BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE A. SIMMER, Claimant, vs. MENARD, INC., Employer, and PRAETORIAN INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED FEB 22 2019 WORKERS COMPENSATION	File No. 5041139 REVIEW-REOPENING DECISION Head Note No.: 1803, 4100

STATEMENT OF THE CASE

Dale Simmer filed a petition for review-reopening seeking workers' compensation benefits from the employer, Menard, Inc. (hereafter, Menard's), and Praetorian Insurance Company, the insurance carrier. A previous arbitration decision was filed on October 30, 2013, awarding running healing period benefits to the claimant. Permanency benefits were not addressed. In reality, the issue of permanency was bifurcated.

The matter came on for hearing on January 18, 2018, before deputy workers' compensation commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of Joint Exhibits 1 through 46, including 40B, which was received on January 29, 2018; as well the sworn testimony of claimant. Nine witnesses testified via deposition, Julie Beck, Holly Hirsh, Jacob Russell, Ray Veloz, Rhonda Veloz, Mary Nell Fullerton, Jeremy Mead, Patricia Willems and Tami Russell. (Joint Exhibits 30 through 38) The record is voluminous and tedious. Administrative notice was taken of the previous arbitration decision, the appeal decision and the administrative file. Matt Ziebell was also present on behalf of the defendants. Erin Hines was appointed court reporter. The parties argued this case and the matter was fully submitted on March 14, 2018.

ISSUES AND STIPULATIONS

Most of the issues have been stipulated and/or previously adjudicated. The only remaining issues are the nature and extent of claimant's permanent disability and

whether the claimant is entitled to alternate medical care. Claimant alleges he is permanently and totally disabled and he plead the odd-lot theory. Defendants deny this. He seeks medical treatment recommended through Sandeep Bhangoo, M.D. Defendants contend they have provided reasonable medical care and there is no basis for alternate care. The only other disputed issue is costs. The parties have requested a specific taxation of costs.

The remaining stipulations and agreements set forth in the hearing report have been accepted and are deemed enforceable.

FINDINGS OF FACT

Dale Simmer was born in July 1959. At the time of hearing, he appeared for hearing as a pleasant, 58-year-old man. He actually lives in Moline, Illinois now, although he testified he spends a great deal of time with his adult daughter in Mason City, Iowa. Much of his time is spent at a campsite near Moline, Illinois. He has a roommate, Julie Beck. He testified live and under oath at hearing.

This matter was originally heard on May 15, 2013 in Iowa Falls, Iowa. As mentioned above, I have reviewed the arbitration decision entered on October 30, 2013, which was summarily affirmed on June 3, 2014. The Deputy Commissioner made a number of findings of fact, as set forth below. These findings are preclusive and the law of the case. With regard to his work/educational background, injury and medical treatment, the Deputy made the following findings:

> Claimant testified he resides in Mason City, Iowa. He is divorced since 2006. He has three grown children. At the time of the hearing he was 53 years old. He weighs 265 pounds.
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> He did not graduate from high school, as he was two credits short. He did not have credits for physical education or shop, due to a steel rod put into his thumb. He has sometimes asserted on job applications he had graduated, as he felt he basically did complete high school. His grades were Cs and Ds. He has no further education and has not been in the military.
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> His first job was at Clear Lake Bakery. His work history is set out in Exhibit 24, page 6. His job was a baker, which required him to handle 50-pound boxes of lard, one-hundred pound bags of sugar, etc., then weigh the ingredients for baking. He would mix the dough, then put it into a 200-pound vat, and the dough could weigh 150 to 500 pounds. He would roll the cart to the next section, 25 feet away from the mixer. He had no back problems while working there.
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> He worked at the bakery for 12 years, until 1989. He then worked at Iowa Paint in Mason City. His job there was as a delivery driver. Large buckets of paint would weigh from 40 pounds and up. He would have to

move the five gallon buckets by hand. After his van was loaded, he would deliver the paint. Some trips were 200 miles roundtrip.

He then became an in-store sales clerk. He had the same duties as delivery driver, with the addition of waiting on customers in the retail store. He then became store manager, which included the other duties but also giving estimates to contractors. He was then promoted to sales representative, which involved going on the road and selling paint to customers, including retail stores. His territory was from Faribault, Minnesota, to Carroll, Iowa, and to Decorah, Iowa. He worked there 15 years, and left in 2003, after tiring of being on the road. He had no back problems while working there.

He then went to work for Menard's in Mason City on July 1, 2003. He was part time at first for a few months. He worked in the wall covering department as a sales clerk. He would wait on customers, and would carry buckets of paint up to five gallons, weighing 40 to 50 pounds. He would help load the paint into customers' vehicles as well as rolls of carpet up to 200 or 300 pounds, water heaters, appliances weighing 100 pounds or more, etc.

His department also handled bird, dog and cat food, which involved lifting 50-pound bags. He was promoted from sales clerk to assistant manager, with the same duties and also training employees. He was then promoted to manager of the wall coverings department, which involved the same duties but more training of employees. He was manager about five years.

Claimant testified his work at Menard's involved more lifting than his prior jobs. He worked about 45 hours per week. He began having back pain in 2009. He went to see William Riesen, M.D., his family physician, for pain in his thighs and feet on January 12, 2009. Dr. Riesen noted claimant had "not noticed anything that makes better or worse". (Exhibit 1, page 1) He also noted "It is possible that he is simply working hard and getting sore since he is now 49." (Ex. 1, p. 2) Dr. Riesen ordered an MRI. He thought claimant's pain was from muscle spasms, and did not give him any work restrictions. Dr. Riesen did not mention scoliosis. Claimant continued to do his job.

Lumbar spine x-rays showed claimant had dextroscoliosis with advanced multilevel degenerative disk disease. (Ex. 2, pp. 1-2) An MRI on January 22, 2009, showed lumbar scoliosis and degenerative changes in the lumbar spine. (Ex. 2, p. 6)

Claimant returned to Dr. Riesen in October, 2009, for continuing pain. Claimant described his work as involving a lot of standing but not much heavy lifting. (Ex. 1, p. 5) Dr. Riesen still thought it was muscle spasms,

and gave him muscle relaxers, which did help. Claimant continued to work. Again, Dr. Riesen did not mention scoliosis or take him off work, or give him any work restrictions. (Ex. 1, p. 7)

On February 10, 2010, claimant missed work and gave as a reason that he had hurt his back at home. (Ex. F, p. 4)

On April 14, 2010, claimant returned to Dr. Riesen for back pain. Again, he diagnosed muscle spasms, and noted the January, 2009 MRI showed degenerative arthritis, but referred claimant to the spine institute in Minneapolis, to Amir Mehbod, M.D., an orthopedic surgeon. (Ex. 1, p. 9) Once again, there was no mention of scoliosis, or work restrictions. At a follow up appointment on April 28, 2010, it was noted claimant "hurt his back." (Ex. 1, p. 10)

On May 3, 2010, claimant was seen by Dr. Mehbod. Dr. Mehbod noted claimant had back pain for a year which was worsening. (Ex. 3, p. 12) Claimant smoked one to two packs of cigarettes per day. (Ex. 3, p. 8) He noted a past history of osteoarthritis. Claimant was noted to be leaning forward. X-rays were taken, and claimant was told he had scoliosis, for the first time. The doctor noted degenerative scoliosis at L1 to L4, with multilevel disc degeneration. (Ex. 3, p. 13) Dr. Mehbod recommended an epidural injection, and physical therapy. The physical therapy helped claimant's pain. He underwent physical therapy at Mercy Hospital in Mason City. He had relief from the injection for about six months.

Claimant told his employer he had scoliosis. However, in his deposition he stated he did not relate his low back pain to his work activities. (Ex. D, p. 12) He stated "I did not know that it was work related because I continued to do all the work that I would normally have done, even after I found out what the problem was." (Ex. D, p. 25)

A year later, in May, 2011, claimant called Dr. Mehbod to request another injection, as his pain was returning and he was starting to walk bent over. He had a second injection, in Bloomington, Minnesota. That injection also helped his pain. Claimant still had no work restrictions.

In January, 2012, claimant had another lumbar MRI, which showed moderate to advanced lumbar curvature, with moderate lumbar spine degenerative changes. (Ex. 2, p. 10)

Claimant continued to work until returning to Dr. Mehbod on February 9, 2012, again due to increased pain. X-rays were again done, and claimant's spine had curved even more than before. Claimant was offered fusion surgery for degenerative scoliosis. (Ex. 3, p. 23)

Claimant testified at his deposition that Dr. Mehbod told him at this point that standing and lifting at work had accelerated the curvature of his spine. (Ex. D, p. 61) However, Dr. Mehbod's records do not confirm that. Claimant recalled Dr. Mehbod told him the surgery would correct the problem and he would be able to return to work.

Dr. Mehbod put claimant on a five pound work restriction. However, claimant continued to do his regular duties at work. He did not inform the employer of his work restrictions. Claimant told Jeremy Mead, his supervisor, he would be taking a personal leave of absence, under the Family Medical Leave Act (FMLA), for the surgery, so that his job would be waiting for him when he recovered. Claimant's last day of work before his surgery was February 19, 2012. The surgery was performed on March 7, 2012, and involved the L3-4, L4-5, and L5 levels. A fusion and insertion of rods was done, from the middle of his back to the lower back.

Claimant applied for Social Security Disability benefits, for the period of time he would be off work for his surgery. (Ex. I, p. 1) No Social Security doctors ever examined claimant, or called to talk to him. Claimant received a letter of refusal, dated May 15, 2012, based on the fact claimant would be able to return to work after his surgery and would not be disabled for the minimum amount of time. (Ex. I, pp. 7-10) His application was denied again in October, 2012. That is currently on appeal, which could take 18 months for a hearing.

In May, 2012, claimant again returned to Dr. Mehbod, shortly after his Social Security Disability denial. Claimant was not truthful with Dr. Mehbod about his pain level, as he wanted to return to work. He was "going crazy" sitting at home. He told Dr. Mehbod his pain level was less than it was. Dr. Mehbod allowed him to return to work after his surgery on June 4, 2012, with restrictions of a five pound lifting limit, and working only four hours per day the first week, six hours the second week, and eight hours the third week.

Claimant returned to the wall coverings department, but was only able to work an hour before having to quit due to pain in his back and fear his leg would give out. He went home and called Dr. Mehbod's office for an off work excuse. The nurse told him Dr. Mehbod agreed it was too early to go back to work with the type of surgery he had. Claimant realized at that time it would not be possible for him to return to work at Menard's, at least not without further surgery. It was at that time he decided to pursue a workers' compensation claim.

Claimant stopped smoking prior to his surgery, at his doctor's recommendation, but claimant began smoking again about three months after the surgery, about the time he attempted to return to work.

> Claimant missed an appointment with Dr. Mehbod because he was told he no longer had insurance. Claimant had lost his health insurance when he could no longer return to Menard's. Claimant applied for IowaCare, a public assistance health program, and claimant qualified. However, since Dr. Mehbod was not in Iowa, IowaCare would not pay for his treatment. Claimant's daughters offered to pay for another visit with Dr. Mehbod.
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> At that appointment, in January, 2013, x-rays showed the surgery had not healed correctly, and Dr. Mehbod recommended further surgery. He felt claimant was unemployable. He authored a letter of restrictions for claimant's Social Security Disability application, including restrictions on sitting, standing and walking.
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> On March 27, 2013, claimant was seen by Sergio Mendoza, M.D., at the University of Iowa. He told claimant the reports from Dr. Mehbod suggested further surgery to correct the problems, which included sagittal imbalance, lumbrosacral nonunion, and proximal junctional kyphosis. He ordered a CT scan and myelogram, which were performed on April 15, 2013. Dr. Mendoza's nurse told claimant some of the screws from the fusion were loose toward the bottom of his fusion, and some screws were rubbing on his spinal cord. Dr. Mendoza recommended he quit smoking, and claimant has done so. He was also told to try and swim, bike or walk more to get his blood pressure down. Claimant has been walking in his back yard, using the fence to stabilize himself and keep from falling. Claimant would like the further fusion surgery recommended by Dr. Mendoza.

(Joint Exhibit 2, pages 2-5)

The Deputy Commissioner then weighed the expert medical evidence and made the following additional findings.

> Claimant was sent to see David Boarini, M.D., in Des Moines in February, 2013 by defendants. Dr. Boarini spent ten or fifteen minutes with claimant at the most, according to claimant. The doctor had him bend over to touch his toes, and measured his thighs and calves. He did not take x-rays. Dr. Boarini attributed claimant's condition to his age and smoking.
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> Claimant's attorney sent him to Ray Miller, M.D., in Cedar Rapids. Dr. Miller examined claimant for one to two hours. Dr. Miller had claimant do stretches, bends, twists, etc. He had claimant lay on a table and the doctor would bend and twist his legs.
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> . . . .

Claimant currently has restrictions of no lifting more than five pounds, and no extended sitting, walking or standing. He is in constant pain, including at the hearing. The pain is across his lower back and on his right side. The pain is at the belt line. He rates the pain as a 10 because he has never experienced pain like this before. It is a constant throbbing and stabbing in the back. For his right thigh, it is similar pain plus numbness, from his hip down to his knee.

He can only stand on his own for ten minutes, without having to lean on something. Leaning on something he can stand for thirty minutes. He can sit in a chair for about ten minutes before he has to change position. He cannot kneel, as it is too much strain on the back, and he would have a hard time getting up again. Crouching and stooping are limited due to the rods in his back. He cannot bend over, again due to the rods and the tightening of the lower back. Twisting from side to side also results in pain, and he has to turn his whole body to the side instead. He has trouble with balance due to the pain and numbness in his right leg, and fears it will "go out at anytime".

Claimant uses a walker, which he keeps by his bed to use first thing in the morning until he gets "limbered up." He uses it at the grocery store as well. He has to use handrails to go up or down a stairway, and goes one step at a time. He would not even attempt to climb a ladder with his balance. He cannot reach above his head, as the stretching pulls on his back too much. He uses a "grabber" to get things like a half gallon of milk weighing four pounds or he would feel back pain. He tried to lift a jug of laundry detergent but almost dropped it. He does not lift anything over five pounds.

Claimant cannot walk very far without assistance. He always uses a cart at the grocery store. He uses a handicap parking sticker for his car. He cannot do any pushing or pulling, other than pushing a grocery cart. His children will help him shop, but he cannot have more than a few items in his cart or he cannot push it. He does not sleep more than four or five hours per night, due to back pain. He has trouble dressing himself, and has to use pants with elastic waists. He has to put the pants on the floor, step into them, and then use the grabber to lift them. He also uses a special device to help him put socks on. He has slip-on shoes so he does not have to tie them.

Changes in the weather affect him, as dampness causes his muscles to tighten up. He only drives short trips within Mason City. He can ride in a car no more than a half hour before he has to get out and walk for ten minutes or so. He can no longer mow or rake his yard, cannot scoop snow, and cannot do any gardening. Inside the house, his daughters do his vacuuming, the heavy laundry, etc. Claimant does not feel he could do any of his prior jobs, including Menard's, today, due to his back condition.

> Claimant met with Lewis Vierling for an evaluation of his vocational abilities. Mr. Vierling felt claimant had lost access to 98 percent of jobs formerly available to him. (Ex. 15)
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> Claimant was also evaluated by vocational expert Ann Rosenbaum. She concluded he was unemployable. However, she added that if claimant underwent further surgery, he might become employable. (Ex. E, p. 2)
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> Before February of 2009, claimant could do all of his work at Menard's, and loved his job. He had been selling paint for over 25 years and enjoyed it. He would like to return to his job at Menard's but does not feel he can do the job now.

(Jt. Ex. 2, pp. 5-7)

Based upon these factual findings, the Deputy Commissioner concluded that, as of the date of hearing (May 15, 2013), Mr. Simmer was still in a healing period. After addressing a number of preliminary issues, the Deputy awarded a running award of healing period benefits.

> Dr. Miller felt claimant had reached maximum medical improvement on March 19, 2013. (Ex. 10, p. 6) However, Dr. Mehbod has recommended further surgery for claimant in light of the failure of the prior surgery and an indication some of the hardware installed in the fusion surgery has come loose. (Ex. 3, p. 39) Dr. Mendoza also felt claimant could benefit from further corrective surgery. (Ex. B, p. 1)
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> At hearing, claimant asserted he is not yet at maximum medical improvement, as further surgery has been recommended for him but not provided. In his post-hearing brief, claimant requests an adjudication of his disability now. If permanent partial disability is awarded, the parties indicate March 19, 2013, is the commencement date for permanent benefits.
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> Claimant may prefer an adjudication of his disability now, but the record shows he is not yet at maximum medical improvement. With two physicians saying he needs further surgery, and a vocational report that says his employability may well be improved by that surgery, it is premature to assess his disability at this point.
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> It is concluded claimant has not reached maximum medical improvement. Claimant will be awarded a running award of healing period benefits.

(Jt. Ex. 2, pp. 12-13) These findings and conclusions were all affirmed on intra-agency appeal and later, in the Iowa Court of Appeals. (Jt. Exs. 3, 4 and 5)

Following the May 2013 hearing, it was expected that Mr. Simmer would have a surgery to correct the fusion surgery. This never happened. Mr. Simmer returned to Dr. Mendoza in November 20, 2013. At that time, the following was documented from the encounter.

> He first saw Dr. Mendoza on 03/27/2013. He reported he had been unable to work secondary to his pain and he lost his job. He has not worked since 02/19/2012. He was thought to have nonunion with loosening of hardware especially at the L4 level. A CT myelogram on 04/15/2013 was consistent with loosening around the sacral screws. Dr. Mendoza's plan for surgery would be partial hardware removal, revision of sacral nonunion, extension of the posterior spinal fusion to include ilium, corrective osteotomy at L4. Prior to surgery the patient was tasked with 3 things: #1 quit smoking and be able to pass a nicotine test, #2 establish care with primary care provider and get blood pressure better controlled, #3 work on cardiopulmonary conditioning and be able to complete 30 minutes of exercise 4 days per week.
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> He returns to clinic to follow up on his progress toward the three goals. Today the patient reports constant back pain only on his left side. He describes recently rolling onto his back and felt like something poked him. He reports he tried using a recumbent stationary bike to develop cardiovascular endurance, but his pain was worse and he quit after one week. He reports he quit smoking for almost 4 months, now smokes a couple of cigarettes a week. He reports his insurance ran out because he is not working, he does not have a primary care provider. He reports he is enrolled in a new Medicaid program, and he is taking blood pressure medication.

(Jt. Ex. 12, p. 12) Based upon this, Dr. Mendoza advised against surgery. "An extensive elective spine surgery as recommended requires him to be in better health. We cannot help him in his current condition." (Jt. Ex. 12, p. 13) Dr. Mendoza gave him three months to get his hypertension under control, improve his cardiovascular endurance and pass a nicotine test.

On March 17, 2014, Mr. Simmer qualified for Social Security Disability benefits. (Jt. Ex. 21) His disability date was determined to be February 19, 2012. He began receiving payments of $1,710.00, in April 2014.

Mr. Simmer returned to Dr. Mendoza on June 30, 2014.

> At his last visit we discussed having him quit smoking, find a physician to manage his hypertension, and work on aerobic exercises with a stationary bike. As of today he has done none of these things. He feels the aerobic exercises made him worse. He is smoking 1/2 pack a day. He has not gone to a doctor for his hypertension and states he ran out of the

> medication given him through the UIHC ER at his last visit (BP today is 184/117).

(Jt. Ex. 12, p. 22) At that visit, Dr. Mendoza noted that claimant "has constant chronic pain," which could not "be explained by any possible loosening of his inferior screws or lumbo-sacral non-union." (Jt. Ex. 12, p. 24) Dr. Mendoza recommended an evaluation with the Spine Team Rehab Program to see if he could participate in a two week program. This evaluation never occurred. At the time, Mr. Simmer was apparently directing his own medical care as the claim had been denied. Based upon the record before me, it appears Mr. Simmer did not have any interest participating in such a program.

The defendants argue forcefully that Mr. Simmer was not motivated to improve his condition by following Dr. Mendoza's recommendations to exercise, stop smoking and take care of his significant blood pressure issues. Claimant argues that it hurt too much to exercise and he was unable to address his blood pressure issues because he had no health insurance. (Transcript, pp. 60-61) I believe Mr. Simmer's testimony that his pain was severe. I believe him that it was painful to exercise. It was probably also hard. It may be true that he may be better off if he would have powered through it to improve his overall health. It is, however, obvious that he suffers from chronic pain. Mr. Simmer acknowledged that he has been unable to quit smoking. (Tr., p. 62) It is generally quite difficult for long-term smokers to quit smoking in the best of circumstances. I find it unsurprising that claimant has had difficulty in this endeavor. Based upon this evidence, I am unwilling to find that claimant's failure to accomplish the goals set forth by Dr. Mendoza somehow negatively impact his claim for industrial disability.

Based upon the record before me, it appears the claimant had no real medical treatment on his back after June 2014. Deputy Heitland had found that claimant had lost his medical insurance once he stopped working at Menard's sometime in 2012. (Jt. Ex. 2, p. 5) During much of this period of time, the matter was on appeal. The Iowa Supreme Court denied further review in October 2015. (Jt. Ex. 5)

On July 28, 2016, claimant was evaluated by Sandeep Bhangoo, M.D., a neurosurgeon, for an independent medical evaluation (IME) at his attorney's direction. Dr. Bhangoo diagnosed lumbar scoliosis with fusion from T12-S1. (Jt. Ex. 15, p. 3) He opined Mr. Simmer suffered a 40 percent whole body impairment rating.

> Dale does have significant limitations with his back as far as range of motion goes. This is going to permanently impair what he can and cannot do. The other concern here is with his screw lucencies, it is possible that further increased activity could worsen that over time, even if he keeps his activity level at minimum. Based on this, I would agree that he is probably no [*sic*] employable in any capacity for greater than 1 hour at a time, and that would be with extremely light duty, no heavy lifting, no bending at the waist, and sitting and standing in shifting position as needed.

(Jt. Ex. 15, p. 4) He did not recommend further surgery either although he made reasonable treatment recommendations for future care, mainly monitoring and repeat scans. (Jt. Ex. 15, p. 5) In September 2016, Dr. Bhangoo clarified his recommended restrictions, noting that Mr. Simmer "should not lift more than 5 lbs on a very rare basis." (Jt. Ex. 15, p. 5)

On September 21, 2016, defendants had claimant evaluated by Charles Mooney, M.D., an occupational medicine specialist. In September, Dr. Mooney performed a traditional defense IME, examining the claimant, reviewing records and preparing a report with his expert opinions. (Jt. Ex. 14) In June 2016, Dr. Mooney had already prepared a report based upon a review of medical records. (Jt. Ex. 14, pp. 1-2) Dr. Mooney provided the following diagnoses:

> 1. Status post spinal fusion secondary to severe lumbar scoliosis and degenerative disc findings with anterior fusion of L3 to the sacrum and posterior fusion of T10 to the sacrum performed on 03/07/12.
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> 2. Ongoing complaints of low back pain with some exaggeration in his complaints and positive Waddell's findings including withdrawal, pain with axial load, and trunk twist.

(Jt. Ex. 14, p. 5) Based upon these diagnoses, Dr. Mooney assigned a 35 percent whole body impairment rating and assigned restrictions of sedentary work with no lifting more than 10 pounds, alternate standing and sitting, no lifting from floor to waist and no prolonged standing or walking (greater than 10 minutes). (Jt. Ex. 14, pp. 5-6) He did not recommend any further medical care. (Jt. Ex. 14, p. 6)

In December 2016, claimant was evaluated by Joseph Chen, M.D., at the University of Iowa Hospitals and Clinics Spine Rehab Program. (Jt. Ex. 12, p. 26) I suspect this is the same program to which Dr. Mendoza had referred claimant in June 2014. Dr. Chen diagnosed Mr. Simmer with major depressive disorder, chronic bilateral low back pain without sciatica and hypertension. (Jt. Ex. 12, p. 28) Dr. Chen prescribed citalopram for the depression. He concluded that Mr. Simmer was not a candidate for the Spine Rehab Program due to "his uncontrolled hypertension and significant mood disorder." (Jt. Ex. 12, p. 29) He recommended that claimant focus on his depression and hypertension. (Jt. Ex. 12, pp. 28-29) Dr. Chen agreed that Mr. Simmer's whole body impairment is 40 percent and recommended restrictions of light or sedentary work with lifting no more than 10 pounds and alternating sitting and standing as needed. He offered no other treatment recommendations.

On January 13, 2017, Mary Nell Fullerton, a human resources coordinator from Menard's, sent a letter to Mr. Simmer instructing him to return to work on January 23, 2017. (Jt. Ex. 24, p. 1) She enclosed Dr. Chen's report and cited his restrictions as sedentary or light duty lifting no more than ten pounds and sitting and standing as needed. The letter included an offer to accommodate his restrictions. Mr. Simmer did not return to work. He testified at hearing that Dr. Chen never examined him as it stated in the report. (Tr., pp. 29-30) He testified that a nurse took his weight and blood

pressure but that Dr. Chen did nothing to examine him at all.

In March 2017, claimant's counsel responded to the instruction to return to work in a letter to defense counsel, explaining all of the reasons Mr. Simmer could not return to work. Most importantly, he pointed out that Dr. Chen's restrictions were not as accurate as those provided by Dr. Bhangoo, Dr. Mehbod or Dr. Miller. He also pointed out that Dr. Chen did not perform a real evaluation of Mr. Simmer. Finally, he noted that Dr. Chen had diagnosed depression, which included symptoms of inability to focus and concentrate which would adversely impact his ability to work as a cashier. (Jt. Ex. 25, pp. 1-2)

On April 3, 2017, Ms. Nell Fullerton wrote to Mr. Simmer again, noting that she understood he still had concerns about his restrictions. She promised that they would discuss any reasonable accommodations he might need in order to carry out the essential functions of the job. She adjusted the report to work date to April 17, 2017. (Jt. Ex. 26, pp. 1-2) Mr. Simmer did not attempt to return to employment with Menard's.

On April 18, 2017, Mr. Simmer returned to Dr. Bhangoo, who noted that his condition had worsened to some degree. (Jt. Ex. 15, p. 6) He noted that "given his limited range of motion and his difficulty even sitting down for an extended period of time, I just do not see how he is going to really be able to functionally work as a cashier for 8 hours a day 5 days a week for a total of 40 hours." (Jt. Ex. 15, p. 6) He essentially affirmed his opinions contained in his initial evaluation and added that he did not think Mr. Simmer could work consistently as a cashier.

In May 2017, Mr. Simmer had a heart attack and received significant treatment for this condition. (Tr., p. 63) Since then he has been treated with medications to control his blood pressure and he has apparently taken his blood pressure issues more seriously. (Tr., pp. 63-64)

Dr. Bhangoo saw Mr. Simmer on one final occasion in December 2017. (Jt. Ex. 15, p. 8) He did provide some treatment at this visit, performing an x-ray of the low back. He opined that he did "not think it is fused at L5-S1" based upon the x-ray and earlier films. (Jt. Ex. 15, p. 8) He also noted that Mr. Simmer's condition had worsened. He noted Mr. Simmer's heart problems. "I told them that once they are on Plavix medication for the stent, it essentially precludes any type of elective surgical correction." (Jt. Ex. 15, p. 8)

Two vocational experts offered expert opinions regarding claimant's employability prior to hearing. Lewis Vierling updated his opinions from the earlier hearings. Defendants selected a new vocational expert, Lana Sellner, to provide expert opinions. Prior to the first hearing, defendants had selected Anne Rosenbaum, who agreed prior to the first hearing, that claimant was essentially unemployable unless he had corrective surgery on his back. "Based upon the above opinions it does not appear Mr. Simmer is able to work at this time; however should he proceed with additional treatment it is my opinion and that of Dr. Boarini he may be able to return to at least sedentary employment." (Jt. Ex. 17, p. 2)

Mr. Vierling provided an amended vocational rehabilitation evaluation in December 2017. (Jt. Ex. 19) His lengthy report is detailed, thorough, accurate and credible. He opined that Mr. Simmer is "unemployable." (Jt. Ex. 19, p. 6)

Ms. Sellner began providing expert opinions for the defendants in July 2016, and wrote various opinions and reports throughout the course of this case up to December 2017. (Jt. Ex. 22) She provided active case management services and was actively attempting to assist Mr. Simmer find a job. She prepared a resume for him and looked up available positions for the labor markets in the Mason City area, as well as the Quad Cities. (Jt. Ex. 22, p. 17) She conceded openly in October and December 2017, that when utilizing the restrictions from Dr. Bhangoo she was unable to identify any jobs for the claimant. (Jt. Ex. 22, p. 18; see also p. 37) She opined there were numerous jobs that Mr. Simmer could perform within Dr. Chen's restrictions and, to her credit, she actively sought to help Mr. Simmer obtain employment within those restrictions. Based upon a full reading of Ms. Sellner's reports and opinions, I find that Mr. Simmer was not particularly interested in working with her to attain employment within those restrictions. This is a crucial aspect of the case and will be addressed more fully below.

Many of the positions Ms. Sellner recommended were not realistic at all, even within Dr. Chen's restrictions. A number of the positions she suggested would not fall within Mr. Simmer's restrictions, others would not fall within his current education, training and skill set. For example, she suggested he apply for Harbor Freight, which involved fairly significant physical activity well outside of Dr. Chen's ten pound alternate standing and sitting restrictions. (Jt. Ex. 22, p. 22) On the other end, she recommended an insurance sales job which required significant travel and use of innovative technology. (Jt. Ex. 22, p. 27) These positions are so outside of the scope of possibility for Mr. Simmer, it harms the credibility of her report overall. Mr. Vierling reviewed the jobs recommended by Ms. Sellner and found them to be outside of Mr. Simmer's restrictions and physical capabilities. (Jt. Ex. 19, p. 6) I find the vast majority of the jobs she recommended are not realistic at all for Mr. Simmer. It is noted, however, that her job was really to help Mr. Simmer find employment. This line of work requires optimism. Ms. Sellner also prefaced her recommendations by noting that she was willing to assist Mr. Simmer in preparation for these positions by advising him on requesting reasonable accommodations, which can certainly be valuable assistance if accepted. Mr. Simmer did not attempt to work with her at all. (Tr., pp. 74-76)

The depositions of nine witnesses were submitted at hearing and their testimony was accepted and reviewed thoroughly: Julie Beck, Holly Hirsh, Jacob Russell, Ray Veloz, Rhonda Veloz, Mary Nell Fullerton, Jeremy Mead, Patricia Willems and Tami Russell. (Jt. Exs. 30-38) These witnesses range from family members and close friends to Menard's officials and neighbors. There is not much in any of this testimony which is particularly insightful in helping me assess Mr. Simmer's industrial disability. Most of the deposition testimony generally corroborates Mr. Simmer's version of events.

The testimony of Jacob Russell and Tami Russell is the exception. (Jt. Exs. 32 and 38) These were former family friends of Mr. Simmer who had a falling out at some point. Mr. Simmer had worked with Tami Russell's husband at Iowa Paint many years

ago. (Jt. Ex. 38, Tami Russell Deposition, p. 7) Jacob Russell is Tami Russell's son. Jacob Russell apparently contacted Menard's corporate office at some point to report that Dale Simmer was not as severely disabled as he was alleging. (Jt. Ex. 33, Jacob Russell Depo., p. 30) Jacob Russell and Tami Russell provided examples of Mr. Simmer engaging in various activities of daily living around 2015 to 2016, which one would be expected to perform at a camp site, such as moving a picnic table, carrying items such as laundry or a cooler and partially climbing a ladder. Both of these witnesses conceded that Mr. Simmer has back problems and they have seen him walk with a cane and exhibit various behaviors of an individual in pain. They testified they simply felt as though he was performing tasks he should not have been doing.

The defendants secured surveillance of Mr. Simmer over a rather extended period of time in an effort to develop evidence that he was not as severely disabled as he claims. The reports submitted by the defendants are set forth in Joint Exhibit 39, and apparently span from July 2016 through September 2017. These reports provided very little probative evidence and are weighted accordingly. There is also video surveillance in Joint Exhibit 40 and Joint Exhibit 40B. These video clips provide very little additional value to the case, however, they do show Mr. Simmer moving around slowly and with a cane in public places.

Mr. Simmer has made no effort to return to work in the past several years. Frankly this case would be much simpler if Mr. Simmer had simply made a serious, good faith attempt to return to work. The facts presented demonstrate persuasively that Mr. Simmer did not cooperate with the employer's efforts to help him return to work. Menard's offered him a cashier position in 2017. It provided vocational case management services. Mr. Simmer viewed all of these efforts with great suspicion. To some extent, of course, this is reasonable and understandable. Menard's had clearly taken Mr. Simmer off the payroll in 2013, leaving him without medical insurance while denying his workers' compensation claim. It is certainly not unreasonable for an injured worker to have some skepticism about a former employer's job offer or offer of vocational services in such a circumstance. Moreover, Mr. Simmer testified that he simply did not believe there is any work he can perform. He testified he felt it was dishonest for him to apply for jobs he knew he could not perform. On this point, I believe him.

The greater weight of evidence supports a finding that the claimant is permanently and totally disabled. He will also likely need ongoing monitoring and maintenance treatment of his low back which should be directed by Dr. Bhangoo.

CONCLUSIONS OF LAW

The fighting issue in this case is whether the claimant has proven that he is permanently and totally disabled. Claimant pleaded odd-lot and contends he is unemployable. Defendants allege that claimant is unmotivated and uncooperative and that he is unemployed by choice. Defendants contend claimant's failure to engage in job search activities precludes him from use of the odd-lot theory.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

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

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. 1982).

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

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

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

Having reviewed all of the evidence in this substantial file, I find that the claimant has proven that he is permanently and totally disabled. Mr. Simmer was 58 at the time of hearing. He did not graduate from high school and he was a below average student. He worked for Menard's in Mason City as manager of the wall coverings department from 2003 through 2012 or 2013. Prior to that, he worked his way up to store manager and sales representative at Iowa Paint. He had a strong work history prior to this injury and it is noted that he has some management skills. All of his past employment, however, has required heavy lifting and significant physical activity, at least from time to time. He has been accepted for Social Security Disability.

His February 2012 work injury resulted in an unsuccessful spinal fusion surgery. The defendants' experts contend his whole body impairment is between 35 and 40 percent, while claimant's expert, Dr. Bhangoo, has opined the impairment is 40 percent. The surgery which was anticipated following claimant's 2013 hearing never occurred because the claimant was unable to accomplish the tasks set forth by Dr. Mendoza to stop smoking, get his blood pressure under control and engage in cardiovascular exercise. Defendants argue strenuously that this demonstrates claimant's lack of motivation and should preclude a finding of permanent total disability. For the reasons set forth in the findings of fact, I disagree.

Dr. Chen recommended restrictions of light or sedentary work with lifting no more than ten pounds and alternating sitting and standing as needed. These are severe and serious restrictions which would clearly preclude Mr. Simmer from all of his past employment. A finding of permanent total disability could be made upon those restrictions alone. I find, however, that the medical reports of Dr. Bhangoo to be the most compelling expert medical opinion in the record. Dr. Bhangoo recommended the following restrictions:

> Dale does have significant limitations with his back as far as range of motion goes. This is going to permanently impair what he can and cannot do. The other concern here is with his screw lucencies, it is possible that further increased activity could worsen that over time, even if he keeps his activity level at minimum. Based on this, I would agree that he is probably

> no [*sic*] employable in any capacity for greater than 1 hour at a time, and that would be with extremely light duty, no heavy lifting, no bending at the waist, and sitting and standing in shifting position as needed.

(Jt. Ex. 15, p. 4) Shortly thereafter, he clarified the lifting restrictions noting that Mr. Simmer "should not lift more than 5 lbs on a very rare basis." (Jt. Ex. 15, p. 5) This opinion is based upon objective criteria, namely, preventing further damage to the already damaged area of the fusion. I find that Dr. Bhangoo's recommended restrictions are the restrictions Mr. Simmer should be following.

There is some evidence in the record which suggests that Mr. Simmer is not as physically impaired as he claims to be. Claimant's campground neighbors who he had a falling out with years ago apparently reported to Menard's that he was able to do more than he claims, including some occasional lifting and walking. Those witnesses generally painted a picture of a man enjoying retirement at a campground. Even those witnesses though conceded that the claimant appears to have real back issues, they just believe the problems are not as severe as he claims. Surveillance showed that he does, in fact, walk without his cane for short distances, which he never denied. While I am not particularly impressed with the testimony of his disgruntled neighbors, nor the 67 hours of surveillance which yielded very little by way of actual video evidence, the defendants have at least presented enough evidence to call into question Mr. Simmer's motivation.

Ordinarily, to make a finding of permanent total disability, whether under the odd-lot theory or not, it is helpful to have evidence that the claimant made an actual work search in good faith. Mr. Simmer did not perform any work search in this case. He refused the employer's offer to attempt a cashier job (five years after the accident; three years after he reached maximum medical improvement). He made no effort to cooperate with the employer's offer of vocational services. Such a showing, however, is not mandatory if the injured worker "introduces other *substantial* evidence that he has no reasonable prospect of steady employment." Second Injury Fund v. Nelson, 544 N.W.2d 258, 267 (Iowa 1995). I find Mr. Simmer did not search for work or cooperate with the employer's efforts to help him find employment because he truly believed he could not perform any work for which he is qualified. There is a difference, however, between knowing something is true and being able to prove it to be true. His refusal to seek work is a risky decision because as much as he believes or even knows it to be true, it is his burden to prove it before this agency.

After reviewing all of the evidence in the record, I do find that there is other substantial evidence which demonstrates a work search would have been futile in this case. I find that claimant's objective, physical impairment is quite severe and extensive. In essence, I find that the objective medical evidence is so compelling, it overcomes any concerns regarding the claimant's credibility or motivation. The experts, including the treating specialists, all opined that his permanent whole body impairment rating was between 35 and 40 percent due to damage to his prior fusion surgery. The best medical evidence in the record demonstrates that the fusion did not work and the spine in his lower back is not properly fused. This is not something that the claimant

could fake. Even if I were to find that claimant is not particularly credible, the fact remains, he has a badly damaged spine which resulted from a work-related injury. The injury resulted in substantial restrictions. Dr. Bhangoo's restrictions include no lifting more than five pounds on a rare basis, no bending at the waist, and alternating or shifting between sitting and standing as needed. These restrictions were based more upon the objective medical condition in claimant's low back than the subjective complaints by the claimant. Dr. Bhangoo opined that there was no way claimant could even work as a cashier, which would be a new job for claimant in any event.

The only physician who recommended less significant restrictions was Dr. Chen. Dr. Chen came to the file late, was not truly a treating physician, and apparently never even examined the claimant. Even so, he still found a 40 percent whole body impairment and restricted the claimant from lifting more than 10 pounds, alternating between standing and sitting. He is the only physician in this record to recommend claimant work at such a level. These restrictions would still preclude claimant from all of his past employment.

As mentioned previously, this case would be easier to decide if the claimant had been more cooperative and, frankly, more motivated to return to work. Had he made a good faith effort to return to work as a cashier, we would know for certain whether he could perform cashier work or not. Had he cooperated with the vocational assistance offered by the employer and made a good faith work search, we would know with greater certainty whether he could find a job that he could hold down in the competitive job market. The evidence suggests, however, that Mr. Simmer was both convinced that there was no way he could do any type of work and he preferred to be retired at this time.

Nevertheless, when the objective medical evidence is combined with the credible vocational opinions, I am even more convinced that claimant is permanently and totally disabled. Both vocational experts agreed that under Dr. Bhangoo's restrictions, there are no jobs available to Mr. Simmer.

For all of these reasons, I find that, even though there are some flaws in claimant's case, the greater weight of evidence supports a finding of permanent total disability.

The next issue is the claimant's need for alternate medical care.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code Section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See

Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

This case is somewhat unusual in that, by the time liability was established, the claimant had reached maximum medical improvement. There has been little or no active treatment to speak of. The defendants never selected an authorized treating physician. They did send claimant to two separate physicians for independent examination. Neither of those physicians offered claimant any treatment for his back. During the period of time this claim was denied, the claimant had a right to establish care with a physician of his choosing.

The defendants argue that the claimant never expressed dissatisfaction with his medical care, which is generally a prerequisite to filing an expedited alternate medical care petition. This expression of dissatisfaction is critical in an expedited case to ensure that the defendants have notice and an opportunity to correct any dissatisfaction with care before filing an expedited proceeding where no discovery is available. In this case though, the claimant's claim had been denied essentially during the entire period of his active medical treatment. Claimant is now seeking an order authorizing care with his chosen IME physician, Dr. Bhangoo. Since the defendants never established care with any physician, and in fact, no defense physician has even offered any care to the claimant, I find that he is entitled to continue his treatment with Dr. Bhangoo. The only care Dr. Bhangoo has recommended is essentially annual evaluations and possibly occasional scans to determine how the fusion looks. This care is superior to the care which has been recommended by defendants, which is none.

The final issue is costs.

Iowa Code section 86.40 states:

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

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

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as

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

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

Using the discretion set forth in Section 85.40, I award costs to the claimant in the amount of $5,044.62.

ORDER

THEREFORE IT IS ORDERED

The defendants shall pay claimant permanent total disability benefits at the stipulated and adjudicated rate of three hundred eighty-five and 24/100 dollars ($385.24) commencing from the date of injury.

Defendants shall pay any past due amounts in a lump sum with interest.

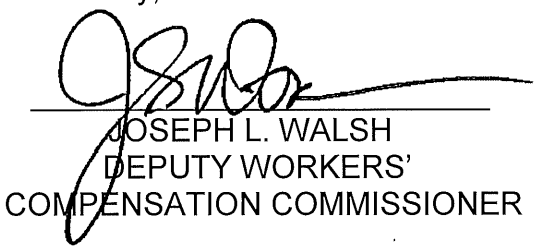
Defendants shall authorize Dr. Bhangoo as the authorized physician and timely pay future medical expenses.

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

Defendants shall receive a credit for all benefits paid.

Costs are taxed to defendants in the amount of five thousand forty-four and 62/100 dollars ($5,044.62).

Signed and filed this 22nd day of February, 2019.



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