BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MOHAMED GARCIA, Claimant, vs. SMITHFIELD FOODS, INC., Employer, and SAFETY NATIONAL CASUALTY CORP., Insurance Carrier, Defendants.	:	File No. 1657969.01 ARBITRATION DECISION Head Note Nos.: 1108.50, 1803, 2907

STATEMENT OF THE CASE

Mohamed Garcia seeks workers' compensation benefits from the defendants, employer Smithfield Foods (Smithfield) and insurance carrier Safety National Casualty Corp. (SNC), for a stipulated work injury to his right leg on September 19, 2018, and two alleged sequelae from it. Pursuant to rules and orders of the agency, the undersigned presided over an arbitration hearing on January 26, 2021, held by internet-based video. Garcia participated personally and through attorney James C. Byrne. The defendants participated by and through Michael J. Miller.

ISSUES

Under rule 876 IAC 4.19(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) Did Garcia sustain a sequela from the stipulated work injury in the form of a:

   a) Back injury; or

   b) Mental injury?

2) What is the nature and extent of permanent disability?

3) What is the commencement date for permanent partial disability (PPD) benefits, if any are awarded?

4) Is Garcia entitled to recover the cost of an independent medical examination (IME)?

5) Is Garcia entitled to taxation of costs against the defendants?

STIPULATIONS

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Garcia and Smithfield at the time of the alleged injury.

2) Garcia sustained an injury on September 19, 2018, to his right leg which arose out of and in the course of his employment with Smithfield.

3) The alleged injury is a cause of temporary disability during a period of recovery, but Garcia's entitlement to temporary disability or healing period benefits is no longer in dispute.

4) The alleged injury is a cause of permanent disability.

5) At the time of the stipulated injury:

    a) Garcia's gross earnings were one thousand one hundred ninety-two and 00/100 ($1,192.00) per week.

    b) Garcia was married.

    c) Garcia was entitled to six (6) exemptions.

6) Prior to hearing, the defendants paid to Garcia forty-four (44) weeks of compensation at the rate of seven hundred ninety and 15/100 dollars ($790.15) per week.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

FINDINGS OF FACTS

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 9;
- Claimant's Exhibits (Cl. Ex.) 1 through 7;

- Defendants' Exhibits (Def. Ex.) A through T; and
- Hearing testimony by Garcia.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Garcia was 41 years old at the time of hearing. (Hrg. Tr. p. 24) He was born in Mexico, where he had ten years of schooling. (Hrg. Tr. p. 25) Garcia immigrated to the United States in or around 1998. (Hrg. Tr. pp. 27–28; Jt. Ex. 3, p. 50)

Having grown up in Mexico and immigrated to the United States, Spanish is Garcia's first language and English his second. (Hrg. Tr. pp. 24–25) Garcia is able to speak and understand some basic English but is unable to understand written English or write English. (Hrg. Tr. p. 25) Garcia requires help from others to translate documents that contain written English so he can understand their contents. (Hrg. Tr. p. 25)

In the United States, Garcia worked in food service at a hotel and a restaurant before Smithfield hired him. (Jt. Ex. 3, p. 50) Garcia had no issues relating to his right leg, back, or mental health before he began employment with Smithfield in 2003. (Hrg. Tr. pp. 30–31; Cl. Ex. 3, p. 50) At Smithfield, Garcia has worked:

- For about a year removing fat from tripes, a job the company has since eliminated, which required lifting 15 to 20 pounds without much bending or twisting. (Hrg. Tr. pp. 31–32)
- For about eight years removing pig bellies, which required lifting bellies that weighed 40 to 70 pounds and a lot of bending and twisting. (Hrg. Tr. pp. 32–33)
- For about five years in the bacon department, which required regularly lifting 15 to 20 pounds and frequent bending and twisting when making pallets. (Hrg. Tr. pp. 33–34)
- In a job called "final rail," which required occasionally carrying bellies weighing 40 or more pounds and frequent bending. (Hrg. Tr. pp. 34–35)
- Since 2017 as a saw operator, the job he held at the time of hearing. (Hrg. Tr. pp. 35–36, 63)

When working as a saw operator, Garcia had to perform the duties of other jobs that involved lifting and walking. (Hrg. Tr. pp. 36, 47) Smithfield changed Garcia's duties so he did not have to work these other positions. (Hrg. Tr. p. 36) At the time of hearing, Garcia's job duties did not include working in other positions that required walking or heavy lifting. (Hrg. Tr. p. 36)

Garcia injured his right knee in June of 2014 while playing soccer. (Jt. Ex. 2, p. 16) The injury caused Garcia pain for three weeks, so he sought care. (Jt. Ex. 2, p. 16) The course of care recommended to Garcia was Icy Hot and Ibuprofen. (Jt. Ex. 2, p. 16) There is no indication in the record a doctor assigned Garcia permanent work restrictions because of the injury or a permanent impairment rating. There is an insufficient basis in the evidence from which to conclude Garcia sustained a permanent impairment from the 2014 soccer injury to his right knee.

On May 5, 2016, Garcia saw RoseMary Mason, M.D., because he was having problems sleeping due to neck pain and stress at work. (Jt. Ex. 2, p. 18) Dr. Mason diagnosed him with nervous stress, neck pain, and insomnia. (Jt. Ex. 2, p. 18) Garcia informed her he wanted something to help him sleep but did "not really want something for stress." (Jt. Ex. 2, p. 18) She prescribed Ambien to help him sleep. (Jt. Ex. 2, p. 18)

Garcia saw David Tan Creti, M.D., at the Crawford County Clinic on July 14, 2016, for complaints of stress, anxiety, and not sleeping well. (Jt. Ex. 2, p. 19) Dr. Creti noted Garcia worked "very long hours in a hard job." (Jt. Ex. 2, p. 19) They discussed good sleep habits. (Jt. Ex. 2, p. 19) Dr. Creti diagnosed him with stress, depression, anxiety, and insomnia. (Jt. Ex. 2, p. 19)

Garcia next sought care for mental health issues at the Crawford County Clinic on March 28, 2017, when he complained of stress, depression, headaches, and insomnia. (Jt. Ex. 2, p. 20) He asked for and received certification for leave under the federal Family and Medical Leave Act (FMLA) for "stress and depression." (Jt. Ex. 2, p. 20) He received a one-year prescription for citalopram with instructions to take it once daily. (Jt. Ex. 2, p. 20)

The FMLA certification paperwork states Garcia's condition began three or four months prior to March 28, 2017, and its probable duration was up to one year. (Jt. Ex. 2, p. 25) It identifies the dates on which Garcia sought care for his depression as May 5, 2016, July 14, 2016, and March 28, 2017. (Jt. Ex. 2, p. 25) Further, it states Garcia was unable to work because of severe stress and depression. (Jt. Ex. 2, p. 25) According to the certification, Garcia was to miss work from March 28, 2017, through April 2, 2017, and may miss four or five days per month after that due to flare-ups of his condition. (Jt. Ex. 2, p. 26) Smithfield approved Garcia's request for FMLA due to depression on April 3, 2017. (Jt. Ex. 2, p. 21–24)

On August 4, 2017, Garcia went to Denison Family Health Center, the clinic of Michael Luft, D.O., with complaints of depression, stress, and insomnia. (Jt. Ex. 3, p. 34) Sara McIntosh, A.R.N.P., performed a PHQ-9 depression screening and noted Garcia reported he:

- Had little interest or pleasure in doing things nearly every day;
- Felt down, depressed, or hopeless nearly every day;
- Had trouble falling or staying asleep, or sleeping too much, nearly every day;

- Felt tired had little energy nearly every day;
- Had a poor appetite or overate not at all;
- Felt bad about himself, that he was a failure, or that he had let himself or his family down several days;
- Had trouble concentrating on things several days;
- Had spoken so slowly or was so fidgety and restless that people may have noticed on several days; and
- Had not thought he would be better off dead or of hurting himself in some way. (Jt. Ex. 3, p. 34)

McIntosh interpreted Garcia's responses and resultant score of 15 to reflect moderately severe depression. (Jt. Ex. 3, p. 34) She prescribed Escitalopram Oxalate for Garcia's depression and referred him to a sleep specialist for his complaints of problems sleeping. (Jt. Ex. 3, p. 36) McIntosh issued doctor's notes for Garcia to miss work due to depression on the following days:

- August 5 and 6, 2017 (Jt. Ex. 3, p. 38);
- September 15 and 16, 2017 (Jt. Ex. 3, p. 39); and
- November 6, 2017 (Jt. Ex. 3, p. 43).

Sometime in 2017, Garcia saw Todd Woollen, M.D., for right-knee pain. (Jt. Ex. 4, p. 131) He underwent x-rays and magnetic resonance imaging (MRI) on his right knee and received an injection. (Jt. Ex. 4, p. 131) The injection "helped the pain go away," according to Dr. Woollen. (Jt. Ex. 4, p. 131) There is an insufficient basis in the evidence from which to conclude Garcia sustained a permanent disability relating to his 2017 complaints of right knee pain. Rather, it is more likely than not the 2017 injury was temporary and resolved with the help of the injection.

Dr. Luft saw Garcia at the Denison Family Health Center on January 30, 2018, because of fungus on his right hand, depression, and insomnia. (Jt. Ex. 3, p. 40) Dr. Luft noted Garcia's "depression has been slightly worse recently." (Jt. Ex. 3, p. 40) Dr. Luft issued a doctor's note excusing Garcia from work that day due to depression. (Jt. Ex. 3, p. 44)

On March 20, 2018, Garcia again sought care at the Crawford County Clinic for problems sleeping and depression. (Jt. Ex. 2, p. 27) The notes document his difficult work, long hours, and that he is married with children. (Jt. Ex. 2, p. 27) Garcia received a doctor's note to be off work for that day and the next, with the plan being for him to return to work on March 22, 2018. (Jt. Ex. 2, p. 27) Garcia obtained recertification of FMLA leave for the same reasons as the March prior, which Smithfield approved. (Jt. Ex. 2, pp. 29–33)

On May 5, 2018, June Myler, A.R.N.P., saw Garcia at the Denison Family Health Center. (Jt. Ex. 3, p. 49) He indicated he had not been sleeping and needed a work note due to depression and stress. (Jt. Ex. 3, p. 49) She issued a doctor's note authorizing Garcia to miss work on May 5, 2018, due to depression and stress. (Jt. Ex. 3, p. 48)

Joey Hoefling, A.R.N.P., saw Garcia at Denison Family Health Center on May 31, 2018. (Jt. Ex. 3, p. 54) He complained of depression that caused him to miss work the day before, though he returned to work earlier that day. (Jt. Ex. 3, p. 55) Hoefling issued a doctor's note requesting Garcia be allowed to miss work on May 30, 2018, due to depression and stress and the afternoon of May 31, 2018, due to the appointment. (Jt. Ex. 3, p. 58)

Garcia returned to Denison Family Health Center on July 19, 2018. (Jt. Ex. 3, pp. 52–54) He informed Hoefling his depression and stress severity had increased slightly due to family concerns with his health over the prior few days. (Jt. Ex. 3, p. 52) Garcia further described his condition as constant with worse symptoms at times. (Jt. Ex. 3, p. 52) Hoefling gave Garcia a note authorizing him to miss work from July 19 through July 22, 2018, due to depression. (Jt. Ex. 3, p. 59)

On September 19, 2018, Garcia injured his right leg while working at Smithfield. (Hrg. Tr. p. 41) He slipped on a piece of meat, fell, and twisted his knee, which resulted in a pop. (Hrg. Tr. p. 41; Jt. Ex. 4, p. 131) Garcia reported his injury and Smithfield provided care. (Hrg. Tr. pp. 41–42)

Dr. Woollen examined Garcia for his leg injury on October 1, 2018. (Jt. Ex. 4, pp. 131–32) Dr. Woollen reviewed Garcia's medical history, including right knee care from two years prior that culminated in an injection that alleviated his symptoms. (Jt. Ex. 4, p. 131) He found this "[h]istory of prior injury was unremarkable." (Jt. Ex. 4, p. 132) Dr. Woollen suspected a ligament strain, assigned work restrictions, prescribed naproxen, and scheduled a follow-up appointment for three weeks later, unless concerns dictated one sooner. (Jt. Ex. 4, p. 132)

Garcia returned to Dr. Woollen on November 5, 2018. (Jt. Ex. 4, p. 133) His pain had not improved and he complained his knee would occasionally lock while walking. (Jt. Ex. 4, p. 133) Dr. Woollen ordered magnetic resonance imaging (MRI), which showed articular cartilage loss, full-thickness articular cartilage fissuring in the lateral femoral condyle and patella, and a lateral meniscal tear with large joint effusion. (Jt. Ex. 4, pp. 133–34) Dr. Woollen referred Garcia to an orthopedic surgeon. (Jt. Ex. 4, p. 134)

The defendants chose Craig Mahoney, M.D., at Iowa Ortho to provide further care. (Jt. Ex. 6, pp. 153–55) He saw Garcia on November 19, 2018, and diagnosed internal derangement of the right knee, caused by the work injury. (Jt. Ex. 6, p. 155) Dr. Mahoney recommended surgery. (Jt. Ex. 6, p. 155) He restricted Garcia to only seated work except for 30 minutes per day. (Jt. Ex. 6, p. 156)

The defendants next chose Bradley Lister, M.D., to provide care for Garcia at Crawford County Memorial Hospital. (Jt. Ex. 7, pp. 157–58) On January 2, 2019, Dr. Lister recommended surgery. (Jt. Ex. 7, pp. 157–59) He discussed in detail Garcia's injury and surgical procedure with him, using models of the knee and a Spanish interpreter. (Jt. Ex. 5, pp. 142–43) Dr. Lister explained the risks, including among others the "possible loss of range of motion and loss of strength and loss of function of the right knee as well as change in walk or gait of the right knee." (Jt. Ex. 5, p. 143)

Garcia returned to Denison Family Health Clinic on January 7, 2019, where Dr. Luft provided care. (Jt. Ex. 3, p. 63) Garcia complained of "increased stress, anxiety[,] and insomnia due to family problems at home." (Jt. Ex. 3, p. 63) He reported he had not gone to work that day because he could not sleep the night before and requested a work note. (Jt. Ex. 3, p. 63) Dr. Luft prescribed "two days off work to regroup" and instructed Garcia follow up as needed. (Jt. Ex. 3, p. 65) He issued a doctor's note requesting Smithfield excuse Garcia from work on January 7, 2019, due to depression and stating he could return to work on January 9, 2019, "or sooner if better." (Jt. Ex. 3, p. 66)

On January 25, 2019, Dr. Lister performed surgery consisting of:

- A right knee arthroscopy;
- Debridement of the right knee;
- A large complex, partial lateral meniscectomy of the complex large, macerated lateral body to anterior horn tears of the lateral meniscus and a partial lateral meniscectomy of the horizontal split tears from the lateral body toward the posterior horn of the lateral meniscus of the right knee;
- Complex partial medial meniscectomy of the small complex medial body to posterior horn tears of the medial meniscus of the right knee;
- Shaving and debridement of the grade II, areas of grade III, and large areas of grade IV (bone-on-bone) chondromalacia of the medial femoral condyle, lateral femoral condyle, lateral tibial plateau, patella, and patellofemoral groove of the right knee;
- Excision and debridement of multiple free floating fragments and debris of the right knee; and
- Partial synovectomy of the synovitis and debridement of the inflammatory tissues of the suprapatella pouch, medial gutter, lateral gutter, and anterior compartment of the right knee. (Jt. Ex. 5, pp. 140, 143–49)

Dr. Lister ordered Garcia off work until January 29, 2019. (Jt. Ex. 5, p. 141) He released Garcia to return to work that day with work restrictions for his right leg of no climbing ladders or stairs, no standing or walking for a period of time, no bending, no squatting, no deep knee bends, no pivoting, no twisting, and no lifting for six to eight

weeks. (Jt. Ex. 5, p. 141) Dr. Lister also directed Garcia he could not get his knee dressings or incisions dirty or greasy, must avoid wet environments, and must avoid environments that are too hot or too cold. (Jt. Ex. 5, p. 141)

Garcia followed up with Dr. Lister after the surgery. (Jt. Ex. 7, pp. 160–172) He returned to work with restrictions as planned. (Jt. Ex. 7, p. 161) On February 13, 2019, Garcia complained of what Dr. Lister documented as continued "mild to moderate globalized pain of the knee with activities." (Jt. Ex. 7, p. 161)

On March 6, 2019, Garcia reported "his pain, swelling and symptoms are slowly improving" and that he had mild daily swelling. (Jt. Ex. 7, 163) Garcia's swelling, pain, and inflammation in his surgically repaired knee was significant enough to necessitate a cortisone injection. (Jt. Ex. 7, p. 164) Nonetheless, Garcia was "able to stand and ambulate out of the clinic without any difficulty." (Jt. Ex. 7, p. 164)

The injection helped alleviate Garcia's symptoms enough that he told Dr. Lister he felt much better during a March 20, 2019 follow-up appointment. (Jt. Ex. 7, pp. 165) He had "no new complaints to report" to Dr. Lister. (Jt. Ex. 7, p. 165) Dr. Lister lifted Garcia's work restrictions effective March 25, 2019. (Jt. Ex. 7, p. 166)

Garcia returned to Denison Family Health Center on March 22, 2019, complaining of increased stress and depression because of family issues. (Jt. Ex. 3, p. 67) He told Kelli Borkowski, A.R.N.P., he had not been sleeping well for the last two days. (Jt. Ex. 3, p. 67) Garcia told Borkowski he felt he had anxiety and depression because of stressors relating to his family and work. (Jt. Ex. 3, p. 68) He requested a work note for March 21 and 22, 2019, because of his symptoms. (Jt. Ex. 3, p. 67) Borkowski classified it as a "[m]oderate episode of recurrent major depressive disorder," discussed treatment options including medication and psychotherapy, and gave him a work note as requested. (Jt. Ex. 3, pp. 68–70)

On April 17, 2019, Garcia stated he had pain when he ambulated for extended time, runs, or uses stairs. (Jt. Ex. 7, p. 168) He took Ibuprofen when his pain increased, which helped. (Jt. Ex. 7, p. 168) Garcia associated a fifty to seventy-five percent improvement in his symptoms following the cortisone shot on March 6, 2019. (Jt. Ex. 7, p. 168) Because of Garcia's ongoing symptoms, Dr. Lister recommended Visco supplementation injection, Synvisc One. (Jt. Ex. 7, p. 168) Dr. Lister administered an injection of Synvisc One on May 22, 2019. (Jt. Ex. 7, p. 170–71)

Garcia returned to see Dr. Lister on June 19, 2020. (Jt. Ex. 7, p. 172) He described Garcia's recovery from knee surgery as "uneventful," despite the cortisone and Synvisc One injections and "occasional knee pain with stairs, deep knee bends, and squats." (Jt. Ex. 7, p. 172) He found Garcia had reached MMI and did not require any permanent work restrictions. (Jt. Ex. 7, p. 172) Dr. Lister advised Garcia to use the NSAID of choice and to elevate and ice his knee as needed. (Jt. Ex. 7, p. 172)

On a Crawford County Memorial Hospital form Dr. Lister completed, signed, and dated July 22, 2019, he provided to Smithfield his opinion regarding Garcia's recovery. (Jt. Ex. 7, 174–75) Dr. Lister identified June 19, 2019, as the date on which Garcia reached maximum medical improvement (MMI). (Jt. Ex. 7, p. 174) He reiterated he had released Garcia to return to work with no restrictions. (Jt. Ex. 7, p. 174) Dr. Lister also indicated he had released Garcia from his care and could ice and elevate his knee and use NSAIDs such as ibuprofen or naproxen for episodes of irritation or inflammation. (Jt. Ex. 7, p. 174)

Further, Dr. Lister opined Garcia sustained a twenty percent impairment to the lower extremity from the work injury. (Jt. Ex. 7, p. 174) The form states, "'Guides to Evaluation of Permanent Impairment' AMA, Fifth Edition was used for calculation of the impairment rating." (Jt. Ex. 7, p. 174) Dr. Lister did not identify any pages, tables, or figures he might have used in arriving at his opinion on permanent impairment. (Jt. Ex. 7, p. 174)

On July 11, 2019, Borkowski administered a PHQ-9 depression screening on Garcia and recorded he:

- Had little interest or pleasure in doing things more than half of the days;
- Felt down, depressed, or hopeless nearly every day;
- Had trouble falling or staying asleep, or sleeping too much, more than half of the days;
- Felt tired had little energy nearly every day;
- Had a poor appetite or overate several days;
- Felt bad about himself, that he was a failure, or that he had let himself or his family down more than half the days;
- Had trouble concentrating on things several days;
- Had spoken so slowly or was so fidgety and restless that people may have noticed on several days; and
- Had thought he would be better off dead or of hurting himself in some way several days. (Jt. Ex. 3, p. 71)

Borkowski interpreted Garcia's responses to be a score of 16 and equate to moderately severe depression. (Jt. Ex. 3, p. 71) She also assessed a General Anxiety Disorder (GAD) screening that resulted in a score of 13. (Jt. Ex. 3, p. 71)

During Garcia's visit, he complained to Borkowski of "increased stress due to long work hours" and "increased anxiety due to son's chronic heart condition." (Jt. Ex. 3, p. 72) Borkowski classified Garcia's symptoms as a "[m]oderate episode of recurrent

major depressive disorder." (Jt. Ex. 3, p. 73) She gave him a note requesting Smithfield allow him to be off work beginning on July 11, 2019, due to depression, and return on July 15, 2019. (Jt. Ex. 3, p. 74) Borkowski also filled out FMLA certification paperwork that formed the basis for Smithfield again approving Garcia for intermittent FMLA leave due to depression. (Jt. Ex. 3, pp. 75–80)

Ultimately, Dr. Lister released Garcia to return to full-duty work at Smithfield on March 25, 2019. (Jt. Ex. 7, p. 164) Garcia returned to work as a saw operator, the position he held before his right-leg injury. There is no indication in the record from which to conclude the injury negatively impacted his wage rate, hours worked, or earnings. At the time of hearing, Garcia was earning a higher hourly wage than he did on the date of injury. (Hrg. Tr. p. 86)

On September 16, 2019, Garcia returned to Denison Family Health Center, where Borkowski performed another PHQ-9 depression screening and found he:

- Had little interest or pleasure in doing things more than half of the days;
- Felt down, depressed, or hopeless nearly every day;
- Had trouble falling or staying asleep, or sleeping too much, nearly every day;
- Felt tired had little energy nearly every day;
- Had a poor appetite or overate several days;
- Felt bad about himself, that he was a failure, or that he had let himself or his family down on more than half the days;
- Had trouble concentrating on things on more than half the days;
- Had spoken so slowly or was so fidgety and restless that people may have noticed on more than half the days; and
- Had not thought he would be better off dead or of hurting himself in some way. (Jt. Ex. 3, p. 82)

Borkowski calculated Garcia's responses equaled a total score of 18 for a diagnosis of moderately severe depression. (Jt. Ex. 3, p. 82) She also performed a GAD screening and Garcia scored 15. (Jt. Ex. 3, p. 82) During the exam, Garcia told Borkowski his depression began getting worse in January and his medication was not as effective. (Jt. Ex. 3, p. 82)

During the exam, Garcia complained of right-knee pain and low back pain that comes and goes. (Jt. Ex. 3, p. 82) Garcia rated his pain at three on a scale of zero to ten. (Jt. Ex. 3, p. 83) He linked his depression related to working long hours and his knee pain. (Jt. Ex. 3, p. 83) Garcia also told Borkowski his stress and depression were

increasing because his workers' compensation case had been closed, doctors had told him he might need additional surgery, and he was trying to figure out if the workers' compensation insurance carrier would cover any additional surgery. (Jt. Ex. 3, p. 82)

Borkowski categorized the reason Garcia came to the clinic was a "[m]oderate episode of recurrent major depressive disorder." (Jt. Ex. 3, p. 84) She noted she reviewed his current treatment regime and made changes because his "symptoms [were] not well controlled." (Jt. Ex. 3, p. 84) Borkowski gave Garcia a work note asking he be excused from work on September 16, 2019, due to depression. (Jt. Ex. 3, p. 86)

Garcia returned to the Denison Family Health Center on September 25, 2019, complaining of a cough, depression, and insomnia. (Jt. Ex. 3, p. 88) Julie Nielsen, A.R.N.P., noted Garcia believed he was experiencing "worsening depression since failed knee surgery 8 months ago. Difficulty working because of pain." (Jt. Ex. 3, p. 88) She diagnosed him with sinusitis and a moderate episode of recurrent major depressive disorder. (Jt. Ex. 3, p. 89) Nielsen gave him a work note asking that he be excused from work on September 23, 2019, due to depression and stress, and stating he could return on September 27, 2019, or sooner if he was feeling better. (Jt. Ex. 3, p. 87)

Dr. Luft examined Garcia on November 11, 2019, for stress and depression. (Jt. Ex. 3, p. 90) During Dr. Luft's PHQ-9 depression screening, Garcia stated he:

- Had little interest or pleasure in doing things more than half of the days;
- Felt down, depressed, or hopeless several days;
- Had trouble falling or staying asleep, or sleeping too much, several days;
- Felt tired had little energy several days;
- Had a poor appetite or overate several days;
- Felt bad about himself, that he was a failure, or that he had let himself or his family down on several days;
- Had trouble concentrating on things on several days;
- Had spoken so slowly or was so fidgety and restless that people may have noticed on several days; and
- Had not thought he would be better off dead or of hurting himself in some way. (Jt. Ex. 3, p. 90)

Dr. Luft gave Garcia a total score of nine and interpreted him to have mild depression. (Jt. Ex. 3, p. 90) Garcia told Dr. Luft he had experienced more stress lately and been unable to sleep the night before. (Jt. Ex. 3, p. 90) He gave Garcia a work note requesting he be excused from work November 11, 2019. (Jt. Ex. 3, p. 93)

On November 15, 2019, Garcia saw Amanda LeFebvre, A.R.N.P., at Denison Family Health Clinic due to stress and depression. (Jt. Ex. 3, p. 94) During the PHQ-9 depression screening, Garcia stated he:

- Had little interest or pleasure in doing things more than half of the days;
- Felt down, depressed, or hopeless more than half of the days;
- Had trouble falling or staying asleep, or sleeping too much, several days;
- Felt tired had little energy more than half of the days;
- Had a poor appetite or overate more than half of the days;
- Felt bad about himself, that he was a failure, or that he had let himself or his family down nearly every day;
- Had trouble concentrating on things on more than half of the days;
- Had spoken so slowly or was so fidgety and restless that people may have noticed on more than half of the days; and
- Had thought he would be better off dead or of hurting himself in some way on several days. (Jt. Ex. 3, p. 94)

LeFebvre scored Garcia's responses at 17, which equated to moderately severe depression. (Jt. Ex. 3, p. 94) Her GAD screening resulted in a 17 score (Jt. Ex. 3, p. 94) He told LeFebvre his depression and anxiety had increased due to pending surgery on his right knee. (Jt. Ex. 3, p. 94) Garcia also complained of "pain from lower back radiating into knee." (Jt. Ex. 3, p. 94) LeFebvre considered it a moderate episode of recurrent major depressive disorder and gave him a work note asking that he be excused on November 25, 2019, for depression and stress. (Jt. Ex. 3, p. 100)

Garcia attended an independent medical examination (IME) arranged by his attorney with Sunil Bansal, M.D., at the Iowa Injury Institute on November 25, 2019. (Cl. Ex. 1, p. 1) As part of the IME, Dr. Bansal performed an in-person examination and review of the records from the Denison Family Health Center, Iowa Ortho, Crawford County Memorial Hospital, and Iowa Radiology. (Cl. Ex. 1, pp. 1–6) Dr. Bansal agreed with Dr. Lister's diagnosis of the right knee and also diagnosed Garcia with sacroiliitis, depression, and anxiety. (Cl. Ex. 1, p. 7)

Dr. Bansal also discussed Garcia's job duties with him. (Cl. Ex. 1, p. 5) The duties of sawing pigs involves making a vertical cut with a saw. (Cl. Ex. 1, p. 5) Garcia told Dr. Bansal that "[h]e does not have to walk much, as he stands in one place." (Cl. Ex. 1, p. 5) Thus, it is more likely than not that Dr. Bansal understood at the time he wrote his report that Garcia's job duties at Smithfield at the time of the IME did not involve much walking. Garcia's job duties did not significantly change in nature between then and the time of hearing.

On causation, Dr. Bansal opined meniscal injuries are common, they cause early-onset post-traumatic osteoarthritis in fifty to sixty percent of patients, Garcia sustained a torn meniscus, and it accelerated degenerative issues in his injured knee in a way consistent with pathophysiology following a meniscal tear. (Cl. Ex. 1, p. 8) With respect to Garcia's back, Dr. Bansal concluded:

> [M]y diagnosis is sacroiliitis that has progressively worsened in intensity from the altered gait secondary to his extensive right knee pathology. Dr. Cohen from John Hopkins University Medical School states that risk factors for sacroiliitis included leg length discrepancy or altered gaits. It is logical that the back pain manifested months after his right knee injury, as this is a cumulative process. As his right knee pathology and pain is permanent, it follows that his back pathology is permanent as it is being aggravated by his antalgic gait resulting from his knee.

(Cl. Ex. 1, p. 8 (citing Cohen S. Sacroiiliac joint pain: a comprehensive review of anatomy, diagnosis, and treatment. Anesth Anaig. 2005 Nov; 101(5):1440–53))

Dr. Bansal opined Garcia had reached MMI on November 25, 2019. (Cl. Ex. 1, p. 7) Dr. Bansal opined on permanent impairment thusly:

- He used Table 17-33 of the Guides to assign a ten percent lower extremity impairment for Garcia's lateral and medial meniscectomy and Table 17-31 to assign seven percent lower extremity impairment for the aggravation of knee arthritis with 3 mm cartilage interval of the medial joint space. (Cl. Ex. 1, p. 8) Dr. Bansal then combined these ratings for a sixteen percent lower extremity impairment or six percent of the whole person. (Cl. Ex. 1, p. 8)

- Based on Garcia's radicular complaints, loss of range of motion, guarding, and positive provocative testing of his right sacroiliac joint, he concluded he was in the DRE Category II impairment for his back and assigned a three percent whole person impairment using Table 15-3 of the Guides. (Cl. Ex. 1, p. 9)

Dr. Bansal assigned Garcia the permanent work restrictions of:

- No frequent kneeling, squatting, bending, or twisting;

- No lifting greater than forty pounds; and

- Avoid multiple stairs. (Cl. Ex. 1, p. 9)

Dr. Bansal opined Garcia may need care in the future. (cl. Ex. 1, p. 9) He thinks Garcia may benefit from intermittent viscosupplementation and steroid injections in his right knee. (Cl. Ex. 1, p. 9) Dr. Bansal believes he may also benefit from intermittent steroid injections in his sacroiliac joint. (Cl. Ex. 1, p. 9)

Julie Nielsen, A.R.N.P., saw Garcia at Denison Family Health Clinic on December 16, 2019, because he had complaints of stress and depression. (Jt. Ex. 3, p. 101) During the PHQ-9 depression screening, Garcia stated he:

- Had little interest or pleasure in doing things more than half of the days;
- Felt down, depressed, or hopeless more than half of the days;
- Had trouble falling or staying asleep, or sleeping too much, more than half of the days;
- Felt tired had little energy more than half of the days;
- Had a poor appetite or overate more than half of the days;
- Felt bad about himself, that he was a failure, or that he had let himself or his family down on several days;
- Had trouble concentrating on things on more than half of the days;
- Had spoken so slowly or was so fidgety and restless that people may have noticed on several days; and
- Had thought he would be better off dead or of hurting himself in some way on several days. (Jt. Ex. 3, p. 101)

Nielsen interpreted Garcia's 15 score to equate to moderately severe depression. (Jt. Ex. 3, p. 101) She administered a GAD screening on which Garcia scored a 13. (Jt. Ex. 3, p. 101) Garcia told Nielsen his depression had increased because of a family situation and unsuccessful knee surgery causing him right-knee pain for which he may need more surgery. (Jt. Ex. 3, p. 101–02) Nielsen categorized Garcia's condition as "severe depression" and gave him two work notes, the second of which requested he be excused from work on December 14, 2019, due to stress and depression, and stating he may return to work on December 19, 2019, or sooner if better. (Jt. Ex. 3, p. 106)

On February 3, 2020, Garcia saw Dr. Luft for stress, depression, and knee pain. (Jt. Ex. 3, p. 107) Garcia shared that his stress had increased, which impacted his sleep, due to "family concerns." (Jt. Ex. 3, p. 107) He also complained of intermittent knee pain that radiated to his lower back. (Jt. Ex. 3, p. 107) Dr. Luft increased Garcia's sertraline prescription from 50 mg to 100 mg and issued a note requesting he be excused from work on February 3, 2020, due to depression, and that he may return on February 7, 2020, or sooner if better. (Jt. Ex. 3, p. 110)

Garcia saw Borkowski at Denison Family Health Clinic on April 17, 2020, because of low-back and knee pain. (Jt. Ex. 3, p. 111–12) On July 14, 2020, Garcia returned t to have his FMLA certification paperwork filled out for renewal. (Jt. Ex. 3, p. 114) On August 21, 2020, Nielsen saw Garcia there for insomnia, knee, and hand discomfort, which resulted in a work note requesting Garcia be excused from work on

August 21, 2020, for depression, and that he may return on August 25, 2020, or sooner if better. (Jt. Ex. 3, pp. 117–21)

Garcia slipped on stairs at work on July 11, 2020, which caused a second injury to his right knee and the pain in his lower back to increase. (Def. Ex. R, p. 68, Depo. Tr. pp. 16–17) He told his supervisor at Smithfield about the injury, obtained care from a nurse there who instructed him to ice the injury, and filled out an injury report. (Def. Ex. R, p. 68, Depo. Tr. pp. 17) Because Garcia's pain did not go away, he went to Dr. Lister. (Def. Ex. R, p. 68, Depo. Tr. p. 17)

On July 29, 2020, Lori Johannsen, PA-C to Dr. Lister, observed "extensive articular surface damage to the lateral and medial compartments" and concluded "a knee arthroscopy will not address [the] articular surface pathology." (Jt. Ex. 7, p. 176) She assigned him a work restriction of no lifting above twenty pounds for six weeks and recommended referral to a joint resurfacing specialist in the orthopedic department at the University of Nebraska Medical Center. (Jt. Ex. 7, p. 176)

Garcia saw Chris Cornett, M.D., for a medical examination arranged by the defendants on October 7, 2020, that included a Spanish interpreter participating by telephone. (Def. Ex. A) Dr. Cornett's examination included a review of records from Crawford County Memorial Hospital, Crawford County Clinic, Denison Family Health Center, Iowa Ortho, and Dr. Bansal. (Def. Ex. A, pp. 1–4) Dr. Cornett also examined Garcia and discussed his injury, care, and symptoms with him. (Def. Ex. A, pp. 1, 4)

According to Dr. Cornett's report, Garcia told him he had no knee problems before the 2019 injury even though he previously sought care for a temporary knee injury. (Def. Ex. A, p. 1) Dr. Cornett later classified Garcia's statement as a denial of "any significant past medical history," which is in line with the care Garcia received for a temporary injury years prior. (Def. Ex. A, p. 4) Garcia also incorrectly identified the year in which the work injury occurred during the examination. (Def. Ex. A, p. 1) Dr. Cornett further asserts:

> He tells me that after the injury, he returned to work and had difficulty putting weight on his right side and he started having low back pain. He did not feel that he injured his low back with the fall. He tells me now that he has low back pain that he rates at 8 out of 10. He states that he gets pain in the low back and in [the] right lower extremity. He denies any bowel or bladder complaints. He has some numbness and tingling in the sole of his foot and at his waistline. He reports weakness in the right knee with walking as well.
>
> He also tells me that he had another fall on July 11, 2020, which caused overall increased pain. He denies any prior treatments for his back.

(Def. Ex. A, p. 1)

Dr. Cornett agreed with Dr. Mahoney's diagnosis and its relation to the work injury. (Def. Ex. A, p. 5) In Dr. Cornett's opinion, Garcia "certainly [had] some pre-existing arthritic changes in the knee that would be unrelated," but he does not go into further detail or explain this determination. (Def. Ex. A, p. 5) He also concluded that with respect to Garcia' leg injury, he agreed with Dr. Lister's identification of Garcia's MMI date, impairment rating, and that the injury requires no permanent work restrictions. (Def. Ex. A, p. 5)

Moreover, Dr. Cornett opined:

> With regards to his back, there was no injury to his back at the time of the accident. Given the involvement and treatment of his knee that has been performed, despite any residual pain in the knee or any residual limp, I see no evidence of any injury to his back. I would not be able to relate his injury in question or subsequent treatment and ongoing symptoms in his knee to any impairment or difficulty with his back. Therefore, in my opinion, he did not suffer a back injury related to this injury in question or treatment of this injury in question. There would be no impairment or limitations for his back regarding this injury in question.

(Def. Ex. A, p. 5)

Defense counsel asked Dr. Cornett "whether, in [his] opinion, Mr. Garcia has an antalgic gait and, if so, if the same has resulted in a permanent or material aggravation of back pathology." (Def. Ex. A, p. 5) He answered:

> In my medical opinion, no. He had a mild limp on my exam. However, given the relatively mild injury to his knee, namely a twisting injury with a meniscus tear, and subsequent arthroscopic treatment, there is no evidence to support this claim other than anecdotal evidence that any altered gait would have affected his back. Therefore, I would find no impairment, no limitations for his back, and relevant related injury to the back.

(Def. Ex. A, p. 5)

In a note dated October 7, 2020, and apparently sent by facsimile on behalf of Dr. Lister, Matthew Tao, M.D., is identified as a doctor to consult regarding Garcia's injury. (Jt. Ex. 7, p. 177) On October 20, 2020, Garcia saw Dr. Tao, who did not reference a 2020 injury under the heading "History of Present Illness" in the records of the exam. (Jt. Ex. 8, p. 178) Consequently, it is more likely than not Garcia was no longer experiencing the increased pain on October 20, 2020, of which he complained earlier and related to the fall earlier that year at Smithfield.

Dr. Tao opined he did "not have a good solution for him at this time." (Jt. Ex. 8, p. 181) He was encouraged that Garcia did not have severe arthritis in his right knee after the injury and surgery. (Jt. Ex. 8, p. 181) Dr. Tao did not think further arthroscopic surgery would provide significant benefit due to the underlying chondral changes. (Jt.

Ex. 8, p. 181) The lack of a compartmental collapse militated against total knee replacement. (Jt. Ex. 8, p. 181) Garcia's experience with injections providing little relief left him uninterested in more. (Jt. Ex. 8, p. 181) Consequently, according to Dr. Tao, Garcia "will be left in some level of pain and functional impairment in knee" due to the lack of a good solution to provide reliable pain relief and functional restoration. (Jt. Ex. 8, p. 181)

Defense counsel sent Dr. Tao a check-box letter dated November 12, 2020, asking if Garcia required "any activity/employment restrictions" relating to his right knee. (Jt. Ex. 8, p. 183) Dr. Tao indicated "No" and explained he did "not recommend further formal restrictions beyond what is already in place" from Dr. Lister and Dr. Bansal. (Jt. Ex. 8, p. 183) Dr. Tao signed and dated his response December 4, 2020. (Jt. Ex. 8, p. 183)

On October 29, 2020, Garcia underwent a neuropsychological evaluation arranged by the defendants with Robert Arias, Ph.D. (Jt. Ex. 9, p. 184) Garcia incorrectly told Dr. Arias that before the work injury he had very little emotional distress, no pre-existing mental health treatment, and no functional interference. (Jt. Ex. 9, p. 184) The medical records and Garcia's statements to Dr. Ressler show this is false and he more likely than not knew the statement to Dr. Arias was false when he made it.

Dr. Arias administered a series of tests on Garcia. (Jt. Ex. 9, p. 185) It is unclear based on Dr. Arias's report whether he administers these tests as part of every examination he performs or if he made individualized choices for Garcia. (Jt. Ex. 9, pp. 184–89) On performance validity testing, Dr. Arias noted:

> On the Green's Word Memory Test, the claimant failed one of the five indices. On the Twenty-One Item Test, performance was within normal limits. On the TOMM, trial one score was a fail, with a raw score of 37. Trial two score was within normal limits. Notably, failure on two or more performance validity tests equates to a 95% chance of other cognitive measures being an underestimate of true ability due to poor effort. Results will be interpreted in this light.

(Jt. Ex. 9, p. 186)

With respect to the testing on emotional functions, Dr. Arias noted:

> Results of the MMPI-2 are considered to be somewhat of an overestimate of current symptomology, particularly somatically. There was also elevated variability in his response, indicating some inconsistency in his responses to items of similar content. The Fake Bad Scale score was elevated indicating somatic symptom overreporting. The clinical profile contained 6 out of 10 significant elevations, most notably indicating elevated symptoms of depression. Similar individuals may overreact to minor stressors or feel vulnerable to real or imagined threats. They also tend to be isolative, with a pattern of social avoidance. Others tend to see them as

> introverted. They tend to withdraw from stress into fantasy characteristically. They also tend to report significant cognitive dysfunction. These individuals utilize repression as a primary ego defense. They also report distress in their interpersonal relationships, particularly maritally. Their somatic complaints tend to be primarily neurological in nature. They also tend to be plagued by self-doubt and low motivation.

(Jt. Ex. 9, p. 186)

Dr. Arias opined Garcia did not present as indicated for any mental health treatment in relation to the work injury. (Jt. Ex. 9, p. 184) He did not believe any such care would be needed in the future. (Jt. Ex. 9, p. 184) Dr. Arias felt any care Garcia required would be for his pre-existing condition. (Jt. Ex. 9, p. 184)

Dr. Arias also "caution[ed] other providers with regard to solely utilizing this claimant's subjective pain and perception of disability to impart permanent work restrictions." (Jt. Ex. 9, p. 184) He opined this would not be in Garcia's best interest and would "likely lead to further disability." (Jt. Ex. 9, p. 184) Dr. Arias also advised other medical professionals that any work restrictions should be based only on "objective medical findings." (Jt. Ex. 9, p. 184)

Garcia's attorney conferenced with Dr. Luft on November 18, 2020. (Jt. Ex. 3, p. 122) Two days later, Garcia's attorney sent Dr. Luft a letter that summarized Garcia's care and the opinions of Drs. Bansal, Lister, Tao, and Arias, and asked a series of questions with spaces to indicate if he agreed or disagreed with the statement or question posed. (Jt. Ex. 3, pp. 122–30) Dr. Luft signed his responses and dated them December 7, 2020. (Jt. Ex. 3, p. 130) In Dr. Luft's responses, he indicated:

- He regularly treats conditions and injuries to the leg, back, and relating to mental health;
- During Garcia's care at Denison Family Health Clinic over the previous years, he has found Garcia "to be credible and forthcoming regarding his physical and mental symptoms, and also regarding his medical history, including his mental health symptoms and the mental health treatment he received prior to commencing care" at the Clinic;
- Because he has found Garcia to be credible, he disagrees with Dr. Arias's characterization of Garcia's credibility;
- Dr. Bansal's conclusions regarding Garcia's injuries to the right leg and back "from an altered gait following his work injury to his right knee" are reasonable;
- Garcia's has major depressive disorder which was substantially aggravated in at least substantial part by the chronic pain and physical limitations caused by the stipulated work injury and it "represents a

permanent mental sequela" because the work injury has caused permanent impairment; and

- He believes Garcia's permanent mental health sequela will require ongoing care, including medication, and will likely cause him to miss more time from work in the future (likely multiple days of work each month) than before the work injury to his leg due to the issues it caused Garcia with concentration and attention at work. (Jt. Ex. 3, pp. 129–30)

- After Dr. Bansal issued his IME report, he reviewed additional medical records relating to Garcia's examinations with Drs. Cornett, Tao, Arias, and Ressler, as well as the Dr. Luft's responses to claimant's counsel. (Cl. Ex. 1, p. 11–12)

Defense counsel shared Dr. Luft's response to the letter from Garcia's attorney with Dr. Arias and asked for his response. (Def. Ex. C, p. 18) In a letter Dr. Arias signed and dated December 17, 2020, he stated in pertinent part (sic):

> There is not indication that Dr. Luft applied any empirical validity assessment to the claimant. Empirical research is clear that clinicians do a very poor job at identifying problems in performance/symptom validity through only observation, rather than applying empirically validated assessment tools to determine the validity of symptoms and performance.
>
> ****
>
> Dr. Luft is not a psychologist. He is not qualified to perform psychological/neuropsychological assessments. In fact, Dr. Luft thus did not conduct any psychological/neuropsychological assessment of this claimant to provide a competent, valid assessment of this individual's symptomatology and performance. He did not obtain any objective assessment of psychological constructs, such as depression or anxiety, nor his current cognitive status that would have otherwise allowed well-founded opinions with regard to his cognitive and emotional status and the validity thereof.
>
> ****
>
> After reviewing this information, there is certainly nothing in the report from Dr. Luft that is compelling from a competent, empirical standpoint that would result in any change I my previous opinions. Dr. Luft has not offered any empirical rebuttal to the data that were collected by the undersigned in my October 29, 2020, evaluation of Mr. Garcia. He also did not provide any substantive rebuttal with regard to the direct contradictions offered by the claimant to the undersigned relative to the information contained in records.

(Def. Ex. C, p. 18–19)

On December 9, 2020, Garcia saw licensed psychologist Catalina Ressler, Ph.D., for an IME arranged by his attorney. (Cl. Ex. 2, p. 16) Dr. Ressler reviewed records relating to Garcia from Smithfield, Crawford County Clinic, Crawford County Memorial Hospital, Iowa Ortho, Denison Family Health Center, Nebraska Medicine Oakview, Arias Neuropsychology and Behavior Medicine, and Dr. Luft's responses to the questions from Garcia's attorney. (Cl. Ex. 2, p. 16) She also performed an interview of Garcia that included background information, his level of functioning prior to the work injury, the work injury, and his level functioning after the work injury. (Cl. Ex. 2, pp. 16–20) Dr. Ressler performed a mental status exam on Garcia as well. (Cl. Ex. 2, p. 20)

Based on Dr. Ressler's review of the records, interview with Garcia, and mental status exam, she diagnosed him with "somatic symptom disorder with a predominant experience of pain that is severe in nature," using the DSM-5 *Diagnostic and Statistical Manual of Mental Disorders*. (Cl. Ex. 2, p. 21) She elaborated in her report:

a. Mr. Garcia's somatic symptoms (i.e., authentic chronic pain to his right knee, right leg, and his back all of which appear to be medically explained) are distressing to him and have resulted in significant disruption to his daily life (e.g., sleep, social interactions, daily activities, work).

b. He is also presenting with excessive thoughts, feelings, and behaviors related to the somatic symptoms as manifested by the following:

    1. Disproportionate and persistent thoughts about the seriousness of his symptoms (e.g., the belief that he will: never be able to get the additional surgeries he requires to be able to heal from the pain; he will lose his job because of his condition and no one will hire him because he is "broken" and injured; will suffer from paint he rest of his life; etc.)

    2. Persistent high level of anxiety about symptoms (e.g., constant desire to be pacing or escape his circumstances; ongoing preoccupation about losing employment or injuring himself again; etc.)

    3. Excessive time and energy devoted to these symptoms (e.g., having difficulty sleeping because of anxiety and pain and waking up frequently to address the experience of pain; spending most of his time thinking or behaving in ways that help to prevent another injury or to reduce the experience of pain; etc.)

c. The state of being symptomatic about his somatic concerns has persisted for over six months.

(Cl. Ex. 2, p. 21)

> Dr. Ressler addressed Garcia's pre-existing mental health conditions:
>
> As [Garcia] explained in his social history (and consistent with his medical records), Mr. Garcia was suffering from episodes of anxiety and/or depression for the six years preceding his injury. Moreover, his experience of depression and anxiety did in fact impact his level of adaptive functioning at times and he was excused from work on occasion because of the effects of his mood. However, his experience of anxiety and depression now appears solely focused on his preoccupation about his physical symptoms and the potential consequences of losing his job because of it. As such, I do not believe that this is an aggravation of a pre-existing condition. Instead, his current symptoms represent the development or the morphing of his previous symptoms or diagnosis into this new mental health condition. Obviously, his previous history of mental health concerns did predispose him to the development of this condition, but I do not believe he was suffering from somatic symptom disorder prior to the injury.
>
> I also would like to note that I do not believe that Mr. Garcia is malingering. I found his description of symptoms, how his mental health concerns have evolved, and his expression of pain to all be congruent with his medical records and presentation. He was appropriately detailed, and there was no exaggeration in his expressions of pain during the clinical interview. To the contrary, I believe he is suffering from chronic shame associated with feeling[] useless and hopeless against his concerns and how others see him as a result of his irritability.

(Cl. Ex. 2, p. 21) She twice reiterated she believed Garcia's mental health diagnosis was causally related to the stipulated work injury to his knee and resulting disability. (Cl. Ex. 2, p. 23)

Dr. Ressler further opined Garcia's mental health condition was permanent because the health concerns relating to his injured knee were permanent. (Cl. Ex. 2, p. 22) She opined Garcia "is demonstrating most impairment in his activities of daily living, social functioning, and concentration tasks." (Cl. Ex. 2, p. 22) Consequently, Dr. Ressler used the Guides to rate Garcia's permanent impairment due to his mental health diagnosis to be, "Class 3 – Moderate Impairment (impairment levels are compatible with some, but not all, useful functioning)." (Cl. Ex. 2, p. 22) She also used the VA Disability Ratings for Mental Health Disorders to give Garcia a fifty percent rating because he needs his medication in order to function and manage pain, is experiencing frequent drops in mood, is often anxious or stressed, and has significant difficulty sleeping. (Cl. Ex. 2, p. 22)

In Dr. Ressler's opinion, Garcia is in need of psychiatric and psychological care. (Cl. Ex. 2, p. 23) She also believes he would benefit from working part time until his condition improves. (Cl. Ex. 2, pp. 22–23) Dr. Ressler opined Garcia would continue to miss work if he continued working full time, without psychiatric or psychological care and given his pain levels and issues sleeping. (Cl. Ex. 2, p. 22)

Garcia's attorney sent Dr. Bansal additional medical records relating to Garcia's examinations with Drs. Cornett, Tao, Arias, and Ressler, as well as the Dr. Luft's responses to the questions from claimant's counsel. (Cl. Ex. 1, p. 10) Dr. Bansal reviewed these records and answered questions from claimant's counsel in a letter signed and dated December 28, 2020. (Cl. Ex. 1, p. 13) Dr. Bansal stated the additional records did not cause him to change the opinions in his IME report. (Cl. Ex. 1, p. 12)

With respect to Dr. Cornett's characterization of Garcia's knee injury as "mild," Dr. Bansal disagreed by quoting the summary of the damage found in Garcia's knee and the repairs it necessitated during surgery. (Cl. Ex. 1, pp. 12–13) Dr. Bansal further expanded:

> In addition to the multiple meniscal tears, he has areas of his knee that are bone on bone and other areas have advanced degeneration. These findings, in concert, adequately explain Mr. Garcia's antalgic gait. In fact, all recent physicians who have examined Mr. Garcia noted a limp, including his treating orthopedist, Dr. Tao who found an antalgic gait on examination. I agree with Dr. Cornett that Mr. Garcia's back pain/injury did not occur initially with the September 19, 2018 injury. I opined in my report that his back pathology was secondary to the cumulative stress from an altered gait, noted by his recent evaluators. Moreover, Dr. Cornett's own examination found several findings related to back pathology. In my medical opinion, there is no better medical explanation for his back pathology as defined by the anatomical area and the logical progression as that caused by his altered gait.

(Cl. Ex. 1, p. 13) He also opined he agreed with Dr. Ressler's opinions regarding Garcia's mental health because they provide "a thorough and logical explanation of how Mr. Garcia's underlying depressive symptoms have evolved into a somatic symptom disorder." (Cl. Ex. 1, p. 13)

Defense counsel provided Dr. Arias with Dr. Ressler's IME report and asked for his opinion. (Def. Ex. D, p. 24) Dr. Arias replied in a letter he signed and dated January 4, 2021. (Def. Ex. D, pp. 21–23) In the letter, Dr. Arias observed Garcia's noted estimate that his "mood difficulties" increased from ten to sixty percent after the work injury would be a six-fold increase of distress. (Def. Ex. D, p. 21) Dr. Arias critiqued Dr. Ressler's opinion in pertinent part as follows:

> This is an informal evaluation from a normative standpoint. Thus, there are no psychometric, empirically validated norms that are applied to these isolated tasks. As a result, the conclusion of a moderate level of

> impairment is made based on a subjective judgment on the part of the examiner. Also of note, in the psychometric evaluation completed by the undersigned on October 29, 2020, he demonstrated no difficulty in attention. Dr. Ressler also neglected to opine about his premorbid level of cognitive functioning. Thus, there is no indication if she has an opinion as to whether his ability to perform serial sevens or spell a simple word backward is baseline for him or an acquired impairment related to some causal event. Of final note, many individuals without any cognitive impairment or lower intellectual level of functioning have difficulty performing serial sevens. Interpreting slow performance on serial sevens will often result in a high false positive rate at opining that this is related to an acquired etiology.

(Def. Ex. D, p. 22)

Dr. Arias concluded:

> After reviewing the above information, my opinions remain unchanged from those expressed in my October 29, 2020, report. Dr. Ressler has not provided any competent, substantive rebuttal to my opinions. She conducted an evaluation that does not meet professional standards, as her evaluation lacked any empirical assessment of validity or of the emotional constructs to be evaluated in a psychological/neuropsychological evaluation. Omission of validity testing is particularly egregious in forensic cases. I do agree that his current distress does not present any aggravation of a pre-existing condition, which she also did opine. With regard to her diagnosis of Somatic Symptom Disorder, with Predominant Pain, Severe, I would disagree with her attribution of this as causally related to the September 19, 2018, work incident. Research is clear that there is no literature documenting that Somatic Symptom disorders emerge in response to accidents or injuries. Instead, somatic symptom presentations reflect a chronic characterological predisposition. Whether or not a full Somatic Symptom Disorder develops is not dictated by the presence of trauma, but rather by a "need" for symptoms (*Assessment of Feigned Cognitive Impairment*, 2007, page 37). Moreover, prior to diagnosing a Somatic Symptom Disorder, it is necessary to establish that the symptom presentation is valid. In my assessment of him on October 29, 2020, his MMPI-2 findings did indicate symptom magnification, particularly with regard to his somatic symptoms. In individuals with problematic validity findings of this nature, there is a very high error rate in diagnosing genuine Somatic Symptom Disorders. Thus, this is a problematic diagnosis both from a validity standpoint, and from an attribution of causality standpoint.

(Def. Ex. D, p. 23)

Claimant's counsel shared Dr. Arias's critique of Dr. Ressler's opinion with her and asked for a response. (Cl. Ex. 2, p. 24) In a letter dated January 11, 2021, Dr. Ressler responded to Dr. Arias's assessment of her IME report. (Cl. Ex. 2, pp. 24–25) She responded to Dr. Arias questioning her competence by stating she has been performing IMEs for over eleven years and has over fifteen years of clinical practice which, she believes, "gives [her] the ability to competently use clinical judgment in the absence of objective and empirically validated assessments." (Cl. Ex. 2, p. 24) On testing, Dr. Ressler stated:

> The decisions I make about whether to use or not use these objective empirical assessments during an evaluation are always driven by a variety of factors, including, but not limited to: the contextual factors presented by the individual I am interviewing; the amount of data I have available to me from medical and employer records; my own clinical observations; as well as the individuals' mental state. Administering assessments because it is the "ideal standard" without taking those factors into account is as invalid a practice as it is administering them and only relying on those to draw such conclusions. My record in doing this specific type of evaluations over the past 11 years will demonstrate that I use those assessments 90% of the time; so, my choice not to use them is also part of the decision-making process and use of my clinical judgment. That decision is not a way to avoid or cover up data as is implied in Dr. Arias' rebuttal to my conclusions.

(Cl. Ex. 2, pp. 24–25)

With respect to whether she considered symptom magnification, Dr. Ressler stated, "If [Dr. Arias's] only statement to argue my point is that MMPI-2 he administered indicated symptom magnification, that is in fact expected in most all legal evaluations and is already considered in my conclusions." (Cl. Ex. 2, p. 25) She concluded (sic):

> Finally, I would like to note that the use of factors during the evaluation such as subjective expression of the individual's perceptions of how their conditions changes over time, the use of a pain rating, or having them do serial 7s during a mental status exam, are not the sole factors I use to draw my conclusions. Using this as a point of data to assess for issues related to malingering, exaggeration, or faking of symptomatology is also a valid use of such subjective questions. I pride myself in narrating a thorough and compassionate story for each individual that enters my office; but ultimately, I am also well-aware of the potential secondary gains they can have as a result from this process. This is to say that each of my conclusions is drawn based on a variety of factors, data, and experience. Dr. Arias arguing that it is "well documented that clinicians do a poor job of using objective data" is a gross invalidation of his own training and experience. Suggesting that the only way to have sound conclusions is by use of empirical data, is a rejection of such experience, expertise, and training.

(Cl. Ex. 2, p. 25)

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. December 11, 2020).

1. Constitutional Issue.

Garcia questions the constitutionality of the 2017 amendments to the Iowa Workers' Compensation Act. Specifically, Garcia takes issue with the provision now codified at Iowa Code section 85.34(2)(*x*) that governs how functional impairment is determined. He alleges it is unconstitutional because it violates the due process and equal protection provisions of the Iowa Constitution.

The Iowa Constitution establishes three branches of government: legislative, executive, and judicial. See Iowa Const. Art. III, § 1. The Iowa Division of Workers' Compensation (DWC) is part of the Department of Workforce Development (IWD), an executive branch administrative agency. See Iowa Code § 84A.1(4). Under the Iowa Constitution, the courts have sole jurisdiction to determine the constitutionality of an Iowa statutory provision. Varnum v. Brien, 763 N.W.2d 862, 875–76 (Iowa 2009). Consequently, the agency does not have legal authority to declare a statute unconstitutional. See Sherman v. Pella Corp., 576 N.W.2d 312, 315 (Iowa 1998) (citing Shell Oil Co. v. Bair, 417 N.W.2d 425, 429–30 (Iowa 1987)). Nonetheless, a party to an administrative proceeding must raise a constitutional issue at the agency level to preserve it for judicial review. Garwick v. Iowa Dep't of Transp., 611 N.W.2d 286, 288–89 (Iowa 2000); see also Bair, 417 N.W.2d at 429–30.

Therefore, agency precedent dictates that when a party challenges the constitutionality of a provision of the Iowa Workers' Compensation Act, the agency must operate under the presumption the statute is constitutional and issue a decision accordingly. See Heeren v. Derby Trucking, LLC, File No. 5067250 (App. December 30, 2020); see also Hammond v. Peterson Air Conditioning & Heating Serv., Inc., File 1263174 (App. July 22, 2002). This decision presumes the challenged statutory provision is constitutional. It does not address the constitutional issue Garcia raised.

2. Causation.

An employer covered by the Iowa Workers' Compensation Act must "provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment, and in such cases, the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury." Iowa Code § 85.3(1). "[W]here an accident occurs to an employee in the usual course of his

employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Scofield & Welch, 266 N.W. 480, 482, opinion modified on denial of reh'g, 222 Iowa 764, 269 N.W. 925 (Iowa 1936). This includes, but is not limited to, a mental health condition caused by a work injury. See Coghlan v. Quinn Wire & Iron Works, 164 N.W.2d 848, 852–53 (Iowa 1969).

"[T]he burden of proof is on the claimant to prove some employment incident or activity was a proximate cause of the health impairment on which he bases his claim." Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 535 (Iowa 1974). "[A] possibility is insufficient; a probability is necessary." Id. The claimant must prove causation by a preponderance of the evidence. See, e.g., St. Luke's Hosp. v. Gray, 604 N.W.2d 646, 652 (Iowa 2000) (citing Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996)).

"'Whether an injury has a direct causal connection with the employment or arose independently thereof is essentially within the domain of expert testimony.'" IBP, Inc. v. Harpole, 621 N.W.2d 410, (Iowa 2001) (quoting Dunlavey v. Econ. Fire & Cas. Co., 526 N.W.2d 845, 853 (Iowa 1995)). The agency, "as the fact finder, determines the weight to be given to any expert testimony." Sherman v. Pella Corp., 576 N.W.2d 312, 321 (Iowa 1998). The agency must weigh the evidence in a case and accept or reject an expert opinion based on the entire record. Dunlavey, 526 N.W.2d at 853. The agency may accept or reject an expert opinion in whole or in part. Sherman, 576 N.W.2d at 321.

In the current case, the parties stipulated Garcia sustained a work injury to his right leg. They dispute whether that injury caused a sequela in the form of a back injury or mental injury. Each alleged sequela is addressed individually below.

a. Back.

Neither Dr. Tao nor Dr. Lister opined on the question of whether Garcia's stipulated knee injury led to an altered gait that subsequently caused a back injury. Dr. Bansal and Dr. Cornett did. The question is which doctor's opinion is most persuasive.

Dr. Cornett categorized Garcia's knee injury as "mild." Based on this characterization, he opined "given the relatively mild injury to his knee, namely a twisting injury with a meniscus tear, and subsequent arthroscopic treatment, there is no evidence to support this claim other than anecdotal evidence that any altered gait would have affected his back."

One problem with Dr. Cornett's categorization of Garcia's knee injury is that he also agreed with Dr. Lister's opinion that Garcia sustained a twenty percent impairment to his lower extremity resulting from the knee injury. As the defendants note in their post-hearing brief, "a meniscus tear generally yields a much lower rating" than the twenty percent assigned by Dr. Lister and adopted by Dr. Cornett. (Def. Brief, p. 9) For example, Table 17-33 of the Guides assigns a *total* medial and lateral meniscectomy a twenty-two percent impairment to the lower extremity (and nine percent to the whole body) and a *partial* medial and lateral meniscectomy a ten percent impairment to the lower extremity (and ten percent whole body). Therefore, Dr. Cornett's opinion on the

functional impairment resulting from the injury is closer to that for a total medial and lateral meniscectomy than the partial procedure Garcia underwent. Classifying a knee injury that necessitated a partial medial and lateral meniscectomy as "mild" while also assigning a twenty-percent lower extremity impairment that is closer to the impairment for a total meniscectomy of that type under the Guides is inconsistent enough to undermine the credibility of Dr. Cornett's categorization of the injury as "mild" and, by extension, the causation opinion he based on it.

Furthermore, the nature of the injury and surgery as described in Dr. Lister's opinion reflect an injury that was not "mild." The injury consisted of multiple tears to the meniscus that had to be repaired. Also weighing against Dr. Cornett's categorization are Garcia's credible ongoing complaints of pain and lack of mobility in his knee, contemporaneously noted in his medical records at the time of care. Dr. Cornett's attempt to explain Garcia's credible and consistent complaints of leg pain as "anecdotal" is unavailing.

Additionally, there is Dr. Tao's opinion that Garcia "will be left in some level of pain and functional impairment in the knee" due to the lack of a good solution to provide reliable pain relief and functional restoration as well as his effective endorsement of the work restrictions imposed by Dr. Bansal when he opined he did "not recommend further formal restrictions beyond what is already in place." For these reasons, Dr. Bansal's categorization of the nature of Garcia's knee injury is more persuasive than Dr. Cornett's opinion that it is "mild." This weighs in favor of adopting Dr. Bansal's opinion regarding the effect of Garcia's knee injury on his back.

The defendants contend Garcia did not complain about back pain enough to make his sequela claim credible. But the defendants' contention that Garcia's "reporting of back pain over the past two and a half years is even less than sporadic" is based on a misunderstanding of the timeline of his care and back complaints. For example, Garcia's first complaint of back pain was September 16, 2019, not 2018. (Compare Jt. Ex. 3, pp. 83–85 and Def. Brief, p. 12) And Dr. Bansal's IME of Garcia was in November of 2019, not 2018. Compare Cl. Ex. 1, p. 1 with Def. Brief, p. 12) Consequently, the evidence shows there was not a large gap in time between Garcia's initial and subsequent complaints of back pain, which makes unavailing the defendants' argument that Garcia's claim is hurt by such a gap.

Relatedly, the defendants argue that Garcia's December 2020 deposition testimony undermines his sequela claim with respect to the back injury. The defendants contend Garcia rated his back pain the highest he had ever rated it during his deposition. But the record shows Garcia rated his back pain on a zero-to-ten scale once. The records do not show Garcia similarly rated his pain during other visits; or, if he did, the rating was not recorded in medical records. Thus, the probative value of comparing Garcia's deposition rating to the other rating recorded in evidence is limited.

Garcia's deposition testimony is consistent with the description of his back pain that he shared with Dr. Cornett during the examination arranged by defense counsel at around the same time as the deposition. Garcia's complaints of back pain as reflected in

medical records show an onset of pain that was on again and off again, then a reduction in symptoms when he was placed on work restrictions due to the July 2020 knee injury at work, and an increase in symptoms after he returned to full-duty work and was on his feet more often. The weight of the evidence shows Garcia's complaints of back pain are credible.

For these reasons, Dr. Bansal's opinion on whether the stipulated work injury proximately caused Garcia's back injury is the most persuasive. Dr. Bansal's causation opinion on Garcia's back injury is adopted. Garcia has met his burden of proof on whether the work injury to his leg caused a sequela to his back.

b. Mental.

Dr. Luft provided care relating to Garcia's mental health. Dr. Ressler performed an IME on the subject. So did Dr. Arias. All three doctors opined with respect to how, if at all, Garcia's work injury impacted his mental health.

Dr. Arias performed an examination of Garcia that included an interview and multiple tests. Garcia misrepresented his history of symptoms and care to Dr. Arias during the examination. Based in part on Garcia's misrepresentations, medical records relating to his care for mental complaints, and his score on the MMPI-2, and cognitive performance validity testing, Dr. Arias concluded Dr. Luft's diagnosis of major depressive disorder before the stipulated work injury was correct and the work injury had not aggravated the condition or caused a new injury.

Dr. Arias's report did not explain how he arrived at the conclusion that failure on two or more of these tests equates to a ninety-five percent chance of poor effort leading to underestimations of true ability in other cognitive measures. (Jt. Ex. 9, pp. 184–89) While Dr. Arias notes he will interpret Garcia's results "in this light," he does not identify which results or how. (Jt. Ex. 9, pp. 184–89) Dr. Arias also did not provide an explanation for why Garcia's MMPI-2 results "are considered to be somewhat of an overestimate of current symptomology, particularly somatically"; in particular, the qualifier "somewhat," which he did not use in his conclusions. (Jt. Ex. 9, pp. 184, 186) Dr. Arias did not identify which, if any, of the generalities he shared regarding "similar individuals" apply to Garcia.

After Dr. Arias issued his report, Dr. Luft indicated in his response to a letter from Garcia's attorney that he had found Garcia credible during their doctor-patient relationship and opined he felt the work injury had caused Garcia mental injury. There is an insufficient basis in the record from which to conclude Garcia misrepresented his history of mental health symptoms or care to Dr. Luft. The evidence supports Dr. Luft's assessment of Garcia's communication with him over the years. Thus, one of the reasons Dr. Arias found Garcia's work injury had not impacted Garcia's mental health is not present with respect to Dr. Luft.

Dr. Arias responded to Dr. Luft's opinions by questioning his competence, lack of specialized training, and failure to obtain empirical evidence via objective testimony. Despite Dr. Arias's full-throated critique, he nonetheless affirmed his adoption of Dr. Luft's pre-work injury diagnosis, which was made when Dr. Luft had the same qualifications, the same lack of specialized training, and, based on the evidentiary record, without empirical data from objective testing like what Dr. Arias administered during his examination.

Thus, on the one hand, Dr. Arias rejected Dr. Luft's opinion with respect to Garcia's mental health after the stipulated work injury while attacking his credentials, competence, and failure to use empirical data from objective testing. One the other, he adopted Dr. Luft's opinion with respect to Garcia's pre-work injury mental health even though his credentials and competence were the same and there is an insufficient basis from which to conclude he used empirical data from objective testing when forming it. Dr. Arias did not attempt to reconcile the basis for his criticism of Dr. Luft's post-injury opinion with his adoption of Dr. Luft's pre-injury opinion by explaining why Dr. Luft's competence, credentials, or failure to use empirical data from objective testing when diagnosing Garcia was not problematic before the work injury. The inconsistency in Dr. Arias's approach to Dr. Luft's medical conclusions regarding his patient's mental health undermine the credibility of Dr. Arias's opinion that Garcia has severe depression and anxiety and the stipulated work injury did not impact Garcia's mental health.

Dr. Arias also took issue with Dr. Ressler's opinion. Dr. Arias made the unsupported conclusory assertion that Dr. Ressler was incompetent because she was a clinician. The attack is no more availing in this context than it was when Dr. Arias leveled it against Dr. Luft. As Dr. Arias did with respect to Dr. Luft's opinion, he also criticized Dr. Ressler for not obtaining empirical data from objective testing. Unlike with Dr. Luft, Dr. Arias did not adopt a diagnosis Dr. Ressler made before the work injury. Nonetheless, Dr. Arias's critique is not persuasive.

Dr. Arias also took issue with Dr. Ressler's diagnosis of Somatic Symptom Disorder. He began by asserting that the condition is not dictated by trauma, but by a need for symptoms, citing to *Assessment of Feigned Cognitive Impairment* for this proposition. Dr. Arias then states one must establish the symptom presentation is valid before diagnosis Somatic Symptom Disorder. Consequently, according to Dr. Arias, because Garcia's MMPI-2 indicated he was magnifying symptoms precluded such a diagnosis, there would be a high error rate in diagnosing Somatic Symptom Disorder.

As discussed above, Garcia made misrepresentations to Dr. Arias about his past symptoms and care and those formed part of the basis for Dr. Arias finding Garcia's work injury had not caused a sequela mental injury. In contrast, the history Garcia gave Dr. Ressler is generally consistent with that reflected in the medical records and therefore credible. Therefore, Dr. Ressler's opinion is not undermined by Garcia providing incorrect information about his past mental health symptoms or care.

Dr. Ressler credibly responded to Dr. Arias's attacks by explaining that she typically uses empirical data from objective testing during IMEs but did not do so in the current case because of her assessment of the contextual factors presented by the individual, the amount of data available from medical and employer records, her own clinical observations, and the individuals' mental state. She persuasively states that using empirical data from objective testing does not trump other information available to her as a clinician.

Further, Dr. Ressler explained her opinion is based in part on the conclusion Garcia was engaging in symptom magnification because that is common in cases relating to litigation such as the current case. In fact, she used factors including subjective expression of the individual's perceptions of how their conditions changes over time, the use of a pain rating, or having them do serial sevens during a mental status exam to assess Garcia for malingering, exaggeration, and faking symptoms. Consequently, the evidence shows the basis of Dr. Arias's critique—Dr. Ressler's failure to use empirical data from objective testing means she did not adequately consider Garcia overstating his symptoms, which undermines her diagnosis of Somatic Symptom Disorder—is not persuasive. The weight of the evidence shows Dr. Ressler anticipated Garcia would overstate his symptoms because of this litigation and her opinion took such exaggeration into account. Dr. Ressler's opinion regarding Garcia's mental health is more compelling than Dr. Arias's.

For the reasons discussed above, Garcia has met his burden of proof on the question of whether the stipulated work injury is a substantial factor in causing a sequela mental injury. The evidence shows it is more likely than not Garcia's mental condition at the time of hearing is a sequela to the work injury to his leg.

3. Permanent Disability.

The parties stipulated Garcia sustained a work injury to his right leg. They dispute whether he subsequently sustained sequelae in the form of a back injury and a mental health injury. This decision therefore addresses the stipulated work injury to Garcia's leg first and then the alleged back and mental sequelae.

a. Mental.

Workers' compensation is "a creature of statute." Darrow v. Quaker Oats Co., 570 N.W.2d 649, 652 (Iowa 1997). This means an injured employee's "right to workers' compensation is purely statutory." Downs v. A & H Const., Ltd., 481 N.W.2d 481 N.W.2d 520, 527 (Iowa 1992). And "it is the legislature's prerogative to fix the conditions under which the act's benefits may be obtained." Darrow, 570 N.W.2d at 652.

The Iowa Supreme Court has held:

> The legislature enacted the workers' compensation statute primarily for the benefit of the worker and the worker's dependents. Therefore, we apply the statute broadly and liberally in keeping with the humanitarian objective of the statute. We will not defeat the statute's beneficent purpose by

> reading something into it that is not there, or by a narrow and strained construction.

Gregory v. Second Inj. Fund of Iowa, 777 N.W.2d 395, 399 (Iowa 2010) (quoting Holstein Elec. v. Breyfogle, 756 N.W.2d 812, 815–16 (Iowa 2008) (citations omitted)). =

"Although the workers' compensation statute is to be liberally construed in favor of the worker, the statute is not to be expanded by reading something into it that is not there." Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992) (citing Cedar Rapids Community School Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979)). "To determine legislative intent, we look to the language chosen by the legislature and not what the legislature might have said." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, (Iowa 2016) (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). The "broad purpose of workers' compensation" is "to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010) (citing 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.02, at 80–2 (2009)). With the 2017 amendments, the legislature altered how this is done under the Iowa Workers' Compensation Act. Multiple of these legislative changes are at issue in the current case.

Garcia's injuries constitute an unscheduled injury under Iowa Code section 85.34(2)(*v*) because the back and mental injuries are not listed in the statutory schedule. See Deaver v. Armstrong Tire & Rubber Co., 170 N.W.2d 455, 466 (Iowa 1969). Before the amendments, unscheduled injuries were compensated based on industrial disability, with the employee's current employment status and earnings factors in the analysis. Mannes v. Fleetguard, Inc., 770 N.W.2d 826, 830 (Iowa 2009) (quoting Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992)); see also Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996). For injuries on or after July 1, 2017, however, the legislature codified a new requirement:

> 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, not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability

Iowa Code § 85.34(2)(*v*).

The record shows that at the time of hearing, Garcia was still working for Smithfield in the position he held at the time of injury. There is no indication the injuries have reduced the salary, wages, or earnings Haney receives. See McCoy v. Menard, Inc., File No. 1651840.01 (App. April 9, 2021). Therefore, under the statute, Garcia's entitlement to benefits must be determined based only upon the functional impairment resulting from his injuries, not his lost earning capacity. Any determination of industrial disability relating to the work injuries must be pursued using the mandatory bifurcated litigation process in section 85.34(2)(*v*), if the statutory requirements are met.

Another requirement the legislature added to the Iowa Workers' Compensation Act in 2017 governs the determination of functional disability. Before the 2017 amendments, the agency could use all evidence in the administrative record, as well as agency expertise, when determining the permanent disability of an injured worker. See, e.g., Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 421 (Iowa 1994). Under agency rules before the 2017 amendments, the Guides were considered a "useful tool in evaluating disability." Seaman v. City of Des Moines, File Nos. 5053418, 5057973, 5057974 (App. Oct. 11, 2019) (quoting Bisenius v. Mercy Med. Ctr., File No. 5036055 (App. Apr. 1, 2013)); see also Westling v. Hormel Foods Corp., 810 N.W.2d 247, 252 (Iowa 2012). However, in cases involving injuries on or after July 1, 2017, the Guides are more than a tool when determining functional impairment; they are dispositive.

> [W]hen determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "*a*" through "*u*", or paragraph "*v*" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(2)(*x*).

Garcia has obtained a functional impairment rating from Dr. Ressler using the VA Disability Ratings and argues for the agency to use it. However, the text of Iowa Code section 85.34(2)(*x*) makes clear the determination of functional impairment "shall be determined solely by utilizing the [Guides]." Under the traditional statutory construction principle of *expressio unius est exclusio alterious*, legislative intent is expressed by exclusion and inclusion alike with the express mention of one thing implying the exclusion of another. Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008). By expressly requiring the determination of functional impairment be made "solely by utilizing" the Guides and not mentioning any other method, the statute must be read to prohibit using another system such as the VA Disability Ratings for determining functional impairment for purposes of determining entitlement to workers' compensation.

The Guides state the following about percentage ratings of mental impairments:

> Percentages are not provided to estimate mental impairment in this edition of the *Guides*. Unlike cases with some organ systems, there are no precise measures of impairment in mental disorders. The use of percentages implies a certainty that does not exist. Percentages are likely to be used inflexibly by adjudicators, who then are less likely to take into account the many factors that influence mental and behavioral impairment. In addition, the authors are unaware of data that show the reliability of impairment percentages. After considering this difficult matter, the Committee on Disability and Rehabilitation of the American Psychiatric Association advised *Guides* contributors against the use of percentages in the chapter on mental and behavioral disorders of the fourth edition, and that remains the opinion of the authors of the present chapter.

Guides, § 14.3, p. 361.

Thus, the Guides expressly reject mental impairment ratings in percentage terms. They provide only broad classes of impairment with percentage ratings. See id., Table 14-1, p. 363. Consequently, the statutory requirement that the determination of functional disability must be made "solely by utilizing" the Guides effectively forecloses the possibility of an employee with a mental injury related to the employee's work from obtaining permanent disability benefits for the injury if the employee, like Garcia in this case, is earning the same or more from the employer after the injury.

Garcia argues the statute, as amended, is effectively taking away the right to workers' compensation for him and similarly situated workers, which supports the conclusion the legislature made a mistake. But the Iowa Supreme Court has long held that the legislature is presumed to have known what it was doing when it enacted a statute. Cf. Jahnke v. City of Des Moines, 191 N.W.2d 780, 787 (Iowa 1971). It naturally follows that when enacting the 2017 amendments, the legislature presumably knew of caselaw precedent on mental work injuries and the contents of the Guides with respect to impairments caused by mental conditions. The presumed competence of the legislature in making our laws leads to the conclusion that it knew it was restricting recovery for mental injuries by employees in Garcia's position.

Moreover, the 2017 amendments effectively extend the functional impairment compensation method traditionally applicable only to disabilities caused by scheduled-member injuries to unscheduled injuries sustained by employees like Garcia, who return to work with the defendant-employer at the same or higher earnings. While this may seem arbitrary, Iowa's workers' compensation scheme has been arbitrary since its inception with respect to what work injuries qualify for compensation based on functional impairment versus lost earning capacity. See Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994); see also Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993). The legislature's decision to expand the types of injuries compensated based on functional impairment demonstrates an intent to extend the purpose of the statutory schedule to other injuries "to make certain the amount of

compensation" and "to avoid controversies." Id. at 407. While the effect on claimants with mental injuries such the one Garcia has sustained is to eliminate compensation altogether for at least a period of time, such an effect is consistent enough with these twin goals to preclude the conclusion the legislature unintentionally erred when amending the law.

How to compensate work injuries is a policy choice the legislature has codified in the Iowa Workers' Compensation Act. Darrow, 570 N.W.2d at 652. While finding Garcia is entitled to permanent partial disability benefits based on VA Disability Ratings or industrial disability analysis would be beneficent to an injured employee, it would require reading something into the statute that is not there. Downs, 481 N.W.2d at 527. Doing so would also be in direct contradiction to the statutory text, which plainly sets forth the process for determining functional impairment in cases such as this one. Id. "Neither the courts, the commissioner, nor attorneys can alter that process by adopting contrary practices." Des Moines Area Reg'l Transit v. Young, 867 N.W. 2d 839, 847 (Iowa 2015) (holding the statutorily proscribed process for IME reimbursement must be followed for a claimant to be entitled reimbursement). Therefore, Garcia is not presently entitled to permanent partial disability benefits for his mental injury under the Iowa Workers' Compensation Act, as amended in 2017.

b. Leg.

Before 2017, the Fifth Edition of the Guides was merely a tool the agency could use when determining the disability caused by a work injury and the agency was allowed to use its expertise and lay testimony when making such a determination. See Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 839–40 (Iowa 1986) (holding the agency is not bound to follow the Guides under the pre-2017 amendments version of what is now rule 876 IAC 2.4); see also Ament v. Quaker Oats Company, File Nos. 5044298, 5044299 (App. March 17, 2016). The 2017 amendments require that the functional impairment of a work injury be determined "solely by utilizing" the Fifth Edition of the Guides. See Iowa Code § 85.34(2)(*x*); see also 876 IAC 2.4 (adopting the Fifth Edition of the Guides for use by the agency). The statute, as amended, also prohibits the use of lay testimony and agency expertise when determining functional impairment. Id.

Under Iowa Supreme Court precedent on statutory construction, it is presumed the legislature is aware of court opinions. See Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678, 688 (Iowa 2013) (citing Baumler v. Hemesath, 534 N.W.2d 650, 655 (Iowa 1995)). Consequently, the 2017 statutory change prohibiting the use of agency expertise and lay testimony when determining functional disability overturns the court's precedent allowing the agency to use its expertise and lay testimony. It is axiomatic that the 2017 changes to the statute demonstrate the legislature intended to reduce agency discretion and increase its adherence to the Guides when determining an injured employee's functional impairment. Consequently, expert opinions that expressly follow the process set forth in the Guides and clearly explain how this was done are typically more persuasive than those that do not.

The defendants argue Dr. Bansal's past work as a claimant's expert undermines his credibility such that the agency should give his opinion less weight here. If that were true, it stands to reason Dr. Bansal would have provided the highest impairment rating for Garcia's knee injury. However, Drs. Lister and Cornett, both chosen by the defendants, agreed Garcia sustained a higher impairment rating for his leg injury than Dr. Bansal assigned him. This undermines the assertion Dr. Bansal's past work as a claimant's expert means his opinion in this case is biased in favor of the claimant.

In Dr. Bansal's IME report, he adhered closely to the Guides when opining on Garcia's functional impairment. He cites to specific tables in the Guides and discusses his reasons for using them, which are credible. In contrast, neither Dr. Lister nor Dr. Cornett detail which parts of the Guides they relied on when determining Garcia sustained a twenty percent functional impairment to the leg. Instead, their opinion is based on a catch-all reference to the Guides included on a hospital form and neither doctor cites to individual tables or discusses reasons for using them.

For these reasons, Dr. Bansal's opinion on the permanent impairment caused by Garcia's right leg injury is most persuasive in this case. The weight of the evidence establishes it is most likely the stipulated work injury caused a permanent sixteen percent impairment to the lower extremity or six percent impairment to the whole body. Dr. Bansal's opinion on the permanent impairment to Garcia's leg is adopted.

c. Back.

As discussed above, Dr. Bansal's opinion on whether the work injury to Garcia's leg caused an injury to his back is more persuasive than Dr. Cornett's. After opining on causation, Dr. Bansal used the Guides to assign Garcia a three percent impairment to his whole body for his back injury. This impairment rating is supported with citations to the Guides and his reasons for using them. It is credible. Dr. Bansal's opinion on Garcia's permanent impairment to the whole body due to his back injury is therefore adopted.

d. Combined Value.

As concluded above, under the Guides, Garcia's work injury to his leg caused a permanent impairment to his whole body of six percent. His sequela back injury caused a permanent impairment to his whole body of three percent. Garcia's sequela mental injury did not cause a functional impairment rating as a percentage under the Guides, so no compensation for function impairment can be paid under Iowa Code section 85.34(2) (*v*) and (*x*). Using the Combined Value Chart on pages 604 and 605 of the Guides to calculate the combined whole body disability caused by Garcia's leg and back injuries, his functional impairment is nine percent to the body as a whole.

4. Rate.

The parties stipulated that at the time of the work injury Garcia's gross earnings were one thousand one hundred ninety-two and 00/100 dollars ($1,192.00) per week. They also stipulated he was married and entitled to six exemptions. Based on these

stipulations and the ratebook spreadsheet published by the agency for the time in question, Garcia's weekly compensation rate is seven hundred ninety and 15/100 dollars ($790.15).

5. Commencement Date.

The parties dispute the commencement date for permanent disability benefits. Garcia believes the correct date is November 25, 2019, the date Dr. Bansal identified as when he reached MMI. The defendants believe it to be June 19, 2019, the date Dr. Lister found Garcia at MMI.

Under Iowa Code section 85.34(2), the commencement date for permanent partial disability benefits occurs when the claimant has reached MMI from the work injury and the permanent impairment can be determined using the Guides. The Iowa Supreme Court has explained MMI in workers' compensation thusly:

> "MMI" is a term of art commonly used by the commissioner, attorneys practicing in the field of workers' compensation law, and medical providers expressing opinions affecting claimants' entitlement to healing period benefits and permanent partial disability benefits under Iowa Code section 85.34. The term is used as an alternative means of expressing the point at which "it is medically indicated that significant improvement from the injury is not anticipated." Iowa Code § 85.34(1). A treatise on Iowa workers' compensation law uses "maximum recuperation" as an alternative moniker for the MMI concept. See 15 James R. Lawyer, Iowa Practice Series: Workers' Compensation, § 13:3, at 135 (2011).

Waldinger Corp. v. Mettler, 817 N.W.2d 1, 6 n.3 (Iowa 2012).

Because Garcia has sustained an injury to the scheduled member of his leg and sequela to his back, his disability falls under Iowa Code section 85.34(2)(*v*), which provides in pertinent part:

> In all cases of permanent partial disability other than those described or referred to in paragraphs "*a*" through "*u*", 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.

But Iowa Code section 85.34(2) does not expressly address what the commencement date is for permanent partial disability benefits when the claimant sustains a sequela relating to the work injury that manifests after the claimant has reached MMI and permanent disability can be determined for a work injury to another body part. In Garcia's post-hearing brief, he did not address his position on the hearing report that the commencement date in a case such as this should be the later date, which presumably takes the sequela into account. The defendants advocate use of the

MMI date for Garcia's stipulated leg injury through the frame that he did not sustain a sequela. So, the defendants did not directly address this question either.

Dr. Lister opined Garcia reached MMI on June 19, 2019. Since then, Garcia has experienced ongoing pain in his knee. He has seen multiple physicians because of it. But no provider has recommended additional care other than pain management.

Neither maintenance medical care nor persistent symptoms will delay a finding of MMI when an injured employee's condition is stable. Ruby v. Gannett Pub. Serv. d/b/a Des Moines Register, File No. 5058620 (App. February 11, 2020). Consequently, the evidence shows Garcia reached MMI for his knee injury on June 19, 2019, and the permanent impairment caused by the injury could be determined. Garcia reached MMI for his knee injury on that date.

However, Garcia had not yet begun to experience back pain on June 19, 2019. His back symptoms began in September. Neither MMI nor the ability to assess permanent impairment can pre-date the onset of symptoms for an injury. Neither statutory requirement for the commencement date relative to the sequela to Garcia's back could be met on June 19, 2019.

Dr. Bansal performed an IME on November 25, 2019. It is more likely than not his finding of MMI relates to the sequela to Garcia's back. It was on this date that Garcia reached MMI for his back and the permanent disability the back injury caused could be determined.

The commencement date for permanent partial disability benefits in this case is the date on which Garcia's back injury reached MMI and could be rated using the Guides, November 25, 2019, as this is the date on which the permanent partial disability came within the purview of Iowa Code section 85.34(2)(*v*).

6. IME.

Under Iowa Code section 85.39(2),

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

The employer is only liable for an IME if the injury is found compensable under Iowa Code chapters 85, 85A, or 85B. Id.

The statute predicates an employee's entitlement to reimbursement for an IME on disagreement with the disability assessment made by a doctor chosen by the employer. Id.; see also Young, 867 N.W. 2d at 847. If no doctor has opined on disability, the claimant is not entitled to reimbursement for an IME. Young, 867 N.W.2d at 844 (holding defendants are "not obligated to pay for an evaluation obtained by an employee outside the statutory process"). It necessarily follows that when the IME had a dual purpose, the defendants are only liable for reimbursement of the expenses relating to the purpose identified under section 85.39. See Pesicka v. Snap-On Logistics Co., 965 N.W.2d 638 *7 (Iowa App. 2021) (table) (affirming the Commissioner's appeal decision reducing by fifty percent the IME reimbursement awarded to the claimant because the IME had a dual purpose).

Dr. Lister, the defendants' chosen doctor, found Garcia sustained a twenty percent impairment from the work injury to his leg on June 19, 2019. Dr. Lister did not provide care or address the question of permanent disability relating to Garcia's back. Garcia found Dr. Lister's opinion on permanent disability to his leg too low and chose Dr. Bansal for an IME. Dr. Bansal examined Garcia and issued a report on injuries to both the leg and back.

Thus, the IME had the dual purpose of obtaining a disability rating for Garcia's leg injury and an opinion on causation and disability with respect to his back injury. Garcia is entitled to reimbursement only for the portion of the IME that followed the statutory process. Young, 867 N.W.2d at 844. He is not entitled to reimbursement for the part of the IME relating to his back injury because it did not follow the statutory process. Id.; see also Pesicka, 965 N.W.2d 638 *7.

Dr. Bansal's bill is itemized based on the cost of the examination and the cost of the report, but not by body part. (Cl. Ex. 1, p. 10) The report and bill make it difficult to discern what percentage share of Dr. Bansal's time was dedicated to each injury. See Pesicka 965 N.W.2d 638 *7. It is appropriate to reduce the total bill by fifty percent to approximate the most likely cost of Dr. Bansal's IME of Garcia's leg. Under Iowa Code section 85.39, Garcia is entitled to reimbursement for the part of Dr. Bansal's IME relating to the leg only, in the amount of one thousand four hundred thirty-seven and 50/100 dollars ($1,437.50).

7. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Young, 867 N.W.2d at 846 (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Garcia prevailed on the majority of disputed issues in this case, so he is entitled to taxation against the defendants of the following costs

- Service of the original notice totaling thirteen and 50/100 dollars ($13.50) under 876 IAC 4.33(3);

- Filing fee of one hundred three and 00/100 dollars ($103.00) under 876 IAC 4.8(2)(*f*), 4.33(7); and

- The reasonable costs of Dr. Bansal's report relating to Garcia's back injury of one thousand one hundred forty-eighty and 50/100 dollars ($1,148.50) under 876 IAC 4.33(6), as explained in more detail below.

"[A] physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony. The underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition." Young, 867 N.W.2d at 846. Activities such as "research and review of the file are akin to expenses associated with an examination and therefore cannot be taxed" as the cost of a report. Voshell v. Compass Group, USA, Inc./Chartwells d/b/a Au Bon Pain Café, File No. 5056857, p. 7 (App. Sep. 27, 2019) (citing Young, 867 N.W.2d at 847, and Kirkendall v. Cargill Meat Solutions Corp., File No. 5055494 (App. Dec. 17, 2018)).

As found above, Garcia is entitled to reimbursement for the part of Dr. Bansal's IME relating only to his leg injury under Iowa Code section 85.39. This leaves the examination and report costs relating to the back injury. The examination cost may not be taxed under agency rules, but the costs relating to the portion of Dr. Bansal's report addressing Garcia's back injury may be. Therefore, the cost of Dr. Bansal's report relating to Garcia's back injury is taxed against the defendants.

ORDER

Based on the above findings of fact and conclusions of law, it is ordered:

1) The defendants shall pay to Garcia forty-five (45) weeks of permanent partial disability benefits at the rate of seven hundred ninety and 15/100 dollars ($790.15) per week from the commencement date of November 25, 2019.

2) The defendants shall pay accrued weekly benefits in a lump sum.

3) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

4) The defendants are to be given the credit for benefits previously paid for the stipulated amount of forty-four (44) weeks of compensation at the rate of seven hundred ninety and 15/100 dollars ($790.15) per week.

5) The defendants shall pay one thousand four hundred thirty-seven and 50/100 dollars ($1,437.50) to Garcia as reimbursement for the portion of Dr. Bansal's IME relating to Garcia's leg injury.

6) The defendants shall pay to Garcia the following amounts for the following costs:

   a) One hundred three and 00/100 dollars ($103.00) for the filing fee;

   b) Thirteen and 50/100 ($13.50) for service of the original notice and petition; and

   c) One thousand one hundred forty-eighty and 50/100 dollars ($1,148.50) for the cost of the expert report by Dr. Bansal relating to Garcia's back injury.

7) The defendants shall file subsequent reports of injury as required by rule 876 IAC 3.1(2).

Signed and filed this 16th day of February, 2022.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Byrne (via WCES)

Michael Miller (via WCES)

Andrew Workman (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.