BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL L. KUEHL,	:	
Claimant,	:	File No. 5061645
vs.	:	
FOLEY COMPANY,	:	ARBITRATION DECISION
Employer,	:	
and	:	
CNA INSURANCE,	:	Head Note Nos.: 1402.40, 1402.60, 1803, 1804, 2907, 4100
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant, Michael Kuehl, filed a petition in arbitration for workers' compensation benefits against Foley Company, as employer, and CNA Insurance, as insurance carrier. The undersigned heard this case on February 24, 2020, in Sioux City, Iowa.

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

The evidentiary record includes Joint Exhibits 1 through 13, Claimant's Exhibits 1 through 8 and 10, and Defendants' Exhibit A. Claimant testified on his own behalf. Spring Kuehl, claimant's wife, also provided testimony on claimant's behalf. The evidentiary record closed at the conclusion of the arbitration hearing.

Counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. All parties filed their post-hearing briefs on April 15, 2020, at which time the case was deemed fully submitted.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the stipulated injury caused permanent disability;

2. The extent of claimant's entitlement to permanent disability benefits, including whether claimant is permanently and totally disabled under the traditional and/or odd-lot analysis;
3. Whether claimant is entitled to past medical expenses; and
4. Whether claimant's costs should be assessed against defendants.

FINDINGS OF FACT

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

Michael Kuehl was 50 years of age on the date of the evidentiary hearing. (Hearing Transcript, page 9) He did not graduate from high school or obtain a High School Equivalency Diploma. (Hr. Tr., p. 10; Ex. 6, p. 1) According to the evidentiary record, Mr. Kuehl dropped out of school in the 9th grade. He started working as a crane operator at 17 years old and has handled this type of employment ever since. (JE9, p. 40) Mr. Kuehl was crane certified by the National Commission Certification of Crane Operators. (Ex. 6, p. 1)

Mr. Kuehl sustained a stipulated low back injury that arose out of and in the course of his employment with Foley Company on July 24, 2017. The evidentiary record does not contain evidence that claimant received any substantial treatment for his low back prior to the alleged date of injury.

On July 24, 2017, Mr. Kuehl was climbing up into an excavator when he slipped and fell to the ground. Mr. Kuehl fell approximately three to five feet and landed on his right heel. He felt a "pop" in his low back and pain down his right leg. (Hr. Tr., pp. 15-16) Claimant reported his injury to his supervisor and continued working. His symptoms progressively worsened over the next several days and the defendant employer eventually sent Mr. Kuehl home from work on July 28, 2017. He has not returned to work for the defendant employer, in any capacity, since July 28, 2017.

At hearing, claimant testified that he first requested medical treatment on Friday, July 28, 2017. (Hr. Tr., p. 18) Claimant further testified that it took "forever" to obtain medical attention, and that when he first presented for medical treatment, he did not actually receive any care. (Hr. Tr., pp. 18-19)

The evidentiary record reveals that Mr. Kuehl presented to the McFarland Clinic on July 28, 2017, the same day he requested medical treatment. The medical record notes that Mr. Kuehl appeared uncomfortable and moved slowly. (JE1, p. 2) The medical staff at McFarland Clinic noted palpable muscle spasms in the right lower lumbar muscles. (Id.) X-rays of claimant's spine revealed slight disc space narrowing at L4-L5, and minimal scoliosis to the right. (Id.) Claimant was diagnosed with a low back strain and referred to occupational medicine. Nancy Carlson, D.O., recommended claimant take 600 mg of ibuprofen every 6 hours as needed for his pain. (Id.)

On August 1, 2017, Lacreasia Wheat-Hitchings, M.D., also of McFarland Clinic, prescribed claimant a Medrol Dosepak and administered a Depo-Medrol intramuscular injection. Following her examination, Dr. Wheat-Hitchings prescribed Tramadol and recommended physical therapy. (JE1, p. 4) Medical records reflect the McFarland Clinic also prescribed cyclobenzaprine and diclofenac at some point in time. (See JE1, p. 4; JE2, p. 6)

After Dr. Wheat-Hitchings recommended that claimant receive treatment closer to his home in Primghar, Iowa, defendants authorized medical treatment through the Sanford Sheldon Medical Center. (See JE2, p. 5) Claimant first presented to Jaclyn Freese, PA-C on August 7, 2017, with complaints of right heel and low back pain, with right-sided sciatica. (JE2, p. 5) The medical record notes that claimant was unable to sit or stand for more than a few minutes at a time. (JE2, p. 6) On examination, claimant exhibited decreased range of motion, tenderness, pain, and spasm in the lumbar spine. (Id.) Given claimant's significant pain complaints and limp, Ms. Freese ordered an MRI of claimant's lumbar spine and prescribed hydrocodone. (JE2, p. 5) It appears the initial plan was for claimant to present to physical therapy prior to undergoing additional diagnostic imaging; however, given claimant's pain complaints and positive straight leg raise on the right, Ms. Freese did not think claimant could tolerate waiting an extended period of time for an MRI. (Id.) Following the examination, Ms. Freese offered claimant the opportunity to obtain stronger pain medication; however, claimant declined. (Id.)

The August 14, 2017, MRI revealed disc desiccation with annular fissures at L4-L5 and L5-S1, bilateral L4-L5 foraminal stenosis, and lumbar degenerative disc disease. (JE6, p. 28) Given these results, Ms. Freese referred claimant to Thomas Boetel, D.O., for further evaluation and possible epidural steroid injection (ESI). (See Ex. 1, p. 2) In the meantime, Ms. Freese continued claimant's prescriptions for physical therapy and medication. (See Ex. 1, p. 2)

Claimant presented to Dr. Boetel on September 6, 2017. (JE3, p. 7) Claimant reported constant right-sided low back pain, and intermittent pain in the right lower extremity, primarily from the thigh to the knee. Claimant denied experiencing any numbness or tingling in the right lower extremity. He further denied experiencing any pain in the left lower extremity. (Id.) After examining claimant and reviewing the August 2017 MRI report, Dr. Boetel assessed claimant with L4-L5 and L5-S1 disk desiccation with annular fissures, L4-L5 bilateral foraminal stenosis, right leg pain with possible L4 radiculitis, and lumbar degenerative disk disease. (JE3, p. 8)

Following his initial examination, Dr. Boetel reassured claimant that his neurological exam was normal. He explained to claimant that based on the results of the MRI, the narrowing of the neural foramen, bilaterally, at L4-L5 could be contributing to irritation of the exiting L4 nerve root, which, in turn, could be contributing to his right leg symptoms. (Id.) The two discussed treatment options, including oral medication, physical therapy, chiropractic adjustments, epidural steroid injections (ESIs), and surgical consultation. (Id.) However, Dr. Boetel relayed that surgical intervention would be a last resort, given claimant's neurological exam. (JE3, p. 9) Claimant relayed his

preference to start with a course of physical therapy. (Id.) Dr. Boetel opined that if claimant was unable to tolerate therapy, or if he did not show improvement, he would recommend a right, L4 transforaminal ESI. (Id.) In closing, Dr. Boetel prescribed Flexeril and Naproxen. (Id.)

It is worth noting Dr. Boetel's medical record reflects that claimant appeared frustrated when he presented for his initial evaluation. (JE3, p. 7) According to the medical record, claimant was frustrated with Ms. Freese's recommendation that he receive an ESI. (Id.) Mr. Kuehl apparently told Dr. Boetel, "I was sent here to get an injection in my back, you have [one] chance to fix it, and then I want it fixed the right way." (Id.) After Dr. Boetel also recommended an ESI, claimant told Dr. Boetel that he was not interested in receiving any medical treatment that had not been approved by the FDA. At hearing, claimant testified that his wife researched ESIs and told him that they were not FDA approved. (Hr. Tr., p. 23) A cursory review of the medical records reveals claimant was weary of pain medications and ESIs in general.

Claimant reported less sensitivity in his low back, but no improvement in his right lower extremity pain, at his October 3, 2017, appointment. (JE3, p. 10) For the first time, claimant reported he occasionally experienced similar symptoms in the left lower extremity. (Id.) He denied experiencing any numbness or tingling. (Id.) Dr. Boetel reassured claimant that his neurological exam remained without focal weakness. Claimant reported no improvement through physical therapy or the use of a TENS unit. (JE3, p. 11) Given this information, Dr. Boetel recommended proceeding with a right ESI. (Id.) Claimant told Dr. Boetel that he was unwilling to consider an ESI. In response, Dr. Boetel provided claimant with additional information regarding ESIs, and reassured claimant that ESI are a common procedure used to help manage pain. (Id.) Claimant remained uninterested. (Id.) In the end, Dr. Boetel continued claimant's physical therapy, refilled his Naproxen prescription, and advised against bedrest. (Id.)

Claimant reported a slight decrease in his symptoms following the transition from Hydrocodone to anti-inflammatories. (See JE4, p. 20)

Claimant presented for a total of 27 physical therapy visits between September 11, 2017, and November 10, 2017. (See JE4, pp. 20, 24) Unfortunately, claimant reported no benefit from physical therapy. Physical therapy records illustrate that claimant consistently presented with strength, mobility, and gait deficits. (See JE4, p. 21) Given claimant's failure to respond to therapy, Dr. Boetel discontinued claimant's physical therapy prescription on November 14, 2017. (JE3, p. 13)

After discontinuing physical therapy due to a lack of improvement, Dr. Boetel recommended Mr. Kuehl present for an EMG of the right lower extremity. (JE3, p. 13) The December 5, 2017, EMG and nerve conduction studies were essentially normal. (See JE3, pp. 17, 18) The EMG revealed no electrodiagnostic evidence of right or left lumbosacral plexopathy or radiculopathy. (See Ex. 1, p. 5; JE6, p. 30) Claimant's nerve conduction studies revealed no significant findings to indicate polyneuropathy or focal peripheral entrapment neuropathy. (See Ex. 1, p. 5; JE6, p. 30)

When claimant's EMG returned unremarkable, Dr. Boetel returned claimant to work on December 19, 2017, with a 20-pound lifting restriction, and recommendations of no repetitive bending, turning, or twisting at the waist, and sit and stand as tolerated. (JE3, p. 14) Given claimant's reluctance to try injection therapy, Dr. Boetel placed claimant at maximum medical improvement on February 9, 2018. (JE3, p. 15)

Defendants subsequently referred claimant to Christopher Janssen, M.D., for an impairment rating. (JE3, p. 16) Dr. Janssen evaluated claimant on March 29, 2018. (Id.) Claimant reported 70 percent of his pain was located in his back, while 30 percent was located in his bilateral lower extremities. (JE3, p. 17) As with all prior examinations, claimant was able to walk without an assistive device, albeit with a slow gait. (JE3, p. 18) Dr. Janssen agreed that claimant had reached MMI. Dr. Janssen opined that according to the lumbar spine DRE model, claimant's condition qualified him for placement in DRE Category II for non-verifiable radicular pain. (JE3, p. 19) Due to the fact claimant's functional abilities had been severely limited by the lower back pain, Dr. Janssen assigned 8 percent whole person impairment, the maximum impairment rating for Category II. (Id.) Dr. Janssen agreed with the restrictions assigned by Dr. Boetel. (Id.)

Due to his ongoing complaints, claimant was referred to Michael Espiritu, M.D., an orthopedic surgeon, for a second opinion regarding whether claimant was a surgical candidate. (JE6, p. 29) The evaluation occurred on May 23, 2018. (JE6, p. 29) The medical record notes that claimant had not had any weakness, but he essentially felt as though he could not move around. After providing a history of claimant's condition, Dr. Espiritu noted that claimant had not presented for injection therapy, despite multiple recommendations for the same. (JE6, p. 29) Instead of relaying how he did not want to pursue treatment options that were not approved by the FDA, claimant told Dr. Espiritu that he did not want to pursue ESIs because he felt such treatment would be putting a Band-Aid on the underlying issue. (Id.) After reviewing claimant's imaging studies, diagnostic studies, and medical history, as well as physically examining claimant, Dr. Espiritu concluded claimant's condition did not warrant surgical intervention. (JE6, p. 30) Dr. Espiritu did not observe any signs of compression within the foramen or lateral recess or central canal at the L4-L5 and L5-S1 levels on MRI. Dr. Espiritu opined claimant's pain was not consistent with mechanical back pain, and he had no signs of instability or fracture on diagnostic imaging. (Id.)

After being released by Dr. Boetel, claimant began presenting to John Cook, M.D., for pain management. (JE10) Claimant first presented to Midwest Pain Clinic on July 18, 2018. (JE10, p. 44; See Ex. 1, p. 6; Ex. 4, pp. 1-3) Amelia Kumisch, NP, diagnosed claimant with chronic pain syndrome, lumbar radiculopathy, and bilateral wrist pain. (See Ex. 1, p. 6) Claimant attributes his bilateral wrist pain to having to push off with both hands when rising from a seated position. (See Hr. Tr., pp. 27-28) Following her examination, Ms. Kumisch referred claimant to Dr. Cook for an ESI. (See Ex. 1, p. 6)

According to at least two records, claimant was drinking up to six beers, daily in the first year after his injury to help with the pain. (Ex. 1, p. 4; JE9, p. 40)

Claimant presented to Midwest Pain Clinic on a monthly basis between July 2018 and the date of the evidentiary hearing. Unfortunately, the evidentiary record does not contain a substantial amount of medical records from Midwest Pain Clinic. (See JE10, pp. 44-51)

On September 29, 2018, claimant presented to the emergency department at Baum Harmon Mercy Hospital with acute chest pain. (JE7, p. 32) Claimant testified that he experienced acute chest pain while he was in the process of taking a shower and was concerned he was having a heart attack. (Hr. Tr., p. 53) Claimant's vital signs were stable, with the exception of sinus tachycardia. (Id.) The medical staff provided claimant with chewable aspirin and two sublingual nitroglycerin, which resolved his chest pain. (Id.) Claimant was admitted overnight to rule out myocardial infarction (MI). Claimant was discharged on September 30, 2018, after his EKG returned normal. (Id.)

At some point in time between July and November 2018, claimant agreed to undergo injection therapy. Dave Welch, P.A., administered ESIs to claimant's lumbar spine on or about November 15, 2018, and December 5, 2018. (See Ex. 4, p. 2) Claimant experienced severe anxiety following the first steroid injection. Dr. Cook characterized claimant's response as an overreaction, prescribed anti-anxiety medication, and assured claimant that he was going to be alright. (Id.)

When claimant reported he did not receive significant relief from the first set of ESIs, Dr. Cook administered bilateral lumbar facet injections at L2-L3, L3-L4, and L4-L5, on or about December 18, 2018. (Id.) It should be noted that this set of injections is not mentioned in Dr. Cook's final report. (See Ex. 4, p. 2) Dr. Cook strongly recommended claimant present for psychiatric care for severe anxiety, depression, and possible conversion reaction. Following his December 18, 2018, examination, Dr. Cook arranged for claimant to present to a cognitive behavioral therapist at Seasons Behavioral Therapy. (JE10, p. 47)

On or about January 7, 2019, claimant presented to the emergency department at Baum Harmon Mercy Hospital, complaining of a loss of sensation and motion in his bilateral lower extremities following a fall at home. (JE7, p. 33) According to the medical records, claimant was getting out of bed to go to the bathroom in the middle of the night when he heard a "pop" in his back. (Id.) Claimant subsequently fell to the floor, face forward. Claimant called for his wife and told her he could not move his lower extremities. (Id.) Mrs. Kuehl called for an ambulance and claimant was transported to Baum Harmon Mercy Hospital. (See JE7, pp. 33-36) After CT scans of the thoracic and lumbar spine returned normal, claimant was transferred by ambulance to Mercy Hospital in Sioux City, Iowa for further evaluation. (JE7, p. 34)

Mr. Kuehl was first evaluated by Jerold Erlandson, M.D., at Mercy Medical Center. (JE11, p. 52) Dr. Erlandson reviewed MRIs of claimant's lumbar and thoracic

spine and consulted the Neurosurgery department. (Id.) Neurosurgery did not believe claimant presented with a neurosurgical problem. (Id.) Dr. Erlandson opined, “This is likely some underlying possible conversion disorder.” (Id.) He admitted claimant to the hospital and recommended an EMG. Dr. Erlandson also scheduled claimant for examinations with Neurology and physical therapy. (Id.)

For reference, a conversion disorder is a condition in which an individual has physical symptoms of a health problem, but no injury or illness to explain them.

Claimant’s EMG did not show any evidence for chronic radiculopathy involving the lower extremities. (See JE11, p. 58) It is noted that such a finding does not necessarily rule out an underlying etiology for chronic low back pain. (JE11, p. 58)

On January 9, 2019, claimant expressed his frustrations regarding his inability to return to his previous activity level. Claimant then requested an evaluation by Neurosurgery at Mercy Hospital. (JE11, p. 55)

Neurosurgeon Ralph Reeder, M.D., conducted an evaluation of claimant on January 9, 2019. After examining claimant and reviewing the updated diagnostic imaging, Dr. Reeder opined claimant’s acute paralysis was not related to the July 24, 2017, work injury. (JE11, p. 60) He advised the medical staff to obtain MRIs of claimant’s brain, cervical spine, and thoracic spine with contrast to rule out other structural abnormalities that could explain claimant’s weakness. (JE11, p. 55) Dr. Reeder explained that the additional imaging was to make certain that claimant was not suffering from a transverse myelitis or unidentified intrinsic cord problem. (JE11, p. 60) With respect to claimant’s chronic low back pain, Dr. Reeder recommended claimant pursue nonoperative treatment. Like the other examining physicians within Mercy Medical Center, Dr. Reeder reached this conclusion without analyzing any outside medical records.

Claimant’s MRIs returned unremarkable. (See JE11, pp. 59, 62) Dr. Reeder opined there was no clear identifiable etiology for claimant’s complaints. (See JE11, p. 61)

When the physicians at Mercy Medical Center could not determine any specific etiology, claimant requested a transfer to the Mayo Clinic for a second opinion. (See JE11, p. 56) Dr. Reeder felt a referral to a tertiary care center was appropriate. (JE11, p. 61) A referral to the Mayo Clinic was initiated on January 10, 2019 and all of claimant’s diagnostic imaging was subsequently sent to the Mayo Clinic for review. (JE11, p. 57) On January 11, 2019, the Neurology team at Mayo Clinic declined an in-patient transfer, and opined claimant would be best served by seeing a neurology specialist for a lower motor neuron disease evaluation on an outpatient basis. (JE11, p. 63) The Mayo Clinic recommended a lumbar puncture and neurosensory evoked potential. It is noted these procedures were what the Mayo Clinic would administer if claimant decided to present to the clinic on an outpatient basis. (Id.)

Claimant refused a transfer to Mercy's skilled nursing facility, and he did not meet the criteria for transfer to Mercy's acute inpatient rehabilitation. (JE11, p. 64)

Claimant was ultimately discharged on January 15, 2019. (See JE11, p. 66) Prior to his discharge, claimant demonstrated some sensation to pain when Tannia Joson, M.D., applied nail bed pressure to his lower extremities. Claimant became very upset when Dr. Joson applied said pressure, and asked why Dr. Joson felt the need to apply nail bed pressure when, "you know that I have no feeling in my legs." (JE11, p. 66) Dr. Joson made note that claimant crossed and uncrossed his legs at times, and he moved his legs while sleeping. The physical therapists at Mercy felt that claimant had more strength in the lower extremities than he was communicating. (Id.) Upon discharge, claimant was provided a wheelchair. Dr. Joson observed claimant pull himself up into his vehicle after putting his legs up on his vehicle's running boards. (Id.)

At hearing, claimant testified that he regained some feeling in his left leg the second week of February 2019. He regained feeling in his right leg one week thereafter. (See Hr. Tr., pp. 37-38) However, claimant testified he is still unable to feel from his right knee down. (Hr. Tr., p. 38)

Claimant presented to Susan Richards, LISW on January 17, 2019, and January 29, 2019, as part of a mental health assessment. (JE8, p. 37) Claimant presented in a wheelchair. When asked what mental health issues he believed he had, Mr. Kuehl answered that his only problems were his work injury and trying to figure out what is going to happen regarding the same. Ms. Richards diagnosed claimant with an unspecified adjustment disorder and recommended a referral to a psychiatrist who specializes in neurology/psychiatry. (JE8, p. 38) Ms. Richards concluded her assessment by providing she did not schedule claimant for any follow-up appointments because she did not, "see a mental health issue at this time." (Id.) It appears this is because claimant's Beck Depression Inventory, Life Events Checklist, General Anxiety Disorder 7-item Scale, and PCL-C all returned unremarkable. (See Id.)

Claimant was subsequently referred to clinical psychologist, Tony Sorensen, Psy.D., for psychological testing to rule out a conversion disorder. (JE9, p. 39) Claimant presented to Dr. Sorensen on April 20, 2019. (JE9, p. 39) During the evaluation, claimant denied most symptoms of anxiety and depression, with the noted exceptions of low energy, worry about treatment of his back and leg pain, and sleeping approximately two hours per night. (JE9, pp. 40-41) Dr. Sorensen diagnosed claimant with adjustment disorder with mixed anxiety and depressed mood, as well as Narcissistic Personality Disorder. (JE9, p. 42) Dr. Sorensen opined claimant's testing did not support a diagnosis of a conversion disorder. (JE9, p. 43) In closing, Dr. Sorensen relayed that it is likely claimant would respond well to behavioral therapy; however, it was unlikely claimant would seek said therapy voluntarily. (JE9, pp. 42-43)

Claimant's counsel deposed Dr. Sorensen on August 10, 2019. (Ex. 3) According to Dr. Sorensen, defendants originally scheduled an appointment with Dr. Bahnson, a psychiatrist; however, Dr. Bahnson referred claimant to Dr. Sorensen for his

initial testing. (Ex. 3, Deposition pages 8-9) Dr. Sorensen testified he reviewed claimant's medical records prior to reaching his conclusions. (Ex. 3, Depo. p. 11) Dr. Sorensen testified that he ruled out conversion disorder as a diagnosis for claimant's condition. (Ex. 3, Depo. p. 15) He did not believe that claimant suffered from Somatic Symptom Disorder. (Ex. 3, Depo. p. 15) Dr. Sorensen confirmed his opinion that claimant's mental health condition does not require permanent restrictions and it would not prevent him from being gainfully employed. (Ex. 3, Depo. p. 25)

Claimant's pain management was transferred from Mr. Welch back to Dr. Cook in October 2019 to further evaluate claimant's radicular low back pain. An updated MRI, dated October 23, 2019, returned mild findings of lumbar spinal spondylosis with no evidence of critical central or foraminal stenosis. (JE10, p. 48) Dr. Cook administered a Caudal ESI on October 31, 2019. (Id.) Claimant received some benefit from the epidural series and his medication management; however, his symptoms persisted, overall.

A few weeks thereafter, claimant presented to Matthiew Hoogland, O.D., and reported blurred vision in his left eye. (JE12, p. 68) Dr. Hoogland opined claimant's blurred vision was likely secondary to steroid use; however, he also noted that stress could play a role. (JE12, p. 69) He further opined the condition would likely resolve on its own within a few weeks. (Id.)

Claimant reported improvement in his left eye condition on December 18, 2019. (JE12, p. 70) Dr. Hoogland assessed claimant's left eye condition as "much improved" but still mildly present. (JE12, p. 73) While there are no additional medical records to support the same, it should be noted that under the additional comments section of Dr. Hoogland's reports, he provided, "Anxiety Disorder," "schizophrenia," and "trouble breathing over the past couple of months in which he is managing with PCP." (Id.; JE12, p. 74)

Claimant returned to Dr. Hoogland's office on January 17, 2020. (JE12, p. 74) This time, however, claimant reported that his left eye was not getting any better. (Id.) At claimant's request, Dr. Hoogland referred him to a retina specialist. (JE12, p. 76)

Ryan Geraets, M.D., examined claimant on February 6, 2020. (JE13, p. 77) Claimant told Dr. Geraets that his vision became blurry a few days after the October 31, 2019, steroid injection. (Id.) This conflicts with the report claimant provided to Dr. Hoogland. After examining claimant's left eye, Dr. Geraets diagnosed claimant with Central Serous Chorioretinopathy of the left eye. (JE13, p. 79) Dr. Geraets discussed the nature of central serous retinopathy with claimant, including its relationship to stress. (Id.) Dr. Geraets opined the spinal injection likely triggered claimant's issues. It is noted that claimant's episodic use of nasacort would also contribute to recurrences in the future. (Id.) Dr. Geraets recommended that claimant avoid all corticosteroids whenever possible to reduce the risk of additional flares. (Id.) In closing, Dr. Geraets recommended against treatment. (Id.) He provided additional treatment would be considered if claimant's left eye continued to carry fluid past April 2020. (Id.) No

physician has opined that claimant's CSR is permanent. In fact, Dr. Geraets opined that the condition would likely resolve with time. He did not recommend any additional treatment. I do not find claimant carried his burden of proving his left eye condition is permanent. I find claimant suffered no permanent impairment or disability as a result of the alleged left eye condition.

Conservative care has not been successful for claimant. As of the time of the evidentiary hearing, no surgeon had recommended surgical intervention.

At hearing, Mr. Kuehl testified to his current functional abilities. He testified he is essentially bedridden at this point in time. (See Hr. Tr., p. 46) According to claimant, he only gets out of bed to use the restroom and let his dogs outside. (Hr. Tr., p. 46) Claimant is able to shower. (Hr. Tr., p. 53) Claimant can cook himself meals, as long as they do not require a substantial amount of time and effort. (Hr. Tr., p. 47) Claimant has a computer at home, and he has the ability to use the internet. (Hr. Tr., p. 61) Claimant testified that his neighbor built him a wheelchair ramp so he could get into his home easier. (Hr. Tr., p. 39) Claimant maintains an active drivers' license. (Hr. Tr., p. 45) It appears as though claimant also maintains his commercial drivers' license, at least in the state of Iowa. (See Id.; "It was suspended for not having a DOT physical because I'm not able to pass a DOT physical. But I've since gotten it cleared up. … I can't drive a semi-truck or anything requiring a CDL outside of the state of Iowa.") At the time of the evidentiary hearing, claimant was taking Hydrocodone and Duloxetine. Claimant testified he takes Hydrocodone "maybe a couple of times a day if I have to. I try not to take it if I can help it." (Hr. Tr., pp. 28-29) He also utilizes Lidocaine patches. (See Hr. Tr., p. 62)

I was able to observe the claimant at the evidentiary hearing. Claimant's presentation was consistent with the medical records in evidence. The medical records in evidence consistently describe claimant's slow gait and pain behaviors. The medical records also consistently document claimant rocking back and forth in an attempt to minimize his pain. (See JE8, p. 38; Ex. 3, Depo. p. 18; Hr. Tr., p. 27) Claimant appeared uncomfortable and mildly agitated throughout the evidentiary hearing. He had a difficult time walking and requested to leave the hearing room once he was finished testifying so he could recline in his vehicle. Despite the fact claimant took remedial classes in high school, I did not observe any cognitive deficits or delay when claimant was responding to questions.

Mrs. Kuehl provided testimony at the evidentiary hearing. She testified to the number of ways in which the work injury has impacted Mr. Kuehl's lifestyle and their relationship in general. She presented as a respectful and trustworthy witness.

Given the lack of objective medical evidence to show claimant sustained a significant low back injury, it is reasonable for defendants to question claimant's credibility. There is some evidence in the record to suggest that Mr. Kuehl lacks credibility; however, a number of examples can be traced to claimant's mental health condition. For instance, claimant reported that he did not have any feeling in his lower

extremities, but responded to nailbed pressure prior to discharge at Mercy Hospital. Similarly, claimant reported an inability to move his legs, but medical records note claimant crossed and uncrossed his legs at times, and he moved his legs while sleeping.

Again, it is important to note that what may appear as an exaggeration or overreaction on the surface, could very well be manifestations of an underlying mental health disorder. The inability to pinpoint any objective signs of injury on diagnostic imaging is what lead the physicians at Mercy Hospital to question whether claimant had a conversion disorder. In such a scenario, the symptoms, while unverifiable by diagnostic imaging, would nevertheless be very real to claimant and would not call his credibility into question.

There are other instances of overreactions, the majority of which are relatively insignificant and appear to stem from claimant's overall frustration with the workers' compensation system. For instance, claimant testified that he requested medical treatment on Friday, July 28, 2017. (Hr. Tr., p. 18) Claimant further testified that it took "forever" to obtain medical attention, and that when he first presented for medical treatment, he did not actually receive any care. (Hr. Tr., pp. 18-19) The evidentiary record reveals that claimant presented to the McFarland Clinic on July 28, 2017, the same day he requested medical treatment. At his initial medical evaluation, the McFarland Clinic ordered x-rays of claimant's spine, provided an initial diagnosis, referred claimant on for additional evaluation, and provided recommendations regarding medication. Days later, the medical team at the McFarland Clinic would re-evaluate claimant and prescribe muscle relaxers and physical therapy. It cannot be said that claimant's treatment was delayed or non-existent.

Similarly, claimant testified that Dr. Reeder kicked him out of the hospital in January 2019. (Hr. Tr., p. 52) This is not supported by the evidentiary record. The physicians at Mercy Medical Center conducted a full workup of claimant over the course of several days. Claimant was discharged after diagnostic imaging failed to reveal any anatomical explanations for claimant's symptoms, and after the Mayo Clinic declined to accept claimant as an in-person transfer.

Claimant has also testified to a number of things that are not supported by contemporaneous medical records. Claimant testified that Dr. Espiritu told him there was a 50 percent chance surgery could fix his condition. However, there is no indication in Dr. Espiritu's report that surgical intervention was an option available to claimant. In fact, Dr. Espiritu found, based on his review of the diagnostic imaging and physical examination, that claimant is not a surgical candidate at this time. Claimant further testified that one of his physicians, presumably Dr. Bansal, told him that if he did not have surgery right away, that at some point in time he would probably end up paralyzed. (Hr. Tr., p. 50) The evidentiary record is devoid of any such surgical recommendation.

He further testified that the physicians at Mercy Hospital in Sioux City did not discuss any surgical options with him. According to claimant, this is because the physicians knew his case was work-comp related. (Hr. Tr., p. 51) Claimant's testimony does not match the medical records in evidence. According to the medical records, representatives from neurology and neurosurgery examined claimant, obtained diagnostic imaging, and ultimately concluded claimant was not a surgical candidate. Their opinions are consistent with the evidentiary record.

I ultimately find that claimant's testimony on matters material to this case were generally credible. That being said, claimant's tendency to dramatize past events is noted. This is excused by the fact claimant consistently reported the same or similar symptoms, and the fact a number of claimant's actions can be explained by the personality disorders diagnosed and discussed in Dr. Sorensen's report. (JE9, p. 43)

In total, three physicians have offered opinions as to claimant's level of permanent impairment.

At the request of his attorney, claimant presented to Sunil Bansal, M.D., on August 31, 2018, for an independent medical examination. (Ex. 1, p. 1) Dr. Bansal produced his IME report on or about October 12, 2018. (See Ex. 1, p. 11) Dr. Bansal diagnosed claimant with disc bulges and annular tears at L4-L5 and L5-S1. (Ex. 1, p. 9) He causally related claimant's diagnoses to the July 24, 2017, work injury. (Ex. 1, p. 10) Dr. Bansal agreed with Dr. Espiritu and placed claimant at MMI as of May 23, 2018. (Id.) Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Bansal placed claimant in DRE Category II and assigned 8 percent impairment to the whole person. (Id.)

Defendants arranged for claimant to present to Douglas Martin, M.D., for a defense IME on March 25, 2019. (Ex. A, p. 1) A list of the medical records Dr. Martin reviewed prior to drafting his IME report is provided in Exhibit A, page 11. Dr. Martin did not review claimant's physical therapy records, or the psychological evaluation conducted by Ms. Richards. On examination, Dr. Martin provides that claimant's strength testing was met with extremely poor effort; an effort that would be inconsistent with the ability to stand and walk. (Ex. A, p. 5) He also noted a substantial degree of pain behaviors and inconsistencies on examination; however, he did not elaborate on the same. Following his review of the records and claimant's physical examination, Dr. Martin diagnosed claimant with Somatic Symptom Disorder. (Id.) Dr. Martin explained he saw no indications that claimant has any anatomic or physiological issues within his lumbar spine. (Ex. A, p. 6) Dr. Martin recommended a treatment plan consistent with medication management and cognitive behavioral therapy. (Id.) Dr. Martin opined claimant's diagnosis would not have a relationship to the work injury. However, he also opined there is no question that claimant sustained some sort of lumbar strain or sprain on the date of injury. (Ex. A, p. 7) Dr. Martin opined claimant does not have a ratable impairment. (Id.)

For reference, somatic symptom disorders are characterized by an extreme focus on physical symptoms that causes major emotional distress and problems functioning.

Dr. Martin addressed the impairment evaluations of Drs. Janssen and Bansal, noting both evaluations are inconsistent with the application of the information as expressed in the AMA Guides, Fifth Edition. (Id.) With respect to Dr. Bansal's opinion, Dr. Martin opined there is no evidence of any objective basis for radiculopathy, so a placement in DRE Category III is inconsistent with the definitional criteria expressed in the AMA Guides. (Id.) It should be noted that Dr. Bansal did not actually place claimant in DRE Category III. With respect to Dr. Janssen's opinion, Dr. Martin opined that in order to have non-verifiable radicular complaints, Dr. Janssen should have specifically identified the nerve root dermatome in question. Seeing none, Dr. Martin disagreed with Dr. Janssen's placement of claimant in DRE Category II. (Ex. A, p. 8)

I do not find Dr. Martin's opinions to be convincing. As Drs. Bansal and Janssen correctly note, there is an entire category in the AMA Guides, Fifth Edition dedicated to non-verifiable radicular complaints. Moreover, the opinions of Dr. Martin do not comport with the evidentiary record as a whole. First, multiple physicians have analyzed claimant's diagnostic imaging and reached the conclusion that claimant sustained disc herniations and annular tears at L4-L5 and L5-S1. This is sufficient evidence of a physical basis for claimant's pain complaints.

Additionally, Dr. Martin's diagnosis of somatic symptom disorder is at odds with the testimony of Dr. Sorensen. Perhaps more importantly, his opinion regarding causation of the same is not in line with the opinions of Dr. Sorensen. While Dr. Sorensen is not a psychiatrist, he is significantly more qualified than Dr. Martin to diagnose conditions related to claimant's mental health. Moreover, Dr. Sorensen conducted the requisite tests to diagnose claimant with mental health disorders; there is no evidence Dr. Martin did the same. While I believe there is a mental aspect to claimant's condition, I am not convinced by Dr. Martin's opinion that the same is unrelated to the workplace injury. Other than to say Somatic Symptom Disorder is primarily a mental health condition, Dr. Martin did not provide a sufficient explanation as to how or why such a diagnosis is not related to claimant's work injury. For these reasons, I cannot accept the expert medical opinions of Dr. Martin.

Instead, I accept the consistent impairment ratings of Dr. Janssen and Dr. Bansal and find that claimant has an 8 percent permanent impairment of the body as a whole as a result of the July 24, 2017, work injury.

With respect to permanent work restrictions, claimant has undergone one FCE. This occurred on July 23, 2018. (Ex. 2, p. 1) Mr. Kuehl was unable to perform any of the material handling test items. It was determined that claimant was not able to meet the capabilities of even the sedentary category of physical demand. (Ex. 2, p. 2) Despite the fact that the FCE did not recommend any specific restrictions, Dr. Bansal "agreed with the restrictions assigned by the valid [FCE] …." (Ex. 1, p. 11)

I do not find the July 23, 2018, FCE report convincing. While it is clear claimant is limited due to his pain complaints, multiple physicians have provided that there is nothing anatomically wrong with claimant's lumbar spine. Moreover, at least some of claimant's physicians and physical therapists have referenced the fact that claimant is physically capable of more than he leads on. It is certainly noteworthy that claimant could not perform any of the material handling test items at his FCE; however, this does not provide the undersigned with an understanding of what, if any lifting claimant attempted or performed at the FCE. Lastly, the FCE was conducted a year and a half prior to the arbitration decision, and prior to claimant receiving additional treatment, including ESIs.

When Dr. Boetel, claimant's treating physician, released claimant to return to work in December 2017, he assigned a 20-pound lifting restriction, and recommendations of no repetitive bending, turning, or twisting at the waist, and sit and stand as tolerated. (JE3, p. 14) Dr. Janssen recommended adoption of Dr. Boetel's recommendations as claimant's permanent work restrictions. (JE3, pp. 16-19) At the time of his IME with Dr. Bansal, claimant relayed that he could lift 15 pounds. (Ex. 1, p. 8) I find it likely that the restrictions assigned by Drs. Boetel and Janssen more accurately reflect claimant's functional abilities when compared to the July 2018 FCE report.

Defendants have also presented evidence to call Mr. Kuehl's motivation into question. To make a finding of permanent total disability, it is helpful for this agency to have evidence that a claimant has made an actual, good faith work search. Mr. Kuehl has not worked since July 28, 2017. He has made no attempt to return to work since July 2017. He has not looked for or submitted applications for alternative employment. He believes such attempts would be futile. He applied for and was granted Social Security Disability benefits. (See Hr. Tr., p. 60) Neither party secured the opinions of a vocational expert. Claimant did not introduce substantial evidence to show that he has no reasonable prospect of steady employment.

It cannot be said that claimant was the ideal patient. Claimant demonstrated very little willingness to participate in the medical treatments recommended by his treating physicians. At his initial appointment with Ms. Freese, claimant declined the opportunity to obtain stronger pain medications and he resisted recommendations that he utilize a wheelchair. Claimant has a well-documented history of refusing to undergo ESIs until October 2018. Claimant told his treating physicians that he did not want to put a Band-Aid on the issue, implying there were other options he felt should be pursued. This, despite the fact no physician in the evidentiary record has recommended surgical intervention at this time. Lastly, several physicians, including Dr. Sorensen, have recommended that claimant present for mental health treatment; however, there is no indication claimant has actively pursued the same.

While they do not share the same opinion with respect to causation, Ms. Richards, Dr. Sorensen, and Dr. Martin believe claimant has some type of psychological overlay to his current condition. Claimant believes he is injured and conducts himself in

a manner consistent with someone who is severely disabled. However, physically, there is little to no explanation for claimant's ongoing, severe pain complaints. He has failed conservative treatment, including anti-inflammatories, opioids, anxiety medications, ESIs, physical therapy, and chiropractic care. None of these treatment modalities provided claimant with any relief.

Unfortunately, claimant's mental health condition has largely gone untreated. It is unclear whether this is due to claimant's unwillingness to participate in the same or if defendants simply have not offered the same to claimant. Regardless, it is apparent this is playing a role in claimant's ongoing condition.

While claimant in all likelihood does have a psychological component to his injury, his unwillingness to undertake medical care that has been recommended to him by multiple medical providers, impacts the industrial disability to be assigned to claimant's work injury.

Claimant sustained significant disability as a result of the July 24, 2017, work injury. That being said, the evidentiary record is not well developed as it pertains to the assertion that claimant is permanently and totally disabled. According to the greater weight of the medical evidence, claimant is not permanently and totally disabled. However, it is unlikely he can return to the operating work he did prior to the work injury, he has a limited work history in general, and he has limited education.

Claimant has a nonsurgical back condition. The diagnostic imaging has returned largely unremarkable. While it is clear claimant is in pain, said pain is noted to fluctuate between 3 and 9 on a 10-point scale, depending on the use of medication. The only FCE in the evidentiary record occurred over 18 months prior to the evidentiary hearing and is largely unhelpful in terms of analysis. There is no evidence that claimant made a genuine attempt to return to the workforce after being released in February 2018. Claimant has not sought any work and, therefore, there is limited information as to what positions within the labor market he could perform.

Considering Mr. Kuehl's age, educational background, employment history, functional abilities, permanent impairment ratings, his lack of motivation to return to the work force, the relatively mild back injury – physically speaking – as well as all other industrial disability factors identified by the Iowa Supreme Court, I find that Mr. Kuehl has proven he sustained a 70 percent loss of future earning capacity as a result of the July 24, 2017, work injury.

I find claimant is entitled to reimbursement for some, but not all of the medical expenses provided in Exhibit 7. Claimant's entitlement to the various medical expenses will be addressed in the Conclusions of Law section.

Claimant was successful in his workers' compensation claim. Costs will also be addressed in the Conclusions of Law section.

CONCLUSIONS OF LAW

In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23, section 24, the changes to Iowa Code section 85.34 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017. Therefore, the provisions of the new statute apply to this case.

The parties stipulate that claimant sustained an injury on July 24, 2017, which arose out of and in the course of his employment with Foley Company.

The first issue to be addressed is whether Mr. Kuehl carried his burden of proving the stipulated injury caused permanent disability, and if so, the extent of the same.

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); Frve 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).

Having found the medical opinions of Dr. Janssen and Dr. Bansal most convincing in the evidentiary record, I also found that claimant proved a causal connection between his claim of permanent disability and the July 24, 2017, work injury.

In this case, I found claimant met his burden of proving he sustained permanent disability as a result of the July 24, 2017, low back injury. Therefore, I conclude

claimant has carried his burden of proving he is entitled to an award of permanent disability benefits.

Defendants offer no argument with respect to whether claimant's entitlement is limited to a functional impairment rating. Claimant did not return to work following his July 24, 2017, work injury, nor did he receive any offers for work from the defendant employer. I find claimant's injury is unscheduled and compensated with industrial disability pursuant to Iowa Code section 85.34(2)(v).

Industrial disability is determined by an evaluation of the employee's earning capacity. Cedar Rapids Community School Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

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). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code section 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)(v). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Industries, Inc., 818 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

I accepted the 8 percent impairment rating assigned by both Dr. Janssen and Dr. Bansal. I find claimant's entitlement to permanent disability benefits is not limited to the functional impairment rating.

Mr. Kuehl asserts he is permanently and totally disabled under both the traditional and odd-lot analyses. Foley Company rejects such an assertion.

In Iowa, a claimant may establish permanent total disability under the statute, or through the common law odd-lot doctrine. Michael Eberhart Constr. v. Curtain, 674 N.W.2d 123, 126 (Iowa 2004) (discussing both theories of permanent total disability under Idaho law and concluding the deputy's ruling was not based on both theories, rather, it was only based on the odd-lot doctrine). Under the statute, the claimant may establish the claimant is totally and permanently disabled if the claimant's medical impairment together with nonmedical factors totals 100 percent. Id.

Total disability does not mean a state of absolute helplessness. Walmart Stores. Inc. v. Caselman, 657 N.W.2d 493, 501 (Iowa 2003) (quoting IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 633 (Iowa 2000)). Total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacity would otherwise permit the employee to perform." Al-Gharib, 604 N.W.2d at 633.

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

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106.

Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

In this instance, I found that Mr. Kuehl did not produce sufficient evidence to establish a prima facie case of total disability. I similarly found that Mr. Kuehl is not an odd-lot employee. Specifically, Mr. Kuehl did not produce substantial evidence to establish that he was not employable in the competitive labor market. In the approximately two years before the evidentiary hearing, claimant did not apply to a single employer. He did not produce any evidence to show he attempted to return to the active workforce. Claimant did not submit a vocational assessment, and no physician has provided Mr. Kuehl cannot return to work in any capacity.

Claimant relies on the fact that he has been awarded Social Security Disability benefits to show he is permanently and totally disabled. Claimant did not submit the decision of the Social Security Administration, or any documents to show what physical

and/or mental health conditions the SSA relied upon when evaluating claimant's entitlement to SSDI benefits.

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

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

Iowa Code section 85.34(2)(v) provides that the undersigned shall take into account the number of years into the future it was reasonably anticipated that the employee would work at the time of the injury. The section does not indicate how this Agency is supposed to "consider" this factor, and the parties did not present any evidence or argument regarding the same. Reasonable minds could disagree as to whether the number of years left in a working life increases or decreases an individual's entitlement to industrial disability. For what it's worth, and because the legislature decided to throw "shall" in the provision, I will provide that I considered the number of years into the future it was reasonably anticipated that the employee would work at the time of the injury. Iowa Code section 85.34(2)(v).

In this instance, having considered the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant proved he sustained a 70 percent loss of future earning capacity. Pursuant to Iowa Code section 85.34(2)(v), industrial disability is paid in relation to 500 weeks as the disability bears to the body as a whole. A 70 percent loss of earning capacity entitles claimant to an award of 350 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

Despite evidence of pre-existing conditions in claimant's knees, defendants offer no argument with respect to apportionment. The evidentiary record is void of any impairment ratings regarding the same. As such, I find defendants are not entitled to apportion their liability for claimant's permanent partial disability in this case.

The parties have stipulated that claimant's gross weekly earnings were $1,307.52. The parties have also stipulated that claimant was married and entitled to

two exemptions on the date of injury. Those stipulations are accepted. However, the parties inaccurately assert that the proper rate for workers' compensation benefits is $807.74. The Iowa Workers' Compensation Manual (rate book) with effective dates from July 1, 2017 through June 30, 2018 indicates that the applicable weekly worker's compensation rate is $808.31. All weekly benefits awarded in this decision shall be payable at the rate of $808.31 per week.

The parties have stipulated that the commencement date for permanent partial disability benefits is February 9, 2018. I accept the parties' stipulation and find permanent partial disability benefits shall commence on February 9, 2018.

Mr. Kuehl seeks an award of the past medical expenses contained in Exhibit 7.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The employer's statutory right to select the authorized medical provider does not apply when emergency care is required. The parties can negotiate and reach an amicable resolution in which the injured worker is permitted to see a medical provider other than the employee's initially selected provider. The injured worker also has a statutory remedy to seek an order of this agency transferring care to an alternate medical provider. Iowa Code section 85.27(4).

Other than these three scenarios, the employer retains a statutory right to select the authorized medical provider. Brewer-Strong v. HNI Corporation, 913 N.W.2d 235, 248 (Iowa 2018). The employee can elect to forego the statutory process and pay for his or her own medical care. However, if the employee elects to abandon the protections of the statute and pursue care through a provider of his or her own choosing, the employer will only be responsible for payment of the unauthorized medical expenses if the employee can prove "by a preponderance of the evidence that such care was reasonable and beneficial" under a totality of the circumstances. Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010).

While it is certainly plausible that claimant's emergency room visit on September 29, 2018, was related to stress and anxiety brought on by the July 24, 2017, work injury, claimant submitted no objective evidence to establish the same. In his post-hearing brief, claimant discusses how Dr. Cook eventually prescribed him blood pressure medication due to his overreaction to the first ESI; however, claimant did not receive his first ESI until November 5, 2018; well after the date in which he presented to the emergency room. There is no evidence to suggest that the September 29, 2018,

emergency room visit was causally related to the July 24, 2017, work injury. I conclude claimant failed to establish entitlement to reimbursement, payment, or satisfaction of the medical expenses associated with the September 29, 2018, emergency room visit.

The dates of service in Exhibit 7 from January 7, 2019, to January 15, 2019, are all associated with the hospitalization and transportation of claimant from his home to Primghar Hospital and then from Primghar Hospital to Mercy Medical Center in Sioux City. The expenses are related to claimant's fall on January 7, 2019. The only causation opinion regarding claimant's hospitalization comes from Dr. Reeder. Dr. Reeder definitively provided that claimant's unexplained, brief paralysis was unrelated to the July 24, 2017, work injury. That being said, it is undisputed that claimant was still experiencing significant pain and discomfort, related to the work injury, in January 2019. It is documented that weeks prior to the January 2019 hospitalization, claimant had experienced an increase in anxiety and other related symptoms following a series of steroid injections. Claimant's hospitalization can be traced back to him experiencing a "pop" in his back when performing a routine activity. There is no evidence claimant experienced similar episodes prior to the date of injury. During his hospitalization, claimant received treatment, including diagnostic imaging, for his work-related low back condition. Moreover, defense counsel provided that his client had authorized recommendations made by the Mercy medical staff following claimant's hospitalization. (See Hr. Tr., p. 78) Regardless of Dr. Reeder's ultimate conclusion, claimant required emergency medical treatment involving his low back. There is no evidence that the fall materially aggravated, or really impacted claimant's low back condition at all. Claimant was not in a position to seek authorization from defendants prior to presenting for medical treatment involving his low back in January 2019. I find that the medical expenses associated with claimant's January 7, 2019, hospitalizations are causally related, reasonable, and necessary.

Finally, claimant seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Claimant has prevailed in his claim for permanent partial disability benefits. Therefore, I conclude it is appropriate to assess claimant's costs in some amount.

Claimant seeks assessment of his filing fees, totaling $200.00. This cost is appropriate and assessed pursuant to 876 IAC 4.33(7)

Claimant is seeking reimbursement in the amount of $900.00 for the cost of his functional capacity evaluation in July 2018. Agency rule 4.33(6) permits the assessment of the reasonable costs of "obtaining no more than two doctors' or practitioners' reports." The agency has previously determined this administrative rule permits assessment of the cost of FCE expenses and vocational expert reports. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009); Pastor v. Farmland Foods, File No. 5050551 (Arb. April 2016); Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010).

However, the Iowa Supreme Court has held that only the cost of drafting the expert's report is permissible in lieu of testimony. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015). Exhibit 10 provides that Mr. Short attributed $350.00 to the cost of drafting the FCE report. This is the only portion of the FCE report that is reimbursable. However, in this case, I did not find the results of the July 2018 FCE to be convincing or particularly helpful. Therefore, exercising the agency's discretion, I conclude the expense of the FCE should not be taxed as a cost against defendants.

Claimant is also seeking reimbursement in the amount of $2,536.00 for Dr. Bansal's IME. Claimant did not assert entitlement for reimbursement of Dr. Bansal's IME pursuant to Iowa Code section 85.39 as an issue on the Hearing Report.

Agency rule 876 IAC 4.33(6) permits the assessment of "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." The Iowa Supreme Court has interpreted this administrative rule. The Court held:

> [A] physician's written report of an examination and evaluation under section 85.39 would be a reimbursable expense under section 85.39, just as an unreimbursed written report of an examination and evaluation, like deposition testimony and witness fees, could be taxed as hearing costs by the commissioner. Yet, 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.

Dr. Bansal's invoice is included within the evidentiary record at Claimant's Exhibit 10. Dr. Bansal charged $540.00 for his examination of claimant and an additional $1,996.00 for drafting his report. Defendants assert Dr. Bansal's fee is unreasonable, yet fail to provide any evidence, or really any argument, to support the same. As such, I find the cost of obtaining this report ($1,996.00) is appropriate and assessed pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay to claimant three hundred and fifty weeks (350) weeks of permanent partial disability benefits commencing on February 9, 2018. All weekly benefits shall be payable at the weekly rate of eight-hundred eight and 31/100 dollars ($808.31) per week.

Defendants shall receive credit for benefits previously paid.

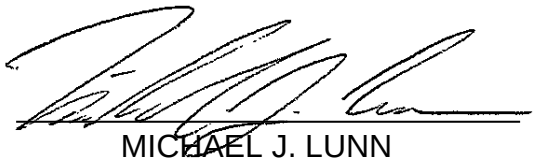
Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

Defendants shall provide claimant future medical care for all treatment causally related to July 24, 2017, work injury.

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.

Costs are taxed to defendant pursuant to 876 IAC 4.33, as set forth in the decision.

Signed and filed this __2nd___ day of September, 2020.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Walter Thomas (via WCES)

L. Tyler Laflin (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.