BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFERY V. STUTTING, Claimant, vs. ARCONIC, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 20000991.03 ARBITRATION DECISION Head Notes: 1803.1; 2907

STATEMENT OF THE CASE

On January 28, 2022, the claimant, Jeffery Stutting, filed a petition in arbitration seeking workers' compensation benefits from Arconic, Inc., employer, and Indemnity Insurance Company of North America, insurance carrier, as defendants. The hearing was held on March 28, 2023. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

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

Jeffery Stutting was the only witness to testify live at the trial. The evidentiary record also includes joint exhibits 1-8, claimant's exhibits 1-4, and defendants' amended exhibits A-E. All exhibits were received into the record without objection.

The parties submitted post-hearing briefs on May 3, 2023, at which time the case was fully submitted to the undersigned.

ISSUES

The parties identified the following disputed issues on the hearing report:

1. The nature and extent of permanent disability sustained by claimant as a result of the stipulated work injury on January 15, 2020.

2. Assessment of costs.

FINDINGS OF FACT

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

At the time of the hearing the claimant, Jeffery Stutting (hereinafter "Stutting") was 57 years old. (Hearing Transcript, p. 14). Stutting resides in Camanche, Iowa. (Id.). He graduated from Camanche High School in 1984. (Id.). After high school, Stutting joined the Army. (Id. at 15). He was in the Army from 1984 to 1992. (Id.). While in the Army, Stutting received training in diesel mechanics and electronics. (Id. at 15-16). He received an honorable discharge in 1992. (Id. at 16).

Stutting did odd jobs for approximately a year after leaving the Army. (Tr., p. 18). In August 1993, ADM hired him to work as a process operator. (Id. at 18). As a process operator, Stutting performed maintenance on pumps, hydraulic units, conveyors, head drives, and ventilators for air compressors and fans. (Id. at 18-19). Stutting held this position for 23 years. (Id. at 19). It is not clear why Stutting's employment at ADM ended in 2017.

In February 2018, Arconic, the defendant employer, hired Stutting to work as a general maintenance journeyman. (Tr., p. 20). At hearing, Stutting indicated the job consisted of "physically working on stuff," and required him to push, pry, squat, wrench, and lift items weighing up to 75 pounds. (Id. at 21). A list of essential functions provided by Arconic indicates Stutting's job duties included removing, replacing, and maintaining motors, hydraulic cylinders, gear boxes, pumps, brake drums, bearings, overhead door slats, and crane cable systems. (Claimant's Exhibit 3, p. 24). This required him to be physically capable of lifting, carrying, pushing, and pulling up to 75 pounds occasionally and 100 pounds rarely. (Id.). He also needed to be able to frequently bend, stoop, stretch, reach, squat, and kneel, as well as occasionally twist, balance, and climb, and constantly stand. (Id. at 25).

Stutting suffered a work-related injury on January 15, 2020. (See Petition). At the hearing, Stutting testified he and his co-workers were lifting a headache bar to the upper level of the plant with a crane when the chains went slack, and the bar fell, rolling over his legs. (Tr., p. 24). According to the medical records, Stutting was taken by ambulance to the Emergency Room at Trinity Hospital. (Joint Exhibit 1, p. 1). There, x-rays were taken and Stutting was diagnosed with a transverse fracture of the left tibia and a transverse nondisplaced fracture of the left fibula. (Id. at 5). Stutting's leg was splinted, and his care transferred to Ryan Dunlay, M.D., at ORA Orthopedics. (Id. at 6).

Dr. Dunlay confirmed Stutting's diagnosis and recommended surgery. (JE 2, p. 11). That same day, Dr. Dunlay performed an open reduction and internal fixation of Stutting's left tibia fracture with intramedullary nailing, as well as closed treatment of his fibular shaft fracture. (JE 3, p. 39).

Stutting received follow-up treatment from Dr. Dunlay. (See JE 2, pp. 13-38). He was placed in a walking boot. (Id. at 13). Dr. Dunlay also proscribed physical therapy at Rock Valley PT. (Id. at 14-15). On February 18, 2020, Stutting presented to Dr. Dunlay with left leg pain and a persistent tingling sensation in his left foot. (Id. at 15). Dr. Dunlay was concerned about his lack of ankle motion; he recommended additional surgery on his left foot. (Id.). Dr. Dunlay performed an open reduction and internal fixation of a fracture on Stutting's left 5th metatarsal the next day. (JE 4, pp. 45-46).

Stutting followed up with Dr. Dunlay on March 2, 2020. (JE 2, p. 17). He had not yet started physical therapy, was still wearing his walking boot, and complaining of numbness on the top of his left foot. (Id.). Dr. Dunlay indicated Stutting needed to start physical therapy, and that he would order an EMG if Stutting's numbness continued. (Id.). Dr. Dunlay returned Stutting to restricted duty work at Arconic, seated 90 percent of the time, for a max of 2 hours, and no driving. (Id.).

Stutting's next follow-up visit was on March 20, 2020, with Andrea Wehrle, PA-C, at Dr. Dunlay's office. (JE 2, p. 18). He told Ms. Wehrle that he had started physical therapy, and his left foot had given out during a session two days earlier. (Id.). Wehrle thought Stutting may have torn a small amount of scar tissue. (Id.). She recommended rest, ice, and that he remain off his left ankle over the weekend. (Id.). She also kept his work restrictions in place. (Id.).

On April 3, 2020, Stutting returned to see Dr. Dunlay. (Id. at 19). He was frustrated by the amount of physical therapy prescribed.[1] Stutting was wearing flipflops and complained of swelling, hypersensitivity, and numbness in his left foot. (Id.). Dr. Dunlay recommended that he wear regular shoes for more foot support and to improve his gait. (Id. at 20). Stutting, however, indicated he cannot wear shoes year-round because his feet sweat—he only wears flipflops. (Id.). He also didn't think his "foot swelling would allow him to wear a shoe comfortably." [2] (Id.). Dr. Dunlay prescribed Neurontin for Stutting's foot complaints, released him to drive, and increased his work restrictions to 4 hours max per day with 90 percent seated duty. (Id. at 20).

Stutting followed up with Dr. Dunlay on April 29, 2020. (JE 2, p. 21). He continued to complain of lower leg pain, numbness, and difficulties with physical therapy. (Id.). Stutting was frustrated with his pain levels and indicated it felt like someone was "kicking him in his shin all day." (Id.). He stated he would not continue with physical therapy if his pain levels remained this elevated. (Id.). According to Stutting, neither oxycodone nor hydrocodone decreased his pain because "his body is

[1] In his treatment note Dr. Dunlay describes him as irritated and aggressive. (JE 2, p. 19).

[2] In his examination note Dr. Dunlay noted very mild swelling in Stutting's left foot. (JE 2, p. 20).

simply different and it requires more pain medication." (Id. at 21-22). Stutting requested a CT scan. (Id. at 22). Dr. Dunlay stated that a CT scan would not show any muscle or tendon injuries, which seemed to be Stutting's main concern. (Id.). Dr. Dunlay, however, agreed to order a CT scan if he continued to have persistent pain and showed no signs of progressive healing in six months. (Id.). Dr. Dunlay ordered blood work to rule out an infection, as well as continued his physical therapy and work restrictions. (Id.).

Stutting saw Dr. Dunlay again on May 11, 2020.[3] (JE 2, p. 23). He continued to complain of numbness and pain in his left foot. (Id.). He, however, indicated he was taking gabapentin and it helped with his pain complaints. (Id.). Stutting's blood test results showed no signs of infection. (Id.). Dr. Dunlay paused physical therapy for a month and continued his work restrictions. (Id.). Stutting had another follow-up appointment on June 12, 2020. (Id.). The treatment note from this visit indicates Stutting was making progress and his fracture was healing. (Id. at 25).

On July 13, 2020, Stutting followed up with Dr. Dunlay. (JE 2, p. 26). In addition to left leg pain and left foot numbness, Stutting complained of right foot pain, as well as hip and back pain that he attributed to his left leg fracture. (Id.). According to the records, this is the first time Stutting mentioned hip or back pain to Dr. Dunlay. (Id.). Stutting received treatment with chiropractor Kenneth Womboldt, D.C., prior to the January 15, 2020 date of injury. (See JE 5, p. 83). On September 12, 2019, Stutting saw Dr. Womboldt for lower back pain, as well as pain in his left sacroiliac (SI) joint and left pelvis pain. (Id.). Dr. Womboldt diagnosed him with intervertebral disc degeneration of the lumbosacral and thoracic regions and muscle spasms; Dr. Womboldt performed a chiropractic adjustment. (Id.). Stutting returned to Dr. Womboldt on March 3, 2020, with right-sided hip pain. (JE 5, p. 85). He attributed his pain complaints to his left leg fracture and use of a walker/boot. (Id.). Dr. Womboldt diagnosed him with an exacerbation of symptoms in his lumbosacral spine, right lumbar paraspinal, and right SI joint. (Id.). He performed a chiropractic adjustment and recommended Stutting return in three weeks. (Id.). On March 31, 2020, Stutting returned to Dr. Womboldt complaining of left-sided hip pain. (Id. at 87). Once again, Dr. Womboldt performed a chiropractic adjustment. (Id.). His treatment note indicates Stutting's condition had improved slightly since his last visit. (Id.). Stutting received treatment from Dr. Womboldt on three other occasions: on April 28, 2020, he was seen for back, bilateral SI joint, and sacral pain; on May 14, 2020, he was evaluated for left SI joint pain; and on May 26, 2020, he was treated for left lumbar paraspinal, left SI joint, and sacral pain. (Id. at 89-94).

In his July 13, 2020 treatment note Dr. Dunlay noted that Stutting was angry and yelling. (JE 2, p. 27). He was very resistant to increasing his work restrictions, but begrudgingly agreed to a 6 hour and later an 8 hour return to work. (Id.). Dr. Dunlay stated Stutting's left ankle remained stiff and had restricted range of motion. (Id.). He,

[3] Stutting had a telehealth visit with Dr. Dunlay on April 29, 2020. (See JE 2, p. 23). The treatment note from that visit is not in the record. (Id.).

however, discontinued physical therapy because Stutting said it did not improve his symptoms. (Id.). Stutting also indicated he still could not wear boots because of his heel pain. (Id.).

Defendants directed Stutting to Theodore Koerner, M.D., to evaluate his back and hip complaints. (Ex. A, p. 1). Dr. Koerner examined Stutting on August 5, 2020. (Id.). He also reviewed x-rays of Stutting's bilateral hips and lumbar spine. (Id; JE 3, pp. 43-44). Dr. Koerner diagnosed him with pre-existing lumbosacral degenerative disc disease with mild L5 and S1 sensory radiculopathy in both hips.[4] (Ex. A, p. 1). He opined that Stutting's left leg injury had mildly aggravated the pre-existing spine condition, but that it had returned to baseline and Stutting did not need any additional treatment for his back and hip complaints. (Id.).

Stutting returned to see Dr. Dunlay on August 17, 2020. (JE 2, p. 28). Dr. Dunlay noted his left leg looked better, his fibula fracture was healed, but he still had some hypersensitivity along his foot. (Id.). Dr. Dunlay changed Stutting's work restrictions to 75 percent seated work, 25 percent standing work, no stairs, and no lifting more than 10 pounds. (Id.).

On August 31, 2020, Stutting had a telehealth appointment with Dr. Dunlay. (JE 2, p. 30). He reported continued difficulty with wearing boots, as well as walking more than 15 to 20 yards before he needed to rest. (Id.). Stutting also asked for a second opinion with a doctor in Iowa City. (Id.). Following this visit, Dr. Dunlay changed his work restrictions to limit walking to 20 yards at a time and indicated he had no objections to Stutting's request for a second opinion. (Id.).

Stutting returned to see Dr. Dunlay on September 18, 2020. (JE 2, p. 32). He did not think his fracture was healed. (Id.). Dr. Dunlay took x-rays. (Id.). They showed that the fracture had healed. (Id.). Stutting alleged that he was unable to wear any shoes due to pain and hypersensitivity. (Id.). He also stated he was unable to perform his job duties at Arconic. (Id.). Dr. Dunlay ordered a functional capacity evaluation (FCE). (JE 6, pp. 72, 74). This was performed by Casey Creger, PT, at Athletico on November 10, 2020. (Id. at 72). Creger opined that Stutting demonstrated consistent effort during the evaluation. (Id.). Creger declared the FCE valid and indicated that Stutting is capable of lifting 37 pounds from floor to waist, 20 pounds from waist to shoulder, and 15 pounds overhead or bilateral carrying for 25 feet. (Id. at 74, 82). Mr. Creger also indicated Stutting could perform frequent standing and walking, occasional stairs, but should avoid sustained squatting, repetitive kneeling, and climbing ladders. (Id. at 82).

Stutting's last appointment with Dr. Dunlay took place on January 8, 2021. (JE 2, p. 35). He reported no change in his symptoms and/or pain levels. (Id.). Dr. Dunlay placed Stutting at maximum medical improvement (MMI) for his left leg injury and

[4] In his report, Dr. Koerner indicated Stutting had received chiropractic care from Dr. Womboldt for his pre-existing back condition starting in approximately 2018. (See Ex. A, p. 1). These records, however, were not submitted into evidence.

adopted Mr. Creger's suggested permanent restrictions. (Id. at 34-35). Dr. Dunlay assigned him 20 percent permanent impairment to the whole body for moderate gait derangement, citing to Table 17-5 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id. at 36). He did not recommend any further treatment. (Id.). On April 30, 2021, Dr. Dunlay added an addendum to his report outlining Stutting's extremity impairment under the AMA Guides. (Id. at 37). According to his addendum, Stutting's permanent impairment is 23 percent of the whole body for loss of range of motion in his ankle joint, loss of weight transfer over the 5th metatarsal, sensory loss involving the common peroneal, superficial peroneal, sural, medial plantar and lateral planter nerves, as well as associated dysesthesia. (Id.). Dr. Dunlay's addendum cited to Tables 17-11, 17-33, and 17-37. (Id.).

At the request of defendants, Stutting attended an independent medical exam (IME) with Rick Garrels, M.D., on July 6, 2021. (Ex. B, pp. 4-10). Dr. Garrels diagnosed Stutting with a left lower leg crush injury with resulting fractures of the distal tibia and fibula status post ORIF with left tibia intramedullary nail on January 15, 2020; left 5th metatarsal fracture status post ORIF on February 19, 2020; and chronic left leg and foot pain. (Id. at 8). He assigned Stutting 11 percent permanent impairment to the left lower extremity for the fracture to his 5th metatarsal with loss of weight transfer, and the left tibia fracture with loss of range of motion in his ankle joint, sensory deficit, and dysesthesias, citing to Tables 16-10, 16-11, 17-11, 17-33 and 17-37 of the AMA Guides. (Id. at 9). Dr. Garrels' report does not address permanent restrictions. (Id.).

At the behest of his attorney, Stutting underwent a second IME with Robert Rondinelli, M.D., on September 14, 2021. (Cl Ex. 1). Dr. Rondinelli diagnosed Stutting with a transverse fracture of the left tibia with posterior displacement status post ORIF with intramedullary nail fixation on January 15, 2020; a transverse non-displaced fracture of the distal left tibia with closed treatment; a left closed comminuted displaced intra-articular proximal base fracture of the left 5th metatarsal status post ORIF on February 19, 2020; probable overuse syndrome of the right SI joint; and delayed recovery due to residual mechanical and neuropathic pain, loss of ankle range of motion, and antalgic gait pattern. (Id. at 2). Dr. Rondinelli opined that Stutting's lower extremity fractures, dysfunctional gait pattern, and overuse injury to his right SI joint were caused by the work accident on January 15, 2020. (Id.). He recommended a rigid exoskeletal system to stabilize Stutting's left leg and foot, custom orthopedic leather shoes, a rocker-bottom sole and a shoe lift to simulate ankle dorsiflexion. (Id. at 5-6). He opined these devices would significantly reduce his antalgic gait pattern and improve his work tolerance. (Id. at 6).

Even though Dr. Rondinelli felt Stutting was not at MMI, he provided several provisional impairment ratings. (Id. at 3). These were for a left sural sensory deficit, forefoot deformity, loss of range of motion in the ankle, loss of muscle strength, as well as gait derangement. (Id. at 4). For loss of range of motion in the left ankle joint, sensorineural impairment, and forefoot deformity, Dr. Rondinelli gave a combined impairment rating of 40-43 percent of the left lower extremity, citing to Tables 16-10, 17-11, 17-33, and 17-37 of the AMA Guides. (Id. at 3-4). He also gave a stand-alone rating

of 53 percent of the left lower extremity for loss of strength, as well as a stand-alone rating of 20 percent whole body impairment for gait derangement, citing to Tables 17-2 and 17-5 of the AMA Guides. (Id. at 4).

Of these potential impairment's, Dr. Rondinelli thought the impairment for gait derangement was the most functionally meaningful and clinically appropriate. (Id.). Based upon the Athletico FCE results, Dr. Rondinelli also recommended Stutting return to work in a sedentary or light physical demand occupation. (Id. at 6).

The hearing record contains several supplemental IME reports. (See Cl Ex. 2; Ex. B, pp. 11-13; Ex. C, pp. 19-24). On January 28, 2022, Dr. Garrels issued a new report which reviewed Dr. Rondinelli's IME findings. (Ex. B, pp. 11-13). In that, Dr. Garrels concluded Dr. Rondinelli's impairment ratings were redundant, confusing, and a misapplication of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id.). On June 6, 2022, Dr. Dunlay issued another report after reviewing Dr. Rondinelli's recommendations for additional treatment. (Cl Ex. 2, p. 23). In this report, Dr. Dunlay indicated he had no objection to the rigid exoskeletal brace recommended by Dr. Rondinelli but did not believe it would improve Stutting's work status in any appreciable way. (Id.). Dr. Dunlay also reiterated his belief that Stutting was already at MMI. (Id.). Dr. Dunlay issued another supplemental check-the-box report to defendants on October 14, 2022. (Ex. C, pp. 20-21). This report reiterated that Stutting reached MMI on January 8, 2021, and had sustained 23 percent body-as-a-whole impairment as a result of the work injury. (Id.). It also stated that an exoskeletal brace would not reasonably restore Stutting's leg function and is not clinically indicated or medically necessary. (Id.).

The record contains numerous opinions addressing the permanent impairment caused by Stutting's work accident on January 15, 2020. Of these, I find Dr. Rondinelli's combined rating for loss of range of motion in the left ankle joint, sensorineural impairment, and forefoot deformity to be the most accurate, as well as supported by the medical records. Both Dr. Dunlay and Dr. Rondinelli provided alternative ratings of 20 percent impairment to the whole body for moderate gait derangement. (JE 2, p. 36; Cl Ex. 1, p. 4). However, neither of these ratings comply with the AMA Guides. *See discussion below.* Similarly, Dr. Rondinelli's strength rating does not follow the AMA Guides. Dr. Dunlay's second rating suffers from a similar flaw. Finally, Dr. Garrels' rating is not supported by the evidence. In his report, Dr. Garrels does not provide any impairment for loss of plantar flexion in the ankle joint. (See Ex. B, pp. 6, 9). His only rating for range of motion loss is for extension, a/k/a dorsiflexion. (Id. at 9). According to Dr. Garrels, Stutting can plantar flex his left ankle to 30 degrees. (Id.). This measurement is not supported by his treatment records, nor does it match the measurements taken by Dr. Dunlay and Dr. Rondinelli in their rating exams. Dr. Dunlay measured Stutting's plantar flexion multiple times throughout his treatment. (See, e.g., JE 2, pp. 20, 21, 23, 25, 26, 28, 32). None of those measurements show the ability to plantar flex to 30 degrees. (Id.). Stutting's ankle motion was also examined during his FCE at Athletico on November 10, 2020. (JE 6., p. 75). Mr. Creger, the physical therapist, found "a reduction in L ankle AROM for DF, PF, Inv and Ev." (Id.).

During his IME exam, Dr. Rondinelli documented 10 degrees of plantar flexion in Stutting's left ankle. (Cl Ex. 1, p. 11). This finding is similar to that documented by Dr. Dunlay, Stutting's treating physician. (JE 2, p. 35). On January 8, 2021, Dr. Dunlay noted 5 degrees of plantar flexion in Stutting's ankle joint.[5] (Id.). The evidence support's Dr. Rondinelli's conclusion that Stutting has permanent impairment due to loss of plantar flexion in his left ankle.

Dr. Rondinelli's combined impairment rating also accurately accounts for the sensory loss in Stutting's left foot. The numbness, tingling, and hypersensitivity in Stutting's left foot are very well documented. (See JE 2, pp. 15, 17-21, 23, 25-26, 37). Despite this, Dr. Garrels only provided 2 percent permanent impairment for hypersensitivity along the common peroneal nerve. (Ex. B, p. 9). This rating is not supported by the evidence. In addition to hypersensitivity, Stutting's medical records document loss of sensation on the outside and top of his left foot. (See JE 2, pp. 15, 17-21, 23, 25-26, 37). Dr. Garrels' rating does not adequately account for this. (See id. at 38)(stating "Dr. Garrels' assessment does not reflect accurately the severity of Mr. Stutting's nerve injury. Though Mr. Stutting had significant hypersensitivity, he also had significant loss of sensation, which is consistent with the severe crush nature of the injury he sustained.").

Dr. Rondinelli's combined rating is the most accurate—it is supported by the hearing evidence and is in compliance with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. The undersigned adopts Dr. Rondinelli's minimum rating for loss of range of motion in the ankle joint, sensorineural impairment, and forefoot deformity. As a result of the January 15, 2020 work incident, Stutting has sustained 40 percent permanent impairment to the left lower extremity.

At the time of the hearing, Stutting was still working full time for Arconic. (Tr., pp. 37, 70). He was working as a flag person in the crane repair department. (Id. at 37). According to Stutting, Arconic created this position for him because he could no longer work in general maintenance under Dr. Dunlay's permanent restrictions, but Stutting also admitted that there are four other flag people at Arconic. (Id. at 37-38, 71-72). Stutting sets up flags on the job site while riding in a buggy. (Id.at 37-39). He works full time—48 hours one week and 36 the next. (Id. at 39). He also makes more per hour than he did at the time of the work injury, however Stutting implied his co-workers often cover for him and let him stay in the office. (Id. at 38-40, 70).

The undersigned does not find Stutting's testimony credible. He made multiple statements that are not supported and/or directly contradicted by the hearing evidence. For example, Stutting stated that both Dr. Dunlay and an orthopedic doctor from Iowa City told him his "tibia flexes like a knee," and that "it will break one day because it's not rigid like it used to be." (Tr., p. 42, 48-52). He also stated that Dr. Dunlay released him

[5] Under Table 17-11 both measurements receive a 15 percent rating to the lower extremity. See Table 17-11, page 537 of the AMA Guides.

from treatment when his fracture was "only halfway healed." (Id. at 34). First, there is absolutely no record of Stutting receiving a second opinion from an orthopedic doctor in Iowa City. Stutting testified he did not submit this doctor's report as an exhibit at hearing because the doctor "didn't write anything down." (Id. at 51). However, Stutting was not even able to remember the doctor's name when asked on cross-examination. (Id. at 53). Second, Dr. Dunlay treated Stutting for almost a year. There is no documentation in Dr. Dunlay's records indicating Stutting's tibia was "flexing like a knee," or that Stutting's leg would break again. Additionally, prior to releasing Stutting from his care Dr. Dunlay took an x-ray of his left leg. (JE 2, p. 32). It showed his fracture was healed. (Id.). Finally, during the hearing Stutting gave confusing and contradictory testimony about his continued participation in a bowling league. (See Tr., pp. 54-63). Given the above, this deputy does not put much weight on his testimony.

CONCLUSIONS OF LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury 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" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (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).

When an expert's opinion is based upon an incomplete or incorrect history, it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867, 870 (1965). The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey, 526 N.W.2d 845.

Based on the above findings of fact, I conclude Dr. Rondinelli's combined rating for loss of range of motion in the ankle joint, sensorineural impairment, and forefoot deformity is the most accurate. I adopt it. Both Dr. Dunlay and Dr. Rondinelli provided alternative impairment ratings of 20 percent impairment to the whole body for moderate gait derangement. (JE 2, p. 36; Cl Ex. 1, p. 4). However, the explanation to Table 17-5 in the AMA Guides, specifically states "the percentages given in Table 17-5 are for full-time gait derangements of persons who are dependent on **assistive devices**." (Ex. E, p. 32)(emphasis in original). Stutting does not use an assistive device. (Tr., p. 69). Under the instructions provided by the AMA Guides, an impairment rating for gait derangement is not appropriate in this case. See Iowa Code § 85.34(2)(x) (stating "the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association . . . .").

Dr. Rondinelli also provided a rating for loss of strength, citing to Table 17-7 of the AMA Guides. (Cl Ex. 1, p. 4). However, the instructions for this table state that if strength measurements are taken by one medical provider, they should be consistent on different occasions. See page 531 of the AMA Guides. Dr. Rondinelli only evaluated Stutting one time. (See Cl Ex. 1). The AMA Guides' instructions also state that strength loss is not a good way to measure impairment in those inhibited by pain. See page 531 of the AMA Guides. The medical records clearly show that Stutting continues to complain of high levels of pain. (See JE 2). A loss of strength rating is not appropriate under these circumstances.

The impairment rating provided in Dr. Dunlay's addendum report also fails to comply with the AMA Guides. In this report, Dr. Dunlay opines Stutting has 23 percent whole body impairment due to loss of range of motion in his ankle joint, loss of weight

transfer over the 5th metatarsal, and sensory loss involving the common peroneal, superficial peroneal, sural, medial plantar and lateral plantar nerves, and associated dysesthesia. (JE 2, p. 37). However, Dr. Dunlay incorrectly calculated Stutting's sensory loss. Dr. Dunlay concluded Stutting has 10 percent whole person impairment for sensory loss under Table 17-37. (JE 2, p. 37). But, as pointed out by Dr. Garrels, it appears Dr. Dunlay did not use Tables 16-10 and 16-11 to grade Stutting's sensory and motor deficits. (Id.; Ex. B, p. 9). According to the AMA Guides, the grade severity is then multiplied by the maximum impairment value provided on Table 17-37. See pages 482-484 and 550 of the AMA Guides; (see also, Cl Ex. 1, p. 3; Ex. B, p. 9). Dr. Dunlay's failure to assign a grade and multiply it resulted in an incorrectly inflated impairment rating. It cannot be accepted. Lastly, as explained above, Dr. Garrels' rating is not supported by the evidence in the record. It is not adopted.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(u) or for loss of earning capacity under section 85.34(2)(v). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

An injury to a scheduled member may, because of aftereffects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment that determines whether the schedules in section 85.34(2)(a) - (u) are applied. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

While Stutting alleges an injury to his right SI joint, no doctor has opined that he has any permanent impairment to that joint itself or to his right hip. He was only provided with impairment ratings for injuries to the left lower extremity and for moderate gait derangement. Given this, there is no evidence in the record showing Stutting sustained a permanent injury to his body as a whole, and no evidence that the anatomical situs of his compensable injury extends into his whole body. The basis and situs of Stutting's permanent impairment is localized to his left lower extremity. His permanent impairment is curtailed to his lower extremity. Utilizing Dr. Rondinelli's combined rating I find Stutting is entitled to 40 percent permanent impairment to the left lower extremity, which is equal to 88 weeks of permanent partial disability benefits at the stipulated rate of $907.45. Defendants, however, are entitled to credit for the 24.4 weeks of permanent partial disability benefits already paid prior to hearing.

Stutting seeks an award of the costs outlined in claimant's exhibit 4. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 IAC 4.33; Iowa § Code 86.40. Administrative Rule 4.33 provides as follows:

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

Id.

Stutting incurred costs for filing his petition, a copy of his deposition transcript, and for a supplemental report by Dr. Dunlay issued on June 6, 2022. (Cl Ex. 4, pp. 26-30). Stutting was successful in this action—defendants were ordered to pay additional permanent partial disability benefits. Therefore, I conclude it is reasonable to assess Stutting's filing fee pursuant to 876 IAC 4.33(7). Stutting did not rely on his deposition transcript in his argument. In fact, he did not even submit a copy of the transcript as an exhibit at hearing, and defendants submitted just one page of it. Given this, I conclude it would not be appropriate to assess Stutting's deposition transcript as a cost. Dr. Dunlay's June 6, 2022 report only addresses Dr. Rondinelli's recommended exoskeletal brace. (Cl Ex. 2, p. 23). Stutting did not ask the agency to award alternate medical care in this proceeding—he did not ask the agency to revisit its prior determination on the exoskeletal brace. The undersigned did not rely upon the supplemental report. Given this, I conclude it would not be appropriate to assess Dr. Dunlay's supplemental report as a cost. I assess costs totaling $103.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay Stutting eighty-eight (88) weeks of permanent partial disability benefits at the stipulated rate of nine hundred seven and 45/100 dollars ($907.45) per week commencing on May 27, 2021. Defendants are entitled to a credit for the twenty-four point four (24.4) weeks of permanent partial disability benefits already paid prior to hearing.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by

the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Defendants shall pay costs of one hundred three and 00/100 dollars ($103.00).

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

Signed and filed this __30th___ day of August, 2023.

Amanda Rutherford

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Rocco Motto (via WCES)

Jane Lorentzen (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.