BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DARNELL WILLIAMS, Claimant, vs. XPO LOGISTICS, INC., Employer, and INDEMNITY INSURANCE COMPANY OF N AMERICA, Insurance Carrier, Defendants.	File No. 21013799.01 ARBITRATION DECISION Head Notes Nos.: 1100, 1108.50, 1402.30, 1402.40, 1403.30, 1803, 2501, 2907

STATEMENT OF THE CASE

Claimant Darnell Williams filed a petition in arbitration seeking worker's compensation benefits against XPO Logistics, employer, and Indemnity Insurance Company of North America, insurer, for an alleged work injury date of October 1, 2021. The case came before the undersigned for an arbitration hearing on May 1, 2023. Pursuant to an order of the Iowa Workers' Compensation Commissioner, this case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits AA through DD, and Defendants' Exhibits A through E.

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on May 1, 2023. The parties submitted post-hearing briefs on June 2, 2023, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of employment on October 1, 2021;

2. The extent of permanent disability, if any;

3. Payment of medical expenses; and

4. Taxation of costs.

FINDINGS OF FACT

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

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

At the time of hearing, claimant was a 57-year-old person. (Hearing Transcript, p. 9) Claimant is a high school graduate. After high school. Claimant obtained a class B commercial drivers' license (CDL) and worked various driving jobs. (Tr., p. 10) He worked driving school buses, transit buses, tractor trailers, garbage trucks, and roll-off trucks. In 2013, claimant obtained his class A CDL, which allowed him to drive over-the-road.

In July of 2021, claimant started working for XPO Logistics, which is an LTL ("less than truckload") trucking company. (Tr., pp. 11-12) Claimant was an overnight truck driver, and he drove double trailers from Shelby, Iowa to Des Moines or Kansas or wherever else he was needed. (Tr., p. 12) He only drove from terminal to terminal. Claimant testified that his shift usually started around 9:00 p.m., and he would drive from his home in Omaha, Nebraska to the XPO terminal in Shelby, Iowa. (Tr., pp. 12-13) Upon arrival he would get paperwork from dispatch to find out where he was going and what vehicle he was driving. (Tr., p. 13) He would then find out which trailers he would be hauling and get them both attached to the vehicle. He said he pulled two 24-25 foot trailers behind his tractor. The trailers were already loaded, but claimant was responsible for hooking them up to his tractor himself. (Tr., pp. 13-14)

Claimant described attaching the trailers. He said he would have to find the dolly wheels he was going to use for his second trailer, and then position them in front of the second trailer. (Tr., p. 14) Then he would get his first trailer, hook it up, and then go back to the second trailer. After lining up the dolly wheels and getting them in place, he would then hook up the second trailer. Claimant described this as physically demanding work, especially getting the dolly wheels lined up to the second trailer. This involved a lot of pushing and pulling so that the first trailer can push the wheels up to the second

trailer. (Tr., pp. 14-15) The dolly wheels are heavy, claimant said like "pushing a small car in and out of park." (Tr., pp. 15-16) The job requirements provided in evidence indicate claimant's job required the ability to lift objects of various shapes, sizes, and weights (up to 50-pounds frequently and greater than 75-pounds occasionally) and "move and position a converter dolly with an average weight/pull force of approximately 128 pounds." (Defendants' Exhibit E, p. 45)

Claimant testified that it usually took him 30 to 40 minutes from arrival at the terminal until his departure with his first load. (Tr., p. 16) His most common run was from Shelby to the XPO terminal in Des Moines, Iowa, which is about 100 miles each way. Once he arrived at the destination terminal, he would do the same process in reverse, disconnecting both trailers and putting them in the proper place at the loading dock. (Tr., pp. 16-17) Once they were separate and disconnected, it was his job to go into the terminal and unload the trailers, usually using a forklift. (Tr., p. 17) The items in each load varied, sometimes there would be pallets, sometimes items would be loose. (Tr., p. 18)

After each trailer was empty and all contents properly distributed, claimant would find the supervisor at the terminal and receive the paperwork for his next destination. (Tr., pp. 18-19) Claimant said on occasion he would help load a trailer. At times he would also haul one empty trailer and one loaded trailer. (Tr., p. 19) Once he had his instructions, he would repeat the process of hooking up his new trailers, and either head back to Shelby, or to a different terminal. Claimant testified he could be sent to Grand Island, Kansas, or wherever he was needed. (Tr., p. 20) The process would then repeat over the course of his shift. Claimant testified that he would usually be back to the Shelby terminal by the morning, but the time varied depending on where he went.

Claimant has alleged that he sustained a work-related injury on October 1, 2021, which was a Friday. (Tr., p. 21) Claimant's shift, as usual, started at 9:00 p.m. Friday night. As he was pushing and pulling the dolly wheels to line up with the second trailer, he began to feel pain in the center of his low back. Claimant testified that he has never had any low back problems previously. (Tr., p. 22) He continued to work, and believes he went between the Shelby and Des Moines terminals that night. He testified that he usually goes back and forth about four times per night. When he finished his shift Saturday morning, he still had stiffness in his low back, but there was no one at the office so he did not report it. (Tr., pp. 22-23)

Claimant went home and went to sleep, but by Sunday, October 3, he was still having soreness and stiffness in his low back, so his wife took him to the emergency room. (Tr., pp. 23-24) The emergency room record indicates that claimant's chief complaint was right hip pain radiating down right leg for approximately 10 days, worsening. (Joint Exhibit 1, p. 1) The record also states that there was no injury, and the location where the incident occurred was home. Clamant testified that he did not tell anyone in the emergency room that the injury happened at work, because he thought it was something he would be able to "shake off" and it would get better. (Tr., pp. 24-25) However, he did not know why the record stated that the injury occurred at home. (Tr.,

p. 25) Claimant lives in an apartment, does not do physical work at home, and did not slip and fall or have any other injury at home. (Tr., pp. 25-26)

When asked again on cross-examination, claimant testified that when he spoke to the nurse in the emergency room, he told her he had been experiencing pain for a couple of days in the center of his back down his right leg. (Tr., pp. 49-50) He believes his wife completed the patient registration form, on which the question "is this due to a workman's (sic) comp?" is answered "no." (Tr., p. 48; Jt. Ex. 1, p. 12) The form also states that the date and time of the accident/injury is unknown. (Jt. Ex. 1, p. 12) He again denied telling anyone at the emergency room that he was injured at home. (Tr., p. 51) However, he again admitted that he also did not mention he had an injury at work, again because he thought it was something he could work through and it would get better. (Tr., pp. 49-53) Claimant testified that despite having worked consistently since graduating high school, he had never had a prior workers' compensation claim, and it was his hope that he would not have to make a claim at that time. (Tr., pp. 60-61)

Claimant had a right hip x-ray at the emergency room, which was negative other than mild degenerative changes. (Jt. Ex. 1, p. 4) He was diagnosed with sciatica, and prescribed medications, including steroids, and told to follow up with his primary care physician within one month and Ortho Nebraska within two to four days. (Jt. Ex. 1, p. 3)

Claimant had a previously scheduled annual physical with his primary care physician, John Lohrberg, M.D., on October 5, 2021. (Jt. Ex. 2, p. 18; Tr., pp. 26-27) Dr. Lohrberg had been claimant's primary care doctor for more than ten years at that point. (Tr., p. 27) During his examination, he mentioned to Dr. Lohrberg that he had been to the emergency room recently due to hip and leg pain, and diagnosed with sciatica. (Tr., p. 27; Jt. Ex. 2, p. 18) Dr. Lohrberg's record indicated claimant had just started the steroids the day before. He described pain down the leg to the calf on the right side, worse with walking and standing and better with sitting. The note states claimant did not recall any "sudden movement or injury that might have stimulated his current symptoms." He also noted that claimant had no previous history of back injury. Dr. Lohrberg recommended claimant give the steroids time to work, and to call if his condition was not improving toward the end of the week. (Jt. Ex. 2, p. 20) Claimant again testified that at that point he did not mention anything to Dr. Lohrberg about a work injury because he was only there for his yearly physical, and the doctor told him to call him if his condition did not get better. (Tr., p. 27)

Claimant continued working his regular job duties. (Tr., p. 28) However, over the remainder of October his symptoms worsened, to the point he called Dr. Lohrberg for an appointment. Claimant testified that his back had gotten more sore and stiff and he was dragging his right leg behind him. He was also experiencing pain and tightness down his right leg. (Tr., pp. 28-29) He saw Dr. Lohrberg on November 4, 2021, at which time he reported that his symptoms had improved for a short time following the emergency room visit, but had recently returned. (Jt. Ex. 2, p. 23) At that time it was present even without activity, and was occurring with sitting in addition to standing. He described pain radiating from the buttock down the thigh into the mid to lower calf level. Again, he noted no history of back trauma. On physical examination, Dr. Lohrberg noted a positive

straight leg raise on the right with pain going down to the right mid-calf. He prescribed additional steroids, but recommended an MRI in order to try to identify the problem.

After he saw Dr. Lohrberg, claimant reported the work injury to XPO. (Tr., p. 29) The injury report states that claimant reported the injury to Michael in human resources on November 5, 2021. (Def Ex. A, p. 11) The report also states that the injury occurred on October 1, 2021, while claimant was pushing and pulling the truck dolly wheels. He described the injury as being in his lower back and affecting the right hip and leg area. Claimant also provided a written statement, dated November 9, 2021, stating that the injury occurred on October 1 while he was in the yard pushing and pulling the truck dolly wheels. (Def. Ex. A, p. 12) He wrote that he "thought it was something I can just tough through and it would get better" and that he ended up going to the emergency room at Ortho Nebraska on October 3.

The employer sent claimant to Concentra on November 5, 2021, where he saw Arthur West, M.D. (Jt. Ex. 4, p. 46) Dr. West's history states that claimant was injured on October 1, 2021 while pushing and pulling dolly wheels at work. He noted claimant's symptoms were worsening, and included right lower back pain radiating to the right calf, and associated lower extremity tingling. On physical examination, Dr. West noted tenderness in the right paraspinal and right-sided muscle spasms on palpation. (Jt. Ex. 4, p. 47) Claimant had full range of motion, but painful. Dr. West also noted an antalgic gait on the right. Dr. West prescribed a muscle relaxer, 800 mg of iuprofen, and recommended a lumbar MRI. He also sent claimant for physical therapy. He assigned work restrictions of lifting up to 35 pounds occasionally, pushing/pulling up to 35 pounds occasionally, bending occasionally, and barring him from driving a company vehicle due to functional limitations – "can't get into cab." (Jt. Ex. 4, p. 49)

Claimant started physical therapy that day, and again reported that he was injured at work while pushing and pulling dolly wheels. (Jt. Ex. 4, p. 50) The therapy note states that claimant kept working after because he "wanted to push through," but his pain was increasing so he went to the emergency room two days later. Since that time, his symptoms had worsened, including the pain radiating down his right leg. At that point he reported only being able to stand for two to three minutes before needing to sit down, and being unable to lay on his back for more than seven minutes. He also reported that he was able to sit in a chair but needed frequent movement of his right leg. He reported no functional restrictions prior to that time.

Claimant testified that physical therapy worked with him doing exercises to try to "loosen up" his lower back and try to stretch it out, but it was not helping. (Tr., pp. 30-31) He had a lumbar MRI on November 11, 2021, which showed multilevel degenerative disc and joint disease, superimposed on a developmentally slender spinal canal. (Jt. Ex. 3, pp. 44-45) It also showed severe spinal canal stenosis at L4-5 and moderate narrowing of the lateral recesses at L5-S1; and severe neural foraminal stenosis at L5-S1 on the right, and moderate foraminal narrowing at L4-5 bilaterally and L5-S1 on the left. (Jt. Ex. 3, p. 45)

Claimant returned to Dr. West on November 12, 2021, and reported that the ibuprofen was helpful but he continued to have pain and stiffness. (Jt. Ex. 4, p. 64) Dr. West referred claimant to orthopedics, and added standing and walking occasionally to his prior work restrictions. (Jt. Ex. 4, pp. 65-66)

Defendants' claims adjuster wrote a letter to claimant dated November 17, 2011. (Claimant's Exhibit AA, p. 1) The letter states that his claim was being denied, because "[a]n accident did not occur while in the course and scope of your employment," and, "[y]our low back/right hip condition is personal/pre-existing in nature and not the result of an accident at work." Claimant testified that after the denial, he returned to Dr. Lohrberg on his own, who referred him to neurosurgery. (Tr., pp. 31-32; Jt. Ex. 2, pp. 27-28)

Claimant saw Jordan Lacy, M.D., and Brittany Kotera, PA-C, on December 6, 2021. (Jt. Ex. 5, p. 68) Claimant again reported symptoms starting around October 1, 2021, while at work moving dollies. He reported pain in the right lateral hip and a sensation as if there was an Ace bandage wrapped around his right leg from the knee down. He also noted a pressure sensation in his back. At that time, he reported that standing and walking aggravated his symptoms, and felt relief while sitting, but was never pain-free. He reported even with sitting he was uncomfortable, but that "sitting is always better than standing or walking." His wife attended the appointment with him, and reported that claimant had been limping due to the pain in the right hip.

Dr. Lacy performed a physical examination and reviewed the MRI. He noted multilevel degenerative changes including moderate-to-severe stenosis at L4-5 and significant foraminal stenosis at L5-S1 on the right. (Jt. Ex. 5, p. 69) His assessment was right back and right lower extremity pain, and spinal stenosis. He recommended an epidural steroid injection, and referred claimant to Kelly Zach, M.D.

Claimant saw Dr. Zach on December 10, 2021, who provided a right L5-S1 transforaminal epidural steroid injection. (Jt. Ex. 7, pp. 88-89) Claimant returned to Dr. Lohrberg on January 4, 2022, reporting that the injection had not helped much. (Jt. Ex. 2, p. 31) He felt he needed a note to extend his light duty, and reported that there was "some debate as to whether his occupation 'caused' his injuries." Dr. Lohrberg stated that his job had "no doubt contributed to the development of his symptoms over time given findings on the MRI." He encouraged claimant to ask the neurosurgeons about this as "they have more expertise in these matters." He noted that claimant was still very stiff when rising from a chair, and was struggling to deal with pain at night. As such, he prescribed gabapentin, and recommended claimant proceed with the second scheduled epidural injection. (Jt. Ex. 2, pp. 31-32) He noted that claimant should work with the neurosurgeon moving forward, but he was happy to help in any way he could. (Jt. Ex. 2, p. 32)

Dr. Lohrberg also authored a letter "to whom it may concern" on January 4, 2022. (Jt. Ex. 2, pp. 35-36) He noted that he had been claimant's primary care physician since 2012, and until October 5, 2021, had never seen him to evaluate back problems. (Jt. Ex. 2, p. 35) He briefly reviewed claimant's treatment history since the October 1, 2021 injury and noted another epidural injection was scheduled for later that week. He stated

that he had reevaluated claimant that day, and started gabapentin in an effort to help relieve his pain. He was hopeful the problem would not require surgery. He then stated his understanding that claimant's job required the "pushing and pulling of truck dollies, which are substantial in weight." He noted that claimant did not describe a "distinct incident" after which his symptoms occurred, but "given his previous symptom free years I believe that his symptoms and findings on MRI are a result of the cumulative effects of his work activity over an extended period of time."

Claimant had a second steroid injection on January 7, 2022, and returned to Dr. Zach for follow up on January 21, 2022. (Jt. Ex. 7, p. 89) He reported only 20 percent relief from the second injection. Dr. Zach noted that claimant continued to have a pressure sensation "that feels like a brick is sitting in his lower back with radiation out to his right hip and lateral leg." Given claimant's lack of improvement with injections, Dr. Zach referred claimant back to Dr. Lacy for surgical consultation. (Jt. Ex. 7, p. 90)

Claimant saw Dr. Lacy on January 25, 2022. (Jt. Ex. 5, p. 70) Dr. Lacy noted claimant only had about 20 percent relief after two epidural steroid injections. He continued to report pain in his right hip and right lower leg below the knee brought on by standing and walking. At that point he was also experiencing pain with sitting for more than half an hour. (Jt. Ex. 5, p. 71) As such, Dr. Lacy recommended surgery. (Jt. Ex. 5, p. 72)

Claimant testified that he was informed on February 4, 2022 by his terminal manager that he would either have to return to work full duty or take medical leave. (Tr., p. 33) At that point, he was not physically capable of returning to work, so he was effectively terminated from employment. (Tr., pp. 33-34) He did apply for and was awarded unemployment benefits. (Tr., p. 34)

Claimant had a preoperative evaluation with Dr. Lohrberg on March 11, 2022. (Jt. Ex. 2, pp. 37-42) Surgery took place on March 23, 2022, consisting of L4-5 laminectomy with right L5-S1 hemilaminectomy and foraminotomy. (Jt. Ex. 6, pp. 83-85) He returned to Dr. Lacy on April 15, 2022, at which time he reported good improvement in the radicular features of his pain. (Jt. Ex. 5, p. 73) He was to remain off work, but was cleared to start physical therapy. (Jt. Ex. 5, p. 74) At his next follow-up on May 27, 2022, he reported resolution of his radicular pain, but had ongoing complaints of persistent back pain and discomfort when standing and walking. (Jt. Ex. 5, p. 76) It had gradually been improving, but was not yet fully resolved. Dr. Lacy noted tenderness to palpation of the paraspinous muscles and paraspinous muscle spasms. He continued claimant's physical therapy, and recommended a course of trigger point injections.

Claimant returned to Dr. Zach for trigger point injections on June 6, 2022. (Jt. Ex. 7, p. 92) At that time, he reported his pain as going across his low back, but not into his legs. Dr. Zach noted that claimant had evidence of lumbar muscle spasm on exam, and proceeded with trigger point injections. (Jt. Ex. 7., p. 93) Claimant was to continue with physical therapy and return to Dr. Zach in two to three weeks for follow up. He returned to Dr. Zach on June 24, 2022, and reported 30 to 40 percent relief from the trigger point injections, with stiffness and soreness still present. (Jt. Ex. 7, p. 95) He said the

injections relieved the intensity of the pain. Claimant continued taking 800 mg of ibuprofen one to two times per day as well, and stated it "takes the edge off." He was also sill attending physical therapy two to three times per week. Dr. Zach provided repeat trigger point injections, and told claimant to return in one month. (Jt. Ex. 7, p. 96)

Claimant returned to Dr. Lacy on July 8, 2022, reporting ongoing low back pain brought on by both periods of inactivity and also exacerbated by walking and standing. (Jt. Ex. 5, p. 79) He reported that neither the trigger point injections nor physical therapy had ultimately improved his low back pain. Dr. Lacy recommended lumbar facet injections to see if that would calm down his persistent low back pain. (Jt. Ex. 5, p. 80) It is unclear whether those injections took place, as there are no additional records from Dr. Zach in evidence.

Claimant testified that in November of 2022, Dr. Lacy again referred him to Dr. Zach in pain management for ongoing care. (Tr., p. 36) He said that both Dr. Lacy and Dr. Lohrberg have told him he would not be able to go back to XPO or the type of work he had been doing. (Tr., p. 37) Claimant testified that he has not worked since he was terminated from XPO. (Tr., p. 35) He applied for Social Security Disability benefits, and those were granted on September 8, 2022, dated back to February 4, 2022, which was the last day claimant worked. (Cl. Ex. BB, pp. 2-4)

Dr. Lacy authored a letter dated March 8, 2023, in which he answered questions posed by claimant's attorneys. (Jt. Ex. 5, p. 81) He stated that his original diagnosis was low back, right hip, and right lower extremity pain, with right lower extremity radiculopathy, due to lumbar degenerative disease at L4-L5 and L5-S1 with significant associated foraminal stenosis. Dr. Lacy noted that claimant's job required pushing and pulling truck dollies, which are "large and of substantial weight." Dr. Lacy opined that claimant's work exacerbated and contributed to the development of his lumbar degenerative disease, the subsequent symptoms, and the need for treatment. He opined that claimant's surgery was causally related to and necessitated by claimant's work and the work injury on October 1, 2021. (Jt. Ex. 5, p. 82) He placed claimant at maximum medical improvement from a surgical perspective on November 28, 2022. He indicated that claimant was under his treatment from the date of his surgery to the date of MMI, and was unable to work during that time. In the future, he thought claimant may require physical therapy, injections, and medication to help control his symptoms.

Finally, Dr. Lacy provided an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. He assigned 11 percent of the whole person, and recommended permanent restrictions from heavy physical activities that require repetitive twisting, bending, and lifting over 50 pounds. Finally, he indicated that the treatment claimant received was reasonable and necessary to treat his injury, and the charges for claimant's treatments were fair and reasonable, and related to the October 01, 2021 injury.

At the time of hearing, claimant continued to have symptoms, including lower back pain and stiffness. (Tr., p. 37) He was not on any prescription narcotics, but continued to take muscle relaxers and 800 mg of ibuprofen. (Tr., pp. 36-37) He

indicated he is not able to stay on his feet for more than 10 minutes at a time, and cannot walk more than 1,500 feet at a time. (Tr., p. 37) He testified that he continues to see Dr. Zach at pain management every three to six weeks, and has had a "spinal block," but his condition is staying about the same. (Tr., pp. 36-38) He testified that when his treatment with Dr. Zach is exhausted he is to call Dr. Lacy for another appointment. (Tr., p. 38) Claimant is not currently looking for work, until he can "build up some stamina so I can be on my feet for more than 10 minutes at a time." (Tr., p. 38) He testified that he cannot even make it through a grocery store to shop because he is not able to stay on his feet that long. (Tr., p. 42) He is also limited in how much he can lift, and believes he can safely lift between 10 and 15 pounds. It was noted at hearing that he had been sitting for 51 minutes with no breaks, and he testified that was not typical, as he usually can only sit comfortably for about 10 to 15 minutes. While he is able to drive a car, he is only comfortable driving about 15 to 20 minutes on his own. (Tr., p. 43)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996).

The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d at 311. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d at 150. An employee does not cease to be in the course of employment merely because the employee is not actually engaged in doing some specifically prescribed task, if, in the course of employment, the employee does some act which he or she deems necessary for the benefit or interest of the employer. United Parcel Serv. v. Miller, No. 99-1596, 2000 WL 1421800, at *1 (Iowa Ct. App. Sept. 27, 2000) (citing Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979)).

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Defendants argue that claimant has failed to prove he sustained an injury arising out of and in the course of employment. The basis for their argument stems entirely from claimant's medical records and actions between October 1 and November 5, 2021. Defendants argue that this is not a case in which claimant neglected to volunteer information to doctors or where an injury was not initially reported as work related. Rather, defendants argue, this is a case in which claimant "denied the existence of any injury for 35 days" from the alleged injury date until reporting it to the employer on November 5, 2021.

I do not find defendants' arguments convincing. Much of the argument is based on claimant's credibility, and I found claimant to be a highly credible witness. He was an excellent historian, and there was nothing about his demeanor or behavior at hearing that would cause me any concern for his veracity. His testimony was consistent with the medical records and other evidence in the record. There is nothing to indicate claimant is anything other than an honest and hard-working person.

Additionally, defendants' analysis of the initial emergency room records and Dr. Lohrberg's notes two days later fails to convince me that claimant is "unworthy of belief." Claimant credibly testified that he initially thought he simply "tweaked" his back, and that he would get better and be able to continue working. He stated that no one at the emergency room asked if his injury was a workers' compensation claim, and his wife completed the patient registration form that has "no" marked under that question. (Tr., p. 48) He denies telling anyone at the emergency room that the pain started ten days prior or that he was injured at home. While he did not mention the pain started while working, at that time, he did not believe he had sustained a serious injury or that he would need to make a workers' compensation claim. With respect to his visit with Dr. Lohrberg on October 5, 2021, claimant testified that visit was a prescheduled appointment for his yearly physical. He mentioned that he had been to the emergency room recently and was having back pain. Dr. Lohrberg recommended he complete the round of steroids he had been prescribed and let him know if his condition did not improve. All of this is reasonable given claimant's history. He did not have a history of back problems at that

point. He had no reason to believe his condition would worsen or that he would eventually need surgery.

Defendants also argue that claimant told both the emergency room providers and Dr. Lohrberg that he had not sustained any distinct injury. Again, he initially thought he would get better, which is reasonable given his lack of prior issues. And as he reported to Dr. Lohrberg on November 4, 2021, his symptoms did improve for a short time, but then returned. (Jt. Ex. 2, p. 23) That was the point at which he returned to see Dr. Lohrberg, and reported the work injury immediately thereafter. Claimant testified that he finally reported the injury because his pain was not getting better, and was in fact getting worse. All of the records from that point on, including claimant's initial written report of injury, contain the same history: on October 1, 2021, claimant was working and pushing and pulling the truck dolly wheels. He started to have pain in the center of his back, but he thought he could "tough through" it, and continued working. When his pain did not immediately improve, he went to the emergency room. After a few more weeks, his pain started to get worse, so he reported the work injury.

The expert evidence also supports claimant's claim that his injury arose out of and in the course of his employment. Dr. West at Concentra wrote that claimant's symptoms were the result of pushing and pulling dolly wheels at work. (Jt. Ex. 4, p. 46) Dr. Lohrberg issued a report noting that claimant's job required pushing and pulling truck dollies, which are substantial in weight. (Jt. Ex. 2, p. 35) He noted that claimant did not describe a "distinct incident" after which his symptoms appeared, but given his prior symptom-free years, claimant's symptoms and findings on the MRI were the result of the cumulative effect of his work activities. Finally, Dr. Lacy also opined that claimant's back injury arose out of and in the course of his employment at XPO, and that the surgery he performed was causally related to the work injury. (Jt. Ex. 5, pp. 81-82) Defendants have offered no contrary medical opinion. The unrebutted medical evidence supports claimant's position that his injury arose out of and in the course of his employment.

Claimant was a credible witness and the records in evidence support his testimony. There is no evidence that claimant sustained an injury anywhere else. There is no evidence that claimant had any preexisting back issues. There is no medical evidence to suggest claimant's injury was not work related. Based on all of the evidence, viewed as a whole, I find that claimant sustained an injury arising out of and in the course of his employment on October 1, 2021.

The parties stipulated that if defendants were found liable for claimant's injury, claimant is entitled to temporary total disability/healing period benefits from February 4, 2022 through November 28, 2022. The next issue to be determined, then, is the extent of permanent partial disability.

The parties stipulated that claimant's disability is an industrial disability. The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning

capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted, and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). The commissioner may also consider claimant's medical condition prior to the injury, immediately after the injury, and presently in rendering an evaluation of industrial disability. IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632-633 (Iowa 2000) (citing McSpadden, 288 N.W.2d at 192). Iowa law also requires the fact-finder "to take into account . . . the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." Iowa Code § 85.34(2).

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

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

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

In his brief, claimant seeks an award of 50 percent industrial disability. (Cl. Brief, p. 7) Defendants argue that any award of industrial disability should be reduced due to his failure to mitigate the aftermath of the injury; his ability to sit through the arbitration

hearing; and his lack of motivation in finding suitable employment. Mitigation of damages in Iowa worker's compensation is not found in Iowa Code Chapters 65, 86, or 87. It is not found in Iowa Administrative Code chapter 876. Mitigation of damages is generally a duty imposed upon a party in tort or contract cases that requires a party to lessen or take reasonable steps to minimize damages. Mitigation of damages in the conventional sense is not a recognized defense in Iowa workers' compensation cases.

Additionally, failure to mitigate damages has been held by the Iowa appellate courts and this agency as an affirmative defense. R.E.T. Corp. v. Frank Paxton Co., Inc., 329 N.W.2d 416, 422 (Iowa 1983) ("The defense of mitigation (or avoidable consequences) must be both pled and proven by the asserting party."); Grittmann v. John Deere Waterloo Works, File No. 1198868 (Arb., May 2001). Defendants did not assert an affirmative defense in the hearing report. That being said, even if the defense is considered, I find defendants have failed to prove the defense by a preponderance of the evidence. Defendants argue that claimant's actions of "hiding the existence of an injury" caused a "material worsening of his injury." (Def. Brief, p. 7) Defendants contend that if claimant had reported the injury immediately, he would have been placed on light duty, his activities would have been modified, and he may have never needed surgery. However, there is no proof that any of this is true, and defendants even admit it is speculative. Furthermore, claimant did seek medical treatment, on his own, within days of the injury. He was not taken off work or given restrictions by the emergency room providers or Dr. Lohrberg in early October, so there is no reason to believe any other physician would have taken him off work or modified his activities at that time either. There is likewise no evidence that claimant would not have needed surgery had he reported the injury earlier, or been placed on light duty immediately. There is no evidence to support the affirmative defense.

With respect to claimant's ability to sit through the arbitration hearing, claimant testified that it was not typical for him to sit that long. (Tr., p. 42) Notably, he was not asked whether he was any pain after sitting that long, or if he had taken any ibuprofen or muscle relaxers that day to help him get through the hearing. It is also noted throughout the medical records that standing and walking are the more difficult activities for claimant, and sitting is always better. The fact that he was able to sit through an arbitration hearing lasting a little more than an hour has little impact on the evaluation of his earning capacity.

Finally, defendants argue that claimant's ability to function in daily life, drive, and lift 10 to 15 pounds "opens the door for a variety of opportunities if the motivation or stamina were present to pursue them." With respect to motivation, claimant testified he was not actively looking for work at the time of hearing, because he has to "try to build up some stamina" so he can be on his feet for more than ten minutes at a time. (Tr., p. 38) He continues to treat with Dr. Zach in pain management, who has told him that his stamina "will hopefully come back." He continues to do physical therapy exercises at home. Until this injury, claimant had worked consistently since graduating high school, for 38 years. (Tr., p. 60) There is no evidence that claimant lacks motivation to return to work if and when he is able to do so.

Defendants also argue there is little evidence to demonstrate claimant's lack of employability, and no vocational assessment in evidence. It is true there are no vocational assessments in evidence, but there is the decision of the Social Security Administration, which found claimant to be disabled. (Cl. Ex. BB) The vocational assessment provided for that decision indicated no transferable skills were found when considering claimant's past work, age, education, and RFC (residual functional capacity) abilities. (Cl. Ex. BB, p. 10)

A determination that claimant is entitled to Social Security Disability is not determinative of disability for workers compensation purposes. However, it is a factor to consider, and indicates that his prospects for employment in the labor market are severely limited in the view of the Social Security Administration. The Social Security decision is based entirely on claimant's back condition. Prior to the injury, claimant was not on Social Security Disability, and was able to work full-time with no restrictions. At hearing, claimant testified that he would not be able to go back to the work he did at XPO, and can no longer do heavy lifting or climb in and out of a truck. (Tr., p. 37) He has trouble walking and standing for extended times. He has permanent restrictions from Dr. Lacy of avoiding heavy physical activities that require repetitive twisting, bending, and lifting over 50 pounds. He testified he cannot lift more than 10 to 15 pounds safely, and that Dr. Zach, who he still sees, has given him a 10-pound lift limit. (Tr., pp. 42-43) His only real job experience since graduating high school is driving. (Tr., p. 44) He has little computer experience or other skills that would help him get a sedentary job. XPO was not able to continue accommodating claimant's restrictions and terminated his employment. (Tr., pp. 33-34) Considering all of the factors of industrial disability, the evidence supports an award of 50 percent permanent partial disability.

Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). Fifty percent is equal to 250 weeks of benefits. The parties stipulated that benefits should commence on November 29, 2022.

The remaining issues to consider are payment of medical bills and taxation of costs. Claimant seeks reimbursement for medical expenses he incurred based on defendants' denial of his claims. Under Iowa law, once defendants denied compensability for claimant's alleged injuries, they lost the right to choose the medical providers for that care during the period of denial. "[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros., 779 N.W.2d at 204. Further, when compensability is contested, "the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care." R. R. Donnelly & Sons v. Barnett, 670 N.W.2d at 197-198 (Iowa 2003). As such, claimant is entitled to reimbursement for medical care he received related to the injury after the date of defendants' denial.

Claimant has submitted a summary of medical expenses for which he seeks reimbursement. (Cl. Ex. CC) Claimant is not entitled to reimbursement for medical bills unless claimant shows that they were paid from his own funds. See Caylor v.

Employers Mutual Casualty Co., 337 N.W.2d 890 (Iowa Ct. App. 1983). Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988). Where medical payments are made from a plan to which the employer did not contribute, the claimant is entitled to a direct payment. Midwest Ambulance Service v. Ruud, 754 N.W.2d 860, 867-68 (Iowa 2008) ("We therefore hold that the commissioner did not err in ordering direct payment to the claimant for past medical expenses paid through insurance coverage obtained by the claimant independent of any employer contribution.") See also: Carl A. Nelson & Co. v. Sloan, (Iowa App. 2015) 873 N.W.2d 552 (Iowa App. 2015) (Table) 2015 WL 7574232 15-0323. As such, defendants shall reimburse claimant for all out of pocket medical expenses, and hold claimant harmless for any claims made by his health insurance company or Medicaid.

With respect to costs, assessment of costs is a discretionary function of this agency. Iowa Code § 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I find that claimant was successful in his claim, and an award of costs is appropriate. I exercise my discretion and award claimant the cost of the filing fee in the amount of $103.00, and the cost of Dr. Lacy's report in the amount of $1,375.00.

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of nine hundred forty-five and 94/100 dollars ($945.94).[1]

Defendants shall pay claimant healing period benefits from February 4, 2022 through November 28, 2022, as stipulated.

Defendants shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits, commencing November 29, 2022.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

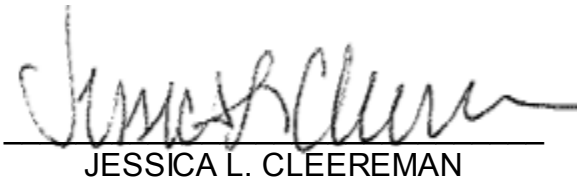
Defendants shall reimburse claimant for all out of pocket medical expenses, and hold claimant harmless for any claims made by his health insurance company or Medicaid.

[1] The parties stipulated to the rate of $945.84, based on an average weekly wage of $1,489.00 and claimant being married with two exemptions. However, the rate as stated in the rate book should be $945.94.

Defendants shall reimburse claimant's costs in the total amount of one thousand four hundred seventy-eight and 00/100 dollars ($1,478.00), which includes the filing fee and Dr. Lacy's report.

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

Signed and filed this ____13th____ day of September, 2023.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrea Amy Montoya (via WCES)

Jacob Peters (via WCES)

Bryan Wallace Brooks (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, 10A) 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.