BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRYCE BONEBRAKE, Claimant, vs. DEAN SNYDER CONSTRUCTION CO., Employer, and WEST BEND MUTUAL INS. CO., Insurance Carrier, Defendants.	File No. 1662016.01 ARBITRATION DECISION Head Notes: 1402.60; 1701; 1803; 1804; 2501; 2701; 3003

STATEMENT OF THE CASE

Claimant Bryce Bonebrake filed a petition in arbitration seeking worker's compensation benefits against Dean Snyder Construction Company, employer, and West Bend Mutual Insurance Company, insurer, for an accepted work injury date of July 3, 2018. The case came before the undersigned for an arbitration hearing on March 8, 2021. This case was scheduled to be an in-person hearing occurring in Des Moines. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, 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 16, Claimant's Exhibits 1 through 12, and Defendants' Exhibits A through F. Claimant's Exhibit 12 was admitted over defendants' objection. Defendants were then allowed additional time after hearing to submit Defendants' Exhibit F, over claimant's objection.

Claimant testified on his own behalf. Defendants' Exhibit F was received on April 16, 2021, after which the evidentiary record was closed. The parties submitted post-

hearing briefs on April 30, 2021, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant has reached maximum medical improvement;

2. If so, the nature and extent of claimant's permanent disability, including permanent total disability;

3. The proper rate of compensation;

4. Whether claimant is entitled to alternate medical care pursuant to Iowa Code section 85.27;

5. Payment of certain medical expenses;

6. Whether defendants are entitled to a credit under Iowa Code section 85.38(2) for payment of medical/hospitalization expenses; and,

7. Taxation of costs.

FINDINGS OF FACT

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

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

At the time of hearing, claimant was a 28-year-old person. (Hearing Transcript, p. 14) He is not married and does not have any children. (Tr., p. 15) He grew up in Grimes, Iowa, but was living in Waukee, Iowa at the time of hearing. (Tr., pp. 14-15) He graduated from Dallas Center-Grimes High School in 2011. He testified that he had about a C-plus average in high school (Tr., p. 15) Following high school, claimant attended classes at Des Moines Area Community College (DMACC) and "welding school," and received an associate's degree in welding. (Tr., p. 15)

Claimant has no prior history of significant low back or bilateral knee pain. (Tr., p. 26) However, his prior mental health history is relevant. Claimant testified that he had a battle with drugs in his junior year of high school, and attempted suicide because he did not know how to ask for help to get clean. (Tr., p. 28) He was eventually hospitalized and received treatment, counseling, and medications. (Tr., pp. 28-29) He testified that he stayed on the medications for about two years. (Tr., p. 29) Prior to the work injury, the last time he required counseling or any other treatment for any mental health

condition was sometime in 2012. (Tr., p. 29) Prior to the work accident, he had never been diagnosed with post-traumatic stress disorder. (Tr., p. 29)

Medical records support claimant's testimony. While there are not records from 2012, records from claimant's primary care provider indicate that claimant's major depressive disorder has been in remission since at least 2017. (Joint Exhibit 16, pp. 226-227) Only days prior to the work accident, on June 29, 2018, claimant's primary care provider noted that claimant reported his mood was stable off medication, and he was not feeling down or anxious. (Jt. Ex. 16, pp. 229-230)

Claimant was hired by defendant employer, Dean Snyder Construction Company ("DSC"), in 2015. (Tr., p. 16) Prior to working for DSC, claimant worked various jobs. He worked at PDI as a picker, picking products for a grocery store. He then worked at Kum & Go gas station as a cashier, stocking shelves, and in the kitchen. He then worked at Metro Fish as a delivery driver delivering seafood. He worked at Cooper Woodworking off and on doing odd jobs, and then he worked at Iowa Steel Fabrication as a fit-up welder. (Tr., p. 16)

DSC hired claimant to work as a skilled construction worker with an emphasis on welding. (Tr., p. 16; Defendants' Exhibit A, p. 1) Claimant testified that his job consisted of "pretty much everything," as the company is a general contractor. (Tr., pp. 16-17) In addition to welding, claimant's job duties included woodworking and concrete work, among other things. (Tr., p. 17) Claimant stated that his work was about 50-50 welding versus other general construction work. (Tr., p. 19) Claimant's work was physically demanding, and involved lifting, pushing, and pulling heavy materials and equipment. (Tr., pp. 18-19) The formal job description for claimant's position notes physical requirements including climbing, balancing, stooping, kneeling, crouching, reaching, standing, walking, pushing, pulling, lifting, grasping, and other repetitive motions. (Def. Ex. A, p. 4) The description also notes that welders are required to work in the medium category, exerting up to 50-pounds of force occasionally, and/or up to 20-pounds of force frequently, and/or up to 10-pounds of force constantly to move objects. (Def. Ex. A, p. 4)

Claimant testified that wheelbarrows at job sites could range from 100 to 800 pounds, depending on what they contained. I-beams could weigh anywhere from 60 to 100 pounds. (Tr., pp. 18-19) Additionally, the various types of welders claimant used were "not light." Claimant testified that a "lunch box welder" weighs about 30 pounds; a "suitcase welder" weighs about 60 pounds; and a "Bobcat welder" weighs at least 400 pounds. (Tr., p. 19) With respect to the Bobcat welder, it is on a trailer and claimant stated that at times they would not have a way to move it other than "we just get two people on it and wheel the sucker around" using the tongue of the trailer. (Tr., p. 19) Claimant also had to carry welding lead, which weighed 96 pounds or more, depending on whether it was "caked in mud." (Tr., p. 19)

As a welder, claimant testified that he was frequently working in the air from a boom lift. (Tr., p. 20) He often worked on jobs involving Fareway grocery stores, which would require him to be in the air welding bar joists and setting steel. He would also

frequently work on roofs, doing trim work for the woodwork on the outside of the building. Claimant testified that he "was always in a boom lift." (Tr., p. 20) The boom lifts ranged from 40 to 85 feet in the air. Claimant testified that before the work injury, he loved working from heights: "I'd go up in the air and just take a panoramic picture of the view and say, 'Look at the view I've got.'" (Tr., p. 20) Prior to the work injury, claimant loved his job. (Tr., p. 88)

Prior to his injury, claimant often took jobs out of town as those jobs paid higher as an incentive. (Tr., p. 22) Claimant does not have children and is not married, so he enjoyed going out of town to get the additional experience and extra pay. The incentive pay varied from job to job, as did the per diem pay. (Tr., p. 22) Claimant's base pay was $18.50 per hour, but it was rare for him to only receive his base pay because he so often worked out of town. (Tr., p. 23) For example, on Fareway jobs, he received an extra $2.00 per hour and $35.00 per diem. (Tr., p. 22)

In July of 2018, claimant was working on a project at Royal Canin in North Sioux City, South Dakota. (Tr., p. 20) Royal Canin is a dog food plant that was building an expansion, and claimant was sent to the job because he could "TIG weld" on stainless steel. (Tr., pp. 20-21) Claimant was not certain when he was first sent to the job, but thought it was sometime between late March and early May of 2018. (Tr., p. 21) Claimant believed the job was scheduled to last for "years." For the Royal Canin job, claimant earned $23.50 per hour, plus per diem and overtime. (Tr., p. 21) He received $25.00 per day for per diem pay. (Tr., p. 24) Additionally, he was working about 15 to 20 hours per week of overtime, and was grossing $1,200 to $1,500 per week, depending on the amount of overtime. (Tr., pp. 21-22)

Claimant testified that he was generally able to keep most of his per diem pay, rather than spending it on living expenses, because he would often bring groceries from home when he worked out of town. (Tr., p. 24) However, at times, he did use the money to buy food. (Tr., p. 88) He was not required to submit receipts for per diem pay, and there was no relationship between the amount actually spent on expenses and the amount of per diem received. (Tr., p. 25) All employees on a particular job received the same per diem pay regardless of how the money was spent. The per diem amounts were paid to claimant as part of his regular paycheck, but he does not know whether taxes were withheld on the per diem portion. (Tr., pp. 25-26) Claimant did not keep any records of how much of the per diem pay he actually spent on food or other expenses while out of town, versus how much he kept. (Tr., p. 88)

On July 3, 2018, claimant was injured while working for DSC on the Royal Canin job. Claimant had been sent with another employee to take the blow-off caps off of the top of some silos. (Tr., p. 30) Claimant and his co-worker used a scissor-lift to get up to the blow-off caps, which were about 86-feet in the air. (Tr., p. 31) Claimant dropped his coworker onto the steel, who would then unbolt the caps, and hand them to claimant one at a time, as that was all that would fit with him in the basket of the lift. Claimant made several trips up and down without incident. However, when they were nearly done, claimant noticed when he got to the top that there was "a giant puddle of hydraulic fluid starting to pool underneath the machine," and he knew he had to get

down as quickly as possible. Claimant took the next cap and started back down as quickly as he could. Once he reached the main boom, he started his turn away from the building so he could continue to lower himself down. At that point, "the machine just let go" and claimant was in a free fall inside the basket of the lift. (Tr., p. 31) Claimant was roughly 35-feet in the air when the machine failed, and he dropped to the ground. (Tr., p. 32) The incident occurred at approximately 8:30 a.m. (Tr., p. 32)

Claimant testified that he remained in the basket the entire time, gripping the handrails and control box. When the basket hit the ground, he was standing with his knees bent, one hand on the railing, one hand on the joystick, and his rear was on the back bar of the cage. (Tr., p. 32) As soon as he hit the ground, he had pain in his knees, but stated he had "so much adrenaline going through me, I didn't care about my safety at that current time." His main concern was for his coworker, who was now stuck on top of the silo, and how he would get him down. (Tr., p. 32)

Claimant helped his coworker get off the roof, and once the two were back safely on the ground, they reported the incident to the acting supervisor, as their regular supervisor was on vacation. (Def. Ex. D, Deposition Transcript, p. 29) They completed some paperwork regarding the incident, and by the time they were done claimant's knees were still in pain, but he did not feel anything else. He finished his shift, which was only until noon that day due to the Independence Day holiday. (Def. Ex. D, Dep. Tr., pp. 29- 30)

After work, claimant left Sioux City to drive to his girlfriend's house in Boone for the holiday. After driving for 30 minutes to an hour, claimant's back started tightening up, and he felt like he had been "hit by a truck." (Tr., p. 33) He testified that he took it easy that day and night, but he "felt like death." The next day he went to his brother's house because his girlfriend had to work, and he was in agony. (Tr., p. 34) When he returned to work on July 5, he assumed his regular supervisor had been told what happened. (Def. Ex. D, Dep. Tr., p. 32) He attempted to work, but eventually a coworker noticed him struggling and told him to go to the medical trailer. (Tr., p. 34) He was unable to get a medical appointment that day, so he had to wait until the following day.

Claimant was seen at UnityPoint Occupational Medicine in Sioux City on July 6, 2018. (Jt. Ex. 1, p. 1) He reported back pain and bilateral knee pain, right worse than left. Based on his x-rays, an MRI was recommended, which was read as "negative with some degenerative changes and some mild to moderate disk bulges." (Jt. Ex. 1, p. 2) The report itself does indicate "multifocal changes of degenerative disc disease as above. The most abnormal level is L5-S1 on the right." (Jt. Ex. 2, p. 7) He was given medication, physical therapy, and work restrictions. (Jt. Ex. 1, p. 2)

By July 13, 2018, claimant's condition had not improved, and he was referred to see an orthopedic specialist. (Jt. Ex. 1, p. 6) He returned to Des Moines, where he saw Todd Harbach, M.D., at Iowa Ortho. (Jt. Ex. 3, p. 9) He was again sent for physical therapy, prescribed medications, and given work restrictions. (Jt. Ex. 3, pp. 9-10)

On July 23, 2018, claimant presented to the emergency room due to back pain. (Jt. Ex. 5, p. 112) He reported being out of his pain medication and unable to reach his doctor. He was given one dose of hydrocodone in the emergency room, as well as a Toradol injection. (Jt. Ex. 5, p. 117) The next day, he followed up with his primary care provider, Carin Bejarno, ARNP. (Jt. Ex. 6, p. 119) Claimant testified that Ms. Bejarno and others at her clinic, UnityPoint Family Medicine Clinic in Grimes, have been his primary care providers his entire life. (Tr., pp. 27-28) Ms. Bejarno noted that claimant was frustrated, as he was out of pain medication and Dr. Harbach's office was not returning his calls. (Jt. Ex. 6, p. 120) He described intense pain, radiating down his right leg. Ms. Bejarno provided him with a prescription to last until his next appointment with Dr. Harbach. (Jt. Ex. 6, p. 120)

Claimant next saw Thomas Klein, D.O., for trigger point injections, which took place on July 26, 2018. (Jt. Ex. 3, p. 11) Dr. Klein also added gabapentin to claimant's existing medications. (Jt. Ex. 3, p. 12) Claimant returned to Dr. Harbach on August 10, 2018. (Jt. Ex. 3, p. 14) Claimant continued to report pain, despite the trigger point injections, medications, and physical therapy. Dr. Harbach felt claimant's pain was myofascial in nature, and that a physiatrist would be better suited to manage his symptoms. (Jt. Ex. 3, p. 15) As such, claimant was referred to Kurt Smith, D.O. (Jt. Ex. 3, p. 15)

Before his appointment with Dr. Smith, claimant returned to Dr. Klein reporting a recent incident of incontinence of both his bowels and his bladder. (Cl. Ex. 1, p. 6)[1] He then returned to Ms. Bejarno on August 24, 2018, and reported the incontinence as well as worsening back pain. (Jt. Ex. 6, p. 123) He reported the trigger point injections were not helpful, and he felt frustrated and "like he is being dismissed by orthopedics and occupational medicine." (Jt. Ex. 6, p. 123) Ms. Bejarno recommended a repeat MRI.

Claimant saw Dr. Smith on August 28, 2018. (Jt. Ex. 3, p. 16) Dr. Smith continued claimant's conservative care consisting of medication, physical therapy, and work restrictions. (Jt. Ex. 3, p. 19) On September 6, 2018, claimant had the MRI that Ms. Bejarno recommended. (Jt. Ex. 6, pp. 124-125) The MRI showed minimal disc bulges at L3-L4 and L4-L5, with no significant spinal canal or foraminal narrowing. (Jt. Ex. 6, p. 125) At L5-S1, the MRI showed a disc bulge with superimposed right foraminal and far lateral disc protrusion; mild to moderate facet arthropathy; and moderate to severe right foraminal narrowing, similar to the prior exam. (Jt. Ex. 6, p. 125)

On September 24, 2018, claimant saw Nicholas Wetjen, M.D., at The Iowa Clinic Neurological and Spinal Surgery. (Jt. Ex. 7, pp. 160-163) It is noted that claimant was referred by Ms. Bejarno, and the visit is "secondary" to workers' compensation. (Jt. Ex. 7, p. 162) After examination and review of the most recent MRI, Dr. Wetjen recommended an epidural steroid injection (ESI) on the right at L5. (Jt. Ex. 7, p. 163) He noted that claimant would also benefit from weight loss, exercise, and physical therapy.

[1] The record of this visit is not in evidence, but was reviewed and summarized in Dr. Sassman's IME report.

If none of that was successful, Dr. Wetjen stated he could be reevaluated for potential surgical evaluation. (Jt. Ex. 7, p. 163)

Claimant continued to follow up with Dr. Smith, and was eventually referred for an ESI. (Cl. Ex. 1, p. 7) Prior to the injection, claimant was found to have kidney stones, for which he received separate treatment. (Cl. Ex. 1, p. 8) On November 19, 2018, claimant saw John Rayburn, M.D., for an injection. (Jt. Ex. 3, p. 21) Claimant did not have any relief from the injection, so it was recommended that he try medial branch block injections. (Cl. Ex. 1, p. 8)

Claimant had an intervening event on November 29, 2018. He was helping a coworker on a welding job when an I-beam slid off its feet and he had to catch it. (Tr., pp. 37; 69) After that incident, claimant stated that his back "tightened up," and he was seen at Concentra. (Tr., p. 69; Jt. Ex. 8, p. 178) Claimant testified that his back pain was worse for about a week, after which it returned to his "regular" pain. (Tr., p. 69)

Claimant had medial branch block injections with Dr. Rayburn in December 2018. (Cl. Ex. 1, p. 9; Jt. Ex. 3, p. 22) Claimant reported less than 50 percent relief from the injections, so Dr. Rayburn placed him at maximum medical improvement (MMI) from a pain management standpoint, as he had nothing more to offer. (Cl. Ex. 1, p. 9)

Claimant followed up with Ms. Bejarno on January 8, 2019. (Jt. Ex. 6, p. 126) At that time, he reported worsening back pain, along with radiculopathy in the right leg. He admitted feeling slightly down and frustrated with the situation, but denied feeling depressed or needing medications at that time. (Jt. Ex. 6, p. 126) Claimant then returned to Dr. Smith, who ordered an EMG of the lower extremities. (Cl. Ex. 1, p. 10) The EMG took place on January 15, 2019, and was normal. (Jt. Ex. 9, pp. 181-182) Following the EMG, Dr. Smith referred claimant for a surgical consultation. (Jt. Ex. 3, p. 26)

Claimant saw Trevor Schmitz, M.D., on January 23, 2019. (Jt. Ex. 3, p. 27) He reported pain at a level 9 out of 10, with radiation to the right foot and right thigh. Dr. Schmitz felt claimant's symptoms were consistent with right L5 or S1 nerve root impingement, so he recommended a selective nerve root block for diagnostic purposes. (Jt. Ex. 3, p. 28) Claimant returned to Dr. Schmitz on February 6, 2019, and reported that the nerve root block injection helped 95 percent of his pain, but only on a short-term basis. (Jt. Ex. 3, p. 29) Dr. Schmitz recommended surgery. (Jt. Ex. 3, p. 31)

Claimant had back surgery on March 18, 2019. Dr. Schmitz performed bilateral L5-S1 posterior lumbar decompression and fusion, and right L5-S1 transforaminal lumbar interbody fusion. (Jt. Ex. 3, pp. 32-35) At his first post-operative follow up on April 1, 2019, claimant reported pain at a level 3 of 10, and denied tingling or numbness in his legs. (Jt. Ex. 3, p. 36) Unfortunately, by April 19, 2019, he was reporting increased pain in his back. (Jt. Ex. 6, p. 134) On that date he had an appointment with Ms. Bejarno, and reported increased anxiety and depression, and that he had been "reliving the accident." He told Ms. Bejarno that prior to the work accident he was doing very well, but since the accident he had become socially withdrawn, depressed, and anxious.

(Jt. Ex. 6, p. 134) He advised Ms. Bejarno that he believed he needed to resume medication for his mental health at that time.

Ms. Bejarno diagnosed claimant with a moderate episode of recurrent major depressive disorder, generalized anxiety disorder, and post-traumatic stress disorder (PTSD). (Jt. Ex. 6, p. 135-136) She encouraged claimant to seek counseling and scheduled him to see the in-house counselor at the family practice clinic. (Jt. Ex. 6, p. 136) She also prescribed Cymbalta for his mental health symptoms.

Claimant followed up with Dr. Schmitz on May 1, 2019. (Jt. Ex. 3, p. 39) At that time, he was reporting pain at a level 5 out of 10, but not much leg pain, only low back pain. (Jt. Ex. 3, pp. 39-40) He still experienced some occasional numbness and tingling in his legs with prolonged standing. (Jt. Ex. 3, p. 40)

Claimant returned for follow up with Ms. Bejarno on May 17, 2019. (Jt. Ex. 6, p. 130) He had missed his counseling appointment, but at that point the Cymbalta had begun to improve his mood. At his deposition, claimant testified that he missed the counseling appointment because it was scheduled so far out that he had forgotten about it. (Def. Ex. D, Dep. Tr., p, 81) Claimant was to continue with the Cymbalta. (Jt. Ex. 6, p. 133)

Claimant saw Dr. Schmitz on May 22, 2019. (Jt. Ex. 3, p. 41) He continued to complain of constant right-sided low back pain. Dr. Schmitz prescribed new medications and ordered physical therapy. (Jt. Ex. 3, p. 43) Claimant continued with physical therapy and regular follow-up appointments with Dr. Schmitz. (Jt. Ex. 3, pp. 44-46) By June 25, 2019, claimant was reporting increased low back pain as well as bilateral leg pain when he bent over and felt a pop. (Jt. Ex. 3, p. 47) Dr. Schmitz ordered a repeat MRI.

The MRI was completed on June 27, 2019. (Jt. Ex. 10, p. 183) The results showed multilevel spondylosis with no new focal disc herniation or significant spinal canal compromise, and his fusion was stable. (Jt. Ex. 10, p. 184) However, on June 30, 2019, claimant presented to the emergency room and was admitted to Mercy One due to back pain, bilateral leg numbness, and urinary incontinence. (Jt. Ex. 11, p. 185) Dr. Schmitz saw claimant while in the hospital, and noted no explanation for the incontinence based on the MRI. (Jt. Ex. 11, p. 188) He recommended a neurology or physical medicine and rehab consultation at that time.

Claimant followed up with Ms. Bejarno following his hospital stay on July 2, 2019. (Jt. Ex. 6, p. 137) He reported feeling back to “normal” since his hospital stay, meaning continued back pain but resolution of the weakness and incontinence. With respect to his mental health, he reported that his mood was stable, and sought to taper off the Cymbalta as it was causing him mood irritability. (Jt. Ex. 6, p. 137) Claimant testified that the Cymbalta made him feel angry. (Def. Ex. D, Dep. Tr., pp. 50; 80) Ms. Bejarno agreed to taper his Cymbalta, and recommended he follow up with neurology, which he had scheduled for July 10. (Jt. Ex. 6, p. 142)

At his next follow up appointment with Dr. Schmitz on July 15, 2019, it was noted that claimant was doing "much better overall." (Jt. Ex. 3, p. 49) His urinary issues had resolved, the numbness and tingling in his legs was getting better, and Dr. Schmitz ordered work conditioning. (Jt. Ex. 3, p. 51) Dr. Schmitz also notes that claimant did not see neurology because "work comp would not cover it." Claimant testified that when he showed up to the neurology appointment Dr. Schmitz had recommended, he was told that workers' compensation was not going to cover it, so he left. (Tr., pp. 76-77)

Claimant returned to light duty work in August 2019. (Cl. Ex. 1, p. 13) He followed up with Dr. Schmitz on August 14, 2019, and advised his symptoms were aggravated by bending. (Jt. Ex. 3, p. 52) On September 12, 2019, he saw Ms. Bejarno to discuss his depression and anxiety. (Jt. Ex. 6, p. 144) At that time, he was again struggling emotionally, and felt his depression to be secondary to his back injury and chronic pain. He had returned to work but was doing light duty office work, which was difficult for him. (Jt. Ex. 6, p. 145) He was having difficulty sitting for long periods of time. He reported constant pain in his back at a level 8 of 10. Ms. Bejarno started claimant on Prozac for his mental health, and recommended he consider a consultation with pain management for his back. (Jt. Ex. 6, p. 146) Claimant advised he would discuss pain management with his back surgeon first.

Claimant had a work hardening evaluation at Athletico on September 6, 2019. (Jt. Ex. 4, pp. 99-104) At that time he demonstrated the physical capability and tolerance to function in at least the heavy physical demand level. (Jt. Ex. 4, p. 99) His main limiting factors included bending, and frequent standing and walking. Subjectively, he thought he would be able to tolerate returning to work. (Jt. Ex. 4, p. 102) His main concern was with bending, but he thought he would be able to manage the majority of his normal duties. (Jt. Ex. 4, p. 102)

Claimant followed up with Dr. Schmitz on October 7, 2019. (Jt. Ex. 3, p. 55) Claimant reported pain at a level 3 of 10, occurring rarely. He described the pain as "tolerable" although he still had some trouble bending. Dr. Schmitz placed claimant at MMI and allowed him to return to work with no restrictions based on his work hardening evaluation. (Jt. Ex. 3, p. 56) Dr. Schmitz then provided a 20 percent whole person impairment rating using the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. (Jt. Ex. 3, p. 57)

Claimant testified that when he returned to full duty work, it "bit me in the butt." (Tr., p. 44) He said that the more he tried, the more his pain got worse and worse. (Tr., p. 44) Initially he did some work pouring concrete and welding, but at one point he was asked to go up in a lift. (Tr., p. 45) It took him over two hours to go 40-feet up because "every time I tried to go, I would break out in a cold sweat and hyperventilate to the point where I'd almost pass out." (Tr., p. 45) He eventually got the job done, but stated it was so traumatic he did not want to put himself in that position again.

Claimant continued to struggle with his mental health during this time. He testified that the "constant pain is enough to just make me want to give up." He testified that some days he is good, and other days the pain is horrible. (Tr., p. 45) He continued

to work, but testified he was struggling to do the work he was assigned. (Tr., p. 48) He was sent to work on a project in Corydon, Iowa, initially to help set steel. However, he testified that as his physical and mental state deteriorated, "they took my welding capacity even farther away from me." (Tr., p. 48) Instead, he was put into more of a cleaning role, and a "fire-watching role," in which he stood and watched others weld to be sure no sparks caused a fire. (Tr., pp. 48-49; 67) He was no longer being assigned to the higher-paying, out-of-town projects. (Tr., p. 49) His earnings decreased significantly as a result, as he was only making his base pay of $18.50 per hour, with limited overtime and little to no per diem pay. (Tr., pp. 65-66; Cl. Ex. 6; 7)

On December 2, 2019, claimant returned to Dr. Schmitz with worsening back pain, radiating to the right calf, right foot, and right thigh. (Jt. Ex. 3, p. 58) Symptoms were aggravated with bending. The record notes that claimant was physically having to do more than normal at his job recently. Dr. Schmitz prescribed a round of steroids, physical therapy, and referred him back to Dr. Smith. (Jt. Ex. 3, p. 59) Claimant returned to Dr. Schmitz, however, on December 17, 2019, now reporting bilateral numbness and tingling in his buttocks, in addition to the back pain. (Jt. Ex. 3, p. 61) Dr. Schmitz did not have a good anatomic explanation for claimant's symptoms, so he ordered an MRI to assess for any neural impingement.

The MRI was completed on December 26, 2019, and showed a stable lumbar spine. (Jt. Ex. 12, pp. 191-192) Claimant saw Ms. Bejarno on January 20, 2020, at which time his mood was stable on the Prozac. (Jt. Ex. 6, p. 148) Claimant returned to Dr. Schmitz on January 22, 2020, reporting persistent pain at a level 8 of 10, radiating to his right hip, thigh, and knee. (Jt. Ex. 3, p. 62) Dr. Schmitz noted that there was no evidence of nerve root impingement on the MRI, and advised claimant to continue with physical therapy for the next three weeks. (Jt. Ex. 3, p. 63) At his follow up with Dr. Schmitz on March 4, 2020, his pain level was 7 of 10 on a constant basis. (Jt. Ex. 3, p. 64) However, Dr. Schmitz noted that he was "overall doing well." (Jt. Ex. 3, p. 65) He was to continue with physical therapy.

At his physical therapy evaluation on April 1, 2020, claimant reported a pins and needles sensation in his heels when sitting; a similar pain in his back; pressure on top of his head when standing that increases with lifting; struggling with lifting 25-pounds; "spider web" pains in his knees with the knees giving out daily; right leg numbness; and pain when trying to sleep on either his back or his stomach. (Jt. Ex. 4, p. 105) He saw Dr. Schmitz that same day, and reported losing control of his urine in therapy the week prior. (Jt. Ex. 3, p. 66) Dr. Schmitz did not see any explanation for the intermittent urinary incontinence from a low back source. (Jt. Ex. 3, p. 67) He recommended claimant see his primary care physician or urology. He was to continue with therapy.

Claimant saw Stephanie Ruden, PA-C, in the Urology Department at The Iowa Clinic on April 21, 2020. (Jt. Ex. 7, p. 167) Ms. Ruden noted both claimant's history of kidney stones as well as his work injury, treatment, and current symptoms. He noted that his loss of bladder control usually happened on days when he was more tired or in more pain. Ms. Ruden opined that the urinary incontinence was likely a result of

claimant's 2018 work accident. (Jt. Ex. 7, p. 168) She thought another evaluation with neurosurgery would be beneficial.

Claimant saw Ms. Bejarno on April 23, 2020. (Jt. Ex. 6, p. 149) He reported ongoing pain in his low back, along with numbness in his legs. The note indicates that claimant has "struggled with work comp and appropriate care." Claimant reported that his back pain had become more problematic recently, with more pain into his lower extremities. He further reported that his back pain was always worse after a long day at work. His mood was relatively stable at that time with continued Prozac. (Jt. Ex. 6, p. 151)

Claimant filed his petition for arbitration before the Iowa Workers' Compensation Commissioner on April 23, 2020. (See Claimant's Petition) Paragraph 5 of the petition states the parts of the body affected or disabled include "low back/spine, lower extremities, and psychological injuries." Defendants filed an answer to the petition on April 30, 2020. (See Defendants' Answer) In response to paragraph 5, defendants stated: "Paragraph 5 of Claimant's Petition the Defendants admit low back injury/spine but deny all remaining allegations of injury contained in paragraph 5." Defendants also listed causation as an additional issue in dispute in response to paragraph 10, but did not specify further.

Claimant saw David Boarini, M.D., at The Iowa Clinic on May 20, 2020. (Jt. Ex. 7, p. 169) Dr. Boarini noted claimant's symptoms of back pain with radiation into the right leg to the foot, right knee to foot numbness and tingling, and right leg weakness. He also noted occasional left leg numbness and tingling, low back spasms, and loss of urinary control four times prior. Upon examination, Dr. Boarini noted that claimant walked with a bit of an antalgic gait, but noted no focal weakness and no abnormality in tone. (Jt. Ex. 7, p. 171) He reviewed the MRI from December 2019 and did not see anything of significance. He did not know if there was anything more to be done, but ordered a repeat MRI and an EMG since claimant felt his condition was worsening. (Jt. Ex. 7, p. 171)

The MRI took place on May 28, 2020, and showed mild spondylosis at L1-L2; spondylosis at L3-L4 and L4-L5, as well as spondylosis and the prior fusion surgery at L5-S1. (Jt. Ex. 7, pp. 172-173) The MRI report also notes postoperative fibrosis at L5-S1. (Jt. Ex. 7, p. 173) Claimant had an EMG of the lower extremities the same day, which was normal. (Jt. Ex. 7, p. 174)

Claimant saw both Dr. Schmitz and Dr. Boarini on June 3, 2020. (Jt. Ex. 3, p. 69; Jt. Ex. 7, p. 175) He saw Dr. Schmitz at 9:15 a.m., and reported his back pain at a level 8 of 10, radiating to the bilateral calves, feet, and thighs. (Jt. Ex. 3, p. 69) He reported increased numbness down his legs, and feeling like his knees were "giving out." Dr. Schmitz did not have anything further to offer with respect to claimant's low back, but gave him a referral to a knee surgeon for evaluation of his knees. (Jt. Ex. 3, p. 70) Claimant then saw Dr. Boarini at 10:45 a.m. (Jt. Ex. 7, p. 175) Dr. Boarini reviewed the MRI and the EMG, and noted there was nothing further as far as surgical treatment. (Jt. Ex. 7, p. 177)

On June 9, 2020, claimant saw Christopher Vincent, M.D., at Iowa Ortho, for his bilateral knee pain. (Jt. Ex. 3, p. 71) Dr. Vincent noted claimant's pain began on July 3, 2018, and radiates to his feet. Dr. Vincent ordered bilateral knee MRI studies to rule out internal derangement, particularly given the high-energy injury claimant sustained. (Jt. Ex. 3, p. 72) Prior to the knee MRIs, claimant had an appointment with Seth Quam, D.O., who is another provider at Ms. Bejarno's office. (Jt. Ex. 6, p. 153; Tr., p. 80) Claimant saw Dr. Quam on July 15, 2020, complaining of ongoing back pain radiating down his legs into his knees. (Jt. Ex. 6, p. 153) Claimant was going to be traveling for a wedding and was worried about his pain levels, so Dr. Quam prescribed a short course of hydrocodone. (Jt. Ex. 6, p. 154)

The knee MRIs took place on June 22, 2020. (Jt. Ex. 12, pp. 193-194) The right knee showed no meniscal tear, but mild proximal patellar tendinosis. (Jt. Ex. 12, p. 193) The left knee showed no meniscal tear, but a mild chondral irregularity reflecting early chondromalacia, as well as a small knee joint effusion. (Jt. Ex. 12, p. 194)

Claimant returned to Dr. Vincent on June 26, 2020, and noted worsening knee pain. (Jt. Ex. 3, p. 73) Dr. Vincent reviewed the MRIs, and noted "a small amount of microscopic tearing, increased signal within the tendon and surrounding soft tissue edema on the undersurface of the proximal tendon," which was consistent with chronic tendinosis of the patellar tendon. (Jt. Ex. 3, p. 74) He noted that the right knee seemed to be more advanced than the left. Dr. Vincent recommended platelet-rich plasma (PRP) injections, and wrote a letter to the insurance carrier on July 6, 2020, seeking authorization for the injections. (Jt. Ex. 3, pp. 74-75) He also stated his opinion that the bilateral patellar tendinitis was a direct result either acutely or as late sequelae of the 2018 work accident. (Jt. Ex. 3, p. 75) He explained that claimant likely sustained microtrauma to the patellar tendons in the incident, which have now gone on to develop chronic tendinopathy and tendinitis. (Jt. Ex. 3, p. 75)

Claimant's injections were approved, and he had a series of three PRP injections in each knee between August 4, 2020 and August 18, 2020. (Jt. Ex. 3, pp. 76-81; Cl. Ex. 1, p. 19) On August 25, 2020, claimant saw Alison Weisheipl, M.D., at Central States Pain Clinic. (Jt. Ex. 13, p. 196) The record indicates that claimant was referred by Dr. Quam. (Jt. Ex. 13, p. 198) Claimant complained of low back and right buttock pain, radiating into his bilateral lower extremities. On physical examination, he was noted to have an antalgic gait and positive straight leg raising test. (Jt. Ex. 13, p. 199) He also demonstrated pain and decreased range of motion in the spine. Dr. Weisheipl noted that the most recent lumbar MRI did not show any nerve impingement, but did show some fibrosis at the surgical site that may explain claimant's symptoms. (Jt. Ex. 13, p. 200) Her diagnosis was lumbar post-laminectomy syndrome. She recommended an ESI, which claimant agreed to try. She also noted that he might be a candidate for a spinal cord stimulator, but would need to lose 50 to 60 pounds to reach an appropriate body mass index (BMI) to proceed with the implant. (Jt. Ex. 13, p. 200)

Claimant had the lumbar ESI and returned to Dr. Weisheipl for follow up 2 days later on September 2, 2020. (Jt. Ex. 13, pp. 201-202) He noted excellent relief of his pain for 24-hours following the injection, with an increase over the last day. He had also

started physical therapy for his knees, and indicated that while in physical therapy, he had the urge to urinate but when he made it to the bathroom, he noticed he had leaked some urine. (Jt. Ex. 13, p. 202) Dr. Weisheipl did not think his urinary issues were related to his spine and urged him to follow up with his urologist. At his next visit, a right L4-5 interlaminar ESI was recommended, which took place on September 23, 2020. (Jt. Ex. 13, pp. 203-204; Cl. Ex. 1, p. 20)

Claimant had a follow up visit on October 13, 2020, and reported no relief following the interlaminar ESI. (Jt. Ex. 13, p. 205) Medication changes were recommended; specifically, that he try zonisamide in place of gabapentin, and methocarbamol in place of tizanidine. Claimant testified that the medications Dr. Weisheipl has prescribed for his back pain have worked better than the prior medications prescribed by Dr. Rayburn and Dr. Klein. (Tr., pp. 54-55)

Claimant followed up with Dr. Vincent for his knees on October 27, 2020. (Jt. Ex. 3, p. 82) He reported that his left knee had improved with the injections and was "virtually asymptomatic." However, he continued to have tenderness along the right knee just below the kneecap and continuing back pain. He was referred for a repeat MRI of the right knee. (Jt. Ex. 3, p. 84) That MRI took place on November 9, 2020, and showed moderate patellar tendinosis, progressed since the previous examination, and very mild quadriceps tendinosis. (Jt. Ex. 12, p. 195)

Claimant had an independent medical evaluation (IME) with Robin Sassman, M.D., on November 16, 2020. (Cl. Ex. 1) Her report is dated December 8, 2020. She notes that she first saw claimant on April 28, 2020, but since he was still undergoing treatment, no report was issued at that time. (Cl. Ex. 1, p. 1) Dr. Sassman reviewed 2,528 pages of medical records pertaining to claimant's evaluation. (Cl. Ex. 1, p. 2) She provided a fairly detailed summary of claimant's medical history through his November 9, 2020 right knee MRI, which was the last record available to her at the time of the IME. (Cl. Ex. 1, pp. 3-21) At the time of the IME, claimant reported low back pain radiating into his groin and down his legs, especially the front of the thigh, right worse than left. (Cl. Ex. 1, p. 21) He stated that he is never pain free. Standing for too long and bending make his symptoms worse, as does carrying items. He has numbness in his legs. His urinary problems had improved, although he still experiences leakage of urine on occasion. With respect to his right knee, he complained of pain behind and below the kneecap, and a feeling of instability. He stated he had fallen several times due to instability. With respect to the left knee, he noted good days and bad days, and believes the treatment he received helped the left knee. He stated that if he "walks stairs," he will have about a week and a half of increased symptoms. Walking downstairs causes sharp pains in both knees and both knees swell. Finally, he noted some depression symptoms, for which his personal doctor placed him on Prozac. (Cl. Ex. 1, p. 22)

After physical examination, Dr. Sassman's diagnoses were low back pain with radicular symptoms status post bilateral L5-S1 posterior lumbar decompression and fusion, with development of post-laminectomy syndrome; right knee pain and patellar tendonitis; and left knee pain and patellar tendonitis. (Cl. Ex. 1, p. 23) She noted that claimant denied having any low back or knee symptoms prior to the work injury.

With respect to MMI, Dr. Sassman noted that claimant was attempting to lose weight in order to pursue a spinal cord stimulator. However, because that treatment is not likely to change his impairment rating, she placed him at MMI as of his last visit with Dr. Vincent. (Cl. Ex. 1, p. 24) She recommended ongoing treatment with Dr. Weisheipl for a trial of a spinal cord stimulator once claimant had lost the acceptable amount of weight. As claimant had not yet had his final appointment with Dr. Vincent, her only recommendation for the knee pain was to keep that appointment with Dr. Vincent. (Cl. Ex. 1, p. 24)

With respect to impairment, Dr. Sassman provided 27 percent whole person impairment related to the lumbar spine; 10 percent lower extremity impairment related to the right knee; and 10 percent lower extremity impairment related to the left knee. She did not find the urinary symptoms to be related to the lumbar spine, and did not add any impairment related to those symptoms. Using the combined values chart, Dr. Sassman combined the ratings for a total impairment of 33 percent of the whole person. (Cl. Ex. 1, p. 26) Dr. Sassman further noted that while her 27 percent rating related to the lumbar spine differs from Dr. Schmitz's 20 percent rating, she used the range of motion method, which is more consistent with the instructions in the AMA Guides because claimant had multiple levels impacted in his lumbar spine. (Cl. Ex. 1, p. 27) Dr. Schmitz used the DRE method, which resulted in a lower rating.

Dr. Sassman recommended permanent restrictions of limiting lifting, pushing, pulling, and carrying to 20 pounds from floor to waist occasionally, 30 pounds at waist height keeping his elbows at his sides, and 20 pounds above waist and shoulder height. She further recommended that he limit standing, walking, and sitting to an occasional basis, and needed to change positions frequently due to his symptoms, He should not kneel, crawl, walk on uneven surfaces, or climb ladders. (Cl. Ex. 1, p. 27)

Claimant returned to Dr. Vincent on December 7, 2020. (Jt. Ex. 3, p. 85) Dr. Vincent noted significant thickening of the proximal patellar tendon on the right, with increased intratendinous edema, as compared to the prior MRI. (Jt. Ex. 3, p. 86) He stated the findings likely reflect vascular changes and hypertrophy of the tendon. Dr. Vincent did not believe there was anything more he could do for claimant's knees, and placed him at MMI. He also referred claimant back to Dr. Schmitz due to his worsening back pain and numbness in his legs. (Jt. Ex. 3, p. 86)

On December 21, 2020, Dr. Vincent authored a letter to the insurance carrier regarding claimant's bilateral knees. (Jt. Ex. 3, pp. 87-88) He noted that claimant continued to have symptoms on the right side, but that they were improved from his pre-injection level. (Jt. Ex. 3, p. 87) Dr. Vincent did not assign any work restrictions related to his bilateral knees. With respect to functional impairment, Dr. Vincent noted normal range of motion, normal neurologic and vascular exams, and normal stability and alignment. As such, he provided a zero percent impairment rating for the bilateral knee injuries. (Jt. Ex. 3, p. 87)

I find Dr. Sassman's opinions to be more convincing than those of Dr. Schmitz and Dr. Vincent with respect to claimant's permanent impairment and restrictions. While

Dr. Sassman was not the authorized treating physician, her report is highly detailed, and she clearly had a good understanding of all of the treatment claimant received related to his physical injuries. Dr. Sassman provided a thorough and convincing explanation as to why her functional impairment rating regarding claimant's lumbar spine differed from Dr. Schmitz's rating. Additionally, I find that Dr. Sassman's recommended permanent restrictions are more realistic than Dr. Schmitz's full duty release. Claimant credibly testified that despite trying to return to his job and perform the work he was assigned, he has been unable to do so. His employer had recognized this by assigning claimant work that is essentially "make work," such as overseeing cleaning crews and "fire-watching" while others weld. Defendants have presented no contrary evidence. Claimant is no longer able to perform the construction or welding work that he did prior to his injuries.

On December 9, 2020, claimant presented to the UnityPoint Behavioral Health Urgent Care clinic. (Jt. Ex. 14) He saw Jennifer Blume, ARNP, as well as Jennifer Vargas, LMSW. (Jt. Ex. 14, pp. 214; 216) Ms. Blume noted claimant felt overwhelmed lately, as he was dealing with a workers' compensation case and ongoing back pain. (Jt. Ex. 14, p. 214) He reported feeling disheartened because his body is "much older than he is due to the injury." He reported depressed mood, low self-esteem, feeling worthless, and not sleeping well. He did report his prior suicide attempts and mental health treatment, and his current prescription of Prozac. He reported he continued to work though it is difficult on his body. (Jt. Ex. 14, p. 214) Ms. Blume's assessment was major depressive disorder, recurrence, moderate, and she recommended slowly increasing his dosage of Prozac. (Jt. Ex. 14, p. 215)

Ms. Vargas completed a psychiatric evaluation, and noted claimant's feelings of low self-esteem and self-worth were related to his inability to perform the same work as he could prior to the accident. (Jt. Ex. 14, p. 216) Claimant indicated that his work accident was traumatic and had a lasting impact on his self-worth due to his inability to perform as he was previously. (Jt. Ex. 14, p. 217) Ms. Vargas discussed coping skills with claimant, and stated he was open to therapy and felt it would be beneficial. Ms. Vargas provided therapy referrals as well as referrals for long-term medication management.

Based on the referrals he received, claimant began seeing Rebecca Peterson, MS, LMHC, on January 4, 2021. (Jt. Ex. 15, p. 218) After reviewing his prior mental health history, Ms. Peterson noted that claimant's current symptoms indicate major depressive disorder and generalized anxiety disorder. (Jt. Ex. 15, p. 220) She also noted that claimant described the work accident as traumatic, and that as a result he no longer likes to be up in the air. (Jt. Ex. 15, p. 221) His stated goals for treatment were to "get my head right," meaning lowering the frequency and severity of anxiety and panic attacks, and decrease the "get me out of here" feeling he experiences when anxious. (Jt. Ex. 15, p. 222)

Claimant returned to Ms. Bejarno on January 19, 2021. (Jt. Ex. 6, p. 158) At that time, he indicated being under a great deal of stress related to his work and ongoing issues with his workers' compensation claim. He reported that he had not been treated

fairly by his workers' compensation providers, and that he feels he is stuck working for the company until after the court proceedings conclude. He further stated that he hates his job and feels like he is treated terribly and his boss bullies him. He reported feeling down and anxious, especially when going to work. He continued to perform light duty work due to the pain in his back and knees. He expressed feeling like he was not being treated fairly and that his medical care with workers' compensation had been very poor. He reported feeling that his back injury will continue to limit his ability to do physical work and strenuous labor, and as this is the only type of work he has ever done, he was unsure what he would do once the court proceeding is done. Despite the recent increase in his Prozac, he was feeling minimal improvement in his symptoms. He did, however, find his counseling sessions to be helpful. (Jt. Ex. 6, pp. 158-159)

On January 27, 2021, Ms. Peterson authored a letter to claimant's employer. (Jt. Ex. 15, p. 223) The letter indicated that per claimant's request, Ms. Peterson was providing a "request of accommodation" within the workplace to support claimant's ability to continue to do his job. Based on his mental health diagnoses, Ms. Peterson felt reasonable accommodations would include breaking longer work tasks into shorter segments; allowing claimant extended deadlines to complete work tasks; increasing opportunities for him to stretch, stand, walk, or otherwise move; increasing and extending his breaks; allowing him to access coping mechanisms, such as deep breathing, muscle relaxation, and other strategies; and allowing him to end his shift earlier than scheduled if his mental health symptoms are not successfully managed using these accommodations. (Jt. Ex. 15, p. 223)

Claimant testified that when the employer received Ms. Peterson's letter, on February 1, 2021, he was sent home without pay. (Tr., p. 62) He stated that his employer told him they could not accommodate him because Ms. Peterson's recommendations were restrictions, not accommodations. On February 22, 2021, Ms. Peterson authored a second letter, this time addressed to claimant at the request of his attorney. (Jt. Ex. 15, p. 223a) Ms. Peterson provided a short summary of claimant's mental health diagnoses and treatment. She explained that the potential accommodations she outlined in her January 27, 2021 letter were not intended to be "restrictions" or "mandates." Rather, they were intended as reasonable adjustments to claimant's typical work tasks needed to accommodate the physical and mental/emotional limitations he now experiences connected to the July 3, 2018, incident. For example, claimant used to enjoy taking the boom lift "all the way up." He is no longer comfortable being in the air and it is challenging for him to get higher than 20 feet. Ms. Peterson concluded that the work accident and subsequent injuries claimant sustained have "significantly impacted [his] physical, mental and emotional well-being and have exacerbated [his] depressive and anxiety symptoms." She further concluded that in order for claimant to continue the duties of his position at DSC, there are adjustments that need to be made to his typical work tasks in order to promote a safe and productive work environment for both claimant and those he works with. (Jt. Ex. 15, p. 223a)

At the time of hearing, claimant remained off work without pay, although he was still considered an employee. (Tr., p. 62) Shortly prior to hearing, defendants accepted the psychological injuries as work related. (Tr., p. 12) As such, he was receiving workers' compensation benefits at the time of hearing. (Tr., p. 86)

On February 2, 2021, claimant returned to Dr. Weisheipl for bilateral knee genicular nerve block injections. (Jt. Ex. 13, pp. 212-213) At hearing claimant testified that the injection in the right knee worked for a few days. (Tr., p. 57) In the left knee, he testified that he felt a little change, but it was wearing off. He further testified that Dr. Weisheipl had proposed "burning the nerves" in both knees to see if that would work, but he was unsure whether his personal insurance would cover that procedure. (Tr., p. 57)

Claimant returned to Dr. Schmitz for a follow up on February 9, 2021. (Jt. Ex. 3, p. 89) At that time, he reported constant symptoms at a level 8 of 10, acute, and worsening. He continued to experience numbness and tingling. After physical examination, Dr. Schmitz noted several findings consistent with a nonanatomic source for his pain. (Jt. Ex. 3, p. 90) These included pain with simulated trunk rotation as well as pain with axial compression of claimant's head. Dr. Schmitz noted that none of the postoperative imaging had revealed any significant pathology, and that Dr. Boarini, who claimant consulted for a second opinion, agreed that there is "no other treatment." Dr. Schmitz felt that the next step would be significant weight loss, up to 100 pounds. (Jt. Ex. 3, p. 90)

On February 10, 2021, Ms. Bejarno authored a report regarding claimant's condition. (Cl. Ex. 4, pp. 33-34) She opined that because claimant's back and knee symptoms had continued despite treatment, they are likely a chronic problem and permanent in nature. (Cl. Ex. 4, p. 33) She noted that claimant has no significant history of prior injuries or problems involving his low back or knees. She reviewed Dr. Sassman's report, and agreed with her opinions and conclusions regarding claimant's permanent work restrictions, impairment ratings, and future medical care. She noted that claimant continues to suffer severe symptoms that adversely affect his ability to work, exercise, and perform many other activities of daily living. She stated that she strongly disagrees with the opinions of the workers' compensation providers that claimant is able to return to fully duty as a welder/construction worker with no restrictions or accommodations. She further noted that because the workers' compensation carrier "has not provided or authorized adequate ongoing treatments for [claimant's] injuries or symptoms," she had provided extensive care for his injuries and referred him to specialists for reasonable and necessary care. These referrals included Central States Pain Clinic, Capital Ortho, and The Iowa Clinic. She opined that claimant has benefits from these treatments, and will likely require ongoing treatment, including ongoing and regular pain management. Claimant will likely also require periodic injections for both his back and knees, prescription medications, and periodic physical therapy treatments for flare-ups.

In addition to the physical injuries, Ms. Bejarno noted that claimant has sustained mental/psychological injuries as a result of the work accident, chronic pain, and adverse

impact of the injuries on his life since the injury occurred. (Cl. Ex. 4, p. 34) She noted his prior history of depression and anxiety, and that his symptoms were well controlled and essentially in remission at the time the accident occurred. After the injury, he developed progressively worsening anxiety and depression as a result of his chronic pain and functional limitations. In addition, he began having flashbacks of the incident and was diagnosed with PTSD in early 2019, along with recurrent major depressive disorder and anxiety disorder. Since that time, she had been prescribing him medications, which have helped his symptoms to a degree. However, his symptoms recently worsened, resulting in his treatment at the Behavioral Urgent Care Clinic and referral to counseling with Ms. Peterson. Ms. Bejarno opined that the work accident and resulting chronic pain resulted in a material exacerbation of claimant's preexisting depression and anxiety. She reviewed Ms. Peterson's January 27, 2021 letter, and agreed that the accommodations requested are reasonable and appropriate for his psychological symptoms stemming from the work accident. Finally, she noted that claimant has complained about being harassed and mistreated by his employer since the accident, which may also be contributing to his currently psychological symptoms. (Cl. Ex. 4, p. 34)

On February 18, 2021, Dr. Weisheipl provided a statement to claimant's attorney. (Cl. Ex. 3, pp. 31-32) Dr. Weisheipl noted that after claimant's back surgery, he continued to have chronic pain, and repeat MRI testing revealed lumbar fibrosis at L5-S1, which can develop following spine surgery. (Cl. Ex. 3, p. 31) She opined that the fibrosis evidences his persistent post laminectomy syndrome, along with his symptoms of radiculopathy, spasms, and neuropathic pain. Dr. Weisheipl opined that based on claimant's current condition, and failures at conservative and surgical treatment, his lumbar symptoms will likely continue indefinitely. As such, she recommended a trial spinal cord stimulator, with potential permanent placement. However, prior to proceeding with placement, she recommended claimant lose enough weight to get his BMI below 40. (Cl. Ex. 3, p. 31)

With respect to his bilateral knees, Dr. Weisheipl opined that while his symptoms had improved somewhat, they have not entirely resolved and will likely continue indefinitely. (Cl. Ex. 3, p. 32) She recommended genicular nerve block injections in his knees every 3 to 4 months. If the injections failed to provide sufficient relief, she recommended radiofrequency ablations (RFA) of the genicular nerves of the knees every 6 to 12 months to manage his pain. She further noted that claimant had been actively losing weight in order to obtain the trial spinal cord stimulator, and it is her opinion that he is "striving to reach his goals in that regard." (Cl. Ex. 3, p. 32)

Finally, Dr. Weisheipl reviewed Dr. Sassman's report, and agreed with her opinions regarding the nature and extent of claimant's injuries, and her recommended work restrictions. She also noted that claimant had suffered a psychological injury as a result of the work injury, but since she had not treated him for those conditions, she deferred to his primary care physician and mental health providers. (Cl. Ex. 3, p. 32)

On March 2, 2021, Ms. Bejarno provided a supplemental report, indicating that due to the extended period of time that claimant has continued to suffer symptoms and

require treatment related to the psychological injuries of PTSD, depression, and anxiety, he has likely reached MMI with respect to these injuries. (Cl. Ex. 12, p. 51) She further opinioned that he will continue to require ongoing treatment and accommodations for his psychological injuries and symptoms into the indefinite future.

As noted above, the record was left open after the hearing to allow for Defendants' Exhibit F, which is a report from Iowa Psychiatry. Claimant was evaluated by Charles Jennisch, M.D., on April 16, 2021. (Def. Ex. F, p. 13) Claimant explained the progression of his mental health symptoms since the work accident. He noted that symptoms initially began shortly after his surgery, when he was prescribed Cymbalta and later Prozac. He did well for a time, but began feeling worse around November of 2020. It was around that time he felt he was being "verbally abused" at work, and also started realizing that he would "never be the same" since the accident. He stated that the "mental pain is crippling" and the "physical pain is debilitating." Since starting therapy and making adjustments to his medications, his condition had improved. His anxiety had also improved since he stopped working, since he no longer has to deal with the verbal abuse. However he still has daily flashbacks and nightmares. (Def. Ex. F, p. 13)

Dr. Jennisch reviewed claimant's past mental health history, as well as his medical history. (Def. Ex. F, pp. 13-14) He noted claimant is never pain-free. (Def. Ex. F, p. 14) After completing his evaluation and examination, Dr. Jennisch's diagnoses were post-traumatic stress disorder, chronic; major depressive disorder, recurrent, mild/moderate with anxious features; and alcohol use disorder in part sustained remission since fall of 2019. (Def. Ex. F, p. 15) Dr. Jennisch discussed a range of treatment considerations with claimant, including increasing his medication dosages or making some medication changes. (Def. Ex. F, p. 16) He recommended claimant continue individual therapy, but noted that the EMDR aspect should not continue indefinitely as it is generally a time-limited intervention, and if no benefit is noted, it is not rational to continue indefinitely.

Dr. Jennisch opined that claimant had reached MMI related to the PTSD, as the prognosis for further improvement is unlikely. (Def. Ex. F, p. 16) He noted that claimant had numerous complaints involving the alleged abusive work environment, which is unrelated to the work injury. Dr. Jennisch felt ongoing treatment is warranted for the major depressive disorder. He stated that in addition to claimant's physical work restrictions, it is reasonable to restrict claimant from "working in the air" based on his tolerability and judgment in this regard. While it is possible that may improve, Dr. Jennisch felt it would likely be a permanent restriction. At the time of Dr. Jennisch's report, the treatment plan was for claimant to continue with his primary care provider and his office as needed. (Def. Ex. F, p. 16)

Dr. Jennisch added an addendum to his report after a review with defense counsel. (Def. Ex. F, p. 17) He clarified that claimant is at MMI for the PTSD. He stated that residual depressive symptoms are "principally" related to claimant's allegations of an abusive work environment, which claimant related to his treatment by some members of management due to his work restrictions. Dr. Jennisch stated that "[t]here

are multiple issues contributing to his recurrence of depression however from this perspective the work accident is a causal factor and he is not at MMI for this condition." (Def. Ex. F, p. 17)

As noted above, defendants have now accepted the mental health conditions as work related. Defendants argue that claimant has not reached MMI for all of his work-related injuries, specifically, the recurrence of his depression, and therefore, permanency is not ripe for adjudication. Claimant disagrees and argues that he has reached MMI for all work-related injuries, including the psychological injuries. Claimant argues he is permanently and totally disabled as a result of the work injuries.

As explained further below, I find that the greater weight of evidence supports claimant's position that he has reached MMI for all work-related injuries, and permanency is ripe for determination. While I do not completely discount Dr. Jennisch's opinions, he does not explain how the additional treatment he recommends is anticipated to significantly improve claimant's depression. All providers agree that claimant needs ongoing treatment for his mental health conditions. However, ongoing treatment does not preclude a finding of MMI. None of the providers, including Dr. Jennisch, have stated that the ongoing treatment will significantly improve claimant's condition or significantly change his permanent disability. The treatment Dr. Jennisch recommends is essentially the same treatment claimant has been receiving on his own since April 2019. There is no evidence that claimant's mental health condition is anticipated to significantly improve with ongoing treatment. As such, I find he has reached MMI, and the issue of permanency is ripe for determination.

Given the nature and seriousness of claimant's injuries, his functional disabilities, age, education, work history, and permanent restrictions, I find that claimant is wholly disabled from employment for which he is fitted. Claimant is entitled to permanent total disability benefits.

CONCLUSIONS OF LAW

The first issue to determine is whether claimant has reached MMI for all of his work-related injuries resulting from the July 3, 2018 accident. There is no dispute that claimant has reached MMI for his physical injuries. Claimant argues that he has also reached MMI for his mental/psychological injuries. Defendants disagree and argue that claimant has not reached MMI with respect to the exacerbation of his major depressive disorder, pursuant to Dr. Jennisch's opinion.

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

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing

period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

MMI refers to stabilization of the workers' condition or a finding that the condition is not likely to abate in the future despite medical treatment. Dunlap v. Action Warehouse, 824 N.W.2d 545, 557 (Iowa App. 2012) Stabilization of the employee's condition is the event that allows a physician to make the determination that a particular medical condition is permanent. Id. at 556 (quoting Bell Bros. Heating and Air Conditioning. v. Gwinn, 779 N.W.2d 193, 200 (Iowa 2010)

The Iowa Supreme Court clarified the issue of maximum medical improvement, or medically indicated significant improvement, in Pitzer v. Rowley Interstate, 507 N.W.2d 389, 391-392 (Iowa 1993). The Court held:

> the stability of condition referred to in Larson's treatise is a stability in industrial disability. Consequently, an anticipated improvement in continuing pain or depression, if medically indicated, may extend the length of the healing period if a substantial change in industrial disability is also expected to result. If, however, it is not likely that further treatment of continuing pain, however soothing to the claimant, will decrease the extent of permanent industrial disability, then continued pain management should not prolong the healing period.

A similar analysis applies in this instance. Although claimant will need continuing treatment for his mental health conditions, there is no evidence that treatment will result in any significant improvement of his functional abilities that would result in any change in his industrial disability. Claimant has reached MMI for his mental health conditions related to the work injury.

Since claimant has reached MMI, the issue of permanency is ripe for determination. Claimant argues that he is entitled to permanent total disability benefits, pursuant to Iowa Code section 85.34(3), or alternatively, permanent partial disability benefits pursuant to section 85.34(2)(v). Defendants argue that because claimant was released to unrestricted duty, his permanent disability is limited to his functional loss pursuant to Iowa Code section 85.34(v).

In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535, effecting workers' compensation cases. See 2017 Iowa Acts chapter 23. This case involves an injury occurring after July 1, 2017; therefore, the provisions of the new statute involving nature and extent of disability under Iowa Code section 85.34 apply to this case.

Claimant has sustained injuries to his back, knees, and mental health, which have resulted in permanent disability. Therefore, claimant has proven he sustained unscheduled injuries. Defendants argue Iowa Code section 85.34(2)(v) is applicable,

and claimant's permanent disability is limited to his functional loss. Iowa Code section 85.34(2)(v) (2017) provides:

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

Defendants argue that claimant returned or was offered work with the employer for which he received or would have received the same or equal earnings as he received at the time of the injury. While it is true that claimant was released to return to work with no restrictions, and he did attempt to do his full duties, overall his attempt was unsuccessful. Claimant credibly testified that despite trying to return to his job and perform the work he was assigned, he was unable to do so successfully. His employer recognized this by assigning claimant work that is essentially "make work," such as overseeing cleaning crews and "fire-watching" while others weld. He was no longer being assigned to the higher-paying, out-of-town projects, and overall, his earnings decreased significantly as a result. (Compare Cl. Ex. 6 and 7) While there are some weeks claimant earned comparable wages to before the injury, overall his earnings decreased.

Additionally, when Ms. Peterson recommended certain accommodations related to claimant's mental health diagnoses, claimant was taken off work completely and was not working at the time of hearing. The workers' compensation commissioner has recently clarified that the post-injury "snapshot" of claimant's salary, wages or earnings should occur at the time of the hearing, just as industrial disability is measured as the evidence stands at the time of the hearing. Sharon Vogt v. XPO Logistics Freight, File No. 5064694.01 (App. June 11, 2021). Performing the comparison based on a claimant's initial return to work could lead to unfair and illogical results. Id. (citing Janson v. Fulton, 162 N.W.2d 438, 442 (Iowa 1968) ("It is a familiar, fundamental rule of statutory construction that, if fairly possible, a construction resulting in unreasonableness as well as absurd consequences will be avoided.")); see also Sherwin–Williams Co. v. Iowa Department of Revenue, 789 N.W.2d 417, 427 (Iowa 2010) ("'[E]ven in the absence of statutory ambiguity, departure from literal construction

is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act.'" (quoting *Pac. Ins. Co. v. Or. Auto. Ins. Co.,* 490 P.2d 899, 901 (1971)).

At the time of hearing, claimant was not receiving or being offered work at the same or greater wages, salary, or earnings as he received at the time of the injury. This reduction in earnings has been persistent since shortly after claimant returned to work, and continued to decrease until he was eventually taken off work entirely. While he is technically still considered an employee, he is not able to work and is not being offered any work. As such, claimant has sustained an industrial disability, measured in relation to his reduction in earning capacity.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). The commissioner may also consider claimant's medical condition prior to the injury, immediately after the injury, and presently in rendering an evaluation of industrial disability. IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632-633 (Iowa 2000) (citing McSpadden, 288 N.W.2d at 192).

The focus of an industrial disability analysis is on the ability of the worker to be gainfully employed and rests on comparison of what the injured worker could earn before the injury with what the same person can earn after the injury. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995); Anthes v. Anthes, 258 Iowa 260, 270, 139 N.W.2d 201, 208 (1965). Changes in actual earnings are a factor to be considered, but actual earnings are not synonymous with earning capacity. Bergquist v. MacKay Engines, Inc., 538 N.W.2d 655, 659 (Iowa App. 1995), Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 525, (Iowa App. 1977), 4-81 Larson's Workers' Compensation Law, §§ 81.01(1) and 81.03. The loss of earning capacity is not measured in a vacuum. Such personal characteristics as affect the worker's employability are considered. Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976). Loss of future earning capacity is measured by the employee's own ability to compete in the labor market.

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).

In assessing an unscheduled, whole body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat. Inc., 777 N.W.2d 387, 392 (Iowa 2009).

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, 288 N.W.2d at 192; Diederich, 258 N.W. at 902 (1935).

The focus for evaluating total disability is on the person's ability to earn a living. Diederich, 258 N.W. at 902. The question is whether the person is capable of performing a sufficient quantity and quality of work that an employer in a well-established branch of the labor market would employ the person on a continuing basis and pay the person sufficient wages to permit the person to be self-supporting. Tobin-Nichols v. Stacyville Community Nursing Home, File No. 1222209 (App. December 2003). A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982). Industrial disability is determined by the effect the injury has on the employee's earning capacity. Bearce v. FMC Corp., 465 N.W.2d 531, 535 (Iowa 1991); Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 123 (Iowa App. 2003).

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

employ is entitled to considerable weight. If the employer in whose employ the disability occurred is unwilling or unable to accommodate the disability, there is no reason to expect some other employer to have more incentive to do so.

I found Dr. Sassman's opinions to be more convincing than those of Dr. Schmitz and Dr. Vincent with respect to claimant's permanent impairment and restrictions. Dr. Sassman's recommended permanent restrictions are more realistic than Dr. Schmitz's full duty release. Dr. Schmitz's full duty release is further undermined by his 20 percent impairment rating. As the Commissioner has noted, "[a] release to return to full duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides." Baker v. Firestone, File Nos. 5040732, 5040733 (Remand, April 13, 2016) Rather, the impact of a release to full duty must be determined by the facts of each case. Id.; see also Miles v. City of Des Moines, File Nos. 5048896-5048899 (App. June 14, 2017); Wineinger v. Ideal Ready Mix, Inc., File No. 5027429 (Arb. August 12, 2010); Jefferson v. Eagle Ottawa, File No. 5013791 (App. February 28, 2007).

Claimant credibly testified that despite trying to return to his job and perform the work he was assigned, he was unable to do so. His employer recognized this by assigning claimant work that is essentially "make work," such as overseeing cleaning crews and "fire-watching" while others weld. He was no longer being assigned to the higher-paying, out-of-town projects, and his earnings decreased significantly as a result. Defendants have presented no contrary evidence. Physically, he is no longer able to perform the construction or welding work that he did prior to his injuries. Additionally, when Ms. Peterson recommended certain accommodations related to claimant's mental health diagnoses, claimant was taken off work completely and was not working at the time of hearing.

Having considered all of the evidence in the record, the greater weight of evidence in this case supports a finding that claimant is permanently and totally disabled. Claimant is a high school graduate, but his only real job experience comes from manual labor, including construction work and welding. Dr. Sassman recommended permanent restrictions of limiting lifting, pushing, pulling, and carrying to 20 pounds from floor to waist occasionally, 30 pounds at waist height keeping his elbows at his sides, and 20 pounds above waist and shoulder height. She further recommended that he limit standing, walking, and sitting to an occasional basis, and needed to change positions frequently due to his symptoms, He should not kneel, crawl, walk on uneven surfaces, or climb ladders. Ms. Peterson has recommended that claimant be provided with mental health accommodations including breaking longer work tasks into shorter segments; allowing claimant extended deadlines to complete work tasks; increasing opportunities for him to stretch, stand, walk, or otherwise move; increasing and extending his breaks; allowing him to access coping mechanisms, such as deep breathing, muscle relaxation, and other strategies; and allowing him to end his shift earlier than scheduled if his mental health symptoms are not successfully managed using these accommodations. Dr. Jennisch has restricted claimant from working from

heights. Given these restrictions and claimant's ongoing chronic pain, along with his unsuccessful effort to return to his regular job, it is clear he is no longer capable of performing the type of work for which he is best fitted. Claimant testified that he has never had a desk job, and he has difficulty sitting for long periods. (Tr., pp. 64-65)

Considering claimant's age, educational background, employment history, permanent impairment, and permanent restrictions, as well as the other industrial disability factors set forth by the Iowa Supreme Court, I find that claimant is permanently and totally disabled.

The parties did not stipulate to a commencement date for permanency benefits. Claimant argues permanent benefits should commence on March 2, 2021, the date on which Ms. Bejarno opined he had reached MMI for his psychological injuries. He further argues the benefits claimant received between February 1, 2021 and March 1, 2021, are properly classified as healing period benefits.

Permanent total disability benefits are payable during the period of the employee's disability. Iowa Code section 85.34(3)(a). As a result, permanent total disability benefits generally commence on the date of injury. See Sandhu v. Nordstrom, Inc., File No. 5046628 (App. January 24, 2019). In this case, however, claimant did return to work, although with difficulty, until February 1, 2021. That was the last date on which claimant physically worked for the employer. It is not reasonable or logical to award permanent total disability benefits while claimant continued to work and earn wages with the employer. Miles v. City of Des Moines, File Nos. 5048896, 5048899 (Arb. September 30, 2020, aff'd on Appeal to Commissioner, March 1, 2021). Therefore, I find that the proper commencement date for permanent total disability benefits is February 1, 2021.

The next issue to determine is the proper average weekly wage and rate of compensation. Defendants argue claimant's gross earnings were $1,170.81 per week, making his rate $700.14. Claimant argues his gross earnings were $1,289.26 per week, resulting in a rate of $760.72. (See hearing report) The difference in the rate calculations stems from claimant's inclusion of his per diem pay in his calculation. Defendants argue the per diem should not be included in the rate calculation, pursuant to Iowa Code section 85.61(3).

Iowa Code section 85.61(3) provides a definition of "gross earnings," and provides that "reimbursement of expenses" and "expense allowances" should be excluded from calculation of gross earnings.

In this case, claimant received per diem pay when he worked out-of-town jobs. Claimant testified that certain jobs had a $35 per day per diem, while others had a $25 per day per diem, but the hourly rate of pay was higher. (Tr., p 22) At the time of his injury, he was receiving $25 per day in per diem pay. Claimant testified that he "pocketed" 50 to 75 percent of his per diem pay. (Tr., p. 24) He would bring groceries from home so he would not have to buy food while working out of town. There was no relationship between the per diem pay and the amount claimant actually spent for food,

and he was not required to keep receipts for expenses. (Tr., p. 25) The per diem pay was included in claimant's regular paycheck. Claimant is not certain whether the per diem pay was taxed, and the payroll records submitted into evidence do not provide guidance in that regard. (Tr., pp. 25-26; Cl. Ex. 6, 7)

This agency has held that the fact that per diem payments were generous or exceeded the employee's actual expenses did not change their character as expenses and not wages. Thompson v. Seed and Grain Systems, Inc., File No. 1059299 (App. December 2, 1998). The simple labeling of payments as expense allowances, however, also does not change the payments true, underlying nature. This agency is compelled to seek the truth regarding the nature of the payment made. Premium Transportation Staffing, Inc. v. Bowers, 872 N.W.2d 199 (Iowa App. 2015) (Table).

In Bowers, the Court of Appeals affirmed a decision by the Commissioner to include a portion of the worker's per diem payment in calculating the rate. The Court stated the following.

> The deputy noted that Bowers' testimony 'that he spent only $12.00 per day for food and expenses and kept the remainder of the $52.00 per diem as compensation is uncontroverted in the record.' The deputy concluded Bowers showed by a preponderance of the evidence that only a portion of his per diem was reimbursement for expenses and that the appellants did not carry their burden of proof to show otherwise. Finding that $12.00 of Bowers' per diem payment was an expense allowance under Iowa Code s. 85.61(3), the deputy commissioner included the remaining $40.00 of the per diem payment in calculating the weekly rate.

Premium Transportation Staffing, Inc. v. Bowers, 872 N.W.2d 199 (Iowa App. 2015) (Table).

Agency precedent has established that a burden shifting analysis is to occur. For a payment to be a bona fide expense allowance under section 85.61(3) there must be some relationship between the amount of the allowance and the amount of the expenses to which it is purportedly related. Sexton v. Midwest Continental, File No. 5039407 (Arb. May 17, 2013). Once the claimant has established a rate of earnings, the burden then shifts to the employer to establish the portion that represents reimbursement of expenses. McCarty v. Freymiller Trucking, Inc., File Nos. 729340 and 729341 (App. February 25, 1986). This burden shifting analysis has been interpreted by the agency as being claimant's initial burden to present some evidence that demonstrates that the true nature of the payment is different than the label. Once the claimant has presented prima facie evidence of this, the burden then shifts to the defendants to produce evidence that demonstrates that the payments are truly for expenses. Ruiz v. Whaley Steel, File No. 5049444 (Arb. January 3, 2017).

The evidence establishes that claimant was paid $25.00 per day, which he acknowledges was designed to cover living expenses when he worked out of town. (Def. Ex. D; Dep. Tr., pp. 17-18) Claimant testified that he usually "pocketed" 50 to 75

percent of it. However, there was no additional evidence to provide more specific amounts, and claimant also testified that he did, at times, spend the per diem allowance on food and expenses. (Tr., p. 88) Additionally, the evidence does not clearly establish whether the per diem amounts were included as part of claimant's taxable income. Claimant has not met his burden to prove that the true nature of the per diem payments was to increase his compensation, as opposed to truly being meant for expenses. As such, the payments are properly excluded from the rate calculation. As such, I adopt defendants' calculation of an average weekly wage of $1,171.00, making the appropriate weekly benefit rate $700.14. (Def. Ex. E, p. 12)

The next issue to determine is whether claimant is entitled to alternate medical care. Claimant has requested ongoing pain management for his back and knees with Dr. Weisheipl. With respect to his mental health care, claimant requests to continue treatment with Ms. Bejarno and Ms. Peterson.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

With respect to the back and knee injuries, both authorized physicians, Dr. Schmitz and Dr. Vincent, have stated they have nothing further to offer claimant. Dr. Weisheipl has provided pain management, and has recommended a spinal cord stimulator once claimant has lost a sufficient amount of weight. Claimant had been successful in losing about 55 pounds at the time of hearing, and was continuing in his attempts. (Tr., p. 56) Dr. Weisheipl also recommended ongoing genicular nerve block injections in claimant's knees, and a potential RFA of the genicular nerves if the injections stopped working. Dr. Sassman and Ms. Bejarno have agreed that claimant should continue to see Dr. Weisheipl for pain management.

Currently, the authorized treating physicians are not offering any care for claimant's back and bilateral knee symptoms. Therefore, claimant has proven that the employer is not authorizing medical care that is effective and reasonably suited to treat his injury. Defendants shall authorize and pay for all reasonable and causally related expenses with respect to claimant's ongoing treatment with Dr. Weisheipl.

With respect to the mental health injuries, after defendants denied the condition, claimant began treatment with Ms. Bejarno, and was eventually referred to Ms.

Peterson for therapy. Defendants have now accepted compensability of the mental health conditions, and have authorized claimant to continue treatment with Dr. Jennisch. Because this authorization of care happened shortly before the hearing, there is only one record available in evidence regarding claimant's initial appointment with Dr. Jennisch. Dr. Jennisch recommended that claimant continue with his individual therapy, and follow up with his office. There is no evidence that Dr. Jennisch's treatment plan will be ineffective or unreasonable. Therefore, at this time, claimant's request for alternate care with respect to the mental health portion of his claim is denied. This ruling does not preclude claimant from filing an application for alternate care in the future.

The next issue involves claimant's request for reimbursement and/or payment of certain medical expenses. Claimant seeks reimbursement for out-of-pocket medical expenses totaling $2,116.90. (Cl. Ex. 8; Tr., p. 63) He also seeks an order that defendants reimburse Wellmark in the amount of their subrogation claim, $3,875.37, and hold claimant harmless. (Cl. Ex. 9, pp. 42-45) Defendants deny the majority of the medical expenses as either unauthorized, unrelated to the work injury, or unreasonable and unnecessary.

It does not appear to be disputed that the medical care for which claimant seeks reimbursement and/or payment is all related to unauthorized care. Once an employer acknowledges that the injured employee is seeking medical care for an injury compensable under the workers' compensation statute, Iowa Code section 85.27(4) provides that an "employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care." Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 247 (Iowa 2018). However, there are situations in which employees may receive alternate medical care paid for by the employer. First, employees may choose their own medical care at the employer's expense during an emergency in which the employer "cannot be reached immediately." Id.; see also Bell Bros., 779 N.W.2d at 203–04. Second, an employee may receive alternate medical care at the employer's expense when the employee and employer consent to such an agreement. Id. Third, "the workers' compensation commissioner may order alternative care paid by the employer following a prompt, informal hearing when the employee is dissatisfied with the care furnished by the employer and establishes the care furnished by the employer was unreasonable." Id.

Outside of these situations, the employer retains the right to choose the employee's medical care. However, the employer's statutory right to choose medical care for the employee's compensable injuries does not prohibit the employee from seeking his or her own medical care, at his or her own expense, when the employer denies compensability for the injury or the employee "abandons the protections of section 85.27 or otherwise obtains his or her own medical care independent of the statutory scheme." Id. at 248; citing Bell Bros., 779 N.W.2d at 204.

In Bell Bros., the Iowa Supreme Court held that an employer's duty to furnish reasonable medical care includes those claims for care by the employee that are unauthorized if the employee can prove "by a preponderance of the evidence that such care was reasonable and beneficial" under the totality of the circumstances. Id.; citing

Bell Bros., 779 N.W.2d at 206. Unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. Id. This burden of proof honors the employer's statutory right to choose the injured employee's medical care under Iowa Code section 85.27(4), yet provides the employee with reimbursement for unauthorized medical care when he or she can show by a preponderance of the evidence that the care was reasonable and beneficial. Id.

Additionally, once defendants denied the psychological injury by filing their Answer to claimant's petition on April 30, 2020, they lost the right to choose the medical providers for that care during the period of denial. "[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros., 779 N.W.2d at 204. Further, when compensability is contested, "the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care." R. R. Donnelly, 670 N.W.2d at 197-198.

Ultimately, therefore, defendants are precluded from asserting an authorization defense as to any future treatment during the period of denial, and defendants loose the right to control the medical care claimant seeks during this period of denial. Brewer-Strong, 913 N.W.2d at 247; Bell Bros., 779 N.W.2d at 204. As such, claimant is entitled to reimbursement for the treatment he received for his mental health injuries during the period of the denial.[2]

Additionally, claimant has proven by a preponderance of the evidence that the unauthorized treatment he received at Central States Pain Clinic, UPH Behavioral Health Urgent Care, and 515 Therapy and Consulting has been reasonable and beneficial. As such, I also find the care he received at UnityPoint Health – Grimes to be reasonable and beneficial, for without that care he would not have received the referral to Central States Pain Clinic. Likewise, his charges from Medicap Pharmacy - Grimes are also reimbursable to the extent they involve medications prescribed by any of the above providers.

The visit to MercyOne involved claimant's urinary incontinence, which ultimately was not found to be related to his work injury. However, claimant went there on an emergency basis, and Dr. Schmitz was called for a consultation. I find that his involvement makes the visit akin to a surgical follow up at a time when causation had not yet been determined. Therefore, defendants are responsible for those charges.

The two charges from Iowa Diagnostic Imaging involve MRI studies to which claimant was referred by Ms. Bejarno and Dr. Schmitz. As such, those charges are reimbursable.

[2] Defendants note in their brief that they are not opposed to paying for claimant's care with 515 Therapy and Consulting.

The undersigned finds no evidence in the record with respect to what treatment claimant received at Des Moines River Physicians, or what the charge from Wal-Mart Pharmacy Sioux City involves. Therefore, I cannot award those charges. The charges related to claimant's care at The Iowa Clinic likewise cannot be awarded. Claimant did not prove that the treatment he received there related to his urinary incontinence was related to his injury. Additionally, Dr. Boarini simply offered a second opinion, stating he had no treatment to offer, which did nothing to provide a more favorable outcome for claimant.

To summarize, defendants are responsible to reimburse claimant for $1,311.07[3] for out-of-pocket expenses related to treatment he received at UnityPoint Health – Grimes, MercyOne Hospital, Central States Pain Clinic, UPH Behavioral Health Urgent Care, 515 Therapy and Consulting, Iowa Diagnostic Imaging, and Medicap Pharmacy - Grimes. (Cl. Ex. 8) Defendants are also responsible for satisfaction of Wellmark's subrogation claim for medical expenses related to those providers, and will hold claimant harmless for those expenses. (Cl. Ex. 9)

Defendants presented a claim for a credit for the Wellmark subrogation amount on the hearing report, but did not address the issue in their brief. To establish entitlement to a credit under Iowa Code section 85.38, defendants must prove that the benefits were received under a group plan; contribution to the plan was made by the employer; the benefits should not have been paid if workers' compensation benefits were received; and the amounts to be credited or deducted from payments made or owed under Chapter 85. Greenlee v. Cedar Falls Comm. Schools, File No. 934910 (App. December 27, 1993) Defendants have not submitted any evidence on this issue and have failed to meet their burden of proof. As such, they are not entitled to a credit related to the health insurance subrogation.

The final issue to address is claimant's request for a taxation of costs. Claimant seeks $103.00 for the filing fee; $13.70 for the service costs; and $750.00 for obtaining Dr. Weisheipl's report. (Cl. Ex. 11) Assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

The costs claimant seeks are all allowable under 876 IAC 4.33. As claimant was generally successful in his claim, I use my discretion and award him $866.70 in costs.

ORDER

THEREFORE, IT IS ORDERED:

[3] This amount includes the additional $100.00 claimant testified about at hearing. (Tr., p. 63)

Defendants shall pay claimant permanent total disability benefits, commencing February 1, 2021, at the rate of seven hundred and 14/100 dollars ($700.14), and continuing during the period of permanent total disability.

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

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

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

Defendants are responsible to reimburse claimant for out-of-pocket medical expenses as outlined in this decision.

Defendants are responsible for the health insurance subrogation claim as outlined in this decision.

Defendants shall reimburse claimant's costs in the amount of eight hundred sixty-six and 70/100 dollars ($866.70).

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

Signed and filed this 17th day of December, 2021.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mark Spellman (via WCES)

Elizabeth Pudenz (via WCES)

James Ballard (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.