BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM STONEHOUSE, JR., Claimant, vs. NCI/CORNERSTONE BUILDING BRANDS, Employer, and LIBERTY INSURANCE CORP., Insurance Carrier, Defendants.	File No. 19006810.01 ARBITRATION DECISION Head Note Nos.: 1108, 1800, 1801, 1803, 2401

STATEMENT OF THE CASE

Claimant, William Stonehouse, has filed a petition for arbitration seeking workers' compensation benefits against NCI/CornerStone Building Brands, employer, and Liberty Insurance Corp., insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on February 9, 2021, via CourtCall. The case was considered fully submitted on March 2, 2021, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-9, Claimant's Exhibit 2, Defendants' Exhibits A-D, and the testimony of claimant, Jennifer Newton, and Jessica Goben.

Prior to the hearing, the claimant moved to be allowed over-length joint exhibits. This motion was granted. In reviewing the exhibits for this decision, there were multiple copies of exhibits repeated through the four hundred plus exhibit set. The purpose of the page limit is for the parties to pare down the medical records to an essential set that are necessary for the hearing commissioner to make a judgment on the issues.

The order noted that the Claimant's Exhibits were only twenty pages. The claimant then made multiple filings of exhibits totaling 313 pages. In reviewing the Claimant's Exhibits, most, if not all, of the medical were duplicative of the Joint Exhibits. The undersigned contacted the parties and informed them that the exhibits should be reviewed and all duplicative exhibits removed. In response, claimant's counsel withdrew

all Claimant's Exhibits but the report of Dr. Sassman which is marked as Claimant's Exhibit 2. (See attached email, page 14)

ISSUES

1. Whether the alleged injury is a cause of a temporary disability for which claimant has not reached MMI;
2. Whether the alleged injury is a cause of permanent disability and, if so, the extent;
3. Whether claimant is barred from recovery based on lack of timely notice under Iowa Code Section 85.23 for the alleged injury of November 12, 2019;
4. The appropriate commencement date of permanent disability benefits;
5. The extent of claimant's industrial disability.

STIPULATIONS

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

The parties stipulate claimant sustained an injury arising out of and in the course of his employment on December 6, 2019. The parties agree that as a result of the December 6, 2019 injury, claimant is entitled to temporary and permanent disability benefits.

The parties agree that the accepted and disputed work injuries are industrial in nature and that at the time of both injuries, claimant's gross earnings were $1,725.00 per week. He was single and entitled to three exemptions. Therefore the weekly benefit rate is $1,076.12.

Defendants have paid benefits since December 6, 2019, and have waived all affirmative defenses.

FINDINGS OF FACT

At the time of the hearing claimant was a 59-year-old person. His past education includes completion of the 10th grade followed by a GED. For the most part, his work history has been driving semi-tractor trailers. Claimant began working for defendant employer in September 2018 as a driver of a flatbed semi-tractor trailer. Claimant has a current CDL which he renewed in July 2020. (DE D:10-11)

Claimant's past medical history includes chiropractic care for his low back and hips along with treatment with Dr. Schulte, claimant's personal physician. (JE 3; 8:416) On May 28, 2007, Dr. Schulte authored a letter which recited past medical history as positive for migraine headaches, atypical chest pain, stiff and painful joints, and right upper quadrant abdominal pain without any GI symptoms. (JE 3:122)

Claimant was involved in a semi-tractor truck accident on April 27, 2009, wherein he suffered neck, upper back and lower back pain. (JE 3:106) X-rays revealed no

fractures, subluxations or prevertebral soft tissue swelling. (JE 3:152) On or about March 20, 2014, claimant slipped and fell at work and broke his left rib and sustained some kind of fracture of his wrist. (JE 3:109) In an October 30, 2019 visit, Dr. Schulte's review of claimant's past medical history included broken ribs in 2014, stitches in the left knee, left head, chin, toe, and eyelid. (JE 3:113)

On November 12, 2019, claimant was at a delivery stop in Michigan. While stepping out of the truck, he slipped and fell onto his lower back into deep snow. He testified he immediately reported his injury to his employer by contacting his supervisor, Ridge Hobbs, the route planner, Steve Fritcher, and Jana Payne, someone he described as in charge of the paperwork. He also maintains he spoke with a nurse. Claimant testified that he was instructed to try Biofreeze and a heating pad. He further testified that when he turned in the receipt for the Biofreeze, Mr. Hobbs became angry.

According to Ridge Hobbs, Ms. Payne was a shipping clerk and Mr. Fritcher was not part of management. Mr. Hobbs testified that he received text messages on November 12, 2019, about claimant's run, but that there were no messages about the fall. Further, Mr. Hobbs testified that there was no receipt for Biofreeze and thus did not get angry when the receipt was turned in.

Claimant maintains he has back pain to this day.

On December 6, 2019, claimant was helping to load a forklift when a steel beam struck him in the head. He was taken to the Mayo Clinic via ambulance and seen on December 6, 2019, for "head and chest trauma." (JE 5:189) Claimant reported a brief loss of consciousness, headache, chest pain, and left ankle pain. Id. Multiple tests were run. The x-rays of the ankle were positive for a trimalleolar ankle fracture. (JE 5:184) A CT of the head and neck revealed a fracture through the right C7 facet, posttraumatic changes to the cord at C6 to T1, moderate to high grade canal narrowing at C6-C7, minimal fractures in T3 and T4 of an uncertain age and an L1 fracture, but x-rays of the pelvis were negative. (JE 5:182, 190-191, 227-228) He also had a trimalleolar fracture of his left ankle. (JE 5:205)

Mark Pichelmann, M.D., recommended claimant wear an Aspen collar for 1 month, but no back brace unless the pain was not well controlled. (JE 5:191). Dr. Pichelmann questioned whether the fracture was from the fall three weeks prior. Id.

Open reduction/internal fixation of the left trimalleolar ankle fracture took place on December 9, 2019, by Timothy O'Connor, M.D., at the Mayo Clinic. (JE 5:232-237)

Because of the possible cord injury, the mobility at the C6-C7 level due to the superior facet fracture and likelihood the right C7 nerve root was being pinched, Dr. Pichelmann recommended fusion and possibly a right C6-7 foraminotomy or facetectomy. (JE 5:287-288) Claimant reported that the right shoulder pain was his primary complaint. (JE 5:262) On December 16, 2019, claimant underwent a right C6-7 facetectomy and C3-T1 posterior instrumented fusion performed by Dr. Pichelmann. (JE 5:329-330) Claimant initially reported the right arm pain resolved. (JE 5:353) He was instructed to wear the cervical collar for three more months and to follow up in two weeks for staple removal. (JE 5:355)

On December 17, 2019, claimant was seen by Dr. Pichelmann for nonspecific numbness radiating into the shoulders, low back pain, and some mild discomfort from the left ankle fracture. (JE 5:374) He was then discharged on December 20, 2019, and admitted to Dove Healthcare South, a rehabilitation facility. (JE 1) On the intake notes for Dove Healthcare South, claimant's prior level of functioning included "community ambulatory driving independently working as an over the road truck driver, completed yardwork and housework independently." (JE 1:1) It was noted on the discharge papers that claimant was independent and used no assistive devices prior to the head injury. (JE 5:197)

His pain at the December 20, 2019, visit was 8 on a 10 scale and located in the upper back, upper extremities, between the shoulder blades along with an uncomfortable sensation in the right lower extremity. (JE 1:5) On December 27, 2019, claimant reported his pain was 2 on a 10 scale.(JE 1:63) He was looking forward to discharging on Sunday and felt confident he could make it to Iowa, his home, without significant issue. (JE 2:63) At the time of his discharge on December 29, 2019, claimant's pain was well controlled by methocarbamol, gabapentin and acetaminophen. (JE 2:62)

On January 2, 2020, claimant was seen by William J. Schulte M.D., for follow-up. (JE 3:72) His prescription list at that time was acetaminophen, gabapentin, methocarbamol, and oxycodone. (JE 3:90)

On January 21, 2020, claimant was seen at the University of Iowa by Matthew Howard, M.D. (JE 4:169) Dr. Howard noted claimant had developed central cord syndrome. (JE 4:171) Claimant was instructed to continue with the cervical collar and return after 6 weeks. Id.

On January 30, 2020, claimant was seen by Brent Woodbury, M.D., for the ankle fracture and surgical repair. (JE 4:156-159) The area was painful with some bloody drainage over the lateral malleolus. Id. There appeared to be a possible stitch abscess and it was recommended he wash the area with soap and water. Id.

He returned to Dr. Woodbury on February 4, 2020, reporting ongoing problems at the incision site. (JE 4:164) Dr. Woodbury irrigated and debrided the left ankle with removal of a retained suture on February 5, 2020. (JE 4:167)

On February 25, 2020, he was seen by Dr. Schulte for other health issues.

On July 2, 2020, claimant was seen in follow up for the left ankle at Fort Madison Community Hospital Clinics by Brent Woodbury, M.D. (JE 9:429) At that time, he rated his pain at 5 out of 10 that was constant and alternated between dull aching pain and sharp shooting pain. (JE 9:429) Weightbearing activities increased pain. Id. Dr. Woodbury placed claimant at MMI with no restrictions and encouraged claimant to continue with exercise and stretching. (JE 9:431)

In an addendum dated August 11, 2020, Dr. Woodbury assigned a 2 percent whole person impairment rating and noted that claimant could have his implants removed in the future if he so desired. (JE 9:434)

Claimant underwent a functional capacity evaluation on September 9, 2020 with Michael Wright, PT, which was deemed valid. (JE 7) Claimant' s primary pain complaints included difficulty walking, balance, neck mobility, pain in the neck, right arm, and left ankle/foot. (JE 7:406) In the evaluator's comments section, it was noted that claimant demonstrated limitations with cervical mobility and dynamic lifting. (JE 7:414) He demonstrated inconsistencies with grip/pinch strength and standing/walking balance. He had previous treatment in Physical Therapy for these deficits but reported no improvement. Id. The therapist recommended the following restrictions:

> No lifting floor to knuckle: >50 pounds occasionally (0-33% of the time, approximately 1-100 repetitions), >25 pounds frequently (34-66% of the time, approximately 100-500 repetitions), >10 pounds constantly (67-100%, approximately 500+ repetitions).
>
> No lifting 12" to knuckle kyphosis >50 pounds occasionally, >25 pounds frequently, and >10 pounds constantly.
>
> No lifting 12" to knuckle lordosis >50 pounds occasionally, >25 pounds frequently, and >10 pounds constantly.
>
> No lifting knuckle to shoulder >30 pounds occasionally, >15 pounds frequently, and >6 pounds constantly.
>
> No lifting shoulder to overhead >20 pounds occasionally, >10 pounds frequently, and >4 pounds constantly.
>
> No carrying 14 feet distance >40 pounds occasionally, >20 pounds frequently, and >8 pounds constantly.
>
> No pushing 25 feet distance >35 pounds occasionally, >17.5 pounds frequently, and >7 pounds constantly.
>
> No pulling 7 feet distance >28 pounds occasionally, >14 pounds frequently, and >5.6 pounds constantly.

(JE 7:413) The therapist placed claimant in the medium work category but noted that lifts over five times per day at this level would place claimant at significant medical risk. (JE 7:414)

On September 30, 2020, Dr. Howard adopted the functional capacity evaluation and recommendations that claimant was not able to perform the essential functions of his job and that he would benefit from placement in a position with decreased lifting and mobility demands. (JE 6:396)

October 27, 2020, Dr. Schulte recorded the initial encounter of the left knee. He had cellulitis on the lower limb. (JE 3:95) X-rays were taken of claimant's right hip which revealed mild bilateral hip osteoarthritis. (JE 3:154)

On November 4, 2020, claimant was seen by Amy C. Pearson, M.D., for pain management. (JE 6:390) He reported constant pain in his shoulder to the top of his head, loss of sensation in the right foot as well as the right medial knee and right anterior thigh. (JE 6:390) Sensations in the right foot woke him at night. Id. He

experienced dizzy spells while cooking in his RV. Id. He was advised to continue to take acetaminophen of no more than 3000 mg per day, ibuprofen, gabapentin at 1200 mg 3 times per day and baclofen 10 mg at night, increasing up to 3 times a day if necessary. (JE 6:394) Dr. Pearson wrote that she was unable to say if the low back/radicular pain was related to the fall but was concerned about the condition of his spine. She recommended an MRI. (JE 6:395) She also recommended a consultation with a neurologist for the vertigo and unsteadiness but was not sure whether these issues could be attributed to the work injury. Id.

On December 22, 2020, claimant returned for follow-up with Dr. Howard and reported continued pain in the neck, right arm, and hand. (JE 6:398-402) He had mild weakness in the deltoids, biceps and triceps. Id. at 401. Following this visit, Dr. Howard opined claimant sustained a 28 percent whole person impairment due to the work injury of December 12, 2019. (JE 6:397)

On January 8, 2021, Dr. Howard wrote a letter in response to an inquiry from defendants' counsel regarding a possible head injury of claimant. "I don't have a clear recollection of whether [claimant] described to me that he had sustained a head injury or was having problems with 'lack of concentration.' Given the nature of his injury he could very well have described to me these problems, but they are not entered into my note." (DE A:1) It was Dr. Howard's opinion the claimant achieved maximum medical improvement from his injuries as of August 17, 2020. Id.

On December 23, 2020, Robin L. Sassman, M.D., conducted an IME of claimant. (CE 2) The report containing Dr. Sassman's record review, examination, findings and opinions was issued on January 2, 2021. (CE 2) At the time of the examination, claimant reported some vertigo, ringing in his ears, pain in his neck radiating into his shoulder and down into his right arm with decreased range of motion in the neck. (CE 2:15-16) He had decreased grip strength, pain in his low to mid back that radiated into the buttocks with some numbness at the bottom of the right foot. Id. He felt unstable on his feet and had ankle pain regularly, particularly around the hardware. (CE 2:16)

Claimant told Dr. Sassman he continued to ride his three-wheel motorcycle, but it causes him increased pain. (CE 2:16) He no longer uses a two-wheel motorcycle as he worried about the ability to stabilize it with his left ankle issues. Id. Claimant described difficulty walking on uneven ground, problems with sleeping, descending steps, getting in and out of the bathtub. Id. With driving, claimant has trouble turning his neck. Id. He was taking gabapentin 1200 mg every 3 hours along with baclofen 10 mg and atorvastatin. Id.

On examination, claimant was tender to palpation over the cervical spine, the T3 and T4 levels of the thoracic spine, at the lumbar processes at the L1 and L5 levels. (CE 2:17-18) He exhibited reduced range of motion at those levels. His shoulder range of motion was free of pain and full. He had decreased sensation in the left upper extremity in the C5 dermatome and in the C6 dermatome in the right upper extremity. (CE 2:18) He had decreased sensation in the left ankle and reduced range of motion. (CE 2:19)

Dr. Sassman's diagnoses that were causally related to the work injuries include

the following:

1. L1 compression fracture with continued lumbar pain with radicular symptoms. This diagnosis is due to the 11/12/2019 injury date.
2. C7 fracture with myelopathy
   - Status post right C6-7 facetectomy, C3-T1posterior instrumented fusion, with harvest of right iliac crest bone on 12/12/19 by Mark Pichelmann, MD.
3. Thoracic spine fractures at T3 and T4.
4. Head trauma with scalp laceration and residual, intermittent vertigo symptoms.
5. Left trimalleolar ankle fracture
   - Status post open reduction internal fixation of the left trimalleolar ankle fracture with fixation of the medial and lateral malleoli and nonoperative management of the posterior malleolus on 12/09/19 by Timothy O'Connor, MD.
   - Status post irrigation and debridement procedure of the left ankle with removal of a retained suture and closure of the 2 cm wound on 02/05/2020 by Brent Woodbury, MD.

(CE 2:20) Notably, Dr. Sassman felt that the low back pain reported by the claimant following his fall on November 12, 2019, resulted in an L1 compression fracture given that claimant did not have any prior back problems. (CE 2:20-21)

Dr. Sassman found claimant at MMI on December 12, 2020, for the cervical and thoracic region and the left ankle injury because even though claimant was attending the Pain Clinic, treatment was not likely to affect his impairment rating. (CE 2:21) Claimant had not received treatment for the lower back issue and thus MMI was not possible to assess for the November 12, 2019 injury. (CE 2:21) If claimant did not pursue future treatment, then Dr. Sassman set the MMI date at one year following the date of injury at November 12, 2020. (CE 2:21)

Dr. Sassman assigned a 10 percent rating for the lumbar injury, 14 percent for the cervical spine, and 8 percent for the thoracic spine. (CE 2:22-23) For the left lower extremity, Dr. Sassman assigned a 20 percent lower extremity rating along with an extra 2 percent for nerve damage or 9 percent of the whole person. (CE 2:24-25) Dr. Sassman also tacked on a 5 percent impairment rating to the whole person for gait disorder. (CE 2:25)

For restrictions, Dr. Sassman recommended that claimant limit lifting, pushing, pulling, and carrying to 10 pounds occasionally at waist height keeping his elbows at his sides. He should not lift, push, pull or carry from floor to waist, above waist or shoulder height or with his arms outstretched away from his body. He should not work on ladders or at heights. He should not walk on uneven surfaces. He should limit the use of vibratory or power tools to an occasional basis. (CE 2:26)

For this IME, Dr. Sassman charged $1,050.00 for the examination and $3,600.00 for the record review and report preparation. (CE 2:27)

Claimant is no longer working. He filed for disability in April 2020 and was approved. Claimant testified that he believes he is still employed by defendant employer and he did renew his CDL in July 2020 but has not performed any trucking duties or other duties for defendant employer. His CDL allows him to haul tanker trailers. Claimant testified that it would be challenging to pull himself into the semi-truck but did concede many trucks have stairs.

CONCLUSIONS OF LAW

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

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 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred 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 (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 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. 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 143.

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).

Claimant maintains he sustained a work-related fall on November 12, 2019, that resulted in an injury to his low back. Defendants do not necessarily dispute the fall itself, but rather that if claimant did fall, there was no injury. They point to the weather and the abundance of snow in the claimant's vicinity. Claimant did not seek out any medical care following this alleged fall. Even if claimant fell and suffered injury, defendants maintain that if claimant did sustain a work-related injury, benefits are barred under 85.23 for lack of proper notice.

When claimant was examined for his work-related injuries arising out of the December 6, 2019 injury, there was evidence of an L1 compression fracture. Dr. Pichelmann questioned whether the L1 fracture was from the fall three weeks prior. Dr. Sassman went one step further and opined that this L1 fracture was from the November 12, 2019 fall. Defendants argue that this opinion is faulty given that Dr. Sassman based the opinions, in part, on the lack of prior back symptoms. Claimant did have prior low back and hip issues for which he sought out chiropractic care. The prior back pain was in the remote past, dating to October 2009. Based on the evidence of the L1 compression fracture, claimant's own testimony, the medical observation of Dr. Pichelmann and the opinions of Dr. Sassman, it is found that claimant sustained a fracture at L1 as a result of a fall that arose out of and in the course of claimant's employment.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Claimant testified that he informed the shipping clerk, a co-worker and Ridge Hobbs, his supervisor, as well as a nurse who advised him to purchase Biofreeze. Ridge Hobbs testified that he was not informed of any injury on November 12, 2019, and that the text messages from Claimant on that date do not mention any injury nor was there any documentation that claimant had turned in a reimbursement for Biofreeze. Both witnesses appear credible. Ridge Hobbs testified primarily based on contemporaneous evidence such as text messages and lack of documentation. Claimant testified based on his personal experience. It is plausible that Mr. Hobbs does not remember claimant's phone call on the issue of the fall. Claimant is one of many individuals that Mr. Hobbs would oversee. In balance, I choose to rely on the memory and testimony of the claimant. He was a credible witness. His medical doctors did not

mention exaggeration of symptoms. His FCE was valid. His testimony was consistent. Based on the foregoing, it is found that claimant timely informed his supervisor, Ridge Hobbs, of the fall on November 12, 2019.

The extent of the low back injury is complicated by claimant's accepted work injury of December 6, 2019. Dr. Sassman assigned a 10 percent rating for the lumbar injury but noted claimant had not received treatment for the back injury. During the FCE in September 2020, claimant did not report low back pain as a current symptom. In the December 22, 2020 visit to Dr. Howard, claimant reported pain in the neck, right arm, and hand. Back complaints were unevenly reported throughout 2019 and 2020. Based on the lack of medical treatment sought by the claimant, the uneven complaints of pain to various medical providers in 2019 and 2020, and the medical opinions of Dr. Howard, it is found claimant sustained a temporary injury to his back which resulted in no permanent injury.

It is not fully clear what symptoms claimant is arguing are connected to the work injury. Based on the opinions of Dr. Sassman and Dr. Howard, however, the evidence supports a finding that the cervical spine, right arm, and left ankle pain arose out of and in the course of his employment due to a work injury of December 6, 2019. The complaints of vertigo, dizziness, loss of concentration and memory do not have sufficient medical support to connect those symptoms to the work injury. The pain clinic doctor was treating claimant for a variety of symptoms, but acknowledged that she did not know whether the additional symptomatology was related to the work injury, and no other experts have provided a causation opinion in support of the theory that claimant's vertigo, dizziness, loss of concentration and memory, and right leg pain are related to his work injury.

Turning to the accepted work injury, claimant seeks either a running award or a finding of a permanent total disability.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

A running award is appropriate when the injured worker has not returned to work, returned to substantially similar employment, or has not reached MMI. Claimant argues that he has not reached MMI because he is still obtaining treatment from a pain clinic. However, MMI does not mean the point at which claimant no longer needs treatment, but rather the point at which claimant's condition is not likely to improve.

The pain clinic treatment he receives is primarily medication management. His medications are monitored and adjusted according to his self-reported pain levels. There is no indication in those pain clinic records nor in the expert opinion letters that

the pain management program will result in reduced pain or an improved condition. Dr. Sassman found claimant at MMI on December 12, 2020, because the pain clinic treatment was not likely to impact the impairment rating. December 12, 2020 is the date of Dr. Sassman's evaluation and appears to be an arbitrary date chosen by Dr. Sassman that does not reflect claimant's course of treatment.

It was Dr. Howard's opinion the claimant achieved maximum medical improvement from his injuries as of August 17, 2020. Id. Claimant received pain management treatment following that date and did not improve significantly. It is found that the date of MMI is August 17, 2020.

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).

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

Claimant's injury was a serious fracture to his cervical spine in addition to a left ankle fracture. He had surgical repair for both. Despite treatment, claimant still has ongoing pain and limitations. The claimant is an older worker with a GED. His primary employment for the recent and remote past has been operating a semi-tractor trailer. He has permanent work restrictions that place him in the medium duty work category with significant lifting limits.

Dr. Woodbury released claimant with no restriction and a permanent impairment rating of 4 percent to the left lower extremity. At the time Dr. Woodbury released claimant, claimant reported pain on a five out of ten scale that increased with weight bearing activities. The functional capacity evaluator determined that claimant had an unsteady gait pattern and used assistive devices for squats and navigating stairs. Dr. Woodbury's opinion is given lower weight as the release with no restrictions he ordered did not match with claimant's symptomatology.

Dr. Howard assigned a 28 percent impairment rating for the whole person whereas Dr. Sassman assessed a 30 percent impairment rating for the cervical spine

and 9 percent for the lower extremity. Dr. Howard adopted the FCE restrictions which restricted lifting, carrying, pushing and pulling. Dr. Sassman recommended that claimant limit lifting, pushing, pulling, and carrying to 10 pounds occasionally at waist height keeping his elbows at his sides. He should not lift, push, pull or carry from floor to waist, above waist or shoulder height or with his arms outstretched away from his body. He should not work on ladders or at heights. He should not walk on uneven surfaces. He should limit the use of vibratory or power tools to an occasional basis. Dr. Howard acknowledged that the claimant could not return to the work he was doing.

Neither doctor restricted claimant from sitting or standing or driving despite claimant's complaints of concentration, memory problems, vertigo or dizziness. Claimant was placed in the medium work category to light work category given his inability to lift frequently throughout the day. Even within the more limiting restrictions provided by Dr. Sassman, claimant would be able to drive his vehicle or a semi-tractor trailer with no touch loads. Claimant has a current CDL which he renewed in July 2020.

Claimant is an older worker with limited education. His work history is primarily as a truck driver. His current CDL allows him to drive oil tankers, among other trucks.

Based on the foregoing, claimant's industrial disability is 60 percent as recommended by Dr. Howard.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant three hundred (300) weeks of permanent partial disability benefits at the rate of one thousand seventy-six and 12/100 dollars ($1076.12) per week from August 17, 2020.

That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to be given credit for benefits previously paid.

That defendants shall pay the costs of this matter pursuant to rule 876 IAC 4.33.

Signed and filed this 22nd day of September, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Hoffman (via WCES)

Stephen Spencer (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.

Gerrish-Lampe, Jennifer [IWD]

From: James P Hoffman <jamesphoffman@aol.com>
Sent: Tuesday, May 11, 2021 10:23 AM
To: Gerrish-Lampe, Jennifer [IWD]; steve@peddicord.law
Subject: Stonehouse

We hereby withdraw our exhibits with the exception of Dr. Sassman report.
This will allow the joint exhibits and Dr. Sassman only to avoid any duplication.