BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THEODORE J. MALGET, Claimant, vs. JOHN DEERE WATERLOO WORKS, Self-Insured Employer, Defendant.	File No. 5048441 APPEAL DECISION Head Note No: 1803,

The arbitration hearing in this matter was held on January 15, 2015, in Waterloo, Iowa. The parties filed their post-hearing briefs on March 10, 2015. The case was deemed fully submitted on that date. The deputy workers' compensation commissioner issued the arbitration decision on August 5, 2015.

The deputy commissioner found claimant was entitled to 250 weeks of permanent partial disability benefits commencing September 8, 2011. Alternate medical care was granted. The deputy awarded medical expenses. Defendant was awarded credit for all benefits previously paid, including wages. Costs were taxed to defendant.

On August 14, 2015, defendant filed a motion to enlarge reasoning and conclusion of law and order re: arbitration decision filed August 5, 2015. Defendant requested the deputy to address the payment of medical expenses as detailed in exhibit 18. Defendant requested the deputy to specify which prescriptions were causally related to the work injury. The deputy did not address the August 14, 2015, motion.

On August 18, 2015, claimant filed a notice of appeal. On August 26, 2015, defendant filed a notice of cross appeal.

Claimant filed his appeal brief on October 7, 2015. Claimant listed the issues on appeal as follows:

Whether claimant is totally disabled under traditional industrial disability analysis;

Whether claimant is totally disabled under the odd-lot doctrine.

Defendant filed its brief on November 6, 2015. Defendant listed the relevant issues as:

The extent of claimant's entitlement to permanent partial disability benefits;

Whether claimant is entitled to payment of unauthorized medical expenses;

Whether claimant is entitled to an order of alternate medical care under Iowa Code section 85.27;

Whether the medical treatment for which claimant seeks reimbursement was reasonable and necessary;

Whether the medical expenses sought by claimant were causally connected to the work injury;

Whether claimant is entitled to an award of costs, and if so, in what amount(s).

Claimant submitted a reply brief on November 30, 2015. Defendant submitted a reply brief on December 11, 2015.

Nineteen weeks after the filing of the last appeal brief, the hearing deputy filed an Order Nunc Pro Tunc on April 28, 2016. The order was filed sua sponte. The deputy wrote:

The parties stipulated to the elements of rate such that the weekly rate herein is $700.70 per week. That is correctly reflected in the findings of fact. However, a scrivener's error in the order cites the rate as "seven hundred seventy and 70/100 ($700.70)."

The order is corrected to remove the "seventy."

The record in this case was reviewed de novo. Both sides dictated the issues to be determined on appeal. See: Iowa Code section 17A.15; and Rule 876 IAC 4.28(7). The party who would suffer a loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule App. P. 6.14(6).

Pursuant to Iowa Code sections 17A.15 and 86.24, I affirm in part as the final agency decision certain portions of the proposed arbitration decision filed on August 5, 2015, and I modify certain portions of the proposed arbitration decision which relate to the issues properly raised on intra-agency appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was 64 years old at the time of the hearing. He is now 66. Claimant is married with adult children. He graduated from a private high school in Oelwein, Iowa, in 1968. At the time of the hearing, claimant resided in Oelwein and served on the Oelwein City Council. He holds an Iowa CDL which allows him to drive certain types of commercial vehicles.

Claimant is a large man. He is six feet seven inches in height. He weighs approximately 350 pounds. Most of claimant's health care professionals have counseled claimant to lose weight. In 2003 claimant had a myocardial infarction. He also underwent bilateral carpal tunnel surgery. Claimant is right hand dominant.

Several months after claimant graduated from high school, he attended Hawkeye Community College for approximately six months in electronic technology. Claimant served in the United States Air Force for four years and three months. Claimant specialized in aircraft radio repair after having attended a six-month radio repair course.

Upon his honorable discharge from the Air Force, claimant returned to Oelwein, Iowa, and commenced employment at the Donaldson Company. Claimant was hired as an electrician/mechanic. He started in 1974 and worked until 2001. Claimant was involved in the day-to-day maintenance and repair of welding equipment and mechanical presses. (Exhibit O, pages 10-11) He also worked as a construction electrician or a machine electrician. (Ex. O, p. 11) Those duties included:

> The difference in my estimation the construction electrician at the facility ran conduit, hooked up motors, sized wire. The machine electrician would design, maintain and build control circuits for machines, relay control circuits.

(Ex. O, p. 12)

Claimant testified the work was all "hands on work." (Ex. O, p. 14)

After 10 years of employment, claimant was promoted to maintenance supervisor. (Ex. O, p. 13) Claimant testified in his deposition about his supervisory duties:

> I was responsible for roughly seven or eight skilled trades [sic] people, mechanic/electricians. Obviously I was responsible for the upkeep and time of the machines, etc.

(Ex. O, p. 13)

During year 15 of his employment, claimant was once again promoted. He became an office worker with the title of manufacturing engineer. (Ex. O, p. 14) Claimant held the position for two or three years. The final position claimant held was facility manager. (Ex. O, p. 14) As facility manager, claimant performed primarily administrative functions, including purchasing new equipment for the plant. Only three to four percent of his duties involved working with his hands. (Ex. O, pp. 14-15) Claimant's main duties included maintenance equipment justification. (Ex. O, p. 17) He supervised nine or ten people. (Ex. O, p. 18) Claimant acknowledged he sustained a hearing loss while he was employed at Donaldson. Claimant left the company because

the facility closed. At the time of the arbitration hearing, claimant was receiving retirement benefits from the Donaldson Company.

Next, claimant worked in Des Moines at Parr Manufacturing. Claimant was responsible for maintenance in a given production area that was related to metal stamping. (Ex. O, pp. 19-20) Claimant worked as a supervisor but he terminated the position within six months. (Ex. O, pp. 20)

Claimant next worked at Exide Battery in Manchester, Iowa. Claimant worked less than 12 months there. His title was maintenance supervisor. He was responsible for supervising the maintenance employees and maintaining the equipment. (Ex. O, p. 21) He had 30 or 40 people to supervise. (Ex. O, p. 21) Claimant scheduled the employees and he ordered machine components. (Ex. O, p. 22)

Claimant worked at Dura Automotive in West Union, Iowa for five or six years. The position was strictly a "hands on job." Claimant worked as an electrician/mechanic. Claimant indicated he worked as a construction electrician. He described his duties:

> It was construction electrician. The duties of that were similar to the Donaldson Company; run conduit, hook up motors, size wire, etc. There were mechanical duties associated with maintaining mechanical presses and resistance welding equipment.

(Ex. O, p. 23-24)

Claimant commenced employment with John Deere on May 29, 2001. He started in the foundry in electrical maintenance. (Ex. O, p. 24)

Claimant described his duties at the foundry as follows:

> A. Sure. They were mostly related to construction, electrical, running pipe, conduit, wire, hooking components up whether it be motors or panels. But to be candid with you – how many years you say I worked there, eight?
>
> Q. In the foundry?
>
> A. Yeah.
>
> Q. You worked there looks like from May 29 of 2001 until September of 2008 so seven years.
>
> A. At the most I did construction work there was six months. The rest the time they sat me in an office and said order parts for us. That's what I did.

Q. Okay. Was the first six months you were doing the hands-on stuff and then the last - -

A. No. Really it was like the first three months and the final three months.

Q. Okay. And in between basically you were in an office for the most part?

A. Yes.

Q. Okay. And when you were in the office, what were your job duties there?

A. It was all computer related. It was ordering parts from the John Deere stock room or ordering parts from their electrical vendors.

Q. You say from the stock room. Was that something that was on site at the facility?

A. It was downtown Waterloo. It wasn't at the foundry.

(Ex. O, pp. 26-27)

Because claimant desired to leave the foundry environment, he bid into a job at the Project Engineering Center, (PEC). (Ex. O, p. 27) Once again, claimant described his job duties:

> Primarily whatever they directed me to do, but the electrical work was once again construction. It was running miles of conduit and wire, sizing the components, hooking them up, installing breaker panels, lights, motors. That's all I did. I didn't do any troubleshooting to speak of there, I just installed new construction.

(Ex. O, p. 28)

During the arbitration hearing, claimant testified he engaged in construction work at the Project Engineering Center prior to his work injury. Claimant testified as follows:

> A. What I did - - and I use the term construction electrician - - is - - because that's all I did, was constructional work at the project engineering center. That's what I was directed to do.
>
> We remodeled test cells. That means you're in there - - usually you'd start out by taking all the old control circuits out and the building wiring, et cetera, the physical end of it, the pipe and whatever. And then you'd go in there and put the new pipe up and the new wiring that they wanted for the

test equipment; or for the utilities that were in that room, utilities being defined as lights or outlets.

Q. Okay. What kind of positions would you be in physically?

A. I could be in any position physically. I could be on a ladder. I could be crawling on the floor. There were some places where you had to get up on top of the office, you know, and I used the term stoop and yet still walk, bent over quite a bit.

(Transcript, pages 11-12)

The parties stipulated claimant sustained his work injury on September 8, 2011, when he was standing on a ladder that collapsed. Claimant fell three feet to the concrete floor and landed on his back. (Ex. F, p. 1) The injury was reported immediately to the proper personnel.

Claimant was sent to Allen Memorial Hospital in Waterloo, Iowa, for medical treatment. (Ex. F, p. 1) Initially, claimant was diagnosed with a low back contusion. (Ex. F, p. 4) X-rays were taken of the spine. Rajeev Angu, M.D., interpreted the x-rays as showing "a mild compression deformity of L4 vertebral body." (Ex. D, p. 1-2)

Robert Broghammer, M.D., commenced treatment of claimant. Dr. Broghammer prescribed pain medication and physical therapy. Claimant did not improve. As a consequence, Dr. Broghammer ordered MRI testing.

The MRI was done on September 21, 2011. The exam was limited due to patient discomfort and a refusal to complete the exam. (Ex. D, p. 3) Greg E. Raecker, D.O., did interpret certain findings as:

IMPRESSION: There is a subacute compression fracture of the L4 vertebral body as discussed. Moderately severe acquired spinal canal and subarticular zone narrowing is seen at the L4-5 level. There is severe acquired narrowing of the left subarticular and foraminal zones at L5-S1 along with mild compromise in the caliber of the canal at this level. Moderate acquired canal narrowing noted at L3-4. This exam limited to a degree due to the patient's discomfort and refusal to allow completion of the study in the standard fashion.

(Ex. D, p. 4)

Lawrence A. Liebacher, M.D., radiologist, interpreted the results of another MRI done on October 27, 2011. He opined:

Impression: The patient has a severe compression fracture of L4 which is subacute. There are broad disc bulges at L3-4 and L4-5 which combined

> with the large facet osteophytes at these levels in the posterior displacement of the superior posterior corner of L4 to cause severe spinal stenosis at L3-4 and L4-5. This appearance is unchanged since 9/21/11. Mild changes of degenerative disc disease at L5-S1. A small fluid collection within the left psoas muscle on the prior exam has resolved. No other change. No new abnormality.

(Ex. G, p. 4)

Claimant was referred to Russell I. Buchanan, M.D., neurosurgeon at Heartland Neurosurgery in Waterloo. Dr. Buchanan evaluated claimant on January 9, 2012. Claimant complained of low back and bilateral leg pain. (Ex. H, p. 1) Dr. Buchannan diagnosed claimant as follows:

> IMPRESSION: compression fracture of the L4 vertebral body. Moderately severe acquired spinal canal narrowing is seen at the L4-5 level. There is severe acquired narrowing of the left at L5-S1 along with mild. Moderate acquired canal narrowing at L3-4.

(Ex. H, p. 3)

Dr. Buchanan advised claimant to lose 50 pounds and to follow a special diet. Dr. Buchanan placed claimant on work restrictions. Claimant was precluded from lifting over 40 pounds on a frequent basis for several weeks. Then claimant could lift up to 60 pounds. (Ex. H, p. 3)

Claimant was referred for a second opinion regarding his back condition. Chad D. Abernathey, M.D., neurosurgeon in Cedar Rapids, examined claimant on February 24, 2012. (Ex. 9, p. 2) Dr. Abernathey reviewed both MRI test results and CT scans and he made the following recommendations:

> **IMPRESSION/RECOMMENDATIONS:** Mr. Theodore Malget clinically presents with persistent low back pain following the L4 compression/burst fracture. I do not recommend an aggressive neurosurgical stance since his symptoms and imaging studies have remained stable. The fracture appears to be stable and he has no associated neurologic deficits. I discussed the risks, goals, and alternatives of conservative management vs, surgical reconstruction with the patient in detail. The patient states he fully understands the breadth of our conversation and concurs. I will be available for further consultation if so desired in the future.

(Ex. 9, p. 2)

In a report to Dr. Broghammer, Dr. Abernathey wrote:

> Thank you for the referral of Mr. Theodore Malget, the gentlemen with and L4 fracture after falling from a stepladder. I agree with Dr. Buchanan that conservative management is the best approach at this time. His neurologic function has remained intact and his fracture appears to be stable. I advised the patient that I would not pursue any additional management at this time and I would not favor kyphoplasty or vertebroplasty. I believe his symptoms will dissipate with time and I see no contraindication to active employment.

(Ex. 9, p. 2)

On May 7, 2012, Dr. Broghammer conducted an examination of claimant in an effort to calculate a permanent impairment rating. Dr. Broghammer opined:

> Mr. Malget did well after his fracture. He continues to have some intermittent back pains and aches, for which he is using a TENS unit. He occasionally takes hydrocodone. His only restriction is seated work as necessary.
>
> **IMPAIRMENT RATING:** Impairment rating is done according to the American Medical Association's *Guide to the Evaluation of Permanent Impairment, Fifth Edition,* hereto and after referred to as the *Guides.* In the *Guides*, Chapter 15 deals with the spine, section 15.4 deals with the diagnosis related estimated for the lumbar spine. This is on page 384 of the *Guides.* Per table 15.4 deals with the diagnosis related estimated for the lumbar spine. This is on page 384 of the *Guides.* Per table 15-3 entitled, "Criteria for Rating Impairment due to Lumbar Spine Injury," Mr. Malget would most clearly fall into DRE lumbar category IV. This is a 20-23% impairment of the whole person. This is for an individual with a fracture greater than 50% compression in one vertebral body without residual neurologic compromise.
>
> I did review Mr. Malget's CT scan, this demonstrated deformity of the posterior margin and superior end plate with 50% AP canal stenosis. I did speak personally with Dr. John Halloran, the original reading radiologist and neuroradiologist at Allen Hospital. Per Dr. Hallorna, Mr. Malget has approximately 80% of central compression in the vertebral body. This would thus place him into a DRE lumbar category IV. As noted previously, this would be a 20-23% impairment of the whole person. The Guides generally instructs evaluators to use the lower end of the corresponding range unless there is a medical reason to use a rating higher than the lowest of the range; thus since Mr. Malget continues to use a TENS unit and take an occasional Vicodin, I would opine that he falls midway through this category. Since Mr. Malget has been doing well with only intermittent problems, I would opine that a **21%** impairment would be appropriate of

> the whole person for his L4 compression fracture with 80% loss of vertebral height and ongoing symptomatology, with use of a TENS unit and occasional use of Vicodin.
>
> My opinions expressed above are those that I currently hold with a reasonable degree of medical certainty based on my education, training and experience as a Board-Certified Specialist in Occupational and Environmental Medicine, licensed to practice allopathic medicine in the State of Iowa.

(Ex. 6, pp. 13-14)

On June 19, 2012, claimant returned to Dr. Broghammer for a follow up appointment. Claimant explained there had been no change in his underlying back fracture. Claimant reported good relief from using a TENS unit and taking an occasional Vicodin. Dr. Broghammer decided to restrict claimant to taking a sit down break when needed at work. (Ex. 6, p. 15) Dr. Broghammer would no longer prescribe narcotic medication for claimant. The dispensing of narcotic medication was transferred to the primary care provider. (Ex. 6, p. 15)

On September 4, 2012, claimant visited the health clinic at John Deere in Waterloo. Claimant reported he was taking three to four hydrocodone per day and on weekends, he took 4 per day. (Ex. 6, p. 17) Claimant reported he could not walk at work for more than 5 to 10 minutes at a time, and he could not stand. Ms. Jean Osgood, NP, provided claimant with a permanent restriction of no walking for more than 10 minutes at any one time. Claimant was provided with a three-wheel bike to navigate around the plant. (Ex. 6, p. 17) He was not the only employee who was using a "three-wheeler" to move from one location to another within the PEC (Tr., p. 78)

On October 16, 2012, claimant returned to Dr. Broghammer with complaints of ongoing pain. Dr. Broghammer informed claimant there would be no more narcotic prescription medications through the John Deere Clinic. Dr. Broghammer opined the work injury had healed after more than one year. (Ex. 6, p. 19) In his clinical note for that date, Dr. Broghammer stated the following in pertinent part:

> I told Mr. Malget that in my opinion given that his back has long since healed, his ongoing back pain may be due to simply his degenerative condition and not necessarily related to his healed compression fracture. Mr. Malget did indicate he would take a pain clinic consultation, he states he wanted it in Iowa City. I told him I would be happy to send him to Iowa City if the pain clinic doctors here could not provide treatment for him. Mr. Malget again became visibly upset and decided he no longer wanted to be seen here at John Deere and left the clinic.

(Ex. 6, p. 19)

In any event, Dr. Broghammer referred claimant to a local physician who specialized in pain management. Ashar Afzal, M.D., treated claimant for chronic pain. (Ex. 5) Dr. Afzal diagnosed claimant with:

> **IMPRESSION:** (1) Compression fracture, L4, healed.
>
> (2) Lower back pain, mostly neurogenic claudication, that is present with activity and absent with sitting down at rest and possibly secondary to lateral recess, neural foraminal, and central canal stenosis at L3-4 and L4-5.
>
> (3) Lumbar facet arthropathy.

(Ex. 5, p. 2)

Dr. Afzal did not relate claimant's pain to the compression fracture. Dr. Afzal opined the symptoms were secondary to walking and secondary to neurogenic claudication that tends to improve when claimant bent forward and flexed his spine. (Ex. 5, p. 2) Dr. Afzal performed epidural steroid injections on November 1, 2012, November 22, 2012 and January 18, 2013.

In a report to Dr. Broghammer, Dr. Afzal discussed the basis for claimant's chronic back pain. Dr. Afzal wrote:

> I have seen Mr. Malget on a few occasions. The majority of his symptoms are secondary to neurogenic claudication present secondary to spinal stenosis, which in part is due to hypertrophy of the ligamentum flavum. These changes do not tend to appear after one injury or incident and tend to be present as ongoing changes of degeneration and deterioration of the lumbar spinal canal structures. It is unlikely for these changes to be present secondary to one incident or one injury. Minimally invasive lumbar decompression is a recently introduced minimally invasive procedure as the name implies for decompression of the spinal stenosis and may help improve a person's symptoms resulting from neurogenic claudication, if other conservative modalities have failed.

(Ex. A, p. 18)

On January 15, 2013, Ray F. Miller, M.D., MPH, performed an independent medical examination pursuant to Iowa Code section 85.39. At that time, claimant reported the following to Dr. Miller:

> Mr. Malget reports that he has no pain with sitting except that by the end of the week, he will get some mild ache in his low back while sitting. He is presently able to walk "one lap" of the Fareway Grocery Store, which he estimates at about 300 feet or one city block. Walking or standing is

limited to about five minutes and then he develops moderate to severe pain, which is improved by sitting. He has some burning pain in both anterior thighs, but no pain in either leg below knee level. He does have some increased pain with bending and twisting. He cannot walk very fast.

(Ex. 2, p. 10)

Dr. Miller diagnosed claimant as follows:

IMPRESSION: A burst fracture of the L4 vertebral body with at least 80% collapse peripherally and essentially 100% collapse centrally. There is no evidence of nerve root impingement or neurologic deficit. There is significant spinal stenosis at the L4 vertebra secondary to the burst fracture.

...

1. The diagnosis is as noted above.

2. The L4 burst fracture occurred at work on September 8, 2011 at the John Deere Waterloo Works related to falling from a step ladder.

3. Mr. Malget is continuing to be treated for his symptoms following healing of the L4 burst fracture. His third and final epidural steroid injection will be this Friday, January 18th. No further evaluation or treatment is planned, so I would consider that date to be the date of maximum medical improvement.

4. Guides to the Evaluation of Permanent Impairment – 5th edition as published by the American Medical Association was used to determine permanent partial impairment. The diagnostic related estimates method of lumbosacral spine impairment is discussed in section 15.4 beginning on page #384. Table 15-3, page #384, discusses the various categories of impairment for the lumbar spine. Mr. Malget has a significant L4 burst fracture with at least 80% compression peripherally and close to 100% compression centrally. He has symptoms of mechanical low back pain, but does not have radiculopathy or nerve deficit. He therefore, would be in diagnostic related estimate lumbar category IV. I would suggest because of the severity of the fracture and the ongoing mechanical low back symptoms, that 23% of the whole person is appropriate.

5. Mr. Malget was evaluated by Therapy Plus following my evaluation today to determine permanent restriction and limitations. The following are recommended:

a. Being on feet limited to 5 minutes at a time.

b. No lifting below knee level or above shoulder level

c. Lift limit 30 pounds at knee to waist level and 50 pounds waist to shoulder level.

d. Push/pull, 2 handed, peak effort 80 pounds occasionally with sustained effort of 35 pounds for a maximum of 100 feet.

e. Overhead work with light parts linked to 30-45 seconds occasionally.

f. Waist level transfers maximum of 50 pounds.

g. Carry at waist level maximum of 30-40 pounds occasionally for maximum of 20 feet.

h. Walking maximum of 100-150 yards at a time.

i. Vertical fixed ladder climb: 10-12 rungs without carrying weight.

6. Mr. Malget currently has symptoms of mechanical low back pain directly related to the residual deformity of the L4 burst fracture and the adjacent disc injuries of L3-L4 and L4-L5. The deformity of L4 and the mechanical back pain are related to his fall from the ladder on September 8, 2011.

7. Mr. Malget's acute fracture at L4 has healed and is stable. He fortunately has no signs of neurologic deficit or nerve root impingement. There is no indication for surgical treatment at the present time. Mr. Malget would be [sic] is best treated with analgesics as needed for control of his pain and to follow the permanent restrictions that have been listed above. It is unlikely that the use of a lumbosacral back support would be of benefit as the pain is generated with standing or walking for a short period of time and not just related to bending, lifting or twisting.

(Ex. 2, pp. 11-12)

Counsel for claimant obtained an employability study. Kent A. Jayne, M.A., M.B.A. C.R.C., Diplomate at the American Board of Vocational Experts, issued both a preliminary vocational economic assessment and a supplemental report. (Exhibit 3) The preliminary report was issued on December 24, 2013. The supplemental report was issued on December 12, 2014.

At the time of the preliminary report, claimant was working at the Project Engineering Center in a position modified to accommodate claimant's work restrictions. Claimant had worked as a functional electrician performing essential tasks for two years

and eight months after his work injury. The modified job did prevent claimant from performing all of the essential tasks of his job as an electrician. However, he did perform vital duties. Additionally, claimant was earning higher wages post-injury than he was earning pre-injury.

Nevertheless, Mr. Jayne, in his preliminary report, opined:

> Based upon the job description as provided, and previous evaluation of individuals in the occupation of electrician, Mr. Malget is not capable of returning to his usual and customary occupation which has comprised the vast majority of his working life. He would be limited to a select range of sedentary occupations...He may remain capable of sedentary, entry level clerical work with accommodation that allowed him to be seated most of the time, and be on his feet no more than five minutes as indicated by Dr. Miller. Given his age and work history, this is an unlikely demand scenario for his residual capacities. With his severely limited bandwidth of transferability, chronic pain reaching severe levels at times requiring medication, and use of TENS, his vocational prognosis for competitive employability is virtually nil. He is clearly not performing at a competitive level in his current job. The employer has seen fit to provide him with a very light duty assignment which essentially allows him to abide by his restrictions. Dr. Miller has indicated concern for progression of his pain.

(Ex. 3, p. 13)

Claimant worked through May 16, 2014. That evening claimant visited his primary care provider in Oelwein, Iowa. (Ex. 7, p. 18) Claimant reported to Lindy Tommasin, ARNP, "He states he is unable to work because he can only be on his feet for about 5 minutes at a time. He is no longer able to bend or lift anything over 10 pounds due to pain and weakness as a result of nerve root impingement." (Ex. 7, p. 18) Ms. Tommasin restricted claimant from working. (Ex. 7, p. 20) May 16, 2014, was the last day claimant worked at John Deere.

Claimant applied for weekly indemnity disability benefits through John Deere. Those benefits are only provided for non-occupational illnesses or injuries. (Ex. A, p. 19) Claimant stated he was disabled due to "chronic back pain." Claimant specifically notified the John Deere nurse's station that under the employee area, claimant wanted the section changed to indicate it was not caused by a post-work fall. (Ex. A, p. 20)

Claimant applied for Social Security disability benefits on or about June 2, 2014. (Ex. L, p. 4) He began receiving his disability benefits from the Social Security Administration in December 2014. Claimant testified he receives $2,220.00 per month in Social Security disability benefits. (Tr., p. 68)

Claimant desired another independent medical examination. Claimant's counsel, referred claimant to Marc E. Hines, M.D., who examined claimant on October 17, 2014. (Ex. 1) Dr. Hines noted the following in his report, in pertinent part:

> **BRIEF REVIEW OF MEDICAL RECORDS:** The patient comes now for an additional opinion with regard to independent medical exam. He states that he does suffer some constipation. He is unable to stand for longer than 5 to 10 minutes. He is unable to walk longer than 5 to 10 minutes, and he finds if difficulty [sic] walking on any uneven ground. He has found that he has lost sexual drive. He wonders if this has anything to do with his medications, but may be also related to difficulty with pain. He finds anything related to walking or standing for any period of time is not possible with regard to social or recreational activities. The patient has pain in his left lateral and superior buttocks, but pain also over the thighs anteriorly with pins and needles, hot burning and numb sensations in the latter areas. The pain is a 6 out of 10 when standing or walking and cannot be ignored for any length of time, and he has pain all of the time to some extent. It limits his playing with kids or grandkids or performing daily activities. It does not generally limit going up and down stairs, getting in and out of car, getting in and out of bed or sleeping. He does feel that the pain medication helps, but for too short of time. With his current medications, he has a Hamilton Anxiety score of 10 and a Beck Depression Inventory of 13, both of these are within normal limits.

(Ex. 1, p. 10)

Dr. Hines diagnosed claimant as follows:

IMPRESSION:

1. This patient has an incidental peripheral neuropathy. In view of the intactness of the neural elements in his back, it seems unlikely that the symmetrical sensory loss in his lower extremities is related to the lumbosacral injury. However, it would be improper to say that his neurologic exam is intact. In fact, he has findings of loss of reflexes previously noted by Dr. Miller and a sensory examination consistent with peripheral neuropathy. I cannot completely exclude the spinal stenosis as part of the etiology of this difficulty. EMG and nerve conduction velocity could be confirmatory in this record. Please see future medical treatment. The patient should at some point have a workup for treatable etiologies of peripheral neuropathy. This portion of his workup would not necessarily be essentially part of his worker's compensation injury, but could be done to exclude the possibility that it is part of the spinal stenosis.

2. The patient has a spinal stenosis which is acquired. Please see the emphasis that I placed on his lumbosacral MRI reading. It was very clear from the outset that the patient had a fracture of the L4 vertebra. The increasing depth of evaluation with MRI and CT clearly demonstrated a very significant and in fact severe burst fracture, which has caused severe spinal stenosis. This has fortunately not impeded the neural elements to the point that surgery was felt to be necessary, but the patient has had gradual progression in symptomatology, to the point that he is no longer able to tolerate the pain and work and has difficulties with striking limitations in terms of his ability to walk or stand.

ETIOLOGY: The etiology of his difficulties is the accident and injury that occurred on September 8, 2011 while working for John Deere, in which he fell from a ladder which had collapsed and fell on his buttocks.

PERMANENCY: This problem is permanent in the sense that I can give no anticipated date of its resolution. The patient in the sense that I am not able to give any date of resolution has reached MMI. However, please see future medical treatment, as there are some unanswered questions that need to be reviewed.

PERMANENT MEDICAL IMPAIRMENT: I have used the Fifth Edition Guides to the Evaluation of Permanent Medical Impairment to give this patient a permanent medical impairment. I concur with previous examiners that the table 15-3, page 384, applies to this patient, and that he has 23% impairment of the whole person. One impairment gave 21% and another 23%, but I think 23 is clearly indicated, given the overall multilevel difficulty which this patient is experiencing. Furthermore, the patient has significant pain, and I would apply an additional 3% whole person impairment simply for the pain, as using the chapter 18 pain chapters. Using combined value tables, page 604, a 23% impairment with 3% is 25% whole person impairment.

RESTRICTIONS: The restrictions which were previously placed by Dr. Miller seem perfectly adequate in one sense. However, it seems reasonable to also review the fact that this patient is no longer able to perform work as well as previously because of the complete exhaustion from pain. He does have some control of the pain with pain medication, but the chronic use of opiate medication, while it is necessary for this patient, will need to be considered from time to time, as the patient will have a need either to have opiate rotation or even some reduction in opiates to try to reinstitute sensitivity to them. Chronic use usually does cause some reduction in sensitivity to the pain medication.

(Ex. 1, pp. 12-13)

Mr. Jayne's supplemental vocational report is dated December 12, 2014. As noted in that report, claimant had ceased working and had applied for his Weekly Indemnity Disability and his Social Security disability benefits. As previously indicated, claimant was also receiving his retirement benefits from the Donaldson Company. Mr. Jayne remained convinced claimant was "incapable of obtaining employment in any reasonably stable branch of the labor market." (Ex. 3, p. 20)

In the arbitration decision, the deputy commissioner did not to discuss the testimony of Mr. Gil Schultz, Safety Manager for the John Deere Waterloo Works. Mr. Schultz is a long-term employee at John Deere. Mr. Schultz acknowledged claimant was accommodated in the workplace, but stated claimant was performing real tasks, such as arc flash, repairing small appliances, and other odds and ends. (Tr. p. 79) Mr. Schultz was asked the following question on direct examination and he provided the following answer:

> Q. (By Mr. McEnroe) All right. But for Mr. Malget deciding to leave work on May 16, of 2014, would he still be employed at John Deere?
>
> A. Yes, he would.

(Trans. p. 79)

RATIONALE AND CONCLUSIONS OF LAW

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960)

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995).

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

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

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

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

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

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

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

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability remains with the claimant. However, when the claimant makes a prima facie case of total disability by producing substantial evidence the claimant is not employable in the competitive labor market, the burden to produce evidence showing the availability of suitable employment then shifts to the employer. If the employer fails to produce

such evidence, and the trier of fact finds the claimant falls into the odd-lot category, the claimant is entitled to a finding of total disability. Guyton at 106.

Factors to be considered in determining whether a claimant is an odd-lot employee include the claimant's reasonable but unsuccessful effort to find steady employment. Whether there is vocational or other expert evidence demonstrating suitable work is not available for the claimant, then there are the factors of the claimant's physical impairment, intelligence, education, age, training and potential for retraining. No factor is necessarily dispositive on the issue. See: Second Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995). As always, the trier of fact is free to determine the weight and credibility of evidence in determining whether the claimant's burden of persuasion had been met.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

Claimant sustained an industrial disability, although he is not permanently and totally disabled. Claimant is not an odd-lot employee under Guyton. At the time claimant left the employ of John Deere, he was employed full time in a position where he had been accommodated for two years and eight months. He had lost no time from work. Moreover, claimant was earning more money per hour after his work injury than he had earned prior to his fall on September 8, 2011. Claimant voluntarily left the workforce. He informed his nurse practitioner he was no longer able to work due to chronic pain. No medical doctor advised claimant to stop working because of his work injury. Claimant completed an application for Work Indemnity Disability benefits under a non-occupational theory. (Ex. A, p. 19) He did not want the form to indicate he was disabled due to a work injury. (Ex. A, p. 20)

Mr. Schultz testified credibly. He testified it was claimant's choice to leave John Deere. But for claimant's voluntary decision, he would still be working at the John Deere Waterloo Works PEC in a full employment capacity. The testimony of Mr. Schultz had great bearing on the determination of the extent of industrial disability.

It is acknowledged claimant was working under some severe restrictions. His condition was non-surgical. Claimant's first independent medical examiner, Dr. Miller, based his restrictions on an evaluation conducted at Therapy Plus. (Ex. 2, p. 12) The restrictions seem plausible, given the nature of claimant's L4 burst fracture. There were three permanent impairment ratings for claimant's spinal condition. The ratings were 21 percent, 23 percent and 25 percent of the body as a whole. No surgical intervention is recommended in the future.

Claimant was 61 years old when he was injured. He continued to work for several years. There is no question claimant was at such an age that retraining was out

of the question. There is little doubt once claimant stopped working at John Deere he was precluded from performing many of his former "hands-on jobs." However, he did have transferable skills available to him in the administrative and supervisory areas. He is employing some of those skills by sitting on the Oelwein City Council.

Therefore, after reviewing all of the factors involving industrial disability, I affirm the deputy commissioner's finding claimant has sustained industrial disability in the amount of 50 percent. Claimant is entitled to 250 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $700.70 per week, commencing on September 9, 2011.

Defendants shall take credit for all weekly benefits paid prior to the hearing, as well as disability income paid pursuant to Iowa Code section 85.38(2). Said credits were included in the stipulations covered by the pre-hearing report.

The next issue for resolution is the matter of the payment of medical expenses as detailed in exhibit 18. In the arbitration decision, the deputy commissioner wrote:

> Claimant seeks payment of medical bills associated with treatment of his back injury. Those expenses were for treatment of the claimant's back injury which I found arose out of and in the course of employment. The bills are itemized in exhibit 18. The listed expenses were fair and reasonable, and necessary for the treatment of the work injury herein. The defendants are responsible for those expenses.

(Arbitration Decision, page 5)

During cross-examination, claimant admitted many of the medications listed in exhibit 18 had nothing to do with claimant's work injury. (Tr., pp. 66-67). Claimant testified as follows:

> Q. (By Mr. McEnroe) So you're not trying to tell us that every medication on Exhibit 18 is something that is related to your back, are you?
>
> A. No.

(Tr.. p. 67)

As indicated in the third paragraph at the beginning of this appeal decision, defendants filed a motion to amend or enlarge reasoning and conclusions of law and order re: arbitration decision filed August 5, 2015. Defendants stated the following in that motion, in pertinent part:

> 1. On pages four and five of the Arbitration Decision the issue of payment of medical expenses claimed by the claimant as itemized in Claimant's Exhibit 18 is addressed.

2. In the order section of the Arbitration Decision the Employer was ordered to pay/reimburse as appropriate medical expenses as detailed above (apparently referencing the Reasoning and Conclusions of Law regarding the Claimant's claimed medical expenses).

3. The medical expenses for which the Claimant is seeking reimbursement were set forth in Claimant's Exhibit 18. A copy of Claimant's Exhibit 18 is attached and incorporated by reference herein.

4. Claimant's Exhibit 18 is a listing of all pharmacy transactions made by the Claimant with the Oelwein Family Pharmacy (Don's Pharmacy, LTD) between September 8, 2011 and December 8, 2014. Exhibit 18 contained prescription information and prescription expense information for numerous prescriptions having no causal relationship to the Claimant's work injury sustained on September 8, 2011 as was admitted by the Claimant during cross-examination at the time of hearing.

5. Neither the Reasoning and Conclusions of Law section nor the Order section of the Arbitration Decision entered in connection with this matter indicate specifically which medical expenses (prescriptions) are causally related to the Claimant's work injury and for which the Employer should be responsible for payment/reimbursement. To avoid potential confusion and/or disputes further clarification with regard to which medications/prescriptions the Employer is being ordered to pay/reimburse would be appropriate.

6. The following prescriptions are the only prescriptions causally related to the Claimant's work injury of September 8, 2011 (See Claimant's Exhibit 18, pages 1-7):

Date	**Drug Name**	**Price/Co-pay**
9/23/11	Hydrocodone	$5.00
10/04/11	Hydrodocone	$5.00
9/10/12	Hydrocodone	$5.00
10/4/12	Hydrocodone	$5.00
10/20/12	Meloxicam	$5.00
11/03/12	Hydrocodone	$5.00

Date	Drug Name	Price/Co-Pay
11/19/12	Meloxicam	$5.00
12/27/12	Hydrocodone	$5.00
03/01/13	Hydrocodone	$5.00
04/06/13	Hydrocodone	$5.00
05/03/13	Hydrocodone	$5.00
06/12/13	Hydrocodone	$5.00
06/15/13	Oxycodone	$5.00
07/12/13	Oxycodone	$5.00
07/29/13	Hydrocodone	$5.00
08/29/13	Hydrocodone	$5.00
09/30/13	Hydrocodone	$5.00
10/01/13	Meloxicam	$5.00
11/08/13	Hydrocodone	$5.00
11/08/13	Meloxicam	$5.00
12/09/13	Meloxicam	$5.00
12/11/13	Hydrocodone	$5.00
01/06/14	Meloxicam	$5.00
01/17/14	Hydrocodone	$5.00
02/05/14	Meloxicam	$5.00
02/14/14	Fentanyl	$5.00
02/14/14	Meloxicam	$5.00
02/27/14	Fentanyl	$5.00

Date	Drug Name	Price/Co-Pay
03/03/14	Meloxicam	$5.00
03/20/14	Fentanyl	$5.00
03/27/14	Hydrocodone	$5.00
03/31/14	Meloxicam	$5.00
04/18/14	Fentanyl	$5.00
04/28/14	Hydrocodone	$5.00
05/08/14	Meloxicam	$5.00
05/17/14	Fentanyl	$5.00
05/17/14	Hydrocodone	$5.00
06/09/14	Meloxicam	$5.00
06/20/14	Fentanyl	$5.00
06/20/14	Hydrocodone	$5.00
07/07/14	Meloxicam	$15.00
07/18/14	Fentanyl	$5.00
07/18/14	Hydrocodone	$5.00
08/21/14	Fentanyl	$5.00
08/21/14	Hydrocodone	$5.00
09/24/14	Fentanyl	$5.00
09/24/14	Hydrocodone	$5.00
10/06/14	Meloxicam	$15.00
11/04/14	Fentanyl	$5.00
11/04/14	Hydrocodone	$5.00

Date	Drug Name	Price/Co-Pay
12/03/14	Fentanyl	$5.00
12/03/14	Hydrocodone	$5.00

The prescriptions for Hydrocodone and Fentanyl were the only prescriptions related to the work injury on September 8, 2011. Those charges totaled $280.00. It is true those charges were prescribed by claimant's personal medical providers. However, claimant was unable to secure pain medication from any of the authorized treating physicians. It is determined defendants are liable for $280.00 in prescription charges for Hydrocodone and Fentanyl.

The third issue for resolution is the matter of alternate medical care pursuant to Iowa Code section 85.27(4). The hearing deputy wrote in the arbitration decision:

> Claimant requires further treatment that defendants are not providing. The alternative medical care is granted.

(Arb. Dec., p. 6)

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 1975).

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

The employee bears the burden to establish what care is reasonable and it is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).The determination will be based on what is reasonably necessary. Long, at 124.

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

In the present case, the record is replete with references where claimant made repeated requests for narcotic pain medications. The authorized treating physicians initially prescribed the requested medications. However, they eventually informed claimant they would no longer prescribe narcotics for pain management. Claimant then sought pain medication from his own family practitioners. He did not seek authorization from defendants to treat with his family medical providers. As a consequence, claimant's family practitioners are not authorized to treat claimant under Iowa Code section 85.27.

Claimant did not follow the procedures provided under Iowa Code section 85.27(4) to seek alternate medical care. He did not communicate his dissatisfaction with the care John Deere had offered him. Claimant did not inform representatives of John Deere the care being offered was not reasonably suited to treat claimant's work-related condition nor did claimant argue the treatment being offered was unduly inconvenient. Claimant made no request for a transfer of care to his family practitioner and/or Nurse Tommasin. Claimant did not satisfy the essential requirements of Iowa Code section 85.27(4). Consequently, claimant is not entitled to alternate medical care.

The final issue for resolution is the matter of costs.

Iowa Code section 86.40 states:

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

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

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is

unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

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

The following costs are taxed to defendants at the arbitration level:

Filing Fee - $100.00; Kent Jayne - $4,462.20; Deposition Copy of Claimant - $87.50. Total - $4,649.70.

With respect to the costs of the appeal, the costs are taxed equally between the parties.

ORDER

IT IS THEREFORE ORDERED that the decision filed on August 5, 2015, is affirmed in part and modified in part.

Defendant shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits commencing on September 9, 2011, payable at the stipulated weekly benefit rate of seven hundred and 70/100 dollars ($700.70).

Defendants shall pay accrued weekly benefits in a lump sum together with interest pursuant to Iowa Code section 85.30.

Defendant shall be given credit for all benefits previously paid, including benefits paid pursuant to Iowa Code section 85.38(2).

Defendant shall pay $280.00 in prior prescription expenses, as detailed in the body of this appeal decision.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding as detailed above, and claimant and defendant shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed this 14th day of February, 2017.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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