August 22, 2016, and December 8, 2016. (See JE2, p. 79) These medical records are not in the evidentiary record.

Claimant returned to Dr. Moe on December 8, 2016. (JE2, p. 79) Claimant continued to complain of pain, tenderness, and radicular symptoms into the right lower extremity. (Id.) It is noted that six weeks of physical therapy did not relieve claimant's symptoms. (Id.) Following his examination, Dr. Moe referred claimant to pain management. (JE2, p. 81)

Richard Holt, D.O. began treating claimant on December 27, 2016. (See Ex. 1, p. 4) Dr. Holt administered an ESI to claimant's low back on February 6, 2017. (JE4, p. 7) Claimant reportedly received no improvement from the ESI. (See JE4, p. 9) On March 16, 2017, Dr. Holt recommended surgical intervention. (JE4, p. 10; Ex. 2, p. 21)

Incident reports submitted into the evidentiary record reflect claimant sustained reoccurrences of pain between his last medical appointment in March 2017 and August 28, 2019, the date of hearing. (Ex. C, pp. 9-16)

Outside of independent medical examinations, claimant did not present for any additional medical treatment between March 16, 2017, and the date of hearing. In his post-hearing brief, claimant provides he does not wish to undergo surgical intervention with respect to the lumbar spine. (Post-hearing brief, p. 32)

At hearing, claimant continued to complain of intermittent pain in the low back and lower extremities. Claimant testified the pain in his low back can last anywhere from one minute to all day. (Hr. Tr., p. 54) According to claimant, he has good days and bad days. (Hr. Tr., p. 53) On his bad days, claimant simply "work[s] through [the pain]." (Id.; Hr. Tr., p. 57)

Claimant worked in a light duty capacity from approximately July 16, 2016, to March 2017. (See JE2, p. 57) From March 2017, until July 22, 2018, Mr. Cain performed his normal job duties as a sales associate in the plumbing and electrical department. (Hr. Tr., pp. 78-79) This consisted of stocking shelves, climbing ladders, and walking approximately seven to ten miles per day. (Hr. Tr., p. 79) During this period of time, Mr. Cain demonstrated good attendance; he did not miss any work due to his alleged work injuries. (Id.) Claimant transferred to the auto service center as a part-time advisor on July 22, 2018. (Ex. D, p. 1) According to claimant, his new role is less strenuous than his job as a sales associate, as he is not required to perform as much walking and he no longer needs to use a ladder. (Hr. Tr., pp. 80-81) He works 28 hours per week in his new role. (Hr. Tr., pp. 80-81)

Both parties sought independent medical examinations. The parties obtained competing medical opinions as to whether claimant's low back condition arose out of and in the course of his employment with Fleet Farm.

Claimant presented for a second defense medical examination, this time with Robert Broghammer, M.D., on June 26, 2017. (Ex. 2, p. 25) Dr. Broghammer considered claimant to be a fair historian. (Ex. 2, p. 22) In discussing his injury history, claimant focused on his low back injury. Consistent with the medical records of Dr. Moe, claimant relayed that approximately one year prior, he was lifting rolls of carpet and had the onset of pain in his low back. (Id.) Claimant reported that his pain gradually worsened after the date of injury. (Id.) Claimant also disclosed there was a subsequent incident in which he stood up and experienced a sudden, severe pain in his low back and down his right leg. (Ex. 4, p. 23) Claimant estimated that the incident occurred in June. (Id.) Dr. Broghammer noted this incident was fairly well corroborated in the medical records as having occurred in early July 2016. (Id.)

Dr. Broghammer opined claimant had reached MMI for both the May 19, 2016, and June 7, 2016, dates of injury. With respect to the May 19, 2016, injury, Dr. Broghammer diagnosed claimant with a left shoulder, left hip, and low back strain. (Ex. 2, p. 25) For the alleged June 7, 2016, work injury, Dr. Broghammer diagnosed claimant with a left shoulder, neck, and lumbar strain. (Id.) He also diagnosed claimant with spondyloarthropathy of the lumbar spine. (Ex. 2 p. 25) He believed claimant's prognosis was, "excellent." (Ex. 2, p. 25) Dr. Broghammer did not provide a diagnosis for the alleged July 6, 2016, injury. (See Ex. 2, p. 25)

Interestingly, despite having an in-depth discussion with claimant regarding the June 7, 2016, date of injury, Dr. Broghammer, and defendants' questions, focused almost exclusively on the alleged July 6, 2016, injury wherein claimant stretched out his low back after completing his workday. (Ex. 2, pp. 25-27) Dr. Broghammer opined

claimant's ongoing symptomatology was not related to the alleged July 6, 2016, injury. (Ex. 2, pp. 25-26) Dr. Broghammer opined the medical records fail to support any evidence of an injury arising out of and in the course of employment occurring on July 6, 2016. (Ex. 2, p. 26)

Dr. Broghammer opined claimant's conditions did not require impairment ratings; however, in the event this agency found in favor of claimant on causation, Dr. Broghammer opined claimant's low back condition would fall into DRE Category II, and his impairment rating would be 5 percent of the whole person, as he no longer exhibited radiculopathy. (Ex. 2, pp. 27-28)

It is difficult to assign significant weight to the report of Dr. Broghammer. On one hand, his report is extensive and contains a well-written summary of claimant's medical history. On the other hand, the question and answer section of the IME report focuses almost exclusively on the July 6, 2016, date of injury, while ignoring the June 7, 2016, date of injury. I acknowledge that, at the time, claimant's petition did not include a June 7, 2016, date of injury. Nevertheless, the June 7, 2016, injury was well-documented in Dr. Broghammer's medical summary, and claimant specifically discussed the injury with Dr. Broghammer when he was asked to describe his injuries. Moreover, Dr. Broghammer's opinion that claimant's physical examination is "reassuringly benign and normal" is not consistent with the medical records in evidence or claimant's testimony.

Claimant presented for an IME with Sunil Bansal, M.D. on December 12, 2017. (Ex. 1) Dr. Bansal agreed with Dr. Moe, that claimant reached maximum medical improvement for the May 19, 2016, date of injury on June 30, 2016. (Ex. 1, p. 11) Dr. Bansal opined that if claimant chose to forego surgical intervention, he would place claimant at MMI for his low back injury as of March 16, 2017, or the date of his last pain management appointment with Dr. Holt. (Ex. 1, p. 11)

Dr. Bansal assigned 5 percent whole person impairment to the left shoulder, and 10 percent whole person impairment for the L5-S1 disc herniation and resulting radiculopathy. (Ex. 1, p. 13) Dr. Bansal specifically opined claimant's ongoing back injury and radiculopathy was related to claimant lifting rolls of carpet on July 6, 2016. (Ex. 1, pp. 12-13) Dr. Bansal imposed permanent restrictions of no lifting over 25 pounds, occasionally, and no lifting over 10 pounds, frequently. (Ex. 1, p. 14) Dr. Bansal also recommended against frequent bending or twisting, and prolonged standing or walking. (Id.)

It is important to note claimant presented to Dr. Bansal's office approximately three days after sustaining another aggravation of his low back pain. According to the medical records, claimant was lifting a heater at work for defendant when he felt a "pop" in his back. Claimant experienced severe pain in his back and bilateral hips. (Ex. C, p. 7) The timing of this injury calls the severity of claimant's complaints at the time of his appointment with Dr. Bansal into question.

Dr. Bansal's IME report did not immediately spark further discovery by defendants. Neither party sought additional medical evidence until April 2019.

Following a conference call, defendants asked Dr. Harbach to provide an updated opinion on April 4, 2019. (See JE4, pp. 11-13) Defendants assert Dr. Harbach was provided "a correct history of events" prior to rendering his April 4, 2019, opinions. (Post-Hearing Brief) In this regard, defendants assert Dr. Harbach's understanding of claimant's injuries at his initial, August 2016, examination was incorrect and based solely on the oral history provided by claimant. The undersigned is skeptical of such an assertion. By making such an assertion, defendants are essentially asking the undersigned to believe that their own expert, as part of a defense IME, was asked to address causation based solely on the oral history provided to him by claimant on examination. Such a request seems unlikely, even more so when considering the experience level of defendants' attorney.

In the April 4, 2019, pre-written report, Dr. Harbach agreed with the following opinions: (1) the May 19, 2016, and June 7, 2016, work injuries did not cause claimant's disk herniation, as no radiculopathy was noted until July 12, 2016; (2) at the time of his August 2016 IME, claimant did not report that he injured himself moving rolls of carpet on July 6, 2016; (3) at the time of his August 2016 IME, claimant did not report a work-related injury occurred on June 20, 2016; (4) based upon the medical records and history provided at the time of the IME, claimant did not sustain a work injury on June 20, 2016, or July 6, 2016; (5) based upon the medical history provided, claimant sustained a temporary aggravation of an underlying preexisting condition in May of 2016, when lifting a generator; (6) claimant sustained zero functional impairment as a result of the May 19, 2016, work injury; and (7) claimant does not require permanent restrictions as it relates to the May 19, 2016, work injury. (JE4, pp. 12-13)

The undersigned has a difficult time assigning significant weight to the updated opinions of Dr. Harbach. First, the updated report is a pre-written document, with pre-written opinions that contradict Dr. Harbach's initial causation opinions. The credibility of such a unique report is questionable on its face. Second, Dr. Harbach's opinions were requested nearly three years after his initial examination of claimant. Dr. Harbach did not re-examine claimant prior to the March 25, 2019, conference call or his subsequent report. Reports correcting prior opinions are typically obtained in short order, and not by means of a pre-written report with pre-written opinions. Third, there is no evidence to show what medical records, if any, Dr. Harbach reviewed prior to agreeing to defendants' pre-written opinions. Theoretically, all medical records Dr. Harbach would have relied upon were available to him at the time of his initial examination. Dr. Harbach's general summary of events in his original report, as provided by defendants on page 11 of Joint Exhibit 4, is accurate. The April 4, 2019, updated report is the equivalent of defendants asking Dr. Harbach to double check his work. Such a report could be persuasive if the expert physician was originally provided inaccurate information. There is no evidence that has occurred in this instance.

Following the supplemental report from Dr. Harbach, defendants sought a conference call and report with Dr. Moe. Defendants asked Dr. Moe to provide an updated opinion on July 29, 2019. (Ex. 3, p. 33) Defendants sought clarification for the impairment rating and permanent restrictions Dr. Moe assigned to claimant three years prior. As previously discussed, Dr. Moe assessed five (5) percent impairment to the left

shoulder, and assigned permanent restrictions of lifting, pushing, and pulling no more than 25 pounds at one time. (JE2, p. 54) In the pre-written report, defendants provided Dr. Moe with two choices as to why he recommended permanent restrictions. The first option was simply that the restrictions were assigned because of a work injury claimant sustained at the defendant employer. The second, much more detailed, option read:

> Permanent restrictions were recommended because Mr. Cain had known degenerative back disease. The restrictions were recommended so that Mr. Cain would not injure or aggravate the degenerative back condition. Recommended restrictions are unrelated to any alleged work injury that occurred before to (sic) June 30, 2016.

(Ex. 3, p. 33) Dr. Moe "checked" the second option. (Id.)

With respect to the June 30, 2016, impairment rating, Dr. Moe was asked to agree or disagree that the five percent functional impairment rating was assigned because as of June 30, 2016, claimant continued to report non-specific shoulder and cervical stiffness. (Ex. 3, p. 34) Dr. Moe "checked" the line marked, "Agree." (Id.)

I do not find Dr. Moe's updated opinion convincing. The most obvious reason for this conclusion is the fact there is no evidence Dr. Moe was aware, or even could have been aware, of claimant's degenerative low back condition between May 19, 2016, and June 30, 2016. In fact, all of Dr. Moe's medical records during this time period provide claimant's past medical history is "non-contributory." (See JE2, pp. 1, 7, 15, 19, 27, 31, 38, 51, 53) Dr. Moe did not request or obtain diagnostic imaging of claimant's back, nor did he diagnose claimant with a degenerative back condition, between May 19, 2016, and June 30, 2016. (See JE2, pp. 2, 6, 16, 20, 28, 32, 39, 52, 54) Claimant's degenerative condition and bulging disk were not discovered until claimant underwent an MRI on July 25, 2016, or three weeks after Dr. Moe's report. (JE2, p. 77) Moreover, the pre-written opinion letter was obtained three years after the initial report, and 31 months after Dr. Moe's last examination of claimant for injuries alleged in the current petitions. Again, such a report is the equivalent of defendants asking Dr. Moe to double check his work. I do not find Dr. Moe's updated opinions persuasive.

The parties stipulate that claimant sustained an injury on May 19, 2016. Defendants dispute that an injury occurred on June 7, 2016, June 20, 2016, or July 6, 2016.

Defendants assert claimant's testimony regarding the June 7, 2016, June 20, 2016, and July 6, 2016, dates of injury is inconsistent and unreliable. (See Hr. Tr., pp. 43, 70-71) While I find claimant to be a rather poor historian, I do not find him to be untrustworthy. Claimant's inconsistent testimony at hearing appeared to the undersigned to be a product of defense counsel's strategic line of questioning rather than a conscious effort to deceive. Claimant acknowledged his confusion following defendants' line of questioning at hearing. (Hr. Tr., p. 75) Moreover, determining the overall credibility of a claimant's testimony is best done by examining the

entire record and comparing the testimony provided at hearing with the material facts in the record as a whole. The contemporaneous medical records in this case are consistent and reliable. This case involves several dates of injury. Claimant is afforded some leniency when discussing specific dates; he is afforded significantly less leniency when it comes to the details of the injurious events. Even the expert medical providers had difficulty keeping the dates of injury straight. I decline the invitation to hold claimant to a higher standard than the medical professionals in this case who, presumably, were provided a copy of claimant's medical records and had an opportunity to review summaries of the same from counsel.

Claimant has consistently detailed two injurious events, one in which he was lifting a generator, and one where he was lifting rolls of carpet. The medical records reveal these events occurred on May 19, 2016, and June 7, 2016, respectively.

The facts in this case are consistent with a finding that claimant had one continuous, injurious process following a distinct injury to the low back on June 7, 2016. As such, I find claimant sustained injuries on May 19, 2016, and June 7, 2016. I further find claimant sustained aggravations of the June 7, 2016, injury on July 6, 2016, and July 11, 2016. It cannot be said that claimant experienced a full remission of symptoms in his low back prior to the aggravations in early July 2016. Conversely, the evidence does not suggest claimant sustained new, distinct injuries on July 6, 2016, and July 11, 2016. Rather, claimant was simply performing his normal job duties. The work activities claimant performed on July 6, 2016, and July 11, 2016, serve to increase the disability attributable to the June 7, 2016, injury; they do not establish a separate and discrete disability.

The expert medical evidence in the matter at hand is underwhelming, as all of the opinions contain notable flaws. Ultimately, I find the opinions expressed by Dr. Bansal to be the most credible and consistent with the other evidence I find convincing in the evidentiary record. I acknowledge that Dr. Bansal attributes the wrong date of injury to claimant's low back injury. However, I do not find this flaw to be fatal to his overall opinion regarding causation; rather, I find Dr. Bansal conflated the multiple dates of injury in the matter at hand. Dr. Bansal's analysis and descriptions of the injurious event holds true regardless of the date assigned. Dr. Bansal's report provides a detailed description of claimant injuring his back while lifting rolls of carpet, and subsequently developing radiculopathy through normal work activities. The occurrence of this injurious event is well-documented in the medical records reviewed and summarized by Dr. Bansal.

In discussing claimant's medical treatment, Dr. Bansal provides,

> He was re-evaluated at Concentra after the July 6, 2016, incident. Over the next two to three months [he] followed up with the doctor and continued to go to physical therapy. Over this time his pain increased, and started radiating down his right leg from his hip down to his knee. He

> told the occupational physician that his pain was severe, and was told that he was having sciatic nerve pain.

(Ex. 1, p. 7)

This timeline holds true for the June 7, 2016, work injury:

> After reporting an increase in low back pain from lifting rolls of carpet at work, claimant returned to Concentra. (JE2, p. 27) Dr. Moe reinstated lifting restrictions and referred claimant to physical therapy for his low back. (JE2, pp. 27-28, 29) ("back to PT for original injury and now the lower back") While his pain initially decreased, it never fully resolved. (JE2, pp. 47-49, 54) Moreover, his pain started to radiate down his right leg to the level of his knee after performing his normal work activities on July 6, 2016, and July 11, 2016. (JE2, p. 55; Ex. C, p. 7) Claimant subsequently told Dr. Moe his pain was severe, and Dr. Moe diagnosed him with sciatica. (JE2, p. 56)

Dr. Bansal provided a thorough summary of all of claimant's medical records. He further provided a well-reasoned, rational analysis of the well-documented injuries to claimant's left shoulder and low back. Dr. Bansal's impairment rating to the left shoulder aligns with the initial impairment ratings of claimant's treating physician, Dr. Moe. Likewise, Dr. Bansal's permanent restrictions are similar to those assigned by Dr. Moe, with the noted exception that Dr. Bansal's restrictions account for claimant's low back condition. Dr. Bansal's impairment rating to the low back is not dramatically different from the rating hypothesized by Dr. Broghammer, and Dr. Bansal's impairment rating more accurately reflects claimant's complaints of ongoing radiculopathy.

As such, I accept Dr. Bansal's impairment ratings and find claimant sustained five (5) percent impairment to the whole person as a result of the May 19, 2016, work injury. I find claimant sustained ten (10) percent impairment to the whole person as a result of the June 7, 2016, work injury. Lastly, I find the permanent restrictions assigned to claimant by Dr. Bansal accurately reflect claimant's functional abilities.

At the time of the evidentiary hearing, claimant was 66 years old. He remains employed with the defendant employer; however, he voluntarily transferred to a part-time position that requires less pushing, pulling, tugging, and ladder climbing when compared to his pre-injury sales position. He works approximately 28 hours per week. He is capable of performing office work; however, he prefers positions that are more hands-on. Claimant has successfully operated under permanent restrictions since June 30, 2016. Despite these restrictions, claimant continues to suffer the occasional flare-up after performing his normal job duties. (See Ex. C, pp. 9-16) Nevertheless, claimant has not missed any time from work as a result of his injuries. By all accounts claimant is a hard-working individual, with a solid work ethic. He is not actively seeking treatment for his conditions. He is not taking any prescription medications for his conditions at this time.

Having considered claimant's age, educational background, employment history, residual symptoms, permanent impairment ratings, permanent work restrictions, his demonstrated ability to return to work, his motivation level, as well as all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Cain has proven he sustained 5 percent loss of future earning capacity as a result of the May 19, 2016, left shoulder injury. I further find that Mr. Cain has proven he sustained a combined 15 percent loss of future earning capacity as a result of the May 19, 2016, left shoulder injury, and the June 7, 2016, low back injury.

Prior to the evidentiary hearing, defendants volunteered 25 weeks of benefits pursuant to the impairment rating of Dr. Moe. (Hearing Report)

## CONCLUSIONS OF LAW

**In File No. 5064102 (Date of Injury: May 19, 2016):**

The first and only issue for determination is whether claimant sustained permanent impairment as a result of the May 19, 2016, stipulated work injury.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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).

The parties stipulated to claimant sustaining an injury arising out of and in the course of employment on May 19, 2016. (Hearing Report File No. 5064102) As a result of these injuries, defendants authorized treatment with Dr. Moe of Concentra Medical Center. (JE2) Dr. Moe placed claimant at MMI for his May 19, 2016, injuries, on June 30, 2016. (JE2, p. 54) Dr. Bansal shares in this opinion. (Ex. 1, p. 11) Dr. Moe assigned five percent impairment to the whole person due to shoulder and cervical

stiffness, and imposed permanent restrictions of no lifting, pushing, or pulling more than 25 pounds at one time. (Id.)

In this case, I found the medical opinions of Dr. Bansal to be more persuasive and credible than the opinions offered by Dr. Harbach and Dr. Broghammer. Dr. Bansal is the only expert physician to physically examine claimant's left shoulder condition. (Ex. 1, pp. 9, 12-13) Dr. Bansal opined the mechanism of lifting the generator on May 19, 2016, and his subsequent shoulder injury is consistent with a brachial plexopathy which would cause claimant's continued numbness, tingling, and pain in the left upper extremity. (Ex. 1, p. 12) Consistent with Dr. Moe's initial opinion, Dr. Bansal assigned five percent impairment to the whole person as a result of the May 19, 2016, work injury to the left shoulder. (Ex. 1)

Having considered all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found Mr. Cain proved a 5 percent loss of future earning capacity. This entitles claimant to a 5 percent industrial disability award, or an award of 25 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

**In File Nos. 5064101 & 5064100 (Dates of Injury: June 7, 2016 and July 6, 2016):**

The first issue to be decided is whether claimant is allowed to amend his petition to reflect an injury date of June 7, 2016, as opposed to June 20, 2016. Essentially, it must be decided whether claimant's low back claim should be denied due to the variance in the injury dates as plead on the division's original notice and petition form and the actual date of injury as established through the evidentiary record.

The Iowa Supreme Court has premised its prior consideration of the sufficiency of pleading analysis with a recognition that our workers' compensation law is for the benefit of working men and women, "and should be, within reason, liberally construed." Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961); see Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 261 (Iowa 1980) (workers' compensation law should be liberally construed). "Its beneficent purpose should not be defeated by reading something into a section which is not there, or by a narrow or strained construction." Disbrow v. Deering Implement Co., 233 Iowa 380, 392, 9 N.W.2d 378, 384 (1943).

The court has noted that a variance in an injury date from the pleading of approximately two weeks is "unimportant." Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 373-74, 112 N.W.2d 299, 301 (1961). The court explained:

> An application for arbitration is not a formal pleading and is not to be judged by the technical rules of pleading. Nor is the same conformity of proof to allegation necessary as in ordinary actions. Cross v. Hermanson Bros., 235 Iowa 739, 742-744, 16 N.W.2d 616, 617, 618, and citations; Ford v. Goode, 240 Iowa 1219, 1225, 38 N.W.2d 158, 161.

Due process requires that a party "be informed somehow of the issue involved in order to prevent surprise at the hearing and allow an opportunity to prepare… The test

is fundamental fairness, not whether the notice meets technical rules of common law pleading." Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992).

Under rule 876 IAC 4.9(5) amendments to pleadings "shall be freely given when justice so requires."

Defendants assert they would be prejudiced by claimant's amendment to his petition offered on the day of the arbitration hearing. I disagree.

Claimant is not now asserting a new injury, but clarifying the first date of injury to the low back. Defendants failed to show they were prejudiced by claimant's error of listing an injury date of June 20, 2016, as opposed to the actual injury date of June 7, 2016. There is no surprise to defendants that this matter involved the low back. There is no surprise to defendants that claimant sustained an injury to the low back while lifting rolls of carpet on June 7, 2016. The essential cause of action as well as the supporting facts remain unchanged by the variance in the date of injury.

It is up to defendants to utilize the extensive discovery and evidence exchange procedures provided to them and the information they receive through their right to control the care to learn the details of any claim. The key to pleading in an administrative process is nothing more nor less than opportunity to prepare and defend. Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 192 (Iowa 1968).

Defendants had complete access to claimant's treatment records and were as knowledgeable of the mechanisms of injury as claimant. The June 7, 2016, injury is well-documented in the medical records, and claimant's expert specifically addressed the carpet incident in his December 2017 IME report. Moreover, defendants submitted an expert report that addressed the June 7, 2016, date of injury, and whether any permanent impairment resulted from the same. (Ex. 2, p. 25) Lastly, defendants' indemnity benefits payment log reflects they were aware of the June 7, 2016, date of injury. (Ex. 6, p. 41) ("Date Loss: 06/07/2016") Defendants were provided sufficient notice of the assertions of claimant and were fully able to investigate and prepare a vigorous defense of this claim despite claimant's error. Defendants seek to have a well-documented injury and its effects thrown out due to a technicality that they themselves recognized well before the date of the evidentiary hearing. Such a result would be undeniably harsh and detrimental to the very nature of the worker's compensation act.

Following consideration of the arguments of the parties, it is concluded claimant's motion to amend the date of injury in File No. 5064101 is granted. I find the proper dates of injury are May 19, 2016, June 7, 2016, and July 6, 2016. I likewise grant claimant's motion to amend all petitions to reflect the possibility of a cumulative injury. While I ultimately found claimant sustained a traumatic injury on June 7, 2016, and such an amendment is unnecessary for the purposes of this arbitration decision, an argument exists that claimant's injury could be characterized as a cumulative injury to the low back with a manifestation date of July 6, 2016. For the same reasons addressed above, defendants failed to show such an amendment would be prejudicial to their defense.

The next issue to be decided is whether claimant sustained a low back injury arising out of and in the course of his employment on June 7, 2016.

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

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994).

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

When looking to the evidentiary record, it is clear there are two well-defined injuries; one that occurred as claimant was lifting a generator, and one when claimant was lifting rolls of carpet. The July 6, 2016, injury and subsequent aggravation on July 11, 2016, only serve to show claimant had difficulty returning to full duty work after the June 7, 2016, date of injury.

It is virtually undisputed that claimant sustained an injury to the low back while moving rolls of carpet at work on June 7, 2016. Two days after being released to full duty work from the original, May 19, 2016, work injury, claimant told his physical therapist he injured his low back and had reported the same to his supervisor. (JE2, p. 24) One day after the aforementioned physical therapy appointment, claimant met with Dr. Moe. (JE2, p. 27) Claimant told Dr. Moe that on June 7, 2016, he was at work lifting rolls of carpet when he noticed increased pain in his left arm, neck, and lower back. (Id.) Dr. Moe noted increased pain and tenderness with decreased range of motion in claimant's lumbosacral spine. (JE2, p. 28) Dr. Moe reinstated stricter lifting restrictions and continued claimant's physical therapy. (Id.) On June 10, 2016, claimant returned to physical therapy and reported an injury history consistent with what he had reported on June 8, 2016 and June 9, 2016. (JE2, pp. 24-28) Claimant reported the same injury history to expert physicians Dr. Broghammer and Dr. Bansal. (See Ex. 1, pp. 6-7; Ex. 2, p. 22)

There are four expert opinions in this case. At one point in time, three of the four physicians felt claimant's low back condition was causally related to his work activities for the defendant employer. Dr. Moe, claimant's treating physician, did not explicitly address causation with respect to the low back injury. However, he did diagnose claimant with a herniated disc, annular tear of lumbar disc, lumbar nerve root compression, and neural foraminal stenosis of the lumbar spine. He also referred claimant on for further treatment with an orthopedic surgeon. (JE2, p. 78)

Dr. Harbach initially opined claimant's work injury aggravated a pre-existing low back condition, which resulted in a herniated disc. Years later, Dr. Harbach would walk his opinions back in a pre-written report from defendants. As discussed in the Findings of Fact section, I did not find Dr. Harbach's updated opinions persuasive.

Dr. Broghammer, did not address causation with respect to the June 7, 2016, date of injury. He did, however, describe the June 7, 2016, incident as part of claimant's injury history, and find that claimant had fully recovered from the same. (Ex. 2, p. 25) Regardless, Dr. Broghammer did not causally relate claimant's low back condition to his work activities for the defendant employer.

Dr. Bansal is the only expert to provide an in-depth analysis of the injury claimant sustained while moving rolls of carpet. While Dr. Bansal did assign the wrong date to the injurious event, this does not discount the fact his causation opinion is specifically tailored to the well-documented injury claimant sustained moving rolls of carpet. Dr. Bansal opined the act described of repeatedly lifting and bending to moving carpet rolls is consistent with the development of an L5-S1 disc herniation. I find this opinion, and

Dr. Bansal's report as a whole, convincing. For reasons discussed in the findings of fact, it is concluded the causation opinion of Dr. Bansal is most persuasive.

Given the opinions of Dr. Bansal, the contemporaneous medical records, and claimant's corroborating testimony, I found claimant met his burden of proving he sustained a low back injury that arose out of and in the course of his employment on June 7, 2016.

The issue then becomes whether claimant sustained a new, distinct injury on July 6, 2016. I found claimant failed to prove he sustained subsequent, discrete injuries on July 6, 2016, or July 11, 2016. Rather, I found the July 6, 2016, and July 11, 2016, incidents were a continuation of claimant's June 7, 2016, traumatic work injury.

If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for. Oldham v. Schofield & Welch, 266 N.W. 480, 482 (Iowa 1936).

In Excel Corp. v. Smithart, 654 N.W.2d 891 (Iowa 2002), the Iowa Supreme Court discussed separate and discreet disability versus a sequela of a prior injury. The Court noted:

> The standard that must be met to establish two separate work-related injuries requires a claimant to demonstrate a distinct and discrete ' 'disability attributable to ... work activities' that occurs after an initial injury.... It is not enough for the worker to show disability has been increased by subsequent work activities. These circumstances may serve to increase the disability attributable to the first injury, but do not establish a separate and discrete disability. To establish a separate injury claim, the subsequent condition of the claimant must not be a consequence of the first injury.

Id. at 900.

The weight of the evidence demonstrates claimant was still recovering from low back pain and stiffness when he was released by Dr. Moe on June 30, 2016. (JE2, p. 53) While his symptoms were improving, it cannot be said they completely resolved. Rather, I find claimant sustained an injury to the low back on June 7, 2016, with subsequent aggravations attributable to normal work activities on July 6, 2016, and July 11, 2016. These aggravations may serve to increase claimant's disability; however, they do not reflect separate and discrete disabilities.

The question before the undersigned as trier of fact does not revolve around the precise moment claimant sustained a herniated disc, or even when claimant first experienced radicular symptoms. We cannot know the answer to this question for sure, as diagnostic imaging did not occur until after all three incidents involving the low back

had occurred. The question is whether claimant's work injury was a substantial cause of the disability suffered by claimant. It is widely accepted that when a body part is rendered weakened by a work-related injury and is subsequently worsened through normal work activities, the employer is liable for the full disability. Oldham v. Schofield & Welch, 266 N.W. 480, 482 (Iowa 1936).

The medical record was not substantially developed between the June 7, 2016, date of injury and the July 6, 2016, date of injury. Dr. Moe did not request diagnostic imaging of claimant's spine. In fact, it was not until claimant presented to Dr. Kurtz on July 19, 2016, that claimant was scheduled for an MRI. The requested MRI revealed a herniated disc, an annular tear, nerve root compression, and foraminal stenosis of the lumbar spine. Unfortunately, because diagnostic imaging was not requested prior to July 19, 2016, it is difficult to definitively say when the herniation occurred. Given the timeline, it is likely the June 7, 2016, work injury caused the herniated disc, or at the very least weakened the disc in claimant's back which later resulted in a herniation through normal work activities on July 6, 2016, and July 11, 2016. Given the objective medical evidence in the record, I find Dr. Bansal's opinion regarding causation convincing. As such, I find the disc herniation occurred as a result of moving rolls of carpet. In either event, claimant met his burden of proof to demonstrate his disability is a natural consequence of the work injury.

The next dispute to be decided in this case is whether claimant's June 7, 2016, injury resulted in temporary disability. Claimant did not miss any time from work following the June 7, 2016, work injury. There is no evidence claimant sustained temporary disability as a result of the June 7, 2016, work injury. As such, I find claimant failed to prove entitlement to temporary disability benefits as a result of the June 7, 2016, work injury.

The next dispute to be decided in this case is whether claimant's June 7, 2016, injury resulted in permanent disability.

The evidentiary record contains two impairment ratings with respect to claimant's low back condition. Dr. Broghammer placed claimant in DRE Category II, and assessed him with a five percent impairment rating due to the fact he no longer suffered from radiculopathy. However, claimant presented to Dr. Bansal months later with radiculopathy and credibly testified he continued to experience the same, at hearing. For this reason, and for the reasons discussed in the findings of fact, I find the impairment rating provided by Dr. Bansal more accurately reflects claimant's impairment. Having found the opinions of Dr. Bansal most convincing, by a preponderance of the evidence, I found claimant carried his burden in proving his June 7, 2016, injury resulted in permanent disability.

The next issue to be decided is the nature and extent of claimant's permanent disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219

Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

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. Iowa Code section 85.34.

This case involves successive injuries with the same employer. This invokes the provisions of Iowa Code section 85.34(7)(b) which govern how successive injuries are to be assessed and what credits should be given to the employer for past payments of weekly benefits.

Iowa Code section 85.34(7)(a) makes defendants responsible for compensating all of an employee’s disability that arises out of and in the course of the employee’s employment with the employer.

Under 85.34(7)(b)(1), when a subsequent work injury occurs while working for the same employer and the subsequent injury is compensated under the same subsection of Iowa Code section 85.34(2), then this agency is to determine the combined disability that is caused by both injuries. The employer's liability for the combined disability shall be considered satisfied to the extent of the percentage of disability for which the employee was previously compensated.

In the instant case, claimant sustained work injuries with the same employer on May 19, 2016, and June 7, 2016. For the reasons set forth in the Findings of Fact, I

found that claimant suffered a 15 percent loss of his earning capacity as a result of both the injury on May 19, 2016, and the injury on June 7, 2016. Such a finding entitles claimant to 75 weeks of permanent partial disability benefits as a matter of law, which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in Iowa Code section 85.34(2)(u). After giving credit for the 5 percent industrial loss previously paid, the remaining 10 percent needs to be compensated. A 10 percent industrial loss entitles claimant to 50 weeks of permanent partial disability benefits as a matter of law. Iowa Code section 85.34(2)(u).

Claimant did not miss any work as a result of the June 7, 2016, work injury. (Hr. Tr., p. 78) As such, I find permanent partial disability benefits shall commence on June 8, 2016. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

## ORDER

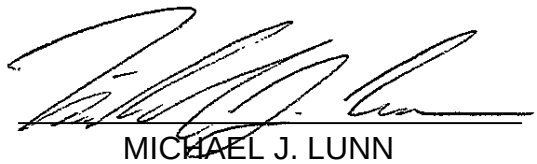
Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated weekly rate of three hundred five and 50/100 dollars ($305.50) per week.

Defendants shall be given credit for all benefits previously paid.

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).

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

Signed and filed this 29th day of April, 2020.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Thomas Berg (via WCES)

Lee Hook (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.